# Child-Friendly Justice

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*The Participation and the Rights of the Child in Court Proceedings From a Central European Comparative Perspective*

*Edited by*
Márta Benyusz
Katarzyna Zombory

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# Introducing Child-Friendly Justice: Concepts, Rights, and Participation

Márta Benyusz, Katarzyna Zombory

Children encounter the justice system in many ways and through various entry points, yet few environments are less suited to their needs than a courtroom. Children can be affected by judicial proceedings either directly, when they stand in courtrooms as victims, witnesses or defendants; or indirectly, when the outcome of judicial proceedings affects their young lives. The legal contexts that affect children are multiple, and most commonly include family cases, such as divorce or adoption, as well as criminal justice and administrative proceedings, for example those concerning nationality or immigration. While encountering the justice system, children often face an adult-oriented environment that fails to accommodate their specific circumstances and needs. The main barriers for children within the justice system include the non-existence or only a partial existence of the right to access justice, exacerbated by the lack of legal capacity to act on their own; the diversity in and complexity of legal procedures, as well as the risk of discrimination on various grounds, and secondary victimization.[1] The concept of child-friendly justice has emerged as a corrective to this reality: an endeavour to adapt justice to the needs of children and ensure that children can meaningfully participate in judicial proceedings that affect them. According to the 2010 Guidelines of the Committee of Ministers of the Council of Europe (CoE), 'child-friendly justice' is justice that guarantees the effective implementation of the children's rights at the highest attainable level, especially justice that is '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'.[2]

1 Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, adopted on 17 November 2010 and explanatory memorandum, CM/Del/Dec(2010)1098/10.2abc-app6, Preamble.
2 Ibid., Point II (c).

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Beyond procedural guarantees, child-friendly justice represents a paradigm shift – from viewing children as passive objects of protection to recognizing them as active rights-holders whose views and experiences should shape judicial processes. Effective child-friendly justice is inherently interdisciplinary, requiring close cooperation between legal professionals, psychologists, educators, and social workers to ensure that children's participation is genuinely meaningful and sensitive to their developmental stage. The concept also aligns with global policy commitments, such as Sustainable Development Goal 16.3, which calls for equal access to justice for all, including children.

Following the adoption of the 2010 Guidelines of the Committee of Ministers on child-friendly justice, the Member States of the CoE have made significant efforts, both in their domestic legislation and judicial practice, to make their justice systems more child-friendly and child-centred. The European Court of Human Rights (ECtHR) has recently established that domestic courts have a positive obligation to examine *ex officio* the appropriateness of hearing children in proceedings concerning their rights, noting that 'there is a consensus among States parties regarding the obligation to provide children with a real and effective opportunity to express their views, either directly or otherwise, and to assist them in doing so through various child-friendly mechanisms and procedures.'[3]

Despite significant normative advances, the practical realization of child-friendly justice remains uneven. Many jurisdictions face persistent challenges in resourcing, training, and ensuring that participation is meaningful rather than merely formal.

The present book aims to familiarize readers with the theory and practice of the children's participation in civil, criminal and administrative court proceedings, both at the international level, and in the domestic legal systems of selected Central European states, based on a comparative legal analysis. The international legal framework governing children's participation in justice system is shaped, on the one hand, by children's participatory rights enshrined in Article 12 of the UN Convention on the Rights of the Child[4], and, on the other, by various instruments adopted under the auspices of the Council of Europe, the European Union, and the Hague Conference on Private International Law. Developments in international human rights law and international private law have led to the emergence of domestic legal standards on child's participation in court proceedings and the implementation of the child's right to be heard in matters affecting them.

The volume is organized in three parts. Part I situates the book's focus on domestic legal frameworks guaranteeing the participatory rights of children in connection with civil, administrative and criminal judicial proceedings. It comprises national reports from eight Central and Eastern European countries (Croatia, Czechia,

3 ECtHR, *MP and Others v. Greece*, judgement of 9 September 2025, application No. 2068/24, para. 100.

4 *Convention on the Rights of the Child*, adopted in New York on 20 November 1989 by General Assembly resolution 44/25, UN Treaty Series No. 27531.

Hungary, Poland, Romania, Serbia, Slovakia, Slovenia) and one Western European country (France), written by *Ivana Kunda and Martina Smojver, Veronika Kissová, Adrienn Nagy, Wojciech Lis, Zsolt Fegyveresi, Marko Knežević, Peter Koromház, Lina Burkelc Juras* and *Magalie Nord-Wagner*. All national reports are based on a standardized questionnaire to enable a comparative legal analysis which outlines the current regulatory approaches in the region. The questionnaire asked the authors of the national reports to examine how children's participation rights are guaranteed and implemented within their national legal systems. It aimed to clarify whether access to civil, administrative, and criminal proceedings is guaranteed for children, and if so, whether any age thresholds apply. It further asked whether the access to court by children is linked to a 'sufficient level of understanding' or to 'the capability to form his or her own opinion'. In addition, the questionnaire requested information on the form and scope of children's access to civil, administrative, and criminal proceedings, particularly in connection with their right to be heard and their legal representation. It asked whether national procedural laws include specific rules for hearing minors and what these rules entail in each type of proceeding. The availability of legal counsels or child attorneys for minors in different types of proceedings was also to be examined. The questionnaire further explored how child-friendly justice principles are implemented in practice, including the use of child-appropriate language, the existence of child-friendly hearing methods and courtrooms, and the availability of specialised training for judges. Authors of the national reports were asked to describe the general approach of the domestic courts, supported by the relevant constitutional or judicial interpretations. Finally, the questionnaire examined how the child's right to express their views is ensured during enforcement procedures, remedial justice and non-litigious proceedings, including any age thresholds that determine when a child's opinion must be considered.

Part II of the book explores the relevant international and European frameworks underpinning the child's right to participate in judicial proceedings. The first chapter, written by *Márta Benyusz*, examines Article 12 of the UN Convention on the Rights of the Child, which establishes the child's right to express their views in all matters affecting them, and to be provided the opportunity to be heard in any judicial and administrative proceedings affecting them. The chapter also discusses the interpretation of children's participatory rights provided by the UN Committee on the Rights of the Child. The second contribution in this section, by *Barbara Tóth*, offers an outline the Council of Europe's legal standards and the case-law of the European Court of Human Rights concerning children's participation in judicial proceedings. The third chapter, by *Agnieszka Tomczewska*, focuses on the Hague Conference on Private International Law's contribution to child protection, especially with regard to the 1996 Hague Convention on jurisdiction, applicable law, recognition, enforcement, and cooperation in matters of parental responsibility and child protection, as well as the 1980 Hague Convention on the civil aspects of international child abduction. This contribution discusses how the legal mechanisms contained in the two Hague Conventions of 1996 and 1980 contribute to the protection of the rights of the child in

cross-border situations. In her final contribution to this part, *Zsuzsa Wopera,* presents certain legal instruments adopted under the auspices of the European Union (EU) that support the children's right to participate in judicial proceedings affecting them, along with the relevant jurisprudence of the Court of Justice of the EU. The chapter primarily focus on the EU legal instruments relating to family law cases with cross-border implications in the field of judicial cooperation in civil matters.

Part III of the book consists of a single contribution by *Kata Zsófia Prém,* which provides a synopsis of the examination of the domestic legal frameworks of the countries covered by the questionnaire. It highlights the key conclusions, the most significant common approaches and differences, as well as best practices concerning children's participation in civil, administrative, and criminal court proceedings, set against the backdrop of the relevant international and European legal frameworks.

While much of the existing literature focuses on Western European or international standards, this volume offers a unique Central European comparative perspective, enriching the discourse with regional insights and practical examples. The countries of this region share deep-rooted traditions, which place the child and the family at the heart of society, values, and policy making. These cultural foundations have shaped the legal and institutional approaches, resulting in normative regulations that afford children special attention.

The present volume, entitled *Child Friendly Justice. The Participation and the Rights of the Child in Court Proceedings From a Central European Comparative Perspective,* forms part of a book series of eleven volumes[5] that provide the curriculum for the International and Comparative Children's Rights (ICCR) LL.M. programme. The series aims to offer a holistic picture on children's rights. It covers both the universal and the regional levels of human rights protection, provides an understanding of children's social and personality development, and examines issues relating to children in conflict with the law as well as interdisciplinary and child-friendly communication. It also gives an overview on national implementation through private law and public law from a Central European perspective, including the child protection systems and justice systems of the countries concerned. Furthermore, it addresses the relationship between religion and children's rights, and the challenges faced by child protection and child rights-based approaches in digital age.

5 The curriculum of the ICCR LL.M is based on an interdisciplinary and legal cross-border research of several countries (primarily Croatia, Czech Republic, Hungary, Poland, Romania, Serbia, Slovakia, Slovenia) and consists of the following eleven books: International Children's Rights; The Rights of the Child in Regional Human Rights Systems; Social and Personality Development is Childhood; The Rights of the Child in Private Law – Central-European Comparative Perspective; The Rights of the Child in Public Law – Central European Comparative Perspective; Religion and Children's Rights; Child Protection Systems – Central European Comparative Perspective; Children in Digital Age – Central European Comparative Perspective; Child-Friendly Justice: The Participation and the Rights of the Child in Court Proceedings – Central European Comparative Perspective; Interdisciplinary and Child-Friendly Communication; Children in Conflict with the Law.

This book is primarily addressed to the participants of the ICCR LL.M. programme. However, it may also be useful for lawyers who deal with children's rights in their everyday practice or academic research, as well as for other professionals working with children. The volume, which provides an overview of the requirements of child-friendly justice and their implementation in practice, should be read together with the other volumes in the series to offer a comprehensive picture of the rights of the child and to the international and domestic challenges in their implementation.

Ultimately, the volume aims to contribute to a justice system in which every child is heard, respected, and empowered – not despite their age, but because of it.

*Márta Benyusz and Katarzyna Zombory*
*Editors*

# Part I
# The Child's Right to Participate: Domestic Legal Frameworks

| Chapter 1 |

# Child-Friendly Justice – Croatian Perspective

Ivana Kunda, Martina Smojver

**ABSTRACT**

The level of 'child-friendliness' of justice systems in different countries may greatly vary. In Croatia, rights of the child are guaranteed under the Constitution of the Republic of Croatia. In addition, a great deal of provisions ensuring rights of children in civil, criminal and administrative court proceedings may be found in different legal acts. These rules only add to the broader framework provided by the relevant supranational instruments. Irrespective of the many benefits this system has for children, there is still room for improvement in practice by introducing new communication methods and technical means, as well as continuous education. This national report provides an overview of the general legislative framework on the participation and the rights of the child in proceedings before the courts in Croatia. In addition to the general rules provided by international and EU instruments, as well as the Constitution, it details the existing rules on the participation of children in civil, criminal and administrative proceedings before courts. Additionally, it offers a glimpse into other ways of promoting children's rights of participation in Croatia, particularly through different activities of the Office of the Ombudsman for Children.

**KEYWORDS**

rights of the child; participation of children in court proceedings; civil court proceedings; criminal court proceedings; administrative court proceedings

## 1. General Legislative Framework

The participation and the rights of the child in proceedings before Croatian courts are, in addition to the applicable instruments at the international and European level, guaranteed under multiple national legal instruments. Being the fundamental legal source of Croatian law, the Constitution of the Republic of Croatia[1] provides the legal framework for the interpretation of all Croatian legislation and other legal instruments.[2] Provisions relevant to the rights of the child at the constitutional level, are

1 Ustav Republike Hrvatske (Constitution of the Republic of Croatia), Official Gazette 56/90, 135/97, 08/98, 113/00, 124/00, 28/01, 41/01, 55/01, 76/10, 85/10, 05/14 (2014).
2 Šarčević et al., 2011, p. 30.

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contained in Chapter III, titled "Protection of Human Rights and Fundamental Freedoms". While the Constitution explicitly mentions the rights of the child in general,[3] it remains silent as to the child's participation rights in court proceedings. Regardless of the lack of explicit mention, the rights of the child to participate in court proceedings are considered constitutionally guaranteed. This is because the rights of the child, in general, are a subtype of human rights whose legal protection is guaranteed under the Constitution. Especially relevant in terms of participation rights and access to justice is Article 29 of the Constitution, which provides that 'everyone has the right to have an independent and impartial court established by law decide fairly and within a reasonable time on his/her rights and obligations, or on suspicion or accusation of a criminal offence'.[4] This provision serves as a guarantee of access to court to all persons – including children.

International conventions and treaties also form an important part of the Croatian legislative framework.

> 'International agreements that have been concluded and confirmed in accordance with the Constitution and made public, and which are in force, shall be part of the internal legal order of the Republic of Croatia, and shall be by their legal force above statutes. Their provisions may be changed or repealed only under the conditions and in the manner specified therein, or in accordance with the general rules of international law.'[5]

Thus, international conventions and treaties to which Croatia is a party represent an important source of law and form part of the internal legal order – hierarchically below the Constitution and above the statutes. Croatia is a signatory of the UN Convention on the Rights of the Child,[6] which, inter alia, guarantees the participation rights of children. Croatia is also a signatory to the European Convention on Human Rights (ECHR)[7] and the European Convention on the Exercise of Children's Rights,[8] as well as other conventions relevant to this matter.

Thus, Croatian national legal instruments reflect the need to ensure the well-being and interests of the child. Generally, the child's rights of participation can be exercised in any court proceedings, whether civil, criminal, or administrative. This will be done primarily through representation by legal representatives and the right to be heard, i.e. express one's opinions and views. The particularities of the child's rights

3 For example, the Croatian Constitution provides that 'The family shall enjoy the special protection of the State' (Art. 62 para. 1 of the Constitution); 'The State shall protect maternity, children and young people …' (Art. 63 of the Constitution); 'It is everyone's duty to protect children …' (Art. 65 para. 1 of the Constitution); etc.

4 Art. 29 para. 1 of the Constitution.

5 Ibid., Art. 134.

6 United Nations, 1989 in accordance with Art. 49.

7 Council of Europe, 1950.

8 Council of Europe, 1996.

of participation will thus be visible, in a more explicit manner, in the specific national statutes. Most significant in that regard is the Croatian Family Act,[9] which regulates all matters involving the rights of the child, such as relations between parents and children, measures to protect the rights and well-being of the child, adoption, guardianship, alimony, mandatory counselling, family mediation, and procedures related to family relations and guardianship. The Family Act currently in force, along with its previous versions, has been drafted based on multiple international legal instruments which regulate the procedural rights of the child, such as the aforementioned UN Convention on the Rights of the Child, the European Convention for the Protection of Human Rights, and the European Convention on the Exercise of Children's Rights, and also the European Convention on Contact concerning Children,[10] the Hague Child Protection Convention,[11] the Hague Child Abduction Convention,[12] the Treaty of Lisbon,[13] the Charter of Fundamental Rights of the European Union,[14] the Brussels II ter Regulation,[15] the General Comment No. 12 of the UN Committee on the Rights of the Child,[16] the Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice,[17] etc.[18]

A core provision for the protection of the rights of children in the Family Act is contained in its Article 5. This provision explicitly obliges courts and other competent bodies to protect the rights of children in court proceedings. Moreover, this provision represents an interpretative rule and, thus, obliges the courts to protect the rights and well-being of the child, regardless of whether the rights of the child are directly or indirectly impacted by a particular procedure.[19]

In addition to the Family Act, special provisions regulating the participation rights of children in court proceedings can also be found in the Criminal Procedure Act[20] and Juvenile Courts Act,[21] in terms of criminal proceedings, and in the Civil Procedure Act,[22] generally in terms of civil court proceedings. Finally, in administrative proceedings, not many rules on the participation and other rights of children are

9 Obiteljski zakon (Family Act), Official Gazette 103/15, 98/19, 47/20, 49/23, 156/23.
10 Council of Europe, 2003.
11 Hague Conference on Private International Law, 1996.
12 Hague Conference on Private International Law, 1980.
13 European Union, 2007.
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16 United Nations, 2009.
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18 Šantek and Parać Garma, 2016, p. 34.
19 Poretti, 2019, p. 73.
20 Zakon o kaznenom postupku (Criminal Procedure Act), Official Gazette 152/08, 76/09, 80/11, 121/11, 91/12, 143/12, 56/13, 145/13, 152/14, 70/17, 126/19, 126/19, 130/20, 80/22.
21 Zakon o sudovima za mladež (Juvenile Courts Act), Official Gazette 84/11, 143/12, 148/13, 56/15, 126/19 (2020).
22 Zakon o parničnom postupku (Civil Procedure Act), Official Gazette 53/91, 91/92, 58/93, 112/99, 88/01, 117/03, 88/05, 02/07, 84/08, 96/08, 123/08, 57/11, 148/11, 25/13, 89/14, 70/19, 80/22, 114/22, 155/23.

offered in the relevant legislative acts. The only specific reference to the participation of minors in administrative procedure can be found in the General Administrative Procedure Act,[23] where it states, 'When the witness is a minor, he/she will be heard in the presence of a legal representative'.[24] However, the general rules on the right to participate in court proceedings should be applied here as well.

## 2. Participation of the Child in Court Proceedings

In order to understand the functioning of the right of the child to participate in a court proceeding, three types of capacities must first be differentiated: personal capacity (*pravna sposobnost*), legal capacity (*poslovna sposobnost*), and litigation capacity.

Children are, as any other natural and legal persons, capable of bearing rights and obligations. The personal capacity to bear rights and obligation (*pravna sposobnost*) is acquired by all persons at birth.[25] On the other hand, children under eighteen years, i.e. minors, do not have legal capacity (*poslovna sposobnost*), which is acquired *ex lege* upon reaching the age of majority (the age of eighteen).[26] Thus, minors cannot create legal effects by own declarations of will. Instead, they need to have legal representatives or guardians who will express the will of a minor on their behalf.

There is an exception to the general rule on legal capacity. It relates to situations where a minor has gotten married before turning eighteen, which in itself is an exception too since marriage generally cannot be concluded by a person who has not reached the age of eighteen.[27] However, the court may exceptionally permit a person who has reached the age of sixteen to marry if he/she is 'mentally and physically mature for marriage' and 'the marriage is in accordance with the well-being of that person'.[28] If such marriage is concluded by a child of sixteen of seventeen, that child will acquire legal capacity *ex lege* from the moment the marriage is concluded.[29] Under the old Family Act, the law provided for another exception to the general rule on legal capacity, which related to a mentally mature minor that became a parent before turning eighteen.[30] To be precise, in situations when a child was born to minors of the age of sixteen or seventeen, the acquisition of legal capacity was decided by a court at the request of the minor, in accordance with the opinion of the Social Welfare Centre (now renamed and restructured as the Croatian Institute for Social Work), and taking

23 Zakon o općem upravnom postupku (General Administrative Procedure Act), Official Gazette 47/09, 110/21.
24 General Administrative Procedure Act, Art. 64 para. 8.
25 Zakon o obveznim odnosima (Obligations Act), Official Gazette 35/05, 41/08, 125/11, 78/15, 29/18, 126/21, 114/22, 156/22, 155/23, Art. 17(1).
26 Art. 18 of Obligations Act.
27 Art. 25 para. 1 of Family Act.
28 Ibid., Art. 25 para. 2.
29 Ibid., Art. 117 para. 2.
30 Šarčević et al., 2011, p. 58.

into account also the mental maturity of the minor.[31] However, this was abandoned and is no longer available under the Family Act currently in force.

It is important to note that legal capacity may also be partial – the court may partially divest a person of his/her legal capacity due to reasons of mental disorders or generally when a person is not able to look after his/her personal needs, rights, and interests.[32] In those cases, a person partially divested of his/her legal capacity may still perform some actions; actually, he/she can perform all acts except the ones enumerated in the court's decision.[33] Exceptionally, the court can also divest a person of his/her legal capacity in full – in such cases, the person may not perform any acts for which such capacity is needed.[34]

A person who has full legal capacity may perform actions in the court proceedings on his/her own, i.e. he/she has litigation capacity (*parnična sposobnost*).[35] Thus, litigation capacity may be defined as a person's ability to influence the course of court proceedings through his/her conscious expressions of will.[36] If a person lacks litigation capacity, he/she will not have a procedurally nor legally relevant will; such person is incompetent to litigate and will have to be represented by someone who will undertake procedural actions on his/her behalf.[37] It follows that, in the majority of the cases, children under the age of eighteen will not have litigation capacity, as they will not have the legal capacity either. Thus, their participation in court proceedings will be affected by means of representation. Lack of the child's legal (and litigation) capacity does not affect the child's right to be heard, i.e. the child will have to be given the opportunity to express his/her opinions and testify before the court, depending on his/her age and maturity. This is so because a person participating in the court or other proceedings for the purpose of providing relevant information does not require legal or litigation capacity.[38] The specific form of child's access to court, i.e. representation and right to be heard, as well as some special forms of legal capacity, are regulated in more detail by the relevant international legal instruments and national statutes for different areas of court proceedings – civil, criminal, and administrative. The special rules applicable to each of the different areas of court proceedings are presented below.

### *2.1. Civil Court Proceedings*

As explained above, access to court is guaranteed for all children under eighteen years old. The access to court is reflected in two aspects: representation and the right to be heard.

31 Uzelac and Rešetar, 2009, p. 170.
32 Šarčević et al., 2011, p. 58.
33 Art. 234 of Family Act; see: Šarčević et al., 2011, p. 58.
34 Art. 234 para. 2 of Family Act.
35 Art. 79 para. 1 of Civil Procedure Act.
36 Uzelac and Rešetar, 2009, p. 166.
37 Ibid.
38 Ibid., p. 175.

*2.1.1. Representation*

As stated in the Croatian Civil Procedure Act, any natural or legal person can be a party to the proceedings.[39] However, given that children under eighteen years old generally do not have litigation capacity, they will not be able to represent themselves in court. Thus, they will have to have a legal representative. The child's representative will primarily be his/her parents or, in the absence of adequate parental care, a guardian.[40]

In certain instances, such as when the parents' interests are in conflict with those of their child, the child will be appointed a "special guardian", who will represent him/her. A special guardian (*posebni skrbnik*)[41] is a person who has passed the bar exam and is employed at the Special Guardianship Centre. He/she is appointed to the child by the court or the Croatian Institute for Social Work in order to protect individual personal and property rights and interests of the child in specific cases listed in the Family Law, for example, in marital disputes and proceedings challenging motherhood and paternity, parental care procedures, cases of conflict between the child's interests and the interests of the child's legal representative, etc.[42] The rights and duties of the special guardian are terminated by the decision of the court or the Croatian Institute for Social Work.[43] In Croatia, there seems to be a continuous increase in the appointment of special guardians for children, which is why the institute of special guardian is particularly important.[44] However, according to the yearly reports of the Ombudsman for children, it seems that the institute of special guardian is characterised by numerous weaknesses and doubts about its effectiveness.[45] This is primarily so due to the overload of the cases given to a singular special guardian,[46] as well as the dislocation of parties and courts.[47]

On the occasion that a minor's legal capacity is recognised within certain limits, he/she will also have litigation capacity within those same limits, i.e. legal capacity and litigation capacity are in that sense linked.[48] In any case, the legal representative will be able to undertake all procedural actions on behalf of the child, unless the law explicitly provides that the representative must have special authorisation for certain actions.[49] During the entire proceedings, the court will *ex officio* check

39 Art. 77 of Civil Procedure Act.
40 Lucić, 2021, p. 815.
41 Arts. 240–246 of Family Act.
42 Ibid., Art. 240 para. 1.
43 Ibid., Art. 246 paras. 1–2.
44 Rešetar and Rupić, 2016, p. 1181.
45 Izvješće pravobraniteljice za djecu 2021. – sažetak, Zagreb, March 2022, p. 16; Izvješće pravobraniteljice za djecu 2022. (Sažetak), Zagreb, March 2023, p. 18. For an example of judgment of Constitutional Court of the Republic of Croatia, see e.g. Judgement of the Constitutional Court of the Republic of Croatia, No. U-III/249/2022 from 12 June 2022.
46 According to the Report of the ombudsman for children from 2022, there have been more than 365 cases and 850 hearings per one special guardian.
47 Izvješće pravobraniteljice za djecu 2022 (Sažetak), Zagreb, March 2023, p. 18.
48 Art. 79 para. 2 of Civil Procedure Act.
49 Ibid., Art. 81 para. 2.

whether the party who lacks legal and litigation capacity is duly represented by his/her legal representative.[50]

The child will mostly participate in particular proceedings involving his/her rights, such as relations with parents, measures to protect his/her rights and well-being, adoption, etc. As noted above, all of these types of proceedings are regulated by the Croatian Family Act.[51] The international principle of primary protection of the well-being and rights of the child is reflected in all proceedings, as per Article 5 of the Family Act. It is also explicitly stated that the child will be a party to all court proceedings in which his/her rights and interests are decided upon.[52] This has not always been the case, as the child did not always have the position of a party to a proceeding, for example, under the 2003 Family Act.[53] Additionally, all of the proceedings on matters of family law which are related to the child are considered urgent, and the competent authorities must act accordingly.[54]

The Family Act also provides some special rules on the legal and litigation capacity of minors. A child who has reached the age of fifteen and earns money can independently undertake legal actions, i.e. enter into legal transactions and assume obligations up to the amount he/she earns and dispose of his/her earnings, provided his/her maintenance is not jeopardised.[55] In other words, the child will have special (partial) legal capacity in such instances. On the occasion that the legal actions are such that the child's personal and property rights would be significantly affected, consent of parents, i.e. other legal representatives, would still be required.[56]

Additionally, a child who has reached the age of fourteen may also request the court to issue a decree allowing him/her to present facts, propose evidence, submit legal remedies and take other actions in the process 'if the child is capable of understanding the meaning and legal consequences those actions'.[57] In those instances, the child can also independently initiate proceeding in matters related to the exercise of his/her rights and interests.[58] Before issuing such decree, however, the court is obliged to request the opinion of the Croatian Institute for Social Work.[59] However, even when the decree is issued, the child's legal representative will still be authorised to take actions in the proceedings along with the child.[60] In such instances, it is also possible that the child's and the legal representative's actions may be contradictory. The decision on whose action must prevail will be decided by the court, taking into

50 Ibid., Art. 82.
51 Art. 1 of Family Act.
52 Ibid., Art. 358.
53 Obiteljski zakon (Family Act), Official Gazette 116/2003, 17/2004, 136/2004, 107/2007, 57/2011, 61/2011, 25/2013; Šantek and Parać Garma, 2016, p. 35.
54 Art. 10 of Family Act.
55 Ibid., Art. 85 para. 1.
56 Ibid., para. 2.
57 Ibid., Art. 359 para. 1.
58 Ibid., Art. 87 para. 1.
59 Ibid., Art. 359 para. 2.
60 Ibid., Art. 359 para. 4.

account all of the circumstances of the case and particularly the welfare of the child.[61] It is necessary to highlight the expression "*sposobno shvatiti značenje*" (*capable of understanding the meaning*) in the wording of the aforementioned provision in Article 359(1) of the Family Act, which equals the term "sufficient level of understanding" used by the Council of Europe. The same term is used with the same meaning on multiple occasions throughout the Family Act.[62]

The child will also be able to conduct certain actions by himself/herself in particular instances enumerated by the statute. For example, in the proceedings for granting permission to a minor to enter a marriage, a person who has reached the age of sixteen will be able to independently submit the proposal to that effect before the court.[63]

### *2.1.2. Right to Be Heard*

Children also have the right to be heard, as guaranteed in many international and national legal instruments. Under the Brussels II ter Regulation, in cross-border cases related to parental responsibility and return of the child under the Hague Child Abduction Convention, the Croatian courts shall, in accordance with the Croatian national law and procedure, 'provide the child who is capable of forming his/her own views with a genuine and effective opportunity to express his/her views, either directly, or through a representative or an appropriate body'. In doing so, 'the court shall give due weight to the views of the child in accordance with his/her age and maturity'. Thus, as explained in Recital 39, the Regulation does not set out whether the child should be heard by the judge in person or by a specially trained expert reporting to the court afterwards. Nor does it specify whether the child should be heard in the courtroom, in another place, or through other means. In addition, the Regulation defines the hearing of the child to be his/her right but not the absolute obligation. Therefore, the court needs to assess it, taking into account the best interests of the child, as in cases involving agreements between the parties.

Turning to the national Croatian law, the Civil Procedure Act prescribes that generally, legal representatives are heard on behalf of the parties who do not have litigation capacity.[64] The court has the discretion to decide to also hear the child instead or in addition to the legal representative if such hearing is possible. No specific provisions are provided on the hearing itself when the witness is a child. It is only stated that minors will not be obliged to take an oath when testifying.[65]

Detailed provisions are found in the Family Act, as the child's opinion is of utmost importance in all matters of family law. According to Article 86 of the Family Act,

61 Ibid., Art. 359 para. 5.
62 See e.g.: Art. 58c para 1, Art. 63 para. 1, Art. 64 para. 1, Art. 130 para. 2, Art. 225 para. 2, Art. 226, Art. 359 para. 1, Art. 450 para. 3 of Family Act.
63 Art. 449 para. 1 of Family Act.
64 Aart. 267 of Civil Procedure Act.
65 Ibid., Art. 247.

'parents and other persons who take care of the child are obliged to respect the opinion of the child in accordance with his age and maturity'.

> 'In all proceedings in which a decision is made about a child's right or interest, the child has the right to learn the important circumstances of the case in an appropriate manner, to receive advice and express his/her opinion, and to be informed of the possible consequences of respecting his/her opinion. The child's opinion is taken into account in accordance with his/her age and maturity.'[66]

The latter expression 'in accordance with his age and maturity' may be considered linked to the similar phrase 'capable of forming his/her own views' in Article 12 of the UN Convention on the Rights of the Child and Articles 21 and 26 of the Brussels II ter Regulation. The expression is used consistently throughout the Family Act.[67]

Because of the importance of the child's opinion and the right to express it, the Croatian national law provides that the court will allow the child to express his/her opinion in the proceedings where his/her personal and property rights and interests are decided. This extends also to remedies, enforcement procedures, and non-litigious proceedings. In that vein, the Family Act provides that the court may decide to hear the person against whom the enforcement is being requested before determining the means of enforcement. It may also refer the child to the interview by an expert if needed (the need for an expert is dependent on the child's age and maturity).[68] In any case, the court will allow the child to express his/her opinion before issuing a decision on the enforcement, directly or indirectly, through the expert.[69] In matters of parent-children relationship, the opposition of a child to having personal contacts with parents or other persons will be particularly taken into account. Thus, when a child who has reached the age of fourteen objects to having personal contact with a parent or another person who, based on an enforcement document, has the right to have personal contact with the child, the court will reject the proposal for enforcement.[70] An explicit reference to the obligation of court to enable the child to express his/her opinion is also given in the Family Act, in the matters relating to establishing temporary measures on the issues of personal relationship between child and his/her parents or other persons.[71]

Despite the fact that the right of the child to express his/her opinion is greatly highlighted in the Family Act, it seems that Croatian courts still occasionally undermine its importance. This is illustrated by the case *M. and M. v Croatia*,[72] which reached the

66 Art. 86 para. 2 of Family Act.
67 See e.g.: Art. 86, Art. 106 para. 4. Art. 191 para. 3, Art. 230 of Family Act.
68 Art. 517 of Family Act.
69 Ibid., Art. 522 para. 1.
70 Ibid., Art. 525 para. 2.
71 Ibid., Art. 536 para. 5.
72 ECtHR, *M. and M. v. Croatia,* No. 10161/13, 3 September 2015.

European Court of Human Rights (ECtHR). In this case, the ECtHR held that there had been a violation of Article 3 of the ECHR, on the prohibition of inhuman and degrading treatment, due to Croatia's failure to promptly investigate allegations of ill-treatment of the child, as well as a violation of Article 8 of the ECHR, on the right to private and family life, on account of the excessive length of the custody proceedings, as well as the child's lack of involvement in the custody proceedings. Particularly jarring was the fact that the court, even after more than four years of ongoing custody proceedings, had not allowed the child to express her opinion about which parent she wanted to live with. According to the ECtHR, this only exacerbated the traumatisation of a child, subsequently resulting in self-harm of the child.

Of course, the child can object to expressing his/her opinion, which the court has to respect as well.[73] If the court decides not to establish the child's opinion, it has to have justified reasons which must be explained in the decision.[74]

The method of obtaining the child's opinion is not explicitly laid down by the Family Act or the Civil Procedure Act. Instead, it is provided in the Ordinance on the Method of Obtaining the Child's Opinion.[75] The Ordinance prescribes that the child always expresses his/her opinion without the presence of parents or guardians or other persons who take care of the child.[76] Determining the child's opinion does not consist only of hearing the child – it includes preparation of the child (i.e. informing the child about his/her right to express opinions on all relevant issues, on the procedure for determining his/her opinion, the influence that such opinion can have on the outcome of the procedure, etc.), assessment of his/her abilities and maturity (i.e. assessment of the child's cognitive abilities to form and express his/her opinion in a reasonable and independent way and to understand the outcomes of the expressed opinion), and, subsequently, the expression of the opinion itself. The expression of opinion will not consist of a questioning; rather, it will be formed as a conversation in a 'stimulating and encouraging atmosphere in which the child will feel safe and respected, and his/her opinion will be seriously listened to and taken into account'.[77] The child may also express his/her opinion through non-verbal forms of communication, such as play, body language, facial expression, drawing etc.[78]

The particular way of obtaining the child's opinion will differ for children under the age of fourteen and for those of fourteen and above.[79] The latter category of children are allowed to express their opinion independently in a suitable place. Only on the occasion that the court decides it is necessary, the expert must also be present. On the other hand, children under the age of fourteen will express their opinions

73 Art. 360 of Family Act.
74 Ibid., Art. 360 para. 3.
75 Ordinance on the Method of Obtaining the Child's Opinion (Pravilnik o načinu pribavljanja mišljenja djeteta), Official Gazette 123/2015.
76 Ibid., Art. 4.
77 Ibid., Art. 7 para. 1.
78 Ibid., Art. 7 para. 2.
79 Ibid., Art. 2.

through a special guardian or other expert, usually a psychologist. This means that the special guardian must obtain the child's opinion, which may be a difficult task for a layman/laywoman. Thus, such guardians must possess the necessary professional knowledge and skills to communicate with the child and determine his/her opinion. If the guardian in question lacks such expertise, he/she may use the help of an expert.[80] In any case, the court has a duty to inform the special guardian or expert on the matters in which the child's opinion needs to be determined.[81]

As mentioned above, the child expresses his/her opinion in 'a suitable place'. It will usually be a place outside the courtroom, which is equipped and adapted for the needs of working with children. It is also necessary to ensure privacy, the safety of the child, and unhindered work.[82] Moreover, such place may also be a special area of the court, a special area of the Croatian Institute for Social Work, the Center for Special Guardianship, home of the foster parents or other persons with whom the child is placed, and other areas determined by the court on the occasion that the previously mentioned conditions are met.[83] Expression of the child's opinion may also be enabled via video link if technical requirements allow it.[84] This might especially be useful means if the child is located far from the court, as in cross-border proceedings, including the proceedings for the return of the child under the Hague Child Abduction Convention and the Brussels II ter Regulation.

### *2.2. Criminal Court Proceedings*

In criminal proceedings, the general rules on the child's participation will apply accordingly. Thus, children will be able to participate in criminal court proceedings through representation but will also be allowed to express their opinions/testify where needed. However, due to the particularly sensitive matters of criminal law, the Croatian Criminal Procedure Act and the Juvenile Courts Act regulate matters of the child's participation in criminal proceedings in specific detail. The regulatory framework on children's participation in criminal proceedings differs depending on the role of the child in the proceedings, i.e. whether the child is a victim of a criminal offence, an injured party, a witness, or a perpetrator.

#### *2.2.1. Child as a Victim of a Criminal Offence*

A child who has been a victim of a criminal offence has a special position in the criminal court proceedings. The court, as well as other actors involved, such as the state attorney's office, the investigator, and the police, are all obliged to treat the child with special care to avoid potentially harmful consequences for his/her upbringing and

80 Ibid., Art. 3 para. 2.
81 Ibid., Art. 3 para. 1.
82 Ibid., Art. 5 para. 1.
83 Ibid., Art. 5 paras. 2 and 5.
84 Ibid., Art. 5 para. 3.

development.[85] Thus, the best interest of the child must be taken into account at all times and all stages of the proceedings.

The child as a victim will have specific rights in the criminal court proceedings, in addition to all of the rights that generally belong to victims. The specific rights for children include the right to an assignee at the expense of budget funds, secrecy of personal data, and exclusion of the public during the proceedings.[86] The child is also afforded some additional rights if the criminal offence in question relates to offences against sexual freedom or human trafficking. Here, the child also has rights such as the right to a counsellor before the examination, interrogation by a person of the same gender, right to withhold answers that strictly refer to the victim's personal life, right to examination through an audio-video device, etc.[87] Similar rights are also afforded to victims who have special protection needs, as determined in accordance with Article 43a of Criminal Procedure Act.

Regardless of the explicit legislative basis for the protection of the child's best interest, this may not always be done in practice. This is visible from *M. and M. v. Croatia*, mentioned above, as the case also dealt with a criminal proceeding against the father who had physically harmed the child. According to the ECtHR, Croatia failed to promptly investigate the allegation of ill-treatment, resulting in the violation of Article 3 of the ECHR. The problems of this sort are also repeatedly indicated in the annual reports of the Ombudsman for Children, which particularly highlight the lengthiness of the criminal proceedings as a serious problem for the child victims, given that this agony significantly delays the chances for successful recovery of the child.[88]

### *2.2.2. Child as an Injured Party*

On the occasion that an injured party is a child, he/she has, as do all injured parties, the right to use one's own language in court, right to an assignee, right to attend the evidentiary hearing and participate in it, right to propose evidence, etc.[89] All of these actions and any statements will be given by the child's legal representative or guardian, where the child lacks litigation capacity (which is in majority of cases). However, a situation may occur where the interests of the child are in conflict with the interests of the child's parents. Here, a special guardian will be appointed for the child by the Croatian Institute for Social Work.[90] Exceptionally, if the child has reached the age of sixteen, he/she can make statements and take actions in the proceedings by himself/herself.[91]

85 Art. 44 para. 2 of Criminal Procedure Act.
86 Ibid., Art. 44 para. 1.
87 See: Art. 44 para 4 of Criminal Procedure Act.
88 Izvješće pravobraniteljice za djecu 2022 (Sažetak), Zagreb, March 2023, p. 18; Izvješće pravobraniteljice za djecu 2023 (Sažetak), Zagreb, March 2024, p. 15.
89 For the full list, see: Art. 51 para. 1 of Criminal Procedure Act.
90 Ibid., Art. 53 para. 1.
91 Ibid., Art. 53 para. 3.

### *2.2.3. Child as a Witness*

The majority of provisions in the Criminal Procedure Act on the participation of the child in proceedings are related to the child as a witness in a criminal proceeding.

As mentioned above, the child does not have litigation capacity and is, therefore, represented by his/her legal representative. Thus, summoning a child witness will usually also be done through his/her legal representatives, typically parents. However, some exceptions are possible – a child who has reached the age of sixteen may be summoned directly, as may all children, if there is a particular need to act urgently or due to other justified circumstances.[92] Such circumstances are not explicitly enumerated in the Criminal Procedure Act and are to be determined by the court in each particular case.

The examination itself will slightly differ depending on whether the child has reached the age of fourteen or not. For children that have not yet reached the age of fourteen, the examination will be conducted by an investigating judge, without the presence of the judge and the parties, usually through audio-video devices operated by an IT assistant. A psychologist, pedagogue, or other expert will assist in the examination. The same is true for the parents or legal guardians of the child unless it would be against the interests of the proceedings or the child. The parties may ask questions, approved by the investigating judge, through an expert. Such examination will be recorded by an audio-video recording device, and the recording will be sealed and attached to the record. Only exceptionally can the child be re-examined.[93]

For children who have reached the age of fourteen, the examination will also be conducted by the investigating judge. The questioning must be done in a way that will not adversely affect the child's mental state. The rules on the examination of a child under fourteen years of age, as described above, may apply here if necessary, depending on the circumstances of the case.[94] If that is deemed unnecessary, the examination will be carried out in accordance with the general rules, i.e. the child will be questioned as adult witnesses.

The child will also be protected in instances where identification must be carried out.[95] In such cases, the child performing the identification will be able to do so without the persons whose identification is being performed being able to see or hear him/her. The same is true for any evidence where the child's identity is visible, such as recordings.[96] Here, the recording will be reproduced with the child's face and voice distorted, so his/her identity is not recognisable. This will be done only if it is necessary to protect the child's interests – if the interest of the proceedings as a whole requires that the identity of the child is shown, the original recording may be presented.

92 Ibid., Art. 173 para. 3.
93 Ibid., Art. 292 para. 1.
94 Ibid., Art. 292 para. 2.
95 Ibid., Art. 303 par. 1.
96 Ibid., Art. 330 para. 3.

*2.2.4. Child as a Perpetrator*

Children may occasionally also be perpetrators of criminal offences. Such situations, although generally rare,[97] deserve special attention.

Given that children differ from adults, particularly in their levels of "physical and psychological development",[98] their different treatment in criminal proceedings is essential. The age for criminal responsibility differs among the Member States of the EU; in Croatia, it has been set at fourteen.[99] Thus, children who have not yet reached the age of fourteen cannot be held responsible for criminal offences. The law does not provide any leeway for children under fourteen to be held responsible, even if it is determined that they had the ability to evaluate and understand the consequences of their actions.[100] On the other hand, children who have reached the age of fourteen will be held responsible – however, their responsibility may be seen as reduced.

The special legal framework for juvenile offenders in Croatia may be found in the Juvenile Courts Act. The rules adopted therein were guided by the need for special protection of children, particularly by the UN Convention on the Rights of the Child and other relevant instruments such as the Guidelines on Child-Friendly Justice and UN Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Powers.[101] Particularly important in that regard is that the approach to juvenile offenders of the Juvenile Courts Act is guided by the obligation to treat the suspected or accused child

> 'in a way that is consistent with the promotion of his/her sense of dignity and worth, which strengthens the child's respect for the human rights and fundamental freedoms of others and which takes into account the child's age and the desirability of promoting his/her return to the community and his/her assumption of active roles in that community.'[102]

In other words, the core aim of juvenile criminal justice, as reflected in the Croatian Juvenile Courts Act, is the rehabilitation and reintegration of juvenile delinquents into society.[103]

The Juvenile Courts Act differentiates between two groups: minors and "young adults". As mentioned above, the age of criminal responsibility in Croatia is fourteen; therefore, "minors", for the purposes of the Juvenile Courts Act, will represent children who have reached the age of fourteen but have not yet reached the age of eighteen. On the other hand, young adults can be defined as persons between eighteen

97 Božićević-Grbić and Roksandić Vidlička, 2011, p. 685.
98 United Nations, 2007, para. 10.
99 Kazneni zakon (Criminal Act), Official Gazette 125/11, 144/12, 56/15, 61/15, 101/17, 118/18, 126/19, 84/21, 114/22, 114/23, Art. 7 para. 1.
100 Petö-Kujundžić, 2004, p. 112.
101 United Nations, 1985; Božićević-Grbić and Roksandić Vidlička, 2011, p. 686.
102 United Nations, 1989, Art. 40.
103 Šarčević et al., 2011, p. 30.

and twenty-one years of age.[104] Regardless of whether the accused is a minor or young adult, the criminal proceedings are always urgent.[105]

Criminal cases against children (and young adults) will be judged by juvenile courts (*sudovi za mladež*).[106] Juvenile courts are formed as a specific department, i.e. "juvenile department", of county and municipal courts at the seat of the county court. Such courts/departments consist of "juvenile council" (*vijeće za mladež*) and "juvenile judges" (*suci za mladež*).[107] The judges of the juvenile courts are appointed by the president of the Supreme Court of the Republic of Croatia from among the judges of municipal and county courts as well as the High Criminal Court of the Republic of Croatia.[108] The judges of juvenile courts must be appointed based on their expressed affinity for the upbringing, needs, and advancements of youth. They should also have basic knowledge not only of criminology but also of social pedagogy, youth psychology, and social work for youth.[109] Juvenile judges also participate in the juvenile council, along with "jury judges for juveniles" (*suci porotnici za mladež*), who are usually professors, teachers, and educators, as well as other persons who have work experience in professional educational work with youth.[110]

The general rules governing the procedure against minors are contained in the Criminal Procedure Act (*lex generalis*); those rules apply provided they do not conflict with the special rules provided by the Juvenile Courts Act (*lex specialis*).[111] A minor shall, whenever possible, be summoned through a parent or a legal representative.[112] From the first action taken on the ground of suspicion of committing a criminal offence to the final conclusion of criminal proceedings, the minor must have a defence counsel, which has to be an attorney-at-law.[113] In the course of the proceedings, the Croatian Institute for Social Work has the right to be acquainted with the developments in the proceedings and to make proposals and draw attention to the facts and evidence that are deemed important for reaching the proper decision.[114] Additionally, whenever the facts and circumstances of a particular case indicate the need to take special measures in order to protect the rights and well-being of minors, the juvenile courts and the public prosecutor's office must report to the Croatian Institute for Social Work.[115]

Additional rights are guaranteed to the suspected or accused child in criminal proceedings, particularly the right to have the parent or guardian present at all times

104 Art. 2 of Juvenile Courts Act.
105 Ibid., Art. 4.
106 Ibid., Art. 35.
107 Ibid., Art. 37 para. 1.
108 Ibid., Art. 39 para. 1.
109 Ibid., Art. 38.
110 Ibid., Art. 41 para. 2.
111 Ibid., Art. 48.
112 Ibid., Art. 55 para. 1.
113 Ibid., Art. 54 paras. 1 and 5.
114 Ibid., Art. 57 para. 1.
115 Ibid., Art. 56

during the proceedings, especially during the questioning;[116] the right to additional information provided to the minor, as enumerated explicitly by the statutes;[117] the confidentiality of the proceedings;[118] etc.

In any case, a minor may not be tried *in absentia*.[119] In all actions to which the minor is present, particularly when minor is subjected to questioning, the court must act with caution, giving particular regard to the aim of preserving the well-being and development of the child.[120] There are no specific instructions provided in the statute; hence, the way the proceedings are conducted is to be decided on a case-by-case basis, depending on the psychological development and personal characteristics of the minor in question.

### *2.3. Administrative Court Proceedings*

As in civil and criminal proceedings, children's access to administrative court proceedings is guaranteed without any specific age threshold. However, the participation of children in administrative proceedings is not regulated under the applicable statutes in much detail. Thus, the general rules of participation apply; the child can be the party to the particular proceedings but cannot represent himself/herself. Instead, the child is represented by his/her legal representative, according to the general rules of representation explained above. In addition, the child has the right to be heard, as guaranteed by the aforementioned legal instruments.

The child's participation is rarely observed in the practice of the Croatian administrative courts. This being said, a case before the High Administrative Court of Croatia of 2015 serves as an example of the child's rights violation in the administrative court proceedings.[121] In that case, a child, S.M., had been previously placed in the relative foster family, i.e. under the care of her grandmother. However, the then Social Welfare Centre (now the Croatian Institute for Social Work) initiated the proceedings for the termination of the right to the long-term placement of the child in this foster family due to the fact that the child began to show behavioural disorders. Namely, it was believed that the child's grandmother was not an adequate foster parent. The grandmother filed a complaint against the decision, which the competent first-instance administrative court rejected. The child's grandmother appealed the court decision, denying such claims against her. The High Administrative Court, having reviewed the entire documentation in the case file, found that the facts on which the administrative bodies and the first-instance administrative court based their decision were not sufficient to establish the termination of the right to place the child in the relative foster family. The fact that the child exhibits behavioural

116 Ibid., Art. 53.b.
117 For a complete list, see: Ibid., Art. 53.a.
118 Ibid., Art. 60.
119 Ibid., Art. 53 para. 1.
120 Ibid., Art. 53 para. 2.
121 Judgement of the High Administrative Court of Croatia, No. Usž-1154/15-2 from 3 September 2015. See also: Zagorec, 2016.

disorders cannot be the only criterion for the conclusion that the grandmother does not adequately care for the child. On the contrary, the case file clearly showed that the grandmother regularly took the child for check-ups and provided her with care and protection. Moreover, the case file also showed that the child was extremely attached to her grandparents. On that note, when the High Administrative Court analysed the course of the administrative dispute before the lower court, it became clear that the competent authorities did not allow the child to express her opinion on the matters at hand. As a consequence, the High Administrative Court established the manifest violation of Article 12 of the Convention on the Rights of the Child.

## 3. Child-Friendly Information and Promotion of Children's Rights

In order for child-friendly justice to function properly, it is also important that children are adequately informed about their rights. Naturally, it will usually be the role of a court to provide children with sufficient information on their rights in the course of the pending court proceedings. However, promoting child-friendly justice and informing children of their rights in general should also be done outside of a courtroom, i.e. before the child is involved in any particular proceeding. On that note, a few relevant sources of information and child-friendly activities in Croatia can be highlighted here.

Firstly, all aforementioned national legal acts, as well as the translations of foreign legal instruments, such as the UN Convention on the Rights of the Child, are translated into Croatian and made publicly available and promoted in different publications online and in print. Thus, anyone has access to relevant legal information. This also includes manuals and other materials, such as the Handbook on Children's Rights,[122] which can be helpful in providing legal information adapted to children's understanding. There are also some child-friendly information or leaflets made specifically for children.[123]

Significant action on the promotion of children's rights is taken by the Office of the Ombudsman for Children. Since 2010, the Network of Young Advisers (*Mreža mladih savjetnika*) has been operating as an advisory body for the Ombudsman. Members of the Network are chosen by the children from the previous generation, while adult counsellors and the Ombudsman herself also participate. Additionally, the Youth Forum (*Forum mladih*), consisting of fifteen members who are children over sixteen years old, operates as an advisory group. Both the Network and the Youth Forum actively participate in the promotion of the rights and well-being of the child, particularly through participation in discussions and conferences on particular topics relating to the child's rights, such as the child's participation in school, child's mental

122 Agencija Europske unije za temeljna prava and Vijeće Europe, 2015.
123 Republika Hrvatska, n.d.

health, child poverty etc., and holding regular meetings with the Ombudsman for Children.[124]

The Office of the Ombudsman for Children regularly organises meetings with children, both in the offices of the Ombudsman in different cities and in schools. The aim of these meetings is to provide children with relevant information about the Office of the Ombudsman for Children and the work done, particularly on the rights of the child. Additionally, the meetings aim to encourage children to exercise their right of participation and enable hearing the views of children concerning the ability and obstacles to exercising their rights in society.[125] Finally, among the regular annual activities of the Office of the Ombudsman for Children are visits to institutions for children, such as institutions of social care, shelters for victims of domestic violence, educational institutions, penal institutions, etc.[126]

124 Pravobraniteljice za djecu, 2023, p. 22.; Pravobraniteljice za djecu, 2024, p. 19.
125 Pravobraniteljice za djecu, 2023, p. 23; Pravobraniteljice za djecu 2024, p. 19. In 2023, there have been 63 in person and 9 online meetings with approximately 1300 children in total.
126 Pravobraniteljice za djecu 2023, p. 29.

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| Chapter 2 |

# Child-Friendly Justice – Czech Perspective

Veronika Kissová

**ABSTRACT**

The perception of a child as an object of the rights of others and an object of protection by law has shifted to treating a child as an active subject endowed with their own legal rights since the Convention on the Rights of the Child. This change has been reflected in legal orders of the signatory countries, including the Czech Republic, which recognises the right of children to participate in any proceedings which concern them. This contribution presents various aspects of children's participation and practical issues of enforcement of the child's procedural rights from the point of view of the current legislation and the corresponding case-law.

**KEYWORDS**

participation rights, legal proceedings, minor, right to be heard, right to information, representation, children, child-friendly justice

## 1. Are the Participation Rights of Children Guaranteed on the Level of the Constitution?

Ever since the ratification of the Convention on the Rights of the Child (hereinafter: "CRC"), the perception of a child within the legal system has shifted from a paternalistic view of the child as an object of protection towards the child as an active legal subject with his/her own rights and obligations. Influenced by international attitudes and the CRC, the approach in the Czech Republic has changed as well, reflected in many provisions within the Czech legal system. One of the most important and most emphasised rights of the child brought by the CRC is the child's right to participation. The signatory countries of the CRC are obliged to ensure the rights of children to participate in every proceeding that concerns them are respected.

The Czech Republic is a signatory to several international treaties and human rights conventions that establish or strengthen the protection of the rights of children. This has made an impact on the protection of the rights of children in the

Veronika Kissová (2025) 'Child-Friendly Justice – Czech Perspective' in Benyusz, M., Zombory, K., (eds.) *Child-Friendly Justice. The Participation and the Rights of the Child in Court Proceedings From a Central European Comparative Perspective.* Miskolc–Budapest: Central European Academic Publishing, pp. 43–63. https://doi.org/10.71009/2025.mbkz.cfj_2.

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Czech legislation. According to Article 10 of the Czech Constitution[1], 'promulgated international treaties ratified with consent of the Parliament and by which the Czech Republic is bound form part of the legal order; if an international treaty provides for something different from the law, the international treaty shall apply', international treaties are legally binding themselves.

The Czech legal system has many levels. The highest of them is the constitutional level, meaning all other legislation needs to be in accordance with provisions within the constitutional regulation. There is, however, no provision within the Czech constitutional law directly stipulating the participation rights of children. According to Article 36 et seq. of the Charter of Fundamental Rights and Freedoms[2], everyone has a right to judicial protection. According to Article 37 of the Charter, everyone is equal in legal proceedings. Moreover, Article 38 para 2 of the Charter stipulates that everyone has the right to have their case heard in public, without undue delay, in their presence, and to be heard on all evidence. These provisions apply to everyone equally.

In accordance with the case-law of the Czech Constitutional Court, all constitutionally guaranteed fundamental rights, including the right to a fair trial and corresponding procedural rights, apply to minors equally as to any other individuals. The Constitutional Court concludes that infringement of a child's rights to participation set forth in Article 12 of the CRC means the child's rights stipulated by the Charter are also infringed.[3] The abovementioned requirements set forth by the constitutional law are then reflected onto different provisions across the Czech legal system, elaborated on in the following subchapters.

## 2. What Legal Instruments Guarantee the Right of Children to Participate in Judicial Proceedings?

The foundation of the right of children to participate in judicial proceedings follows, as mentioned in the previous subchapter, from the constitutional requirement of fundamental procedural rights of every human being stipulated by the Charter. In the Czech legal system, the provisions of legal documents on levels below the constitutional level must comply with constitutional law. The specific legal instruments guaranteeing the right of children to participate in judicial proceedings then differ depending on the branch of law.

1 Constitutional Act No. 1/1993 Sb., the Constitution of the Czech Republic, as amended.

2 Constitutional Act No. 23/1991 Coll., the Charter of Fundamental Rights and Freedoms, re-adopted under No. 2/1993 Coll., as amended; hereinafter "Charter".

3 See for example Case No. II. ÚS 725/18 from 8. 10. 2018, No. IV. ÚS 1328/20 from 28. 7. 2020 (N 157/101 SbNU 98), No. IV. ÚS 2611/20 from 22. 12. 2020 (N 235/103 SbNU 398), No. III. ÚS 484/23-2 from 25. 4. 2023, No. III. ÚS 409/23 from 30. 5. 2023, No. II. ÚS 1751/23-2 from 25. 7. 2023, No. II. ÚS 859/23-2 from 23. 8. 2023, No. II. ÚS 2355/22 from 24. 1. 2023.

### *2.1. Civil Proceedings*

In respect to civil law, provisions relevant to the right of children to participation can be found within both substantive and procedural law. Prior to when the Civil Code[4] came into effect in 2014 – within substantive law – the relevant provision could be found in the Act on Family from 1963[5], according to which a child capable of forming their own opinion and of assessing the impact of decisions concerning him/her shall have the right to receive necessary information and to express themself freely on all decisions of their parents regarding the child and to be heard in any proceedings in which such matters are decided.[6]

Nowadays, the right of children to participation is in general stipulated in Art. 867 of the CC, which says

> 'before making a decision affecting the child's interests, the court shall provide the child with the necessary information to enable him/her to form his/her own opinion and to communicate it.' (para 1), 'if, in the court's opinion, the child is unable to receive the information, or is unable to form his/her opinion, or is unable to communicate that opinion, the court shall inform and hear the person who is able to protect the interests of the child, provided that the person must be a person whose interests do not conflict with the interests of the child; a child over the age of twelve shall be presumed to be able to receive the information, form his/her own opinion and communicate that opinion. The opinion of the child shall be given due weight by the court.'[7]

According to Art. 875 para. 2 of CC, parents of a child also have to enable the child's participation in a decision-making process regarding the child. This also applies to proceedings in which the child is represented by the parent.

The procedural counterside followed the changes of the substantive law by passing amendments to the Civil Procedural Code from 1963[8], which in § 100 para 3 stipulates that in proceedings involving a minor child capable of forming his/her own views, 'the court shall proceed in such a way that his/her views on the matter are ascertained'. This provision is the general rule for the child's participation rights in civil court proceedings.

Moreover, in 2013, the Act on Special Civil Proceedings[9] was passed, which regulates non-litigious proceedings, for instance "proceedings on granting full legal capacity to minors", "proceedings on protection of personality rights", "inheritance proceedings", "proceedings on divorce", "proceedings on affiliation", "proceedings on adoption", and "proceeding in matters of care of minors". Similarly to proceedings

4 Act No. 89/2012 Sb., as amended, hereinafter: "CC".
5 Act No. 94/1963 Sb., as amended especially by the Act No. 91/1998 Sb.
6 Art. 31 para. 3 of the Act on Family.
7 Art. 867 para. 2 of CC.
8 Act No. 99/1963 Sb., Civil Procedure Code, as amended, hereinafter "Civil Procedure Code".
9 Act No. 292/2013 Sb., on Special Civil Proceedings, as amended, hereinafter "ASCP".

based on the Civil Procedural Code, 'the court shall proceed in such a way that the minor receives the necessary information about the court proceedings and is informed of the possible consequences of complying with his/her opinion and the consequences of the court's decision. The minor's legal representative or guardian has a similar duty towards the minor'.[10] It is often ruled by the Constitutional Court that the child's right to participate in proceedings is his/her right, not an obligation, and whether the child wants to exercise the right is solely his/her decision he/she will make based on the information on the proceedings and the subject-matter provided to him/her.[11]

Besides general provisions on participation rights, there is a regulation of specific proceedings. One such case is adoption proceedings. If a child is eligible to be adopted[12], the administrative body may start proceeding to arrange for an adoption of the child. In the proceeding, the child's participation rights are explicitly guaranteed by Art. 806 of the CC, which states that a child over 12 years old can only be adopted with his/her consent. Moreover, if the child was too young during the adoption proceedings, the adoptive parents have a duty to inform the child about adoption when appropriate, no later than when he/she begins compulsory school attendance[13].

Special participation rights of the child are also guaranteed in the context of healthcare decisions. If a child over the age of 14 opposes a medical procedure, even if his/her representatives (mostly parents) agree with it, it cannot be carried out without the court's approval. Conversely, if the child's legal representative does not agree with the interference with the integrity of the child, despite the child's wishes, the procedure may be carried out at his/her request or at the request of a close person only with the approval of the court[14]. Other rules are part of specialised legislation[15].

### *2.2. Criminal Proceedings*

In the Czech legal system, a minor can be held responsible for an offence only as a juvenile. However, the substantive and procedural specifics of criminal proceedings with a minor are regulated separately in the Act on the Liability of Young Persons for Unlawful Acts and on Juvenile Justice from 2003[16]. A juvenile is defined as a person who 'at the time of committing the offence has attained the age of fifteen years and has not exceeded his eighteenth year'.[17] Children under the age of 15 do not have criminal responsibility. Proceedings in the case of children under 15 years of age on suspicion of having committed an otherwise criminal offence shall, unless the law provides otherwise, be conducted in accordance with the rules governing civil court

10 Art. 20 para. 4 of the ASCP.
11 Constitutional Court case No. II. ÚS 2866/17 from 28. 2. 2018; see also: Čamdžićová, 2021.
12 in compliance with Arts. 819 and 820 of the CC.
13 Art. 836 of the CC.
14 Ibid., Art. 100.
15 i.e. Act No. 272/2011 Sb., on Health services, as amended.
16 Act No 218/2003 Sb., Juvenile Justice Act, hereinafter "JJA" or "Juvenile Justice Act".
17 Art. 2 para 1 point c) of the JJA.

proceedings.[18] However, not even every minor over the age of 15 has to be criminally responsible, pursuant to Art. 5 para 1 of the JJA

> 'a juvenile who, at the time of the commission of the offence, has not attained such intellectual and moral maturity as to be able to recognise the unlawfulness of the offence or to control his/her actions is not criminally responsible for the offence.'[19]

The JJA regulates both substantive and procedural specifics of proceedings concerning acts of juveniles.

The purpose of separate regulation on proceedings with minors is to apply measures

> 'which will effectively contribute to refrain them from committing an unlawful act and to finding a social outlet appropriate to his/her abilities and rational development, and to contributing, to the best of his/her ability, to the redress of the harm caused by his/her unlawful act; the proceedings must be conducted in such a way as to contribute to the prevention and deterrence of unlawful acts.'[20]

Contrary to standard criminal proceedings, in cases of juveniles, more emphasis is put on prevention rather than retribution. Moreover, people involved in the proceedings with minors are required to have undergone special training on dealing with juveniles.[21] Criminal cases involving minors are heard in juvenile courts, which are, however, not separate judicial bodies but specialised judges working at general courts in cooperation with the authority for the socio-legal protection of children and specialised law enforcement authorities.

The manner of conducting the juvenile proceedings is specified in Art. 41 et seq. of the JJA, according to which the juvenile's 'age and mental maturity must be taken into account in such a way that their psychological and social balance is not disturbed and their further development is endangered as little as possible'. In particular, the regulation emphasises the psychological and social balance of the juvenile, thereby seeking to interfere with the juvenile's mental state and social situation as little as possible.[22] This applies to all acts carried out by the authorities acting under the Juve-

18 Ibid., Art. 96.
19 Šámal, 2011, p. 37.
20 Art. 1 para. 2 of the JJA.
21 Ibid., Art. 3 para. 8 says 'Judges, prosecutors, law enforcement officers, and Probation and Mediation Service officers acting in juvenile criminal cases must have special training in dealing with juveniles'.
22 Šámal, 2011, p. 394.

nile Justice Act, i.e. police, prosecutors, and courts, irrespective of the stage of the criminal proceedings at which they are carried out.[23]

The Juvenile Justice Act expressively lists the rights of a minor in juvenile proceedings, such as the right to treatment appropriate to his/her age, mental maturity, and state of health. Meanwhile, all authorities are obliged to inform the juvenile of his/her rights and to give him/her full opportunity to exercise them.[24] This includes the right to participation in accordance with the view of the child as an active subject as defined by the Committee on the Rights of the Child.[25]

Nonetheless, there are still provisions showing a paternalistic approach towards minors, such as the right of the minor's parents to represent them in the proceedings and act on their behalf, which explicitly allows the legal representative to exercise these rights even against the juvenile's wishes, following the requirement of best interests of the child.[26] The juvenile also has a right to professional representation in the proceedings. According to Art. 33 para. 1 of the Criminal Procedure Code[27], a juvenile has the right to choose a defence counsel. The juvenile must have a defence counsel from the moment measures are taken against him/her pursuant to the Juvenile Justice Act or the Criminal Procedure Code, including urgent and non-repeatable acts, unless the act cannot be postponed and the notification of the defence counsel cannot be ensured. The importance of the participation of a defence counsel is then emphasised by the broad definition of compulsory defence of minors.[28] The participation of a defence counsel strengthens the juvenile's position in the proceedings and mitigates his/her disadvantage, which is such that, due to his/her age, the juvenile usually does not have sufficient knowledge of his/her rights and the applicable regulation or is unable to exercise them independently.[29]

Besides being on trial, minors can be involved in criminal proceedings as witnesses or victims, for which special protection of the minor's interests is guaranteed by the law. A specific approach is required when dealing with minors; for example, since questioning on some details of a criminal act could negatively affect the mental and moral development of the minor, the questioning must be conducted with particular care. In terms of its content, it should be conducted in a way that the interrogation need not be repeated in subsequent proceedings, with the assistance of another person experienced in dealing with minors. If it could contribute to the interrogation, parents may also be brought in. However, the presence of parents is excluded if they are also witnesses in the case, are involved as victims, or could be prosecuted. The

23 Ibid., p. 392.
24 Art. 42 of the JJA.
25 UN Committee on the Rights of the Child, 2009.
26 According to Art. 43 of the JJA, parents of the juvenile are entitled to represent the juvenile, in particular, to choose a defence counsel for the juvenile, make motions on behalf of the juvenile, and file applications and appeals on his behalf.
27 Act No. 141/1961 Sb. as amended.
28 Arts. 42 and 36a of the Criminal Procedure Code.
29 Šámal, 2011, p. 409.

same applies if it can be concluded that the minor will not be able or willing to tell the truth in the presence of their parents.[30][31]

### *2.3. Administrative Proceedings*

Children's right to participation in administrative proceedings is guaranteed by the Administrative Procedure Act, which came into effect in 2006[32]. The ability of subjects to be a party in administrative proceedings does, similarly to civil proceedings, correspond to their legal capacity. Irrespective of their procedural capacity, according to Art. 29 para 3 of the Administrative Procedure Act, anyone has a right to be heard in the course of the proceedings.

Provision analogical to Art. 100 para 3 of the Civil Procedure Code is Art. 29 para. 4 of the Administrative Procedure Act,[33] which applies to proceedings conducted by social-legal protection authorities. The child must be given an opportunity to express his/her views either directly, through a representative, or the socio-legal protection authority. Since under standard circumstances, the representative of a child would be the parent, in cases regarding socio-legal protection of the child, the authorities must take into consideration the possibility of a conflict of interests between the child and the parent, and it is often necessary to obtain the child's opinion otherwise.[34]

Moreover, according to Art. 8 para. 2 of the Act on Socio-Legal Protection of Children[35] regulating procedural and substantive issues of socio-legal protection of children,[36]

> 'a child capable of forming his/her own opinions shall have the right, for the purposes of social protection, to express those opinions freely in the discussion of all matters affecting him/her, even without the presence of his/her

30 Arts. 102 and 158 para. 5 of the Criminal Procedure Code.
31 Šámal, 2011, p. 477.
32 Act No. 500/2004 Sb., as amended, hereinafter "Administrative Procedure Act".
33 "In proceedings in which a minor child who is capable of forming his/her own views is a party, the administrative authority shall proceed in such a way that the views of the minor child on the matter are ascertained. To this end, the administrative authority shall give the child the opportunity to be heard either directly or through a representative or the competent child welfare authority. If the child's interests so require, the child's opinion may be ascertained without the presence of the parents or other persons responsible for the child's upbringing. In such a case, the administrative authority shall involve another suitable adult in the act. The opinion of the child shall be taken into account by the administrative authority taking into account the child's age and maturity of mind."
34 Jemelka, Pondělíčková and Bohadlo, 2016, p. 172.
35 Act No. 359/1999 Sb., as amended.
36 According to Art. 1 para. 2, the law concerns in particular
a) the protection of the right of the child to a favourable development and proper upbringing,
b) the protection of the legitimate interests of the child, including the protection of the child's property,
c) action aimed at restoring the disrupted functions of the family,
d) providing an alternative family environment for a child who cannot be brought up permanently or temporarily in his/her own family.

> parents or other persons responsible for the child's upbringing. The child's views shall be given due weight, appropriate to his/her age and mental maturity, in consideration of all matters affecting him/her. In its action, the social welfare authority shall take into account the wishes and feelings of the child, taking into account his/her age and development, so as not to endanger or impair his/her emotional and psychological development.'[37]

The regulation shows that the participation rights of children shall be respected not only in court proceedings but in all cases when the minor comes into contact with the socio-legal protection authority. Thereby, children's participation rights reflect the fact that the child is not an object of legal relations within parental responsibility nor an object of protection by the authorities involved in resolving the family situation, such as parental conflict.[38]

## 3. Is There Child-Friendly Information/Translation of Legal Instruments Available for Children on the Possibility to Participate in General?

The child's ability to exercise his/her participation rights depends on the information the child receives. Although the right of the child to be informed is not explicitly mentioned in Article 12 of the CRC, it has traditionally been inferred by interpretation and confirmed by case-law. Indeed, the right of the child to be heard is "not limited to merely ascertaining the child's views on the matter under consideration but also includes further communication with the child and informing him/her of the proceedings".[39]

The right of children to information can, in regards to the right to participation, be divided into two aspects. The first is the child's right to be informed about the proceedings affecting him/her. Regarding the participation of the child, the Czech Constitutional Court has consistently argued in its case-law that the child cannot be viewed as a mere object in the proceedings but must be perceived as an important subject of the law and a participant in the proceedings and treated as such.[40] Accordingly, the child should also be communicated with by the court in an appropriate manner. The Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice provide that

> 'the right of any person to access to justice and to a fair trial - in all its components (including in particular the right to be informed, the right to be heard,

37 Art. 8 para. 2 of the Act on Socio-Legal Protection of Children.
38 Rogalewiczová, 2018, p. 53.
39 Constitutional Court case No. II. ÚS 725/18 from 8. 10. 2018.
40 Ibid.

> the right to a defence and the right to be represented) – is essential in a democratic society and applies equally to children'.[41]

It follows that as a part of the right to a fair trial, the child is entitled to be informed in the proceedings. In this sense, Article 12 of the CRC shall be understood as expressing the right of the child to access justice, inclusive of the right to a fair trial.

The exercise of the child's right to information and, as a result, the child's participation in the proceedings depends on whether and to what extent the entity obliged to provide the child with information on the proceedings fulfils its obligation. However, Czech legislation does not unanimously place the obligation to provide information in this sense onto one entity, but it varies from one provision to another. In general, the obligation to inform a child is placed with the judicial authority[42], the child's legal representatives[43], or authorities focusing on socio-legal protection of children[44].

Regulation of the child's right to be informed about the proceedings is fragmented in the Czech legal order, which is why the Constitutional Court has addressed the issue, concluding that ensuring the child is properly informed is ultimately a responsibility of the general courts (the judges), saying that the court cannot rely on the child receiving information about his/her rights and the proceedings from their legal representatives, i.e. their appointed guardian.[45] Thus, the court cannot resign on its duty to inform simply because a similar duty is imposed on other entities. In addition, the court has a general duty to inform subjects of the proceedings,[46] including children. Moreover, it is the task of judicial authorities to protect fundamental rights and freedoms in accordance with Article 4 of the Czech Constitution and to ensure that the rights of the parties are respected in the proceedings, including the principles of fair trial under Article 36 et seq. of the Charter.

However, the child's right to information is not limited to information to the extent at the discretion of the obliged person. The child has the right to actively ask questions or seek clarification.[47] The child shall be informed of the relevant facts consistently throughout the proceedings and should be provided with necessary assistance and support for understanding the information. The obligation to inform the child is not limited to facts relating to the merits of the case but also to information on the proceedings in general, including the meaning of possible procedural steps, rights, and obligations of the child.[48] The child should, therefore, also be informed of his/her participation rights.

41 Council of Europe, 2010, p. 14.
42 Art. 6 of the ECHR; Art. 867 para. 1 of the CC; Art. 20 para. 4 of the ASCP.
43 Art. 875 of the CC; Art. 20 para. 4 of the ASCP.
44 Art. 8 para. 3 of the Act on Socio-Legal Protection of Children.
45 Constitutional Court case No. II. ÚS 725/18 from 8. 10. 2018 and case No. I. ÚS 3038/16 from 5. 6. 2017.
46 According to Art. 5 of the Civil Procedure Code.
47 Rogalewiczová, 2018, p. 57.
48 Constitutional Court case No. II. ÚS 1532/10 from 7. 10. 2010.

The exercise of the right of the child to participate in proceedings is, in the first place, a result of the information (regarding the subject matter of the proceeding) the child has received. The possibility of the child exercising participation rights does, however, depend on the child's awareness of his/her rights and how to enforce them. Given the age and corresponding limited capacity of the child, besides assistance with information provided by an adult or an authority, the child should also have access to child-friendly information materials on their rights.

In order to ensure the child has an option to familiarise him/herself with his/her rights, there are some child-friendly sources of information available online. The links to such sources are also provided on the website of the public defender (ombudsman), with the possibility of reaching out for guidance. A child-friendly version of the CRC in the Czech language is also available on the website. Moreover, there is a leaflet by the Council of Europe addressed to children, explaining their rights in a brief and understandable way, including the right to express his/her opinion on anything that concerns him/her, which must be taken into account, all available on the ombudsman website.[49] An illustrated version of the CRC is available along with other explanatory materials by the Department of Labour and Social Affairs and non-profit organisations.[50] Videos informing children of their rights in a child-friendly way, including participation, right to information, right to be heard, and other rights of the child during proceedings are available as well.[51] Even though these materials are easily accessible online, they may still be unreachable for some children, especially of a younger age, who do not have access to the internet. Therefore, the factual accessibility of these documents might, in many cases, still depend on parents or other adults. Another obstacle is the difference between a child having information on their rights and a child being able to exercise their rights.

## 4. Age as an Aspect of a Child's Access to Court

### *4.1. Civil Proceedings*

The conditions of participation in civil proceedings are defined by the Civil Procedure Code as the ability to be a party to the proceedings and a procedural capacity. The capacity to be a party to proceedings is the capacity to have procedural rights and obligations in the proceedings. Procedural personality is defined in Art. 19 of the Civil Procedure Code, which provides that "the capacity to be a party to proceedings is vested in those who have legal personality; otherwise, only in those to whom the law

49 For more see: https://deti.ochrance.cz/pomoc/odkazy/ (Accessed: 2 January 2024).
50 For more see: http://www.pravonadetstvi.cz/tvoje-prava/umluva-o-pravech-ditete-1/prava-deti/ilustrovana-umluva-o-pravech-ditete/ (Accessed: 3 January 2024).
51 For more see: https://kids.umpod.cz/web/en/childrens-rights (Accessed: 3 January 2024).

confers it." This provision refers to the substantive law concept of legal personality.[52] Procedural capacity can then be defined as the ability to act independently in the proceedings (or through a chosen representative). Procedural capacity, defined in the CPC, also refers to substantive law, namely to the concept of legal capacity. Children generally have partial legal capacity based on their level of maturity, which is (rebuttably) presumed to correspond to the maturity of minors of his age. The presumption allows an individual assessment of each minor's intellectual and volitional maturity.

Article 20 para. 1 of the Civil Procedure Code provides that everyone has procedural capacity to the extent that he/she is capable of acting independently (within the substantive law). However, in some proceedings, the law grants full procedural capacity to minors beyond the abovementioned rule, i.e. some proceedings in family law matters. Where the minor lacks procedural capacity, he/she must be represented.

Regardless of the child's procedural capacity, the law guarantees children the right to participation in proceedings that concern them. Access to proceedings for children is not restricted by an age limit under Czech law; however, the maturity of the child is the decisive factor in the manner of their participation and the relevance of their opinion. Article 867 of the CC (quoted above) establishes a rebuttable presumption that a child over the age of 12 is capable of accepting the court's information and forming his/her own opinion. However, the court should also communicate with younger children. It is the duty of the judge to consider whether and how to ascertain the child's opinion, bearing in mind that even an interview with a child younger than 12 years of age may provide further insights significant for the court's decision. According to the Czech Constitutional Court

> 'participation of children in legal proceedings shall increase with age of the child. It is a continuum. Whereas 18 years of age cannot be the point before which the child cannot participate in the proceeding at all and after reaching the age of 18 should participate fully'.[53]

The manner of realisation of the child's participation should then correspond to the child's development.

### *4.2. Administrative Proceedings*

Similarly to civil proceedings, in administrative proceedings, procedural capacity is defined as referring to the Civil Code, namely legal capacity. Nonetheless, Art. 29 para. 3 of the Administrative Procedure Act stipulates the administrative authority may give an opportunity to any person (regardless of legal capacity) to make a statement during the proceeding. In regards to a minor, the administrative authority shall

52 Legal personality is, according to Art. 15 para. 1 of the CC, the ability to have rights and obligations within the limits of the legal order. A person has a legal personality throughout the whole course of their life.

53 Constitutional Court case No. I. ÚS 1041/14 from 4. 12. 2014.

proceed in such a way that the views of the minor on the matter are ascertained if the minor is capable of forming his/her own views by giving him/her the opportunity to be heard either directly (with or without the presence of the child's parent) or through a representative or the children's socio-legal protection authority.[54] The opinion of the child must then be taken into account by the administrative authority considering the child's age and maturity.

Regarding the child's capability to form his/her opinion, just like in the case of legal capacity, the administrative authority would, with reference to Art. 867 of the CC, presume a child over the age of 12 is capable of doing so. Similarly, the Act on Socio-legal Protection of Children stipulates a rebuttable legal presumption that a child over 12 years of age has this capacity. It is presumed that a child over the age of 12 is mature enough to form and express his/her opinion.[55] However, the age limit of 12 years must be taken in so far as a rebuttable presumption, and the child's maturity shall be examined in each individual case.

### *4.3. Criminal Proceedings*

For criminal proceedings, 15 years of age is the age limit of criminal responsibility. Therefore, for acts of younger minors, regulation of civil law proceedings applies. However, for minors over the age of 15, special procedural rules apply (the Juvenile Justice Act).

If a criminal proceeding concerns a child as a victim or witness to somebody else's offence (either adult or another minor), there is no age limit for hearing a minor. The Juvenile Justice Act stipulates that the proceeding must be conducted in a manner respecting the child's interests, for the purposes of which age and mental maturity of the child must be taken into account so their psychological and social balance is not disturbed and their further development is endangered as little as possible.[56]

### *4.4. Terminology*

The Czech legal order uses the term "capable of forming his/her opinion" and accepting the court's information, also used in the UN Convention and the Brussels II regulation, which also presumes the child is capable of a sufficient level of understanding (term used by the Council of Europe). The procedural rules, in combination with substantive law, as interpreted by the Czech Constitutional Court, are, therefore, based on a rebuttable presumption of a child over the age of 12 being able to accept the information, form his/her own opinion, and communicate it. Not age, but maturity of the child is the decisive aspect of the child's participation. The mental maturity of a child is related to his/her age, but the child's development is a continuous process with the development of intellectual and moral maturity until full adulthood.[57]

54 Art. 29 para. 4 of the Administrative Procedure Act.
55 Rogalewiczová, 2018, p. 58.
56 Art. 41 of the JJA.
57 Šámal and Šámalová, 2011, pp. 398–399.

## 5. Child Participation (A Form of Access and Special Regulation for Hearing a Minor Child in the National Procedural Law)

### *5.1. Civil Proceedings*

Article 100 para. 3 of the Civil Procedure Code stipulates the court shall proceed in such a way that the child's views on the matter are ascertained, preferably by questioning the child directly. In some cases, the court may also ascertain the views of the child through his/her representative, an expert opinion, or the socio-legal protection authority. The court may question the child without the presence of other persons if their presence could be expected to influence the child so that he/she does not express his/her true opinion.

However, a third person should be present at the interview, e.g. a socio-legal protection worker, a psychologist if necessary, or another court worker. If the public prosecutor's office intervenes in the case, the interview with the child may also take place in the presence of the public prosecutor. The court may deny the presence of a confidant of the child who is not his/her legal representative and whose presence is requested by the child only if the purpose of the questioning would be undermined by their presence.

The law establishes a priority of ascertaining the child's opinion directly. However, in some cases, the very question of the admissibility of a direct hearing of the child by the court may be dependent on the procedural arrangements the court can make to ensure that the child is not traumatised or unduly stressed by a direct interview in the court.[58] The priority of a direct hearing is based on the assumption of a more objective assessment of the child's opinion in direct contact with the child.[59] While conducting the interview with the child in the presence of the judge is considered to be "*a sufficient guarantee of objectivity*" of the interview,[60] case-law of the Czech Constitutional Court stresses the dependence of the child's ability to formulate his/her opinion on "a properly and professionally conducted interview"[61] to enable the child to express his/her true opinion, which emphasises the requirement of specialised judges and other persons in contact with the child.

### *5.2. Administrative Proceedings*

According to Art. 29 para. 3 and 4 of the Administrative Procedure Act, the administrative authority may give a minor an opportunity to express his/her opinion on the proceedings. The administrative authority shall ascertain the views of the child either by giving the child the opportunity to be heard directly (with or without the

58 Dušková, Hofschneiderová and Kouřilová, 2021, p. 210.
see also Constitutional Court case No. II. ÚS 1945/08, from 2. 4. 2009 or No. II. ÚS 291/16 from 29. 3. 2016.
59 Constitutional Court case No. III. ÚS 1265/16 from 19. 6. 2018.
60 Constitutional Court case No. IV. ÚS 2458/18 from 5. 11. 2018.
61 Constitutional Court case No. IV. ÚS 827/18 from 10. 4. 2018.

parent present) or through a representative or the children's socio-legal protection authority.

### *5.3. Criminal Proceedings*

In juvenile proceedings, the authorities are obliged to cooperate with bodies of socio-legal protection of children, citizens' interest associations, and persons implementing probation programmes in order to strengthen the educational effect of juvenile proceedings, create conditions for an individual approach, respond in a timely manner to the needs and interests of juveniles and victims and other affected subjects, and prevent further criminal activity.[62] In carrying out the juvenile proceeding, authorities must respect personalities of the subjects involved. In dealing with juveniles, their age and mental maturity must be taken into account in a way that their psychological and social stability is not disturbed and their further development is compromised as little as possible. Moreover, procedural acts should be carried out by the police authority specialised in juvenile criminal matters.

Special procedural rules apply when a child is a victim or a witness of a crime. When questioning a minor, the interrogation must be conducted with particular care. Attention to the procedural rights of minors is also reflected in other provisions of the Criminal Procedure Code (e.g. if an explanation is requested from a minor, his/her legal representative must be notified unless it cannot be postponed and notification of the legal representative cannot be arranged).

The Criminal Procedure Code specifically regulates the protection of personal data and privacy of persons under the age of 18 in regard to criminal proceedings.[63] No person may disclose in any way information that enables the identity of the victim under the age of 18 to be recognisable. The rule applies to the publication of images, visual and audio recordings, or other information on the proceedings. The court's decision may not be published in the public media with the name, surname, and place of residence of such victims. Such information may be published if necessary for the purposes of tracing persons, criminal proceedings, where public interest justifies it, or where the person in question has given his/her consent. In the case of a minor, a legal representative or a guardian has the right to consent, considering the best interest of the child.

## 6. Representation of Children in Proceedings

### *6.1. Civil Proceedings*

Under Czech law, children can be represented in proceedings based on three different legal titles – statutory (by legal representative), judicial decision, and power of

62 Art. 40 para. 1 and Art. 41 of the JJA.
63 Art. 8a et seq. of the Criminal Procedure Act.

attorney. Section 32 para 2 of the Civil Procedure Code provides that a party to the proceeding cannot be represented by a person whose interests are in conflict with those of the represented party.

In civil proceedings, children are generally represented by their legal representative because, in accordance with Art. 20 of the Civil Procedure Code, persons who cannot act independently in court must be represented, including minors. There is a correlation between legal capacity and procedural capacity regarding the subject matter. Under specific circumstances, the judge may decide a minor must be represented in the proceeding despite having the legal capacity to act independently in the subject matter (on the level of substantive law). On the other hand, in some cases, the minor is *ex lege* granted a full procedural capacity, e.g. proceedings for permission to marry.[64]

The legal representative of a minor is usually his/her parent as a carrier of parental responsibility. According to Art. 865 para. 1 of the CC, parental responsibility is vested in both parents equally. In representing the child, the parents shall act in mutual agreement in accordance with the best interests of the child. If the parents do not reach an agreement on a matter significant to the child's interests, the court shall decide on a petition of one of the parents. Besides parents, a guardian[65] or custodian[66] can also act as a legal representative of the child.

A minor can also, just like any other procedural subject, be represented based on a power of attorney. Article 37 para. 2 of the Charter establishes the fundamental right to legal representation. A party to the proceedings has the right to be represented from the outset of the proceedings by a representative of his/her choice. It can be assumed that in many cases, the minor or his/her parent may wish for the child to be represented by a lawyer. In general, any party to the proceedings, including a minor, may be authorised by him/her pursuant to Art. 25 para. 1 of the Civil Procedure Code. The limited legal capacity of minors constitutes a restriction on choosing a legal representative and granting a power of attorney. It is then up to the minor's representatives to act on behalf of the minor pursuant to Art. 894 para. 1 of the CC in this as well.

In cases where the child is unable to act independently and is not represented, the judge will appoint a procedural guardian (guardian *ad litem*). A procedural guardian, appointed under Art. 29 para. 1 of the Civil Procedure Code, is not supposed to replace the guardian appointed by the guardianship court but should allow for a continuity of the proceeding.[67] Moreover, a procedural guardian only has the power to represent a party in the case for which he/she was appointed. The procedural guardian can be

64 Svoboda, 2022, marg. No. 15.

65 In accordance with Art. 928 of the CC, a guardian is appointed when there is no parent who has and exercises full parental responsibility towards the child. The guardian has in principle all the rights and obligations of a parent towards the child, except for a duty of maintenance.

66 Art. Art.63 para. 1 of the CC.

67 Smolík, 2022.

a close relative, another suitable person, or a lawyer. The person concerned, if not a lawyer, must agree to the appointment.

A problematic aspect of proceedings where guardian *ad litem* has been appointed for the child is that the child loses the opportunity to choose a legal representative for the proceedings since the legal representatives – the parents – who could otherwise grant a power of attorney on their behalf, have been excluded from representing him/her.[68] The child's representation is then fully dependent on a court-appointed guardian. In this respect, the Czech Constitutional Court criticised the cumulation of the subject acting in the best interest of the child (from an objective point of view, e.g. the child's legal representation) and representation of the child in the proceedings (acting according to the child's wishes, which may be in conflict with the "objective" best interest of the child). Both these roles are often assumed by the socio-legal protection authority. However, case-law has pointed out the lack of professional capacity, which may be an obstacle to the protection of the best interests of the child. This is particularly in cases requiring in-depth legal knowledge in civil litigation proceedings (e.g. in the case of objections to the ineffectiveness of gift contracts for immovable property to minors in case No. I. ÚS 3304/13 or IV. ÚS 3305/13).

The Czech Constitutional Court has also emphasised the necessity of the court maintaining contact with the child in addition to his/her representative.[69] Another consequence of the protection of participation of minors is the limitation of the possibility to issue payment orders. Payment orders without a hearing should not be issued against a minor who has not reached full legal capacity if the court has any doubts as to the propriety and effectiveness of his/her representation by the legal representative. In such cases, it is necessary to consider, before issuing a decision, whether it is appropriate to appoint a procedural guardian for the child, taking into account the best interests of the child.[70]

### *6.2. Administrative Proceedings*

Similar rules to the civil proceedings apply in administrative proceedings. The minor is also usually represented by his/her legal representative, guardian, or attorney in accordance with Art. 31 et seq. of the Administrative Procedure Act.

### *6.3. Criminal Proceedings*

The minor's legal representatives have a right to represent the minor in the proceedings and act on their behalf, which explicitly includes the right of the minor to participate in those acts. However, the legal representative may exercise these rights on behalf of the juvenile even against the juvenile's will, following the requirement of the best interests of the child. Legal representatives of the child have several rights in the juvenile proceeding

68 Constitutional Court case No. I. ÚS 3304/13 from 19. 2. 2014.
69 See for example: Constitutional Court case No. I. ÚS 1041/14 from 4. 12. 2014.
70 See for example Constitutional Court case No. II. ÚS 3133/19 from 27. 11. 2019.

> 'to choose a defence counsel, make motions on behalf of the juvenile, and file applications and appeals on his/her behalf; he is also entitled to participate in those acts which the juvenile may participate in under the law...the right to ask questions, to inspect evidence....'[71]

It is the court's obligation to instruct the child's representative on his/her procedural rights.

The juvenile also has a right to professional representation in the proceedings. According to Art. 33 para. 1 of the Criminal Procedure Code, a juvenile has the right to choose a defence counsel. The juvenile must have a defence counsel from the moment measures are taken against him/her pursuant to the Juvenile Justice Act or the Criminal Procedure Code, including non-repeatable acts, unless the act cannot be postponed and notification of the defence counsel cannot be ensured.[72] The juvenile must have a lawyer even if he expressly refuses representation. If the juvenile does not exercise his/her right to choose a defence counsel and if the legal representative or guardian does not choose one, his/her next of kin, sibling, adoptive parent, spouse, companion, or other interested person may choose one instead.[73] The juvenile justice authorities are obliged to inform the juvenile of his/her rights and provide a full opportunity to exercise them. In the position of a victim, a minor is entitled to legal aid free of charge.[74]

## 7. Enforcement of Child-Friendly Justice in the Czech Republic

### *7.1. Is Child-Friendly Language Utilised?*

In regards to the participation rights of the child, his/her representative has the duty to inform the child. Considering the limited capacity of children, the way in which the information is communicated is also crucial for his/her participation. Therefore, the form of communication and language should be adapted to the child's age and intellectual maturity so that he/she can understand it and form his/her opinion from it.

The Czech Constitutional Court has concluded that the court's decision, even though it must comply with formal requirements, should also be formulated in such a way that the child can understand it. If it is not formally possible, it is the court's obligation to inform the child of the contents of the decision. In this respect, the child's wishes shall also be taken into account when it comes to the manner in which he/she wishes to be informed of the outcome of the proceedings.[75] Children should also be

71 Art. 43 of the JJA.
72 Ibid., Art. 42a.
73 Ibid., Art. 44.
74 Art. 51a para. 2 of the Criminal Procedure Act.
75 In Constitutional Court case No. II. ÚS 725/18 from 8. 10. 2018, the minor, through her guardian in the proceedings (socio-legal protection body) expressed her wish to be informed of the outcome of the proceedings in the form of a letter sent to her mother's address.

advised that their opinions and wishes are not binding for the judge. Furthermore, they should be given an explanation on how their opinion was taken into account in the decision and what are its consequences.

### *7.2. Are There Child-Friendly Court Spaces?*

In the context of the child's right to a fair trial and the particular vulnerability of the child, the right to be heard should be understood to include the right to have the necessary procedural arrangements made to enable the child to participate in the proceedings.[76] The Czech Constitutional Court also emphasises the obligation of the court to ensure a "*peaceful atmosphere*" for the hearing.[77] It is not recommended to conduct an interview with a child in a courtroom during a hearing, as this setting may not be child-friendly. It may be conducted anywhere the court assesses to be appropriate, taking into account the interests of the child, e.g. in another room in the court building arranged to create a child-friendly atmosphere, in the judge's chambers, a school facility, or even in the child's home[78]. The Constitutional Court stresses the priority of a personal interview between the judge and the child, even though the survey of the child's opinion via socio-legal authorities or experts does not constitute a violation of the procedural rules. It is apparent the Constitutional Court fully accepts ascertaining the child's opinion in an informal setting.

### *7.3. Are There Child-Friendly Hearing Methods?*

As previously mentioned, the Czech Constitutional Court stresses the necessity of "a properly and professionally conducted interview",[79] which should take into account not only the age of the child (and the maturity) but also the nature of the case and other circumstances, such as the family background and the social environment.[80] The child's opinion should be ascertained "comprehensively, i.e., primarily by means of indirect questions (especially in the case of younger children)".[81] The Constitutional Court has also emphasised the difference between the right of the child to be heard as a special procedural right and the questioning of persons as a means of evidence. It concluded there is no need to adhere to the formal procedures inherent in the examination of parties or witnesses.[82]

### *7.4. Is There Training for Judges?*

It is the court's responsibility to ensure the child is provided with an appropriate environment for his/her participation and to take measures to that end. Poor practice

76 Dušková, Hofschneiderová and Kouřilová, 2021, p. 212.
77 Constitutional Court case No. I. ÚS 2661/10 from 2. 11. 2010.
78 Such was the case considered in the Constitutional Court case No. II. ÚS 1931/17 from 19. 12. 2017.
79 Constitutional Court case No. IV. ÚS 827/18 from 10. 4. 2018.
80 Constitutional Court case No. III. ÚS 459/03 from 20. 8. 2004.
81 Constitutional Court case No. II. ÚS 291/16 from 29. 3. 2016.
82 Ibid.

in ascertaining a child's views can lead to so-called systemic abuse, which is "harm caused to a child by an improper or insensitively implemented official (or judicial) procedure". To prevent it, the Guidelines on child-friendly justice[83] stress the need for training professionals in communicating with children. In this context, it is worth mentioning the activities of the Judicial Academy in the Czech Republic on good practice. In particular, the recommendations for judges resulting from the 5th Family Law Symposium of the Judicial Academy on Child Participation in Custody Proceedings of 24-25 June 2021, in addition to the theoretical part, include a description of appropriate communication with the child and other aspects of child participation, and a tutorial model of conversation with children.

## 8. Is the Child's Right to Express His/Her Views Enforced? If Yes, to What Extent In…

### *8.1. Remedies*

In regards to a child's participation rights, the child should be informed (as has been already mentioned) also about the outcome of the proceedings and possible remedies, including the constitutional complaint. Along with information on possible remedies, the child should be informed of the consequences of exercising them, including advice and support from qualified persons.[84] Often, the lack of awareness of children's rights and redress mechanisms is an obstacle to children's access to them, as they are dependent on other persons to pursue remedies on their behalf. It is also for this reason that the Committee on the Rights of the Child stressed the need for an independent institution specialising in the protection of the rights of children, whose advice and assistance would be available to children in an informal way. The failure to introduce such an institution in the Czech Republic has also been the subject of criticism by the Committee on the Rights of the Child.[85]

### *8.2. Enforcement Procedures*

Civil enforcement procedures are regulated either in Act No. 120/2001 Coll. on Bailiffs and Enforcement Activity (Enforcement Code) or the Civil Procedure Code. The parties to the enforcement proceedings are referred to as the beneficiary (the person who has filed the application for the order for execution) and the obligor (the person against whom the beneficiary directs the application for the order for execution). Meanwhile, procedural personality and capacity are defined by the same rules as for the purposes of inquiry proceedings[86]. Enforcement proceedings can only be initi-

83 Part IV, para. 15.
84 Dušková, Hofschneiderová and Kouřilová, 2021, p. 213.
85 Concluding recommendations of the Committee on the Rights of the Child on the third and fourth periodic reports of the Czech Republic on implementation of the obligations under the Convention on the Rights of the Child, para. 34.
86 See the subchapter on representation in civil proceedings.

ated on request, which has to be filed by a person representing the child. When filing for enforcement of a court order, a parent may represent the child.[87] However (as in inquiry proceedings), if there is a conflict of interest between the parent and the child, a guardian must be appointed for the child.

Given the specific characteristics of enforcement proceedings, the court shall order enforcement of a decision without a hearing unless the court considers it necessary or if the law requires it.[88] Therefore, in enforcement proceedings, the parties generally do not have the opportunity to be heard (whether they are an adult or a child).

87 For example, to enforce the maintenance of a minor child from a parent, the other parent may represent the child.
88 Art. 253 of the Civil Procedure Code.

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| Chapter 3 |

# Child-Friendly Justice – French Perspective

Magalie Nord-Wagner

**ABSTRACT**

Children's participation rights in France are not explicitly in the Constitution but are secured through international conventions (CRC, European texts), national laws, and the juvenile justice system. The key concept is *discernement*, combined with age thresholds, which determine when minors can be heard, take part in proceedings, or be held responsible.

Civil, administrative, and criminal procedures provide representation (parents, guardians, ad hoc administrators) and specific guarantees: specialised courts, compulsory legal counsel, audiovisual-recorded hearings, and priority for educational over punitive measures. France also develops child-friendly justice with simplified guides, adapted spaces (Mélanie rooms, UAPED), and specialised training.

The *Conseil Constitutionnel* and the *Défenseur des droits* ensure that the best interests of the child and proportional treatment remain central.

**KEYWORDS**

Children's rights, Juvenile justice, *Discernement,* Age thresholds, Child-friendly justice, Constitutional guarantees

## 1. The Participation Rights of Children on the Level of the Constitution

The French Constitution does not explicitly address the participation of children in administrative or judicial proceedings. However, the constitutional principles that underpin the French legal system, such as the presumption of innocence and the adversarial principle, apply universally to all individuals, whatever their age. Children are, therefore, entitled to the same fundamental legal protections as adults.

In its decision of 29 August 2002,[1] the French Constitutional Council recognised the fundamental principle of the specific nature of juvenile criminal justice. This recognition underlines the need to take into account the age of minors when assessing

1 Conseil Constitutionnel (2002) 'Décision No. 2002-461 DC du 29 août 2002' [Online]. Available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000000227586 (Accessed: 13 January 2024).

Magalie Nord-Wagner (2025) 'Child-Friendly Justice – French Perspective' in Benyusz, M., Zombory, K., (eds.) *Child-Friendly Justice. The Participation and the Rights of the Child in Court Proceedings From a Central European Comparative Perspective.* Miskolc–Budapest: Central European Academic Publishing, pp. 65–81. https://doi.org/10.71009/2025.mbkz.cfj_3.

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their penal responsibility. The decision underlines the importance of seeking the educational and moral recovery of delinquent children through measures appropriate to their age and personality. These measures are generally ordered by specialised courts or according to appropriate procedures.

It is important to note that while the emphasis is on rehabilitation and educational measures, this does not exclude the possibility of imposing penal sanctions on juveniles where necessary. This reflects a balanced approach that considers both the need for accountability and the recognition of developmental differences between adults and juveniles in the legal system.

## 2. Legal Instruments Guaranteeing the Right of Children to Participate in Judicial Proceedings

Several instruments guarantee children's right to participate in judicial proceedings.

France has signed and ratified the International Convention on the Rights of the Child (hereinafter CRC) of 20 November 1989. Several articles of this international text are directly applicable to French law. In its decision of 22 September 1997, the Conseil d'Etat recognised the direct applicability of Article 3, which states that 'the best interests of the child shall be a primary consideration'.[2] The Constitutional Council confirmed this interpretation for the first time in a decision of 21 March 2019.[3] In 1995, the Conseil d'Etat also affirmed the direct applicability of Article 16 of the CRC, which states that 'no child shall be subjected to arbitrary or unlawful interference with his/her privacy, family, home, or correspondence'.[4]

As a member of the Council of Europe, France is also party to a number of conventions directly or indirectly affecting children's participation in judicial proceedings. For instance, France has ratified the European Convention on the Exercise of Children's Rights (ETS No. 160), which came into force on 1 July 2000. France is also bound by the various European Union texts on the subject.[5]

Numerous French laws also deal with children's participation in legal proceedings. Most of these are codified in the *Code civil* (Civil Code), the *Code de procédure civile* (Code of Civil Procedure), the *Code de procédure pénale* (Code of Criminal Procedure), and the *Code de la justice pénale des mineurs* (Code of Juvenile Criminal Justice).

2 Conseil d'État (1997) *22 septembre 1997*. [Online]. Available at: https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007930359 (Accessed: 13 January 2024).

3 Conseil Constitutionnel (2019) 'Décision No. 2018-762 QPC du 8 février 2019' [Online]. Available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000038109243 (Accessed: 13 January 2024).

4 Conseil d'État (1995) *10 mars 1995*. [Online]. Available at: https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007864916 (Accessed: 5 January 2024).

5 For instance: Art. 24 of the Charter of Fundamental Rights of the European Union; Directive (UE) 2016/800 du Parlement européen et du Conseil du 11 mai 2016 relative à la mise en place de garanties procédurales en faveur des enfants qui sont des suspects ou des personnes poursuivies dans le cadre des procédures pénales [Online]. Available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000035603585 (Accessed: 13 January 2024).

France has its own specific juvenile criminal law, with its own rules of responsibility, its own procedure, and its own courts. The *Code de la justice pénale des mineurs*, which has been in force since 30 September 2021 (successor to Ordinance no. 45-174 of 2 February 1945 on juvenile delinquency), regulates the situation of juvenile delinquents.

## 3. The availability of Child-Friendly Information and Translation of Legal Instruments Available for Children on the Possibility to Participate in General

Various elements can be used to make legal instruments easier for children to understand:

Writing documents in accessible language: For example, the guide "Et si on s'parlait de la justice?" is an initiative of the Ministry of Justice in partnership with the association *Les petits citoyens*. It aims at explaining to children aged 7 to 11 how justice works in France, using simple words and humorous drawings. There is also a guide to juvenile justice on the French Ministry of Justice website, which explains the various rights of minors, the procedures, etc., in a simple and attractive way.[6]

Proliferation of educational resources: Educational resources provided by websites such as educadroit.fr play a vital role in helping children understand the legal process. These resources are valuable tools for children and educators, facilitating a better understanding of legal concepts. The inclusion of justice education in school curricula also ensures that children receive structured, age-appropriate knowledge about their rights and the legal system.

Youth protection associations: The existence of numerous youth protection associations in France helps to provide support for child victims and their families. These associations not only offer assistance but also inform and assist children and their families in their dealings with the courts. The direct support provided by these associations helps ensure that children and their families are well informed about judicial proceedings, which in turn makes the legal system more effective.

## 4. Children's Access to Civil Court Proceedings, Administrative Court Proceedings, and Criminal Proceedings Guaranteed under 18 Years of Age?

Due to their inability to exercise legal rights, minors are generally unable to initiate legal proceedings themselves. That is why, in principle, minors under the age of 18 can access the various judicial procedures via their legal representatives (parents, tutor) or an *ad hoc* administrator (if their interests are in conflict with those of their

6 Ministère de la Justice, 2021.

parents or tutor). In certain cases, however, age limits or consideration of the minor's discernment may allow direct access to justice.

## 5. The concept of the children's "Capability of Forming His/Her Opinion" (used in the UN Convention and the Brussels II Regulation) or "Sufficient Level of Understanding" (used by the Council of Europe) in Domestic Legal Instruments

In French law, the concept of *discernement* (discernment) is used to determine 'the possibility of taking into account the will of the minor, whether in making choices, giving his/her opinion on matters that concern him/her, or assuming responsibilities'.[7] It is a subjective notion that depends on the personality and development of each child. It is not defined by law but is determined by the judge on the basis of the minor's age, physical ability, intelligence, etc. The *discernement* will confer a number of rights on the child, including the ability to be heard.

## 6. The Age Threshold Representing the Limit to "Sufficient Level of Understanding", the child's "Capability to Form His/Her Opinion"

In certain areas, particularly criminal law, France has, for a long time, relied solely on the concept of a minor's discernment to determine responsibility. It is only since the *Code de la justice pénale des mineurs* of 1st October 2021 that French law has set a real age threshold in this area.

In civil law, too, sometimes only the minor's discernment can be taken into account. This is the case, for example, with Article 388-1 of the *Code civil* concerning the hearing of minors in civil proceedings. Once they have sufficient discernment, minors may ask to be heard by a judge in any civil case concerning them.

In the majority of cases, French law has several age thresholds which can be combined with the fact that the minor has the necessary discernment. Authors generally distinguish 3 main levels.[8]

> *13 years*: this age threshold signifies the juncture at which minors are deemed to possess sufficient discernment, rendering them criminally accountable, as articulated in Article L. 11-1, paragraph 2, of the *Code de la justice pénale des mineurs*. It is essential to note that this is a rebuttable presumption, and if a minor can demonstrate a lack of discernment, they may be deemed not

7 Dekewer-Defossez, 2012, p. 163.
8 This distinction is made by the following authors: Bonfils and Gouttenoire, 2021.

criminally responsible. Furthermore, from the age of 13, minors become susceptible to penal sanctions, including imprisonment and fines.

In civil law, this age demarcation serves as the point at which juvenile offenders may face legal proceedings. Moreover, this minimum age requirement extends its application to civil law contexts, such as changes in surname or forename or granting consent for adoption.

*15 years*: this marks the age at which a minor is deemed to possess adequate discernment to provide legal consent for a sexual relationship with an adult. According to the *Code pénal*, engaging in sexual relations with a minor under the age of 15 is classified as a criminal offence for adults. Furthermore, the age of 15 is commonly utilised as an aggravating circumstance in criminal cases involving such situations.
*16 years*: under criminal law, from the age of 16, minors may incur the same penalty as adults if the judge does not apply the *excuse de minorité*. Before the age of 18, minors benefit from a reduction of the penalty incurred due to their age. In principle, they only incur a sentence equal to half that incurred by an adult for the offence in question. From the age of 16, magistrates may, by exceptional and reasoned decision, remove this *excuse de minorité*.

In civil law, this age allows minors to become emancipated. It also corresponds to the end of compulsory schooling and, therefore, the possibility for minors to work. Article 1234 of the *Code de procédure civile* considers that a minor over the age of 16 may automatically request that the family council be called to meet, whereas, below this age, this request is subject to the minor's discernment. This case is an example of the combination of the two systems presented.[9]

## 7. The Form of the Access to Civil Court Proceedings, Administrative Court Proceedings and Criminal Proceedings

### *7.1. Civil Court Proceedings*

#### *7.1.1. Right to Be Heard*

Under the terms of Article 388-1 of the *Code civil*, 'In any proceedings concerning him, a minor who is able to discern may, without prejudice to the provisions providing for his/her intervention or consent, be heard by the judge'. The minor is entitled to be heard if he/she so requests. The hearing may take place individually, in the presence of a lawyer, or alongside a person chosen by the minor unless the judge determines that the chosen person is not in the minor's best interests. It is important to note that

9 Ibid.

the minor's participation in the hearing does not confer upon them the status of a party to the proceedings. The judge must ensure that the minor is informed of this possibility.

*7.1.2. Legal Action by a Minor*

The principle of representation of minors: as minors are unable to exercise their rights, they cannot, in principle, initiate legal proceedings. They will, therefore, be represented by their parents or, failing that, by a tutor, in accordance with the law.

In general, children are represented in legal proceedings by their legal representatives. Legal representatives are persons exercising parental authority. Article 382-1 of the *Code civil* states that 'when legal administration is exercised by both parents, each of them is presumed, *vis-à-vis* to third parties, to have received from the other the power to act alone in administering the minor's property'. Consequently,

> 'Legal proceedings relating to an extrapatrimonial right or actions for nullity, rescission, or reduction of acts performed by the protected person, as well as any procedural act that entails loss of the right of action, which are acts of disposal that therefore require the consent of both parents as legal administrators.'[10]

If a parent exercises parental authority alone, he/she may take the steps that parents exercising parental authority jointly must take together. However, certain decisions cannot be taken by the parents alone and require the authorisation of a judge. This is the case for acts that involve 'renouncing a right in the minor's name, whether it concerns his/her property or extrapatrimonial rights'.[11]

Article 388-2 of the *Code civil*:

> 'Where, in proceedings, the interests of a minor appear to be in conflict with those of his/her legal representatives, the *juge des tutelles* under the conditions set out in Article 383 or, failing that, the judge hearing the proceedings shall appoint an *ad hoc* administrator to represent him/her.'

Indeed, in some cases, the parents will not be in the best position to defend the child's interests. That is why an *ad hoc* administrator can be appointed to represent the minor. The minor himself may request the appointment of an *ad hoc* administrator. This *ad hoc* administrator may be a relative of the minor; however, the judge can appoint a natural or legal person from a list drawn up within the jurisdiction of each Court of Appeal. Their role is to represent the minor. In the context of educational assistance proceedings, where the intervention of the children's judge is linked to a

10 Gouttenoire, 2023.
11 Ibid.

family danger to the minor, the appointment of an *ad hoc* administrator to represent the non-discerning minor, for instance, is necessary.

#### *7.1.3. Acting in Absentia*

In some cases, however, the minor may act personally, without being represented. For example, in the case of educational assistance, i.e. if the health, safety, or morals of a minor are in danger or if the conditions for his/her education or physical, emotional, intellectual, and social development are seriously compromised,[12] a minor, who is in such danger, may refer the matter directly to the *juge des enfants*. Even if the minor lacks the necessary discernment, he/she may still be a party to the educational assistance proceedings, represented by an *ad hoc* administrator.[13]

A minor may bring a case to the European Court of Human Rights (hereinafter ECHR) in person if one of his/her rights under the European Convention on Human Rights has been violated, without needing to be represented.[14] A child who brings a case before the ECHR enjoys the same rights as adults, particularly as regards the right to legal assistance from a lawyer and respect for the adversarial principle, as well as the opportunity to submit observations during the proceedings.

Finally, in certain cases, the minor's representatives cannot make a decision on his/her behalf because of the personal commitment involved.[15] These may include when the minor signs an employment contract, becomes a parent, etc. In such cases, the law recognises that the minor has the capacity to commit himself/herself because the consent of the person concerned is considered essential.[16] However, it is only possible if the minor concerned has sufficient *discernement*.

### *7.2. Administrative Court Proceedings*

The administrative courts are less often in contact with minors than the civil and criminal courts. They apply the basic rules of the Civil Code.[17] Minors may, therefore, take legal action in their own right but must always be represented by their parents, a guardian, or an *ad hoc* administrator.[18]

In the case of unaccompanied minors, they will generally be represented by an *ad hoc* administrator. However, in certain cases, they may act alone, for example, to file a *référé-liberté* requesting emergency accommodation or care by the child welfare authority.[19]

12 Art. 375 of the Code Civil.
13 Gouttenoire, 2023.
14 European Court of Human Rights, 2025.
15 Gouttenoire, 2023.
16 Ibid.
17 Ciaudo, 2023, p. 209.
18 Conseil d'État (1997) *9 juillet 1997, Mlle Kang* [Online]. Available at: https://www.legifrance.gouv.fr/ceta/id/CETATEXT000007970718 (Accessed: 13 January 2024).
19 Conseil d'État (2011) *30 décembre 2011, Boiguile* [Online]. Available at: https://www.legifrance.gouv.fr/ceta/id/CETATEXT000025115886 (Accessed: 13 January 2024); Ciaudo, 2023.

## 8. Criminal Proceedings (Right to Be Heard, Representation)

### *8.1. Hearing a Minor*

A minor may be heard as a witness (and must, therefore, swear to tell the truth) from the age of 16.[20] Below this age, he/she can be heard but will not be subject to the obligations of a witness (swearing, obligation to say what they have seen and heard, for example).

### *8.2. The Representation of the Minor Victim*

Whatever the offence when the minor is a victim, some specific rules may apply.

> 'The *procureur de la République*[21] or the *juge d'instruction,*[22] when seized of acts committed voluntarily against a minor, shall appoint an *ad hoc* administrator when the minor's interests are not fully protected by his/her legal representatives or by one of them. The *ad hoc* administrator ensures that the minor's interests are protected and, where appropriate, exercises the rights of a civil party on the minor's behalf. In the event of a civil claim, the judge will appoint a lawyer for the minor if one has not already been chosen.'[23]

Apart from this special case, minors may be accompanied, at all stages of the proceedings, by their legal representative and, where appropriate, by any adult of their choice.[24]

They may also be accompanied by an approved victim support association.[25] It should be noted that there is a large number of youth protection associations in France that provide support to child victims and their families and inform and assist them in their dealings with the courts.

### *8.3. The Special Case of Juvenile Offenders*

It should be noted that when a minor is suspected of having committed an offence, a specific procedure is initiated, with different rules from those that apply to adults. In addition to penal sanctions, magistrates also have educational measures at their disposal, which they will often prefer for less serious offences.

Moreover, the *Code de la justice pénale des mineurs* has established the system of *césure pénale* for minors. In the first instance, a hearing is held, in principle, within three months of the incident, to rule on the minor's guilt. Then, six to nine months later, there is a hearing to decide the penalty. In the meantime, the minor is subject to

20 Art. 108 of the Code de procédure pénale.
21 Public prosecutor.
22 The *juge d'instuction* is a magistrate who investigates the most serious offences on both sides.
23 Art. 706-50 of the Code of Criminal Procedure.
24 Art. 706-53 of the Code de procédure pénale.
25 Ibid.

a period of "educational probation". It is a period of observation that may include educational and security measures. The idea is to give new meaning to the educational measure pronounced for the young person and provide a rapid response to the facts.

Judicial staff and the relevant courts are also specialised. Criminal proceedings are conducted by specialised public prosecutors.[26] As far as the trial courts are concerned, only specialised judges and courts are able to judge minors:

The *juges des enfants* are magistrates chosen for his/her interest in children's issues. They are responsible for protecting children at risk but also have jurisdiction over juvenile delinquency. Since the introduction of the *Code de la justice pénale des mineurs*, the *juge des enfants* have jurisdiction to judge minors who are able of discernment and who are being prosecuted for 5th class contravention,[27] as well as related offences of the first four classes. They may take educational measures against these minors and, if the minor was aged 13 or over at the time of the offence, impose certain minor penalties (confiscation, community service, etc.).[28]

The *juge des enfants* also performs the functions assigned to the judge responsible for the enforcement of sentences for minors. He/she also presides the *tribunal pour enfants*, which has jurisdiction over minors aged 13 and over, for *crimes* (aged between 13 and 16 at the time of the offence) and *délits* and 5th class *contraventions* (aged between 13 and 18 at the time of the offence).

Lastly, for crimes committed by minors aged between 16 and 18 at the time of the offence, there is a *Cour d'assises des mineurs*. The magistrates are assisted in their work by the *Protection judiciaire de la jeunesse* (PJJ), whose role is to carry out the measures they order.

Minors are generally inexperienced when it comes to the legal process.[29] This is why, unlike for adults, the assistance of a lawyer is compulsory before all courts.[30] The assistance of a lawyer is also compulsory during police custody. Minors are not automatically entitled to legal aid. The income of the minor's parents must, therefore, be taken into account. However, minors whose parents have lost interest may be assisted under legal aid in criminal proceedings (regardless of their parents' income).[31]

26 This is known as "parquet des mineurs".
27 There are 5 categories of contraventions in France. The amount of the fine is as follows (131-3 Code pénal):
– up to 38 euros for 1st class offences;
– up to 150 euros for 2nd-class offences;
– 450 euros maximum for 3rd class offences;
– 750 euros maximum for 4th class offences;
– a maximum of 1,500 euros for 5th class offences.
28 Bonfils and Gouttenoire, 2021.
29 Ibid.
30 Art. L 12-4 of the Code de la justice pénale des mineurs.
31 Bonfils and Gouttenoire, 2021.

## 9. Special Regulations for Hearing a Minor Child in the National Procedural Law

### *9.1. Civil Court Proceedings*

Under Articles 388-1 et seq. of the *Code civil,* a minor may ask to be heard by the judge in all proceedings concerning him. If the minor has sufficient discernment, the judge is compelled to hear the minor if asked. If the minor has not been heard in such proceedings, the judge must check if he/she has been informed of the possibility of access to justice.

The initiative for a hearing may also come from the child's parents. In this case, Article 338-4, paragraph 2, of the *Code de Procédure civile* gives the judge the possibility to refuse the hearing if he/she 'does not consider it necessary for the resolution of the dispute or if it appears to be contrary to the interests of the minor'. The judge may also invite the minor to appear on his/her own initiative. In this case, the minor is not obliged to respond.

According to Article 388-1 of the *Code civil*, the child is heard by the judge or 'when his/her interests so require, by a person delegated by him/her'. The principle is that the judge himself should hear the child. If the court before which the child is to be heard is a collegiate court, Article 338-8 of the *Code de procédure civile* provides that the court may either hear the minor itself or appoint one of its members to conduct the hearing and report back to the court.

The judge may also designate another person to hear the minor in his/her place. The judge must give reasons for his/her decision in terms of the child's best interests, in particular, because of the psychological pressure the child is under or the need to involve a professional listener.[32] For instance, it may be appropriate to have recourse to certain judges who are particularly trained in hearing children. The person appointed by the judge to hear the child must have no links either with the minor or with a litigant and must work or have worked in the social, psychological, or medical-psychological field.[33] The hearing of the minor must take place as quickly as possible so as not to delay the proceedings.

### *9.2. Criminal Proceedings*

#### *9.2.1. For Minors Who Are Victims*

Specific procedural arrangements for prosecutions under Article 706-47 of the *Code de procédure pénale* (for instance, murders or assassinations committed on minors, rape, prostitution of a minor, child pornography, etc.). Minors who are victims of these offences may undergo a medical-psychological examination to determine the

32 Gouttenoire, 2023.
33 Ibid.

nature and extent of the damage and whether special treatment or care is required (art 706-48 *Code de procédure pénale*).

During the investigation or enquiry and by decision of the *Procureur de la République* or of the *juge d'instruction*, the hearings or confrontations of the minor may be carried out in the presence of a psychologist or a doctor specialising in children, a member of the minor's family, the *ad hoc* administrator, or any other person mandated by the children's judge during the investigation or enquiry.[34]

The hearing of the minor must always be audiovisually recorded. An audio recording is possible only if this is in the interest of the minor.[35] This recording aims to prevent the minor from repeating testimony at various stages of the proceedings.

*9.2.2. Minors Suspected of Having Committed an Offence*

Minors suspected of having committed an offence may be questioned under different procedures.

*Audition libre*[36]: A minor suspected in a penal investigation may be heard freely. In this case, he/she has the right to leave the place where he/she is questioned at any time. The investigators must immediately notify his/her legal representative. They must inform the minor and his/her representative of their rights: the facts of which he/she is accused, his/her right to remain silent, to leave the room if he/she so wishes, the appointment of a suitable adult to replace the person responsible for the minor to assist him/her throughout the proceedings, the right to be assisted by a lawyer chosen by the minor or appointed by the President of the Bar if the offence for which he/she is being questioned is a *délit* or a *crime* punishable by imprisonment, etc. Minors must be assisted by a lawyer if they are suspected of having committed a *crime* or a *délit*. They may choose their own lawyer, or their legal representatives may do so.

*Retenue* ou *Garde à vue*[37]: This measure allows a minor suspected of involvement in an offence to be held under constraint at the disposal of investigators.

Under the age of 10, neither police custody is permitted. If a child is apprehended by the investigators, he/she must be returned to his legal guardians as soon as possible.

Between the ages of 10 and 13, the minor may be required to remain on police premises under certain conditions. This is known as *retenue*. This procedure is possible if there are one or more plausible grounds for suspecting that the minor has committed or attempted to commit a *crime* or a *délit* punishable by at least 5 years in prison and if this detention fulfils one of the objectives set by criminal law.[38] The *retenue* must be authorised by the *Procureur de la République* or *juge d'instruction* and may not last longer than 12 years (with the possibility of an extension of 12 hours).[39]

34 Bonfils and Gouttenoire, 2021.
35 Art. 706-52 Code de procédure pénale.
36 Art. L 412-1 s. Code de la justice pénale des mineurs.
37 Ibid., Art. L 413-1 s.
38 Ibid., Art. L 413-1.
39 Ibid., Art L 413-2.

Minors over 13 may be held in *garde à vue* (custody) if they are suspected of having committed or attempted to commit a *crime* or a *délitc* punishable by prison and if the objectives set by law for garde à vue have been met.[40] Police custody lasts 24 hours, with a maximum extension of 24 hours (with some possible new extensions if the minor is over 16).

As soon as the *garde à vue* begins, the police inform the person's parents or guardians by any means. However, the Procureur de la République or the juge d'instruction may decide to postpone this information for a maximum of 12 hours in order to gather evidence or prevent a serious attack on the minor's physical integrity or freedom.[41]

The minor must be assisted by a lawyer during the detention. In a very recent ruling, the French Supreme Court annulled the hearing of a minor in police custody. The hearing had taken place without the minor's lawyer but with the consent of the minor's father. The Cour de Cassation recalled that 'the plaintiff, a minor, even with the agreement of his legal representative, could not be heard without the assistance of a lawyer'.[42]

From the start of the *retenue* or the *garde à vue*, a doctor must be appointed to examine a minor under the age of 16, at the request of the minor, his/her family, or his/her lawyer.[43] Finally, the questioning of a minor placed in *retenue* or *garde à vue* is subject to an audiovisual recording.[44]

## 10. Legal Counsel and Representation (Child Attorney) for Children?

### *10.1. Civil Court Proceedings*

As we have seen, Article 388-1 of the *Code de procédure civile* provides that 'in any proceedings concerning him/her, a minor who is capable of forming his/her own views may (...) be heard by the judge or, where his/her interests so require, by the person appointed by the judge for that purpose'. The same article states that the minor may be 'heard alone, with a lawyer or a person of his/her choice. If this choice does not appear to be in the minor's *best interests, the judge may appoint another person*'.

In the context of educational assistance proceedings, Article 1186 of the *Code de procédure civile* also provides that the minor may be assisted by a lawyer.

There has been a degree of professionalisation among lawyers working with minors. On 25 January 2008, the Conférence des Bâtonniers adopted a Charte nationale de l'avocat de l'enfant (National Charter for Children's Lawyers),[45] which sets out best practices and the specificities of assistance to minors. In particular, it stipulates

40 Ibid., Art. L 413-6.
41 Ibid., Art. L 413-7.
42 Cour de Cassation (2023) 'Chambre criminelle, 15 mars 2023' [Online]. Available at: https://www.courdecassation.fr/decision/6411793a25b075fb02f1b078 (Accessed: 15 January 2024).
43 Arts. L 413-4 et L 413-8 of the Code de la justice pénale des mineurs.
44 Ibid., Art. L 413-12.
45 Journal du droit des jeunes, 2008, p. 42; Conseil national des barreaux, 2017.

that the child must be assisted as far as possible by a lawyer who specialises in dealing with minors.

### *10.2. Criminal Proceedings*

The *Code de la Justice pénale des mineurs* states that a lawyer must be present in the event of a *retenue* (for minors under 13 years of age) or when a minor is in *garde à vue* (between 13 and 18 years of age). If the minor or his legal representatives do not choose a lawyer, one will be appointed for him. Minors must also be accompanied by a lawyer before the trial courts.

According to Article L 12-4 of the same Code,

'...a minor who is prosecuted or convicted shall be assisted by a lawyer.
The minor participates in the choice of his/her lawyer or makes this choice in accordance with the conditions set out in this Code.
Where a lawyer has been appointed ex officio, as far as possible, the minor shall be assisted by the same lawyer at each stage of the proceedings'.

## 11. The Enforcement of Child-Friendly Justice in Civil Court Proceedings, Administrative Court Proceedings, and Criminal Court Proceedings

### *11.1. In Criminal Procedure*

The Outreau case in France in the early 2000s brought into sharp question the way in which children's views were taken into account. The indictment of a large number of people in this case for rape and sexual assault of minors was based on the testimony of child victims. However, the appeal trial will bring down all these elements, which is being experienced as a "judicial Chernobyl".[46] The result was a profound trauma in the judicial world and many changes in the way children's views were taken into account.[47] This is one of the reasons why, as we have already seen, the minor's hearings are recorded on audio-visual equipment so that he/she does not have to repeat the information several times. The conditions of these hearings have also been adapted.

As far as possible, investigations about offences committed against minors are entrusted to specialised investigation departments or investigators. For instance, as far as the national police force is concerned, there are *brigades de protection des familles* (*brigade de protection des mineurs* in Paris) that are specialised in dealing with cases involving minors. They receive specialised training, particularly in the hearing of minor victims.

46 Albouy, 2004.
47 Guery, 2023, p. 55; Sontag-Koenig, 2015, p. 619.

Specific procedures have been implemented for investigators to hear child victims. This is the case, for example, with the *Mélanie procedure*. Many police stations have a *Mélanie*[48] room dedicated to interviewing minors. This room is like a child's bedroom or a playroom with lots of toys, which not only makes the child feel safer but also gives him/her the opportunity to show what happened to him/her by using dolls as examples.

In some places, *Unités d'Accueil Pédiatrique "Enfants en Danger"* (UAPED) have been set up. These units are located in hospitals. Their purpose is to offer a hearing by the police and to provide comprehensive care (legal, medical, and forensic) for the child victim in a single adapted location with trained staff.[49]

Recurrent training courses on taking children's statements have also been set up for investigators. As far as magistrates are concerned, Article R.213-13 of the *Code de l'organisation judiciaire* states, 'within each judicial court in whose jurisdiction a juvenile court has its seat, one or more examining magistrates appointed by the first president are specifically responsible for cases involving minors'. During their initial training at the Ecole de la Magistrature, magistrates take specific modules in this area. Continuing education is also provided.

Various hearing protocols have been developed, based, in particular, on the NICHD (National Institute of Child Health and Human Development) protocol. What they all have in common is a hearing in successive phases. The NICHD protocol, which is used by police officers and social workers in particular, is based on the following principles: making contact, free recall of the facts, specific questioning and closing the specific questioning, and closing the interview.[50]

## 12. The Approach of National Courts to Acces to Justice for Minors

The *Conseil Constitutionnel* has made several important decisions about access to justice for minors:

In its decision of 29 August 2002, the *Conseil Constitutionnel* recognises the specific nature of juvenile criminal justice as a fundamental principle recognised by the laws of the Republic.[51]

The *Conseil Constitutionnel* decision of 8 February 2019 stresses the importance of specific procedural guarantees for minors heard as part of a criminal investigation.[52]

48 This is the name of the first little girl to benefit from this programme.
49 For an example, see: Minisitère de la Justice, 2023.
50 Ibid.
51 Conseil Constitutionnel (2002) 'Décision No. 2002-461 DC du 29 août 2002' [Online]. Available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000000227586 (Accessed: 13 January 2024).
52 Conseil Constitutionnel (2019) 'Décision No. 2018-762 QPC du 8 février 2019' [Online]. Available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000038109243 (Accessed: 13 January 2024).

The decision of the same court of 26 March 2021 concerned the impartiality of the courts in matters of juvenile justice, declaring contrary to the Constitution the provisions allowing the *juge des enfants* who have investigated a case to preside over the juvenile court hearing the same case.[53]

In its decision of 10 February 2023, the *Conseil Constitutionnel* reiterated the importance of appropriate educational measures for juvenile offenders. It also ruled that the pre-trial detention of minors must be specially justified and limited to the necessary severity, taking into account the personal situation of the minor and the seriousness of the offences of which he/she is accused.[54]

The *Conseil Constitutionnel* in its decision of 19 June 2025 reaffirmed the constitutional requirement that juvenile justice measures must be primarily oriented toward the educational rehabilitation of minors, be adapted to their age and personality, and uphold the principle of diminished criminal liability by reason of age.[55].

## 13. The Enforcement of the Child's Right to Express His/Her Views

It is crucial to underline the significant role played by the *Défenseur des droits* (Defender of Rights), particularly in safeguarding and promoting children's rights.[56] The *Défenseur des droits* is an independent constitutional authority with a dual mission focused on protecting minors and defending their rights. One of the main responsibilities of this institution is to ensure that the principle of the "best interests of the child" is properly applied.

The *Défenseur des droits* adopts a proactive approach to ensure that children are not discriminated against and that they play an active part in decisions and actions that have an impact on their lives. The institution receives direct referrals from minors, their parents, or any concerned person who notices that a child is facing difficulties or suffering. For example, a child facing difficulties such as bullying at school can turn directly to the Defender of Rights or help.

Unaccompanied minors, in particular, frequently seek the intervention of the *Défenseur des droits* when they encounter problems with administrative procedures. The institution is equipped to respond to the various problems encountered by minors and endeavours to find amicable solutions. If the *Défenseur des droits* identifies wrongdoing, it has the power to ask the competent authorities to initiate disciplinary

53 Conseil Constitutionnel (2021) 'Décision No. 2021-893 QPC du 26 mars 2021' [Online]. Available at: https://www.conseil-constitutionnel.fr/decision/2021/2021893QPC.htm (Accessed: 13 January 2024).

54 Conseil Constitutionnel (2023) 'Décision No. 2022-1034 QPC du 10 février 2023' [Online]. Available at: https://www.legifrance.gouv.fr/jorf/id/JORFTEXT000047121006 (Accessed: 30 September 2025).

55 Conseil Constitutionnel (2025) 'Décision No. 2025-886 DC [Online]. Available at: https://www.conseil-constitutionnel.fr/decision/2025/2025886DC.html (Accessed: 30 September 2025).

56 Défenseur des droits, 2021; On this question you can see: Chopin, 2021.

proceedings against the parties responsible. In addition, the *Défenseur des droits* has the power to propose legal or regulatory reforms to improve the protection of minors.

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| Chapter 4 |

# Child-Friendly Justice – Hungarian Perspective

Adrienn Nagy

**ABSTRACT**

Hungary was the first of the Central and Eastern European countries to sign the Convention on the Rights of the Child (CRC) on 14 March 1990. This was promulgated by Act LXIV of 1991 and entered into force on 6 November 1991. The adoption of the CRC marked the beginning of the necessary harmonisation of legislation and the preparation of a law on the protection of children in accordance with the Convention. To ensure the effective exercise of the child's right to participate guaranteed by Article 12 of the CRC, it was necessary to amend the rules of the Hungarian administrative, civil, and criminal procedure laws. The objective of this book chapter is to explore how children's right to participate is enforced in Hungarian administrative, civil, and criminal proceedings and the related national practice. It is necessary to analyse the relevant sections of the Hungarian Fundamental Law, the rules of Act XXXI of 1997 on the Protection of Children and the Administration of Guardianship, the Code of Civil Procedure and Civil Code, and finally, the rules of Code of Criminal Procedure. In addition to the legal provisions, the main case law of the Hungarian courts is also presented.

**KEYWORDS**

procedural rights of children in Hungary, children's right to participate in Hungarian administrative, civil and criminal proceedings, children's right to express their views in Hungarian judicial proceedings, child who has sufficient understanding of Hungarian law

## 1. Introduction

After the regime change in 1989, Hungary was the first of the Central and Eastern European countries to sign the Convention on the Rights of the Child (CRC) on 14 March 1990, which was promulgated by Act LXIV of 1991 and entered into force on 6 November 1991. The adoption of the CRC marked the beginning of the necessary harmonisation of legislation and the preparation of a law on the protection of children in accordance with the Convention. As a result of this work, *Act XXXI of 1997 on the Protection of Children and the Administration of Guardianship* (hereinafter: Gyvt.) came into effect.

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Before presenting the Hungarian national rules in detail, it is necessary to examine whether the protection of children's rights is implemented at the constitutional level in Hungary.

## 2. Constitutional Protection of Children's Rights in Hungary

The Hungarian Fundamental Law does not provide for children's rights 'in general', but rather *the right of the child to protection*, while at the same time setting out the general requirements and state duties relating to the protection and care of the child.[1]

According to Article XV (1) and (5) of Fundamental Law

> '(1) Everyone shall be equal before the law. Every human being shall have legal capacity.
> (5) By means of separate measures, Hungary shall protect families, children, women, the elderly, and those living with disabilities.'

The Fundamental Law highlights certain groups to be protected. This includes families, which are the smallest basic units of society, children, women, the elderly, and disabled persons.

The right of the child to the protection and care necessary for his or her proper physical, mental, and moral development is currently regulated by Article XVI para. 1 of the Fundamental Law

> '(1) Every child shall have the right to the protection and care necessary for his or her proper physical, intellectual, and moral development. Hungary protects the right of children to be identified by their sex assigned to them at birth and provides for their education in accordance with the values based on Hungary's constitutional identity and Christian culture.'

In its decision 995/B/1990, the Constitutional Court stressed that "children are human beings who are entitled to all the fundamental constitutional rights as everyone else", but in order to be able to enjoy the full range of rights, they must be provided with all the conditions for adulthood appropriate to their age.

In its Decision 3068/2020 (9.III.AB), the Constitutional Court ruled that in cases where the return involves minor children, which would increase the risk of physical or psychological harm or otherwise create an intolerable situation for them, the court must, therefore, act with increased caution in such cases and the interests of the child(ren) must be explored and protected by the maximum available means of evidence. The interests of children are also particularly important because, in addition to international agreements, Article XVI para. 1 of the Fundamental Law specifically

1 Lux, 2018.

provides that every child has the right to the protection and care necessary for his or her adequate physical, mental, and moral development. In view of this, in proceedings directly affecting the best interests of the child, particular emphasis must be placed on the fairness of the proceedings (Recitals [44]-[45]).[2]

In 2011, Act CCXI of 2011 on the Protection of Families was adopted in Hungary, which lists the obligations of parents raising a minor child: respect for the child's human dignity and respect for the dignity of the child, cooperation with the child, and informing the child about matters concerning him or her. The provisions of the Act also provide for the rights of the child in general in connection with the Fundamental Law. According to the explanatory memorandum, the purpose of this Act is to lay down the most important rules, deriving from the Fundamental Law, related to the protection of families in a cardinal Act.

## 3. Children's Participation in Administrative Proceedings

Act XXXI of 1997 on the Protection of Children and Guardianship of the Child (hereinafter Gyvt.) and the related Government Decree 149/1997 (IX.10) (hereinafter Gyer.) provides that the fundamental interests of the child must be considered in its application and the safeguarding of these interests shall be pursued at all times.[3]

Article 8 of Gyvt. states that children have the right to express their views and be informed of their rights, be informed of the means of enforcing those rights, and be heard, directly or otherwise, on all matters affecting their person and property, and have their views considered in accordance with their age, state of health, and level of development. Together, this ensures the child's right to participate, both in the informal context of family life and in family substitute care, as well as in judicial and administrative proceedings concerning the child.

It is also important that children are informed about their rights and how to exercise them. This obligation to provide information is primarily the responsibility of the family (the parents) and the organisations and persons involved in the child's education, care, or other affairs. The child's right to participate also includes the right to lodge a complaint in matters concerning himself or herself.[4,5]

The child has the *right to initiate proceedings* before a court and other bodies specified by law in the event of a violation of his or her fundamental rights[6] i.e. to have the capacity to take legal action. In several specific types of cases, the Gyer. allows a child with limited capacity aged 18-14 to initiate proceedings on his or her own initiative[7], for example: a child over 16 may initiate proceedings for the abandonment of his or

2 Lux, 2022, p. 18.
3 Visontai-Szabó, 2021, p. 182.
4 Kriston, 2020, p. 18.
5 See: Article 36 of Gyvt.
6 Article 8 para. 3 of Gyvt.
7 Czibrik, 2022, p. 87.

her parents[8] or for the marriage of a minor[9]; a child with limited capacity to act may initiate proceedings for the choice of his or her school or career[10]; a child in care may also submit an application for a change of placement on his or her own initiative.[11]

All children have the right to be heard. The views of the child should be considered, taking into account his or her age, health, and level of development. If the age of the child prevents him or her from expressing an independent opinion, his or her legal representative shall act to enforce this right. In guardianship proceedings, a *child who has sufficient understanding* is a child who, in accordance with his or her age and intellectual and emotional development, can understand the essential content of the facts and decisions affecting him or her and the expected consequences of such decisions.[12]

In view of the personal nature of the living conditions regulated by the Gyvt., it is important for the guardianship authority, which essentially decides on the fate of children and families, to make its decisions based on the most accurate knowledge of the persons and the environment. The Gyvt., therefore, provides for a wide-ranging *hearing of the persons concerned in guardianship proceedings* so that the authority and its administrator can become as familiar as possible with these circumstances and the persons involved before taking a decision.

In view of this, Article 128 para. 1 of the Gyvt., in the light of Article 12 of the CRC, stipulates the persons who must be heard by the guardianship authority in guardianship proceedings. These persons include the legal representatives and persons responsible for the care of the child (parent, guardian, carer). Under Article 12 of the CRC, a child who has sufficient understanding but who lacks or has limited capacity to act must also be heard. The child who has sufficient understanding of the guardianship proceedings shall be informed of the possibility of making a statement, and the legal representative shall be informed at the same time. In this connection, Gyer. also stipulates that if such a child requests a hearing, it may not be waived. Likewise, in the personal and property matters of such a child, a hearing cannot, as a general rule, be waived. In addition, the guardianship authority is also obliged to hear the person against whom the authority seeks to establish an obligation. The Gyvt. also provides that, where necessary, the child's close relatives must be heard to learn about the child's upbringing and environment.

The Gyer. gives the guardianship authority considerable freedom in the *conduct of the hearing*. The hearing must be conducted primarily on the premises of the *child welfare agency* in the presence of the legal representative. However, in the interest of the protection of the child, the Gyer. provides for a derogation from this general rule[13]. Thus, it is possible for the guardianship authority to hear the child in the absence of

8 Art. 22 of Gyer.
9 Ibid., Art. 34.
10 Ibid., Art. 26.
11 Ibid., Art. 105/A; Katonáné Pehr, 2023.
12 Art. 2, point a) of Gyer.
13 Ibid., Art. 11 para. 6.

the legal representative, which may be the case where the interests of the child and the legal representative conflict, for example, because of a legal dispute between them or because of an act or omission of the legal representative. However, a hearing in the absence of a legal representative may be held only and exclusively in the best interests of the child and cannot be based on the effectiveness of the proceedings alone.

In many cases, the office is not the right environment to build trust, and the situation of the person concerned (e.g. age, health) can make it difficult to appear before the authority. Therefore, the Gyer. usually allows for the hearing to take place outside the premises of the office[14]. The Gyer. allows the authority to conduct the hearing *at the place of residence of the person concerned, at the educational institution, or health care institution* providing services to the person.

## 4. Children's Participation in Civil Proceedings

### *4.1. The Rules of the Code of Civil Procedure*

It is important to emphasise that *Act LXII of 2012 on the amendment of certain laws related to the implementation of child-friendly justice* was of particular importance for Hungarian civil and criminal procedure law. This Act transposed the rules of international legal instruments, which provide guidance to state governments on how to make their judicial systems child-friendly, into the field of civil and criminal procedure by amending the rules of the old Code of Civil Procedure and the old Code of Criminal Procedure.

When analysing the participation of children in civil proceedings, we should primarily look at the rules of Act CXXX of 2016 on the Code of Civil Procedure (hereinafter Code of Civil Procedure).

In the regulatory system of the Code of Civil Procedure, *the minor child is represented in three roles:* party, witness, and interested person in action related to parental custody.

#### *4.1.1. The Child as a Party in Civil Proceedings*

According to Section 33 of the Code of Civil Procedure:

> '[Legal capacity to be a party to judicial proceedings]
> Any person who is able to accrue rights and obligations under the rules of civil law is considered to have capacity to be a party in judicial proceedings.'

According to this rule, a child can be a plaintiff or defendant in a civil action without any limitation from the date of his or her birth until the date of death.

14 Ibid., Art. 11 para. 7.

The age of the plaintiff or the defendant is relevant in terms of who can make valid declarations in a civil action. According to Article 34 para. 1 of the Code of Civil Procedure:

> '[Competency in judicial proceedings and legal representation]
> (1) A person may be a party in judicial proceedings acting personally or by way of counsel:
> a) if having full legal capacity under civil law;
> b) if being of legal age with partially limited legal capacity, and if there exists no restriction in his legal capacity under civil law relating to the subject matter of the action or to procedural steps in court; or
> c) if having the right of disposition of the subject matter of the action under civil law.'

A person may participate as a party if he or she has full capacity to act under the rules of the Civil Code. Since civil procedural law does not recognise limited procedural capacity to act, *a person under the age of 18 does not have procedural capacity to act*, even if he or she has already reached the age of 14.

A party shall act through his or her *statutory representative* in the action if the party does not have any procedural capacity to act. Therefore, generally, *the parent acts as the statutory representative instead of the child*, who does not have the procedural capacity to act. If the child does not have a statutory representative, the court will appoint a *public representative* for the party if the party lacks capacity and does not have a statutory representative, for example, if the minor child has neither a parent nor a guardian.[15]

In family law procedures, such as in matrimonial proceedings, special rules apply to the representation of the child and the participation of the minor as an interested party. In actions related to personal status,[16] special rules apply to the legal actions of children who have reached the age of 14. According to Article 431 para. 2 of the Code of Civil Procedure, a person having limited capacity to act, whose personal status is affected by the action, shall have *full procedural capacity to act during the action.* This means that a child who has reached the age of 14 can make a valid procedural statement if he or she is a party in an action related to his or her personal status without the consent of his or her statutory representative. Although the child is rarely a party in actions related to personal status, it can happen; for example, in an action to terminate parental custody, where the child who has reached the age of 14 can also initiate the procedure.

15 Wopera, 2023, p. 2.

16 According to the Civil Procedure Code an action related to personal status means an action on custodianship, a matrimonial action, an action for the establishment of parentage, an action related to parental custody, actions related to contact with the child and actions related to the termination of adoption. (Article 429 of Civil Procedure Code).

*4.1.2. The Child as a Witness in Civil Cases*

According to Section 298 of the Code of Civil Procedure, a minor under the age of 14 years may be asked to testify only if there is no other way to obtain the evidence the testimony is expected to provide. The hearing of a minor may be attended by his or her statutory representative. Any warning and information communicated during the hearing shall be phrased in a manner adapted to the minor's age and level of maturity, in a child-friendly manner. The hearing shall be conducted in an appropriate atmosphere, also in a child-friendly manner.

In the hearing of a minor under the age of 14 years, he or she shall not be advised of the legal consequences of perjury; instead, the minor shall be advised to say only the truth in a manner adapted to the minor's age and level of maturity, in a child-friendly manner. The statement on the confidentiality of personal data and on the refusal to testify shall be made by the minor's legal representative, and the right to appeal the court's decision ordering a witness to testify shall be exercised by the legal representative.

Where any conflict of interest exists between the witness of minor age and the minor's legal representative, the court shall request the *guardian authority to appoint a caretaker officer* to exercise the rights of the legal representative.

The law does not specify an age as a condition for testifying, from which it follows that minors under the age of 14 can also be heard as witnesses. This section of the Code of Civil Procedure regulates the hearing of minors under the age of 14 as witnesses *as an exception*, thus ensuring that the child only has to participate in the justice system ultimately if justified by an important procedural interest.[17] The suitability of a child to testify is a question that, with general life experience, the court can judge independently, without the use of an expert.[18]

4.1.3. The Child as an Interested Person in Civil Proceedings

Section 473 of the Code of Civil Procedure contains precise procedural rules for the hearing of minor children as an interested person in actions related to personal status, which are considered to be a very forward-looking provision.[19]

If the court has decided to interview the child as an interested person, in justified cases, it shall simultaneously appoint ex officio a *public representative* for the minor. Moreover, the court may hear the minor child *without the parties and the parties' representative being present.*

The court shall summon a minor *under the age of 14 years* through his or her legal representative, where such representative is held responsible for ascertaining the minor's appearance. Where a minor *over the age of 14 years* is summoned to appear, the court shall notify the legal representative of the summons even if the legal representative is summoned to the hearing as well.

17 See more: Nagy, 2019, pp. 782–783.
18 Decision No. 2011/ 2318 of Curia (Supreme Court of Hungary).
19 See more: Boros, 2019, pp. 1141–1149.

A minor shall be interviewed *in an appropriate atmosphere*, in due consideration of the minor's age and level of maturity, *in a child-friendly manner*. At the beginning of the interview, the minor shall be asked to state his or her name, place and date of birth, mother's name, and home address and shall be advised to say only the truth, as well as of his or her right to refuse to make a statement or answer certain questions. The court, if having appointed a public representative for the minor, shall inform the minor about the role and the rights and obligations of the public representative in the proceedings.

The minor child shall be heard by the presiding judge. Prior to the hearing, the parties may submit questions to be asked if the minor is interviewed in the absence of the parties. During the hearing of the minor, the public representative may submit questions to be asked. The presiding judge may allow the public administrative to interview the minor directly. The presiding judge shall decide whether the proposed and the directly asked questions are admissible.

At the end of the interview, the statement recorded in a written report shall be read in the minor's presence, or if the statement is made by way of sound recording summarising the content of the records, it shall be carried out in the minor's presence. Such recording, or the omission thereof, shall be indicated in the records. At the time of reading or when the recording is made, the minor may modify his or her statement or give additional information. The records may be supplemented and amended if so authorised by the presiding judge, relying on the comments of the public representative or the parties if the hearing takes place in their presence. The request made by the public representative or the parties, therefore, if rejected, shall be indicated in the records. If the minor is interviewed in the absence of the parties, the presiding judge shall inform the parties of the contents of the records made of the interview.

Hungarian courts have *child-friendly children's hearing rooms*, where minor children can be heard by the court in a child-friendly environment. Children under the age of 8-10 are typically heard in these children's hearing rooms; older children prefer to be heard in the courtroom.

### *4.2. The Rules of the Hungarian Civil Code*

The basic private law rules for minors can be found in two parts of Act V of 2013 on the Civil Code (hereinafter Civil Code), in Book Two, entitled "The Individual as subject of Law", and Book IV, entitled "Family Law Book".

Article 4:2 of the Civil Code states that "in family relationships, the interests and rights of the child shall be afforded increased protection". This declaration is closely linked to the general principles of family law since the child, who, due to his or her age and situation in life, is inherently in the position of the weaker party in family relations, needs special protection and support. It is clear that the legislator's intention is that the child should not be the subject of official proceedings, should not be a passive sufferer of his or her parents' decisions, but should be the main stakeholder in the proceedings, who should be informed of all important matters, should have the

right to express his or her views on them, and should have the right to have his or her views taken into account, in accordance with his or her age and maturity.[20]

*4.2.1. Children in Civil Substantive Law*

In Hungarian law, *a minor is a person under the age of 18,* except if she or he has attained majority by marrying over the age of 16. Minors *under the age of 14* shall have no capacity to act. Minors shall have limited capacity to act if they have *reached the age of 14.*

A minor child under the age of 18 is *under parental custody.* According to Section 4:146 of the Civil Code, a minor child shall be subject either to *parental custody* or *guardianship.* Parental custody includes the right and obligation to determine the minor child's name, to care for and bring the child up, to determine the place of residence and manage the minor child's assets, as well as the right to appoint a guardian and to exclude someone from being a guardian. The content of parental custody includes the *obligation to legally represent the child.* The parents exercising parental custody shall have the right and obligation to represent their child in his or her personal and property matters. This means that the parent or guardian has the right to initiate an action on behalf of the minor. The parent or guardian provides legal representation of the child in the lawsuit as well.

Actions where there may be a conflict of interest between the parent and the child are, of course, an exception to this provision. This can happen, for example, in proceedings to establish parentage or in proceedings to terminate parental custody.

Of course, the abovementioned rule does not apply to the hearing of the child by the court, which is the child's personal declaration of rights, which the child himself makes in court.

According to Article 4:163 of the Civil Code, it is also important to emphasise that *the parent shall not represent his child in cases* in which the parent, their spouse, cohabitant, lineal relative, or any other person whose statutory representation is performed by the parent is a party of opposing interest regarding the child. If the parent who is the statutory representative of the child cannot act in the child's affair by virtue of an Act or upon the order of the guardianship authority due to a conflict of interests or any other obstacle, the guardianship authority shall appoint an *ad hoc guardian* for the child. The appointment of an ad hoc guardian may be applied for by any interested party or authority, or it can also take place ex officio. For the purposes of the appointment of an ad hoc guardian, the parent shall be required to notify, without delay, the guardianship authority of the parent not being allowed to act due to the grounds specified earlier. The ad hoc guardian shall have the same competence as the guardian in the case.[21]

20 Boros et al., 2013, p. 28.
21 Wopera, 2023, pp. 2–3.

*4.2.2. Children's Right to Participate in Civil Proceedings Affecting Them*

The Family Law Book of the Civil Code provides several ways for the rights of the child. Section 4:148 of the Civil Code *"Involving the child in the decision-making"* provision has fundamental importance[22]:

> 'The parents shall inform their child concerning the decisions that pertain to the child as well, and they shall permit the child of sound mind to express his/her views before the decision is made, and to partake in making the decision itself together with his/her parents in cases defined by law. The parents shall take the child's opinion into account, giving due weight consistent with the child's age and degree of maturity.'

According to Article 4:171 para. 4 of the Civil Code in the procedures for settling the exercise of parental custody and for the child's placement with a third party, the court shall hear both parents, except if any insurmountable obstacles exist, and *notify the child who has sufficient understanding of the opportunity to express his or her views.* If the child requests to be heard, or if the court is of the opinion that a hearing is in order whether requested or not, the court shall hear the child personally or through an expert.

*If the child is over the age of 14 years,* the decision relating to custody and his or her placement can be made *upon the child's agreement,* except when the child's choice is considered to jeopardise his or her development.

It is important to emphasise that Act LXII of 2021 on international judicial cooperation related to parental responsibility supplemented the cited provision of the Civil Code by stating that the *court must notify the child* of the possibility of expressing his or her views. With this provision, the Hungarian legislation took a great step in the direction of child-friendly justice. The amendment entered into force on 1 August 2022, and it must also be applied in ongoing procedures.[23]

Thus, in order to ensure that the child's opinion is taken into account, the Civil Code requires the court to inform the child of the fact that he or she can express his or her opinion or otherwise express it during the proceedings if his or her parents do not inform him or her of this possibility.

This regulation is otherwise flexible as it is up to the court at which stage of the first-instance procedure to inform the child of the possibility to express his or her views. It is reasonable to send the notice to the child *at the beginning of the preparatory stage* of the civil procedure. Furthermore, if the child requests to be heard, it must be done as soon as possible within the framework of preliminary taking of evidence. It is important to use notices with different content and language in court proceedings based on age groups. It may be necessary to standardise the wording of

22 See more: Barzó, 2017, pp. 46–47; Tóth, 2021, pp. 620–633.
23 Wopera, 2023, p. 1.

court notices with the involvement of psychological experts so that it is sufficiently "child-friendly".[24]

In the notice sent to the child, the court shall inform the child that he or she can express his or her views in different ways. They can do this in writing, by any electronic message, video message, or drawing, which they can send to the court electronically, with the help of their parents, or even on their own, i.e. they do not have to appear in court. The use of electronic means of communication is already natural for Generation Z children. The experience we have so far shows that children are very active, and many of them take the opportunity to express their views electronically.[25]

The Civil Code guarantees the participation of the affected child not only in actions related to parental custody but also in *actions settling contact*. According to Article 4:181 paras. 1–2 of the Civil Code, the child must be heard in actions settling contact. This means that the court or the guardianship authority[26] must not only notify the child of the possibility of expressing his or her views but also ensure that the child shall be heard. The court or the guardianship authority shall decide on the contact with the child, taking into account the age, health, and living conditions of the child, parents' personal conditions, and the opinion of the child who has sufficient understanding.

#### *4.2.3. Definition of 'Child Who Has Sufficient Understanding'*

Hungarian civil law does not define the concept of 'child who has sufficient understanding'. According to the court practice, "the court have to examine the child who has sufficient understanding in each case, in which the age of the child is not a determining factor".[27]

Hungarian family law regulations *do not specify the age* at which a child has sufficient understanding. Among the relevant laws, only Article 2 point a) of 49/1997. (IX. 10.) government decree on guardianship authorities and the child protection and guardianship procedure defines that "a child who has sufficient understanding: a minor who, in accordance with his age and intellectual and emotional development, is able – during his hearing – to understand the essential content of the facts and decisions affecting him, to foresee the expected consequences."

Based on legislation and judicial practice, this is clearly a *subjective category*. The court must decide whether the child has sufficient understanding and whether an uninfluenced opinion can be expected from him. The legal practitioner can find out about this based on the child's age and the parents' statement, and if necessary, a

24 Wopera, 2022.

25 Ibid.

26 The guardianship authority shall decide on the contact with the child if no matrimonial action or action for settling parental custody is pending.

27 Hungarian legislation attaches great importance to the expressed will of the child, and if it can be established that it reflects the child's well-considered, considered and sufficiently justified views, it must be evaluated. The only limitation in this is if it can be determined from the child's age, maturity, and expressions that he has not sufficient understanding: he is not able to express a view on the given issue independently and without influence. Decision of Curia (Supreme Court of Hungary, published in No. 298 of 2019).

psychologist can decide on this issue. At the same time, the Supreme Court of Hungary, in its civil decision, took the position that the determination of a child who has sufficient understanding is not a professional matter. In this case, the court can take a position without appointing an expert. It is, therefore, clear that there is no uniform standard for the judicial determination of the existence of sufficient understanding, the assessment of which is based on a thorough consideration of the circumstances in each case, of which the child's age is an important, but not the only, decisive factor.[28]

#### *4.2.4. Ways of Hearing the Child*

According to Article 4:171 para. 4 of the Hungarian Civil Code, the court hears the child *directly* or by *involving an expert*.

If the court considers that it wants to obtain the child's opinion in the case by hearing, it must also decide whether to do so through a direct hearing or an expert. As a rule, *the method of hearing is, therefore, always chosen by the judge*. Judges have very different opinions as to whether it is appropriate to hear the child directly or by involving an expert.[29]

The *child's direct hearing* must be conducted in a way that considers the child's age and level of maturity. To get to know the position of younger children, different communication from the judge is necessary than in the case of a teenager. If the hearing is done correctly by the judge - and with appropriate discretion - it can allow the child to express his or her own wishes and relieve the child of any sense of responsibility or guilt he or she may have felt towards his or her parents. At the same time, it is advisable to inform the child during the hearing that the court will take his or her views into account but will not decide exclusively based on it or in accordance with it.

If the court decides to *hear the child by involving an expert*, it appoints a forensic psychologist expert. In the order regarding the appointment of the expert, the court must indicate the questions to which the expert must answer. When asking questions, the experts themselves determine what examination methods they use with the help of methodological letter No. 20 on the scope and activities of forensic psychologist experts of the National Institute of Forensic Medicine.

### *4.3. Representation of Children*

An important issue in the application of Article 12 of the CRC is how to ensure that the child has the right to express his or her views. This questions whether the child should be given the opportunity to participate directly or should he or she be accompanied by an adult whose role is to act as a "mouthpiece" for the child and convey what he or she says to the court.

In international practice, there are currently *five basic forms of child participation* in family law proceedings: the presentation of an expert opinion in court based on the hearing of the child; direct hearing by a judge; participation of a person representing

28 Boros, 2019, p. 1144; BH1996. 480.; BH2020. 11.; BH2022. 14.

29 See more: Kozák, 2011, pp. 23–30; Visontai-Szabó, 2015, pp. 24–35; Ádamkó, 2015, pp. 10–16.

the best interests of the child in the proceedings; legal representation of the child; direct participation of the child as a party.[30]

There is generally no question that *a child who is a party* to official or judicial proceedings concerning a family law matter has the right to be represented independently. However, there are many ways in which a child can be self-represented *if he or she is not a party to the proceedings but has a right or legitimate interest in the proceedings*.

In Hungary, there is a clear desire to develop the quality of children's participation. The development of *child-friendly hearing rooms* (and their use in family law cases) and the *training of judges* organised by the Hungarian Academy of Justice should be positively evaluated. However, it is questionable whether the legal institution of *ad hoc guardianship* orders, the *appointment of child psychologists as experts* in family law cases, and the system and practice of *preparing environmental studies* are working well. By 'good', we mean whether these instruments enable the child to be effectively involved in the proceedings and whether the determining authority or court can obtain a true picture of the child's views and all the necessary facts and positions that contribute to a decision being made in the best interests of the child in accordance with Article 3 of the CRC.[31]

### *4.4. Children's Participation in Enforcement Proceedings*

In certain cases, Hungarian law also allows the child to express his or her opinion during the enforcement proceedings, and the court must take this into account when making its decision.

According to Article 4:178 of the Civil Code, the child shall have the right to maintain, on a regular basis, a personal relationship and direct contact with his or her parent living separate and apart. The parent or other person raising the child shall ensure that the right to maintain personal relationships can be exercised undisturbed. On the other hand, unless otherwise provided for by the court or the guardian authority, the parent living separate and apart from his or her child has the right and obligation to maintain contact with the child.

According to Article 4:181 of the Civil Code, in a matrimonial suit or an action brought in connection with the exercise of certain rights of custody, the parents may reach *an agreement* relating to visitation rights; in the absence of an agreement, *the court shall decide* - upon request or ex officio if deemed necessary for the protection of the child's interest - about visitation rights. If there is no matrimonial suit or action in connection with the exercise of certain rights of custody in progress, in the absence of the parents' agreement on visitation rights, the decision lies with the guardian authority. The parties concerned and the child who has sufficient understanding shall be heard before such a decision is made. The court or the guardian authority shall adopt a decision relating to visitation rights considering the child's age, health, and

30 Fernando, 2013, pp. 387–407.
31 Gyurkó, 2022, p. 2.

living conditions, parents' personal circumstances, as well as the opinion of the child who has sufficient understanding.

Enforcement of decisions relating to visitation rights shall be ordered by the court in non-litigious proceedings according to Act CXVIII of 2017 on the rules applicable to civil non-litigious proceedings.[32]

According to Article 22/E, if contact fails because *the child over 14 years of age* has expressed his or her will, the court shall stay the enforcement proceedings, provided that parents ordered to have access to a mediation procedure, either on application or on the basis of an order of the court; or one of the parents requests the court or the guardianship authority to modify, restrict, or withdraw the decision relating to visitation rights.

In most cases, the courts will hold a hearing on the application for an enforcement order. The hearing can explore the relationship between the parents, and, in many cases, the child is also heard by the court.[33]

The Act, therefore, *distinguishes between the declaration of a child over the age of 14 and the declaration of a child under the age of 14* regarding the establishment of contact. Article 22/E gives the court the possibility of suspending enforcement if the establishment of contact fails due to the child's independent and uninfluenced expression of his or her will. This does not mean that a child under the age of 14 is not free to express his or her views on contact. However, this opinion can only be assessed in the light of the child's age, state of health, and level of development.

According to Curia, the fact that a minor child does not want to spend more days with his father does not, in itself, relieve the plaintiff from ensuring that contact is properly maintained. The minor child did not want to spend a weekend with his father because he was spending time with the child from the father's new marriage. The Curia considers that this reason is not sufficient, given the age and level of development of the minor child, to disregard the provision of the contact ordered by the court. The applicant has no basis for relying on it, and the child's opinion does not render the failure to provide contact irresponsible.[34]

## 5. Children's Participation in Criminal Proceedings

In Hungary, about 30 children die every year as a result of abuse or neglect. According to child welfare services, nearly 200,000 children are at risk. For every detected case of child abuse, there are 25 hidden cases. According to Szilvia Gyurkó, child abuse statistics have been steadily increasing since 2016, with more than 6300 cases detected in 2020, which is 500 more than in the previous year. However, according to

32 See more: Nagy and Wopera, 2021.
33 Harmat and Völcsey, 2020, p. 27.
34 Curia Kfv.37.636/2021/6.

the expert, this is also due to the decrease in the number of hidden cases.[35] This result can also be derived from the fact that the special rules of child-centred justice are also an important part of Hungary's legislation through the extensive regulatory system of Act XC of 2017 on Criminal Procedure (hereinafter Code of Criminal Procedure).

In criminal proceedings, children can be in three positions: defendant (i.e. perpetrator of the crime); victim; witness.

The fact that we can talk about child-friendly justice in Hungary greatly contributes to the improving trend in detecting crimes involving children. It is the fundamental interest of society that such crimes should not remain hidden, and it is also in the fundamental interest of the individual, since the traumatised child receives help and possibly opens the chance to become a healthy, cured adult.[36]

### *5.1. Vulnerable Groups in Criminal Proceedings*

Code of Criminal Procedure uses a different regulatory technique to ensure children's right to participate in criminal proceedings compared to the national rules for administrative or civil proceedings.

The Code of Criminal Procedure regulates uniformly, in *Chapter XIV,* the provisions relating to so-called *vulnerable groups requiring special protection*. As a rule, special treatment is provided by law for natural persons and victims who: in understanding, in exercising the rights and fulfilling obligations specified in this Act, is prevented from participating effectively in criminal proceedings.[37]

It follows from all this that *only natural persons* can belong to the category of persons entitled to special treatment, which is excluded in the case of legal persons. Special treatment is, as a general rule, only for *victims and witnesses*. An exception to this is provided for in Article 96, which allows, for example, the application of certain protection measures to defendants under the age of 18 and 14, representatives of witnesses or victims, experts, consultants, defence counsels, or property interests.[38]

The Code of Criminal Procedure provides guidance to law enforcement authorities on the *criteria that can be considered in determining special treatment*. On the one hand, the circumstances of the person concerned, such as age, mental, physical, or health condition, and on the other hand, the blatantly violent nature of the act and the relationship of the person concerned to other persons involved in the criminal proceedings may also be examined.[39]

These provisions of the Code of Criminal Procedure require, with certain exceptions, the cooperation of the victim/witness. Thus, *the person concerned may refuse certain measures falling within the scope of special treatment.*[40] In other words,

35 Révész, 2022.
36 Zumbok, 2022, p. 102.
37 Art. 81 para. 1 of Code of Criminal Procedure.
38 Ibid., Arts. 90–96.
39 Ibid., Art. 81 para. 2. The detailed rules are laid down in Regulation 12/2018 of 12 December 2018 IM Regulation.
40 Art. 83 of Code of Criminal Procedure.

the legislator grants him the right of self-determination, which reflects that his aim was basically to ensure that the procedure should be conducted in the interests of the person in need of special protection. The law distinguishes between victim and witness in such a way that in the case of a witness, he or she can reject a motion to that effect without making a decision, whereas in the case of the victim, this requires the form of a decision. This refers to the privileged position of the victim of the crime since he or she is the one who is most vulnerable in the proceedings, given that he or she is the most directly involved in the crime.[41]

At the same time, it lays down mandatory rules and *deprives the enforcer of the right to decide if:*

> '(a) a person is under eighteen years of age,
> (b) is a disabled person defined by law, or
> (c) the victim is a victim of a crime against sexual freedom and sexual morality.'[42]

*This imposes an obligation on the authorities to classify as vulnerable persons* those who meet any of the above. Furthermore, it similarly imposes an obligation on the person concerned since he or she cannot refuse measures which are linked to that institution.

The Code of Criminal Procedure lists by way of example *the measures that may provide special protection to the person concerned.* Accordingly, authorities should pay close attention when keeping contact, protecting privacy, and handling personal and health data. The role of the authority is important in connection with the preparation of a procedural act requiring the participation of the person concerned since the aim is that it can be carried out without delay, that it should not be repeated if possible, and that it does not have to meet unnecessarily a person who participates in the criminal proceedings, especially if the protected position is based on his or her relationship with that person. The authorities should play a role in making it as easy as possible for the person concerned to have access to an assisting person. It may also exclude the public from the procedural event. In order to facilitate the exercise of the rights and the fulfilment of the obligations of the person in need of special treatment, the court, the prosecution, and the investigating authority shall carry out the procedural act in the premises designated or adapted for that purpose.[43]

*During proceedings involving a person under the age of eighteen (not only the victim!),* video and audio recordings must be made whenever possible, a forensic psychologist expert may be required to be present at the proceedings, or the procedural event shall be carried out with the assistance of such an expert or a specialist adviser. The

41 Zumbok, 2022, p. 104.
42 Art. 82 of Code of Criminal Procedure.
43 Ibid., Art. 85 para. 1 point i). The detailed rules are laid down in Regulation 13/2018 of 13 July 2018 IM Regulation.

consultant shall carry out its activities under the guidance of the person in charge of the procedural act (the court, the prosecution service, or the investigating authority); in doing so, he or she shall convey the questions put to the person who has not attained the age of eighteen years and any other communications by the authority. The testimony of the above person cannot be verified with a polygraph; his or her confrontation can only be ordered with his or her consent.[44]

*In proceedings involving persons under 14 years of age*, the above measures are complemented by further restrictions. According to this, the child may be heard only and only if the evidence expected from him or her cannot be replaced by anything else. It must be carried out in a room that serves this purpose or has been made suitable for this. If possible, the same person must conduct questioning each time, and video and audio recordings must be made. It prohibits confrontation and excludes counsel and the accused from procedural acts (unless requested by these persons).[45]

The law is even stricter *if a crime against sexual freedom or sexual morality is committed against a person under the age of eighteen.* It applies more binding rules regarding the place of proceedings, prohibits the presence of the defence counsel and the defendant at the procedural event in all cases, and, if the procedural act is conducted by telecommunication, unless exceptions are made by law, the person concerned can only see the judge, prosecutor, or member of the investigating authority. The right of the persons present to ask questions is limited; they can only make a motion in this regard. Any procedural event where the presence of the victim is mandatory is to be excluded from the public without consideration.[46]

### *5.2. Some Practical Solutions in Hungary*

The Hungarian Code of Criminal Procedure strives to ensure that procedural acts are carried out with the highest possible care for children as actors in proceedings in a special protection situation. At present, the main goal is to interview them once, preferably in an environment that does not embarrass them, and to do so in the presence of professionals who work with children.

From 1 January 2021, the Code of Criminal Procedure provides the opportunity for children to be questioned by a forensic psychologist or consultant[47] during criminal proceedings. This provides an opportunity for the child victim of crime to avoid the risk of becoming a secondary victim by having to relive the trauma they have suffered again and again. According to experts, this is very important because the greatest strain for the child is caused by the repeated repetition of events.

The place where children are heard is the *Barnahus House (Children's Houses).* This Icelandic method provides an opportunity to interview children complexly, in

44 Art. 87 of Code of Criminal Procedure.
45 Ibid., Art. 88.
46 Ibid., Art. 88 para. 5.
47 Decree No 12/2018 (VI. 12.) of the Ministry of Justice on the rules applicable to certain acts and persons involved in criminal proceedings Sections 14/A-14/D contain detailed rules for procedural acts carried out with the assistance of a specially trained adviser.

a single place, integrating experts into the procedure. The event itself does not take place in an official room but in a place adapted to the needs of children, where a psychologist or consultant talks to the child concerned. Video and audio recordings of the conversation are made; with the help of these recordings, members of the authority, such as the person conducting the investigation, the prosecutor, and even the defence counsel, can follow the questioning in a so-called monitoring room and also propose to ask questions.

The first Barnahus House opened its doors in 2016 in Szombathely. After that, from 1 February 2021, such an institution has also been operating in Budapest, in the building of the Budapest Child Protection Centre and Regional Child Protection Service. Other houses operate in Debrecen and Gyula.[48] This has provided an opportunity to reach an important milestone in legislation, as mentioned above, so that the court could dispense with questioning victims under the age of 18 if a crime of a sexual nature has been committed against them. Such a hearing can only take place in the case of the victim and only in the case of crimes against sexual freedom or sexual morality.[49]

What can it mean in practice to plan and carry out procedural acts in accordance with the personal needs of the person concerned when a child is heard in court proceedings? One important aspect is the presence of a person whom the child knows or trusts. This may be either the *ad hoc guardian*, the *victim's legal representative*, or the *person acting as an assistant to the witness*. This circumstance alone can inspire confidence and calm in the procedure.[50]

48 For more see: https://barnahus.hu/ (Accessed: 16 January 2025).
49 See more: Hirtling, 2022, pp. 235–242; Gál, 2021, pp. 30–36.
50 Zumbok, 2022, p. 107.

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| Chapter 5 |

# Child-Friendly Justice – Polish Perspective

Wojciech Lis

**ABSTRACT**

A child has the right to express his/her opinion, especially in matters concerning him/her and those that concern his/her legal interest, especially in the course of court proceedings. The child's right to express himself/herself during court proceedings is a manifestation of the child's appreciation as a valuable source of information. Hearing the child increases the chances of determining the factual circumstances of the case as fully as possible and, consequently, makes it easier to issue an accurate decision. Properly conducted, it allows in almost every case to determine the child's current care and upbringing situation as well as his/her relationship with his/her parents. It allows one to learn about the child's preferences and expectations regarding the court's decision. Creating conditions for the child to exercise the right to express himself/herself during a hearing is a manifestation of recognising the child's subjectivity, treating him/her as capable of understanding the situation that is the subject of the proceedings and expressing his/her position. Giving the child a chance to express his/her needs allows them to be diagnosed and taken into account when making a decision, which should always be aimed at realising the child's good whenever a child appears.

**KEYWORDS**

freedom of expression, rights of the child, welfare of the child, court proceedings, grounds for hearing

## 1. Introduction

A child does not have the right to self-determination, but he/she has the right to participate in the decision-making process, especially in matters that affect him/her. The above is a consequence of the dignity inherent in every human being, from which stems the imperative to be treated subjectively, regardless of any factors, including age. A child's subjectivity indicates that he/she is not an object in the hands of parents or state authorities but a separate subject within the family group and other social groups. The expression of human subjectivity is, among other things, freedom of expression, which allows the child to articulate his/her needs, signal problems, and demand certain actions. The child's freedom of expression is realised on many levels,

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from expression within the family to situations involving his/her participation in legal procedures. "The exercise of the right to express oneself should be possible in all settings in which the child is present, that is: in the family, in school, in health and social care institutions, in the police, in court, in assemblies in which the child may participate. (...) of course, this usually concerns matters in which children can be involved, without any harm to them and respecting their childhood".[1] In this way, the child will not be treated merely as an object of adult influence but as an active participant in the decision-making process whose position will at least have to be considered.

A fundamental right of the child in legal proceedings is to be able to express his/her point of view on matters concerning him/her, served by the institution of a hearing. The purpose of a hearing is to find out the position of the child in a particular case, get a better picture of the facts in question, look at the problem from a broader perspective, and, as a consequence, be in a better position to deal with the case in a way that is in the best interests of the child. The child's statements can only broaden the perspective of the assessment of the child's situation, confronting the parents' positions with the direct information obtained from the child. Hearing the child increases the chances of ascertaining the facts of a case as fully as possible and consequently facilitates a sound judgment. It also provides an opportunity for the judge to engage directly with all members of the family. Conducting a hearing thus provides a unique opportunity to uncover possible irregularities or abuses toward the child, allowing for the proper protection of the child's rights.[2] It also counteracts the shifting of the burden of the judge's decision to opinions formulated by experts.[3]

From a psychological perspective, a hearing is a conversation between a judge and a child. It is a conversation that is specific to the child given the circumstances and situational context in which it is conducted, the place where it is carried out, the interlocutor, the purpose, and the content addressed. A hearing is a particular form of interpersonal relationship whose specificity lies in the imbalance between the interlocutors. On one side is the judge – a mature adult aware of the purpose of the meeting, familiar with the procedure, endowed with social authority, assessing the family's problems, and deciding on their resolution. The second interlocutor is the child – a minor experiencing helplessness, confusion, and anxiety, often induced, against his/her will, to talk to the judge, embroiled in adult conflict, and placed in situations of having to choose between parents and their judgements.[4] In short, in psychological terms, listening is the process of giving and receiving information in direct contact with another person.

The study attempts to assess the institution of hearing of the child in Poland in civil proceedings as a means of involving the child in matters concerning him/her.

1 Borkowska, 2014, p. 20.
2 Cieśliński, 2017, p. 147.
3 Słyk, 2015, p. 22.
4 Budzyńska, 2015, p. 35.

It also draws attention to the psychological assessment of this institution, which is extremely important in view of the need to use psychological knowledge in dealing with the child, especially in assessing the statutory criteria for hearing a child. This will help answer the question of whether the procedural guarantees are sufficient and meet the needs of the child in both legal and psychological areas.

## 2. Constitutional Grounds for Hearing the Child

A child's right to be heard is one of the fundamental rights of the child and a constitutional value in its own right.[5] It stems from dignity, which is the source of freedoms and rights, which in turn gives rise to the right to self-determination, the manifestation of which is having one's own views and articulating them. For this reason, the right to be heard requires, at the very least, that the child be given the opportunity to present them.[6] It is guaranteed by the Constitution of the Republic of Poland of 2 April 1997,[7] which is the supreme law of the Republic of Poland (Article 8). It follows that in the system of Polish law, which includes both acts of domestic law and acts of international law, there are no normative acts that would override the Constitution of the Republic of Poland.

The right to be heard is a consequence of the freedom of expression guaranteed by Article 54 of the Polish Constitution, according to which "Everyone shall be granted the freedom to express his/her opinions and to obtain and disseminate information". The legislator does not differentiate between freedom of expression, considering it a fundamental right of every human being. It allows the child to signal his/her needs, make comments, present complaints, and interact with adults who must at least listen to his/her views. The right to be heard is also part of a child's socialisation and upbringing. The failure of parents to fulfil these responsibilities can result in the restriction or termination of their parental rights. The implementation of the upbringing process begins directly with the arrival of the child. Upbringing is a dynamic process, conditioned by a number of variables, whose fundamental aim is to prepare the child to function responsibly in the social environment and form the child's personality. The process of upbringing, however, cannot be based solely on a system of commands and prohibitions upheld by the child's parents. Parents have the right to bring up their children according to their own convictions. However, this upbringing should take into account the degree of maturity of the child, as well as the child's freedom of conscience and religion and his/her beliefs[8]. The degree of maturity affects, at each stage of a child's development – up to the age of majority, the scope of decisions the child can take independently and thus the scope of his/her

5 Judgment of the Constitutional Tribunal of 21 January 2014, SK 5/12, OTK-A 2014, No. 1, item 2.
6 Lis, 2018, pp. 209-221.
7 Constitution of the Republic of Poland of 2 April 1997, Dz. U. 1997, No. 73, item 483 as amended (hereinafter: the Polish Constitution).
8 Art. 48(1) of the Polish Constitution.

rights and obligations. Article 48(1) corresponds to Article 53(3) of the Polish Constitution, which guarantees parents the right to provide their children with moral and religious upbringing and teaching in accordance with their beliefs. This right stems from the assumption that the child, as an immature and dependent being, requires constant care and concern from adults. The upbringing of the child is the responsibility of the parents and falls within the autonomy of the family.[9] The safeguards adopted are intended to protect the family from interference by external factors, in particular by preventing the imposition by public authorities of preferred upbringing patterns, value systems, and perceptions of the world affecting the formation of the child's attitudes, personality, and beliefs. The anchoring of the right to be heard dictates that the child should be treated as an active participant in the upbringing process, not merely as an involuntary object of influence by his/her parents on the way his/her personality, attitudes, and behaviour are shaped. This emphasises the child's subjectivity, while also drawing his/her attention to the need to take his/her needs into account in the context of the family's capabilities, thus teaching the child responsibility for himself/herself and his/her loved ones. It also shows the dynamism of the educational process, which must take into account the maturation of the child and, consequently, the acquisition of an increasing influence on the shape of his upbringing and the functioning of the family.

The rights arising from the content of Articles 48(1) and 53(3) of the Polish Constitution are limited by the content of Article 72(3) of the Polish Constitution, according to which 'In the course of determining the rights of the child, public authorities and persons responsible for the child shall be obliged to hear and, as far as possible, take into account the child's opinion'. The solution adopted affects the way in which parental authority is exercised. The addressees of the duty to listen to the child are the public authorities and persons responsible for the child, first and foremost, of course, the parents. Thus, it can be assumed that this circle includes all entities entitled and obliged to decide on the determination of the child's rights. The Constitutional Tribunal has clearly emphasised that from the content of Article 72(3) of the Polish Constitution stems the obligation of the entities influencing the fate of the child to respect the child's distinctiveness, individuality, and convictions and the necessity to recognise the subjectivity of the child and to listen to the child's opinion[10] in the course of determining the rights of the child. The obligation to listen to the child has been defined in an absolute manner, without specifying exceptions that would allow the child's hearing to be waived, such as his/her age, degree of maturity, state of consciousness, etc. However, the right to be heard does not imply that the child's opinion will be prejudicial, as the child's opinion is to be taken into account only "as far as possible". This implies an obligation to listen to the child when he/she is affected by a particular legal proceeding and to respect the opinion expressed by him/her. This

9 Lis, 2020, p. 23.

10 Judgment of the Constitutional Tribunal of 11 October 2011, K 16/10, OTK-A 2011, No. 8, item 80.

does not mean, however, to attach any legal effect to this opinion.[11] The limitation of the right to be heard is, therefore, built into its essence. It is an expression of the recognition of the autonomy of the family and the parental authority resulting from the fact of parenthood, which is a consequence of the child's dependence and is determined by the need to control the child's actions. The Constitutional Court has even stated that the child's right to be heard is framed, as it were, in opposition to the subjects to whom the final decisions belong. These actors help the child define his/her position in the world, guided by his/her welfare, respecting his/her opinions, convictions, and distinctiveness, but filtering them through their own experience and knowledge, which the child, for obvious reasons, does not yet have.[12]

## 3. Hearing of the Child Under International Law

The constitutional provisions on the issue of the hearing of the child are in line with the provisions of acts of international law ratified by Poland, which, by virtue of Article 87(1) of the Polish Constitution, are sources of universally binding law in the Republic of Poland.

Fundamental among these is the Universal Declaration of Human Rights adopted on 10 December 1948, which, in Article 19, guaranteed everyone the right to freedom of opinion and expression.[13] Similarly, the European Convention for the Protection of Human Rights and Fundamental Freedoms was drawn up on 4 November 1950, which, in Article 10, determined that everyone has the right to freedom of expression.[14] Convention on the Rights of the Child, adopted by the United Nations General Assembly on 20 November 1989,[15] in Article 12 obliged States Parties to ensure that a child capable of forming his/her own views has the right to express them freely in all matters affecting the child and to give them due weight in accordance with the age and maturity of the child. To this end, the child will, in particular, be given the opportunity to express himself/herself in all judicial and administrative proceedings concerning the child, either directly or through a representative or an appropriate authority, in accordance with the procedural rules of domestic law. The consideration of the child's position, therefore, depends on the child's age and maturity. The refinement of these criteria is left to the law of individual States Parties to the Convention. They have a great deal of freedom to shape the legal instruments guaranteeing the child's right to express his/her own views. It should be added that by ratifying the Convention, Poland made

11 Judgment of the Constitutional Tribunal of 21 January 2014, SK 5/12, OTK-A 2014, No. 1, item 2.

12 See judgment of the Constitutional Tribunal of 11 October 2011, K 16/10, OTK-A 2011, No. 8, item 80; judgment of the Constitutional Tribunal of 21 January 2014, SK 5/12, OTK-A 2014, No. 1, item 2.

13 United Nations, 1948.

14 Council of Europe, 1950.

15 United Nations General, 1989.

a declaration stipulating that the exercise of a child's Convention rights, in particular those expressed in Articles 12-16, would be done with respect for parental authority, in accordance with Polish customs and traditions concerning the child's place within and outside the family. The Declaration emphasised the fundamental and irreplaceable role of the family in the process of upbringing and responsibility for the child's development, which stems from natural law.

The protection of children's rights in judicial proceedings is ensured by the European Convention on the Exercise of the Rights of the Child, drawn up on 25 January 1995. According to Article 3(b), a child, considered under national law as having sufficient understanding, in proceedings concerning him/her before a judicial authority, should be given the right - and may himself/herself request such a right - to be questioned and to express his/her views. This corresponds to Article 6(b), which provides that in proceedings concerning children considered under domestic law to have sufficient understanding, the judicial authority, before taking a decision, should (1) ensure the child has been provided with all relevant information, (2) where appropriate, informally if necessary, consult the child himself, either personally or through other persons or institutions, in a manner appropriate to the child's discernment, unless to do so would be manifestly contrary to the child's best interests, and (3) give the child an opportunity to present his/her views.

The obligation to take the child's view into account in pending judicial and administrative proceedings also derives from Recommendation No. R/84/4 of the Committee of Ministers of the Council of Europe of 28 February 1984 on parental responsibility.[16] Annex No. 3 of the Recommendation contains a guideline addressed to the authority with the power to decide, obliging it to take note of the child's position. It follows that 'The competent authority obliged to take a decision on parental responsibility or on the exercise thereof, which concerns the child's essential interests, should take cognisance of the child's position, insofar as the child's degree of maturity permits'. In view of this, the European Court of Human Rights has rightly noted that as soon as children become mature enough to form an opinion about their relationship with their parents, courts should take into account their views and feelings and their right to respect regarding their private life.[17]

It is clear from the wording of the provisions cited above that a child's right to express himself/herself in matters concerning him/her is an expression of the dignity inherent in every human being and of the need to protect the child's welfare, which is a central category of Polish family law.

To conclude the section on international law norms, it should be noted that they do not provide a sufficient basis for the formulation of definitive rules determining the obligatory or optional nature of a child's hearing in proceedings before a court, as well as the standards for such a hearing. In particular, they do not oblige to provide for a face-to-face hearing. They only define it as a definitely desirable element of the

16 More extensively: Council of Europe, 1994.
17 ECtHR, *Khusnutdinov and X v. Russia*, No. 76598/12, 18 December 2018.

proceedings, realising fundamental human rights, and oblige to enact appropriate procedural guarantees,[18] leaving this issue to the internal legislation of individual states.

## 4. Legal Nature of the Hearing

The constitutional obligation to listen to the child has been detailed in the Act of 25 February 1964 Family and Guardianship Code.[19] From its content, it follows that 'A child under parental authority owes obedience to his parents, and in matters in which he can independently make decisions and declarations of will, he should listen to the opinions and recommendations of his parents formulated for his good' (Article 92 § 2 KRiO). The legislator presupposes the consensual cooperation of family members and that a certain margin of discretion is left to the child in matters in which he/she can make decisions and declarations of will independently.

> 'Parents, before making decisions on more important matters concerning the person or property of the child, should listen to the child, if the child's mental development, state of health and degree of maturity so permit, and take into account, as far as possible, the child's reasonable wishes.'[20]

The legislator did not set an age caesura to involve the child in the decision-making process, recognising that parents are best placed to judge the maturity of their child and the views they express. The duty to hear the child has been defined in absolute terms, while the duty to take the child's views into account has a relative character. The child must be heard "before a decision is taken", i.e. at the latest immediately before a final decision is made on major issues concerning the child's person or property. However, the legislator has not formulated any indication regarding the criteria for categorising a case as more important. The doctrine also refrains from attempting to define the concept of "more important matters", indicating only that such matters certainly include the choice of school (especially secondary school), extracurricular activities, the decision to take the child abroad, the determination of the method of medical treatment, the sale of property belonging to the child, or the purchase of property forming part of the child's estate. The duty to listen to the child only comes into play when the child's mental development, state of health, and degree of maturity allow it. However, this is decided by the child's parents. The child should have an understanding of the matters about which he/she is being heard so that he/she can express an opinion with a good understanding of what is at stake. Parents should

18 Słyk, 2015, p. 17.
19 Act of 25 February 1964 Family and Guardianship Code, consolidated text Dz. U. 2023, item 2809 (hereinafter: the KRiO).
20 Art. 95 para. 4 of the KRiO.

take into account the child's position, provided that this takes the form of reasonable wishes. These should be taken into account "as far as possible", which leaves parents with the option of disregarding the child's position when making decisions if they consider them to be impossible due to their complexity, the disproportionate nature of the time, resources, and action required in relation to the objective pursued, or due to a lack of sufficient financial resources.

For civil proceedings, the institution of hearing the child is regulated in the Act of 17 November 1964 Code of Civil Procedure,[21] separately for procedural[22] and non-procedural[23] proceedings. The provision of Article $216^1$ § 1 of the CPC stipulates that 'The court in cases concerning the person of a minor child shall hear the child if his/her mental development, state of health, and degree of maturity allow it. The hearing shall take place outside the courtroom'. Contrarily, according to Article 576 para. 2 of the CPC,

> 'The court in matters concerning the person or property of the child shall hear the child if his mental development, state of health and degree of maturity so permit, taking into account, as far as possible, his reasonable wishes. The hearing shall take place outside the courtroom.'[24]

The wording of these provisions dictates they should be applied at all times and in every case involving the person or property of the child and testifies to the intention to establish such an instrument to enable the court to have direct contact with the child. At the same time, the position of the court is not prejudicial; the child must consent to be heard, and the refusal to do so constitutes a reason for waiving the child's hearing. Where the hearing of the child is abandoned at the latest before the conclusion of the proceedings, it shall be indicated in the minutes of the hearing or the hearing for what reasons the hearing was not held. As an aside, it should be added that the provisions of Articles $216^1$ paras. 3 and 4 of the CPC and $216^2$ of the CPC apply to Article 576 § 2 of the CPC mutatis mutandis, which is intended to ensure equal treatment of minor participants in trial and non-trial proceedings.

The child's hearing is a procedural act, not part of the evidentiary process. Consequently, whatever content the child discloses, the hearing is not the basis for establishing the facts of the case.[25] This does not mean, however, that they have no relevance. A hearing is not a means of proof and, unlike a witness interview, is not referred to as evidence. Nevertheless, the function of a hearing is similar to that of witness evidence, as it seeks to establish the child's position on a matter that directly concerns him/her. It is, therefore, described as 'an auxiliary procedural institution of

21 Act of 17 November 1964 Code of Civil Procedure, unified text Dz. U. 2023, item 1550 as amended. (hereinafter: the CPC).
22 Arts $216^1$ -$216^2$ of CPC.
23 Ibid., Art. 576 para. 2.
24 Ibid., Art. 576 para. 2.
25 Cieśliński, 2017, p. 148.

a technical-procedural nature, serving to obtain from the court the explanations and factual statements needed by the court for the determination of the case'.[26] However, it is not subject to formalised rules of evidence. In particular, it is not subject to the criminal sanction of giving false testimony.

As a child hearing is a procedural act, both its conduct and its omission are decided by the court, i.e. by the court's panel and not by its president.[27] The order to hold a child's hearing is unappealable, but the refusal of a hearing may already be the basis of an appeal plea.

The institution of a hearing provides the child with procedural subjectivity but does not equip him/her with procedural capacity, i.e. the capacity to take action in person. Pursuant to Article 65 para. 1 of the CPC, procedural capacity, i.e. the capacity to take procedural actions, is vested in natural persons having full capacity to take legal actions, legal persons, and organisational units which are not legal persons and which are granted legal capacity by law. A natural person without procedural capacity may take procedural actions only through his/her statutory representative[28]. The child, therefore, as a natural person who does not have full legal capacity, does not have procedural capacity, and, consequently, hearing the child does not mean granting him/her the status of a participant in the proceedings.[29]

The court will hear the child if the child's mental development, state of health, and degree of maturity allow it. Making the hearing dependent on the child's personal qualities determines its relatively obligatory nature. After evaluating the child's mental development, state of health, and degree of maturity, the court shall decide whether to conduct a hearing. A minor cannot have more procedural rights than an adult person, for whom both the informational hearing[30] and the conduct of subsidiary evidence from the hearing of a party have been left to the court's discretion[31]. Undoubtedly, however, the abandonment of the hearing leads to a de facto limitation of the possibility of learning the child's position and, consequently, limits the cognitive capacity of the judge, which may influence the case decision. "If the court has abandoned the hearing of the child, at the latest before the end of the proceedings, it shall indicate in the minutes of the meeting or hearing for what reasons this activity was not carried out"[32]. It should be added that if the court does not hear the child, although it could have done so, or, having heard the child, does not take the child's opinion into account at all and does not justify its position convincingly, parties may challenge such a decision. It is assumed that these are such significant procedural errors that they may constitute an effective ground of appeal initiating appellate proceedings.

26 Markiewicz, 2010, p. 342.
27 Judgement of the Supreme Court of 13 December 2013, SNO 35/13, LEX No. 1409019.
28 Art. 66 of CPC.
29 Order of the Supreme Court of 16 December 1997, III CZP 63/97, LEX No. 32972.
30 Art. 216 of the of CPC.
31 Ibid., Art. 299.
32 Ibid., Art. $216^1$ § 4.

As an aside, it should be added that it is extremely difficult for a judge to decide whether a child's mental development, state of health, and degree of maturity permit a hearing. This is because deciding on these issues requires psychological or, more broadly, medical knowledge. Mental development in psychology means the degree of intellectual, social, and emotional development of a child in relation to the age norm. It can, therefore, happen that a child is very well developed intellectually - has a rich vocabulary, a wide knowledge of the surrounding world, and knowledge of social norms, but his emotional or social development is disturbed, causing significant difficulties in contact with the judge and problems in formulating his own judgements, experiences, needs, and preferences. At the same time, deficits in intellectual development may not exclude the child's participation in the hearing. Their depth and relevance to the child's ability to express his/her position, needs, and preferences require the consultation of a psychologist and the adaptation of the interlocutor in the interview to the individual capacities and peculiarities of the child. The issue of developmental stage, as well as individual deviations from generally accepted developmental norms, must, therefore, be considered.

In the context of the hearing, the child's degree of maturity is a set of characteristics, among which the following are of particular importance: awareness of one's own needs and preferences and the child's relative constancy, ability, and readiness to express them; lack of excessive dependence on others; expressing a sense of autonomy and independence of judgement, resilience in difficult situations, ability to recognise the intentions of others; and understanding one's role in civil proceedings. The health condition, from a psychological point of view, limiting the possibility of the child's participation in the hearing depends on somatic diseases, the treatment of which, according to the specialist, excludes the child's participation in legal procedures; psychosomatic ailments, the symptoms of which may be aggravated under stress; autism; holistic developmental disorders with aggravated features of Asperger's syndrome; the therapy process to which the child is subjected due to traumatic experience; and emotional problems. In all these cases, the child is under the care of relevant professionals who should provide their opinion on the child's ability to participate in the hearing activity, which will be extremely helpful to the judge.[33]

At a later stage of the proceedings, according to the circumstances, the child's mental development, state of health, and degree of maturity, the court will take into account the child's opinion and reasonable wishes[34]. Thus, at this stage of the proceedings, the court reassesses these grounds, which means that even if it previously considered that they justify hearing the child, it may then, on the basis of direct contact with the child, observation of the child's behaviour, and assessment of the information provided, conclude there are no grounds for taking the child's opinion and reasonable wishes into account. Hearing the child does not, therefore, imply an

33 Budzyńska, 2015, pp. 43–44.
34 Art. $216^1$ para. 2 of CPC in conjunction with Art. 576 para. 2 of CPC.

obligation to take the child's view into account when making a decision concerning him/her.

## 5. Types of Cases Justifying a Hearing with the Child

The legal safeguards for a child's hearing are open-ended; they do not specify the range of matters on which a hearing is permissible. Notably, while personal issues may be easier for a child to assess, as they might often be related to their emotions and desires, property issues, which require knowledge and life experience, are generally beyond a child's capacity for independent assessment.

Analysing the doctrinal and case law position shows that the hearing of the child is conducted in cases of divorce, separation, determination of contact, enforcement of contact orders, prohibition of contact, ordering the enforcement of contact and imposing a fine for non-compliance, surrender of the child, modification of a divorce judgment on parental authority, modification of a divorce judgment on the whereabouts of a minor, limitation of parental authority, suspension of parental authority, termination of parental authority, establishment of custody, placement in a foster family, termination of a foster family, modification of an order on parental authority, modification of a child's place of residence, adoption, termination of adoption, determination of the child's essential interests, maintenance payments, unenforceability of a writ of execution, authorisation to issue a passport, change of name, determination of the validity of admission to a psychiatric hospital, authorisation for a woman to marry despite being underage, determination/denial of the child's origin, determination of the ineffectiveness of an acknowledgment of a child, annulment of an acknowledgment of a child, surrender of a child on the basis of the Hague Abduction or Retention Convention, issuance of custody orders, disposition of a child's property, and authorisation to perform an act exceeding the ordinary administration of the child's property. These examples testify to the inclusion of the child in the decision-making process and the strengthening of the legal position of the child, to whom the legislator guarantees the possibility of co-decision in various categories of matters concerning his/her person or property.

## 6. Conditions for the Conduct of the Hearing

The hearing depends on the fulfilment of the statutory prerequisites, among which the legislator has included the child's attainment of an appropriate level of mental development, the degree of maturity, and the state of health. All these prerequisites must be considered together. The court assesses them in light of the totality of the circumstances of the particular case and in relation to the particular child. It follows that the court should approach each case individually and analyse on a case-by-case basis whether involving the child directly in the court proceedings is necessary from

the point of view of those proceedings, considering the impact of the hearing on the child's welfare and emotions. It is also for the court to assess what weight to give to the child's hearing and whether and to what extent to take into account the child's views and reasonable wishes.

The hearing should be conducted at a stage of the proceedings where the evidence gathered in the case makes it possible to assess the child's mental development, degree of maturity, and state of health. Contact with the child too early results in the judge not knowing what issues will need to be clarified and not having sufficient knowledge of the child to assist in planning and conducting the hearing. Conversely, a hearing at the final stage of the proceedings may lead to the child being held responsible for the outcome. As there will be parental expectations of this activity, it may in turn put pressure on the child. Therefore, it is advisable that the judge's interview with the child is not carried out either at the beginning of the proceedings or at the end but at a stage when material on the functioning of the child and his/her family has been collected, it is possible to identify issues that need to be identified when in contact with the child, and the judge has already formulated some hypotheses that he/she wishes to verify.[35] The decision whether to grant a hearing to a child should be made on the basis of a careful assessment of the information gathered that relates to the person of the child and the case, enabling a decision to be made as to the use and suitability of the institution of a hearing in a particular case. This information usually comes from an interview conducted by the probation officer, an examination by a panel of forensic specialists, a school opinion, and medical certificates or other documents collected in the case file. The knowledge of the child also allows for proper preparation for the hearing, in particular, to decide on the participation of a psychologist during the hearing, formulate questions, and make the right choice of time and place for the activity. Before proceeding with the hearing, the court should also consider whether the direct involvement of the child in the court proceedings is necessary in view of the objectives of the proceedings, the complexity of the proceedings, as well as the conflict between the parents and the impact of this conflict on the child.

The issue of competence arises against this background, and the question is whether the court has jurisdiction to assess whether there are sufficient grounds for a hearing. Furthermore, does it have the competence to assess the statutory conditions for a child's hearing?

> 'Their assessment requires taking into account both the developmental context and the personal skills and talents of the child, as well as the dynamics of changes taking place in the child's development (developmental abnormalities) conditioned by situational factors, especially the family situation, which is both the subject of the trial and possibly testimony before the court.'[36]

35 Ibid., pp. 44–45.
36 Czerederecka, 2010, p. 27.

There is no doubt that the legitimacy of the hearing of the child can only be ensured by a person prepared to do so, with expertise, first of all by psychologists dealing with children and adolescents, who prepare a relevant opinion on the order of the court. Such an opinion should be prepared on the basis of an analysis of the court case file, an examination of the child (observation, interview, psychological tests), and an interview with the parents or legal guardians. Of course, such a solution piles up practical problems. It generates additional costs, and the waiting time for the opinion prolongs the duration of the trial.[37]

Although a hearing plays an important role, it is for the court to assess in each case whether it is in the best interests of the child. This is because the nature of the case may create such tensions and evoke such emotions that the physical presence of the child in court may be inappropriate and detrimental to the child's mental health.[38] The child's hearing must be accompanied by an absolute conviction of the absolute necessity of the exercise and the value of the information it can provide. In other words, the hearing should be carried out for the sake of the principle of the child's welfare and in accordance with the child's best interests. It must not cause any negative consequences either in the emotional-psychological or in the socio-educational sphere. The importance of the child's welfare has been confirmed by the Supreme Court, which has held that guided by expediency, taking into account the degree of maturity of the minor and the nature of the guardianship case, the competent court should take cognisance of the position of that minor with a view to his/her welfare.[39] The best interests of the child should constitute the basic premise of all court decisions concerning the child, the directive in the case of the creation of the law and its application, as well as a criterion of evaluation in deciding on the child's affairs and in resolving conflicts between the interests of the child and those of third parties.[40]

> 'In the hearing of the child, in addition to the judge, only an expert psychologist may participate if, due to the health condition, mental development or age of the child, it is necessary to provide psychological assistance to the child during the hearing or it is necessary to assist the judge in identifying the needs of the child during the hearing.'[41]

The legislator emphasises the judge's personal participation in the hearing activity, establishing contact with the child, and the possibility of directly shaping the conversation. Thus, it excludes the possibility of the judge being replaced by another entity. This is also supported by direct contact between the judge and each participant in

37 Ibid., p. 39.
38 CJEU, C-491/10 PPU, *Joseba Andoni Aguirre Zarraga vs. Simone Pelz*, 22 December 2010 [Online]. Available at: https://eur-lex.europa.eu/legal-content/en/TXT/?uri=CELEX:62010CJ0491 (Accessed: 6 February 2024).
39 Order of the Supreme Court of 15 December 1998, I CKN 1122/98, LEX No. 35758.
40 More extensively: Stojanowska, 2000, pp. 55–65.
41 Art. $216^2$ para. 2 of CPC.

the court proceedings. The expert psychologist plays only a supporting role here and performs his/her role under the guidance and supervision of the court; he/she can assess whether the emotional development of the child allows the hearing to take place and assist the judge in formulating questions addressed to the child. The expert psychologist provides a great deal of support and assistance, mainly in the area of expressing feelings and speaking out about the child's family. He/she also provides a guarantee of the correctness of the conduct of the hearing from the perspective of the child's emotional costs and signals any overload involved while assessing the child's motivation to express himself/herself.

No other persons, and under no circumstances the child's parents or persons representing the parents, may attend the hearing. The presence of these persons may have an embarrassing effect on the child, involving an internal compulsion to please those close to him/her and a conflict of loyalties, ultimately causing the child to be selective about the information provided to the court. It should be remembered that the more people there are, the more difficult it is to establish proper contact with the child and obtain a comprehensive, relaxed relationship with him/her.

It is difficult to determine the age limit of a child beyond which a hearing is justified. However, it is not so much and not only the age that determines the use of the institution of a hearing but also the level of mental development and the degree of maturity, which, after all, may vary among children of the same age. Psychological studies of children during childhood on determining the possibility of expressing reasonable wishes in matters concerning them show that this is a period in which children have great difficulty in doing so, mainly due to developmental issues (difficulties in determining time, distance, taking the perspective of the parent under whose care they are currently placed, succumbing to authority figures, etc.)[42]. Practical experience confirms that regardless of the efforts made by the judge and the conditions of the hearing, young children do not bring anything of value to the case, as they are not mature enough and can easily be manipulated.[43] If judges already decide to hear a child, they do so with children who have reached the age of 13. This limit is not accidental, as from the age of 13, the child acquires limited legal capacity. Of course, it is also possible to hear a younger child if it is supported by his/her subjective qualities, which are, after all, of an eminently individualised nature. This is all the more so since the legislator does not provide for limitations on the possibility of hearing a child on the criterion of his/her age. This confirms that the decision to hear the child is highly discretionary and falls within the judge's discretionary power.

42 More extensively on the characteristics of human life periods: Harwas-Napierała and Tremapała, 2004; Czerederecka, 2010.
43 Cieśliński, 2017, p. 145.

> 'The child may be heard only once in the course of the proceedings, unless the child's best interests require this to be done again or the need for a new hearing is raised by the child. The re-hearing of the child shall be conducted by the same court, unless this is impossible or the child's best interests prevent it.'[44]

Repeated summoning of the child to court, appearing at the court premises, repeating questions, replaying observations and facts, and arousing related emotions may lead to secondary traumatisation of the child.

Bearing in mind the child's subjective qualities and the accompanying experiences, it is important to prepare the child adequately for this activity. Of course, this does not mean instructing the child on what he/she can or cannot say. The process of preparing the child for the hearing must not influence the content of his/her speech. Nevertheless, it is necessary to sensitise the child to the fact that he/she should speak the truth and describe what has actually happened. Before the hearing begins, the child should be informed of the purpose and implications of the activity, its course, and the role it will play in a way that he/she understands. It should be explained to the child who will be present at the hearing and the role these people will play. It is extremely important to make the child aware that the hearing is motivated by his/her welfare and serves to defend his/her interests. It is essential that the child understands the purpose and meaning of presenting his/her position. The child must be informed that he/she can refuse to attend the hearing or to answer the questions put to him/her. It should be explained that he/she does not need to know the answers to the questions asked, and he/she has the right to say that he/she "does not know" or "does not remember" something, without fear of consequences. It is equally important to discuss the tensions and fears associated with participating in this type of legal procedure. It is important to anticipate the situation and be able to mentally adjust to participating in the hearing, so the child should be warned in advance about when and where the hearing will take place. Predictability of the situation increases the sense of security and makes it easier to cope with the emotions involved. Adapting the conditions of the hearing to the child's capacity can be a condition for obtaining reliable and credible information, and the child's right to express himself/herself will then be fully realised.[45]

Parents play a huge role as they are the persons who, due to their daily contact with the child and their knowledge of the child's reactions, are best placed to prepare the child to participate in legal procedures. Therefore, they are the ones who first need to be equipped with basic information about the legal procedures in which their child will be involved in order to then explain to the child what these procedures will consist of, what their purpose is, and how they will be carried out. The awareness of the child's parents will, in many cases, determine the success of a procedure.

44 Art. $216^1$ para. 3 of CPC.
45 Borkowska, 2014, p. 46.

## 7. Conduct of the Hearing

Of great practical importance, often determining the success of the hearing, is the time and place at which it is held. The timing of the hearing should be adapted to the child's physical and mental state, as determined on the basis of information obtained from the parents and other sources available to the court. The time of the hearing should be adapted to the child's age, state of health, and the time of the child's optimal cognitive activity. The duration of the hearing should be adapted to the child's individual capacities. The hearing should not interfere with the child's other activities or force the child to wait a long time before being interviewed. If more than one child is involved in the proceedings, the date of the hearing should be set individually for each child.

> 'The hearing of the child shall take place in a closed session, which shall be held in appropriately adapted premises at the seat of the court or, if the welfare of the child so requires, outside the seat of the court.'[46]

This regulation is specified in § 186(1) of the Rules of Procedure of common courts, according to which the hearing of a minor child shall be conducted, if possible, in a room intended and adapted for this purpose. If there is no such room on the premises of the court, the hearing may be held in a room meeting these conditions located outside the court building, cooperating in this respect with non-governmental organisations dealing with the protection of children's rights.[47] The choice of the venue for the hearing is extremely important from the point of view of the child's mental state. There is no doubt that the conditions in which the hearing is conducted will influence the judge's gaining of the child's trust and facilitate the child's openness to conversation. Therefore, it is important to create conditions that are as friendly as possible, where the child feels at ease and does not feel any pressure. A child's visit to the court premises or any other place where hearings are held should not involve stress and negative experiences for the child.

The venue for the hearing must be child-friendly, provide a sense of security, an atmosphere of intimacy and discretion, and promote concentration and freedom of expression. Concern for the welfare of the child participating in legal procedures is an overriding value, which is why the legislator obliged the Minister of Justice to determine by regulation the manner of preparation and conduct of a child's hearing and the conditions to be met by the premises intended for the conduct of such hearings[48]. To date, however, no such regulation has been issued.

46 Art. $216^2$ para. 1 of CPC.
47 Regulation of the Minister of Justice of 18 June 2019 - Rules of Procedure of common courts, unified text Dz. U. 2022, item 2514.
48 Art. $216^2$ para. 4 of CPC.

In psychological terms, it is emphasised that the room in which the child's hearing is conducted should correspond to the conditions of a friendly interrogation room, also known as a blue room, and be closer to a living room than to a staff room. It should also be equipped with a seating area adapted for the child and, depending on the age, accessories that give it a friendly character.[49] The hearing of the child should take place in the most favourable conditions possible, which is why it takes place outside the courtroom in appropriately adapted premises, which must meet certain formal and technical requirements, at the seat of the court or, if the best interests of the child require it, outside the seat of the court. In practice, however, under Polish conditions, minors are most often heard in judges' offices, which are not adapted for such activities.

In the field of civil proceedings, there is currently no clear regulation of standards such as those applicable in criminal proceedings for questioning a minor witness specified by the Minister of Justice.[50] Within the framework of civil proceedings, some solutions resulting from the content of this regulation are applied by analogy. The hearing room should be isolated from outside noises and protected against unauthorised entry of outsiders. The colour scheme of the hearing room should be light and subdued. It should be equipped with furniture suitable for adults and children, and the floor should be covered with soft carpeting. The dress code of the hearing officer should be informal, so the judge must not be dressed in a toga and chain.

While the creation of appropriate conditions for the hearing is important in terms of the child's atmosphere and well-being, more important is the manner in which the hearing is conducted. The judge conducting the hearing should begin by introducing himself/herself to the child, introducing the psychologist expert, if present, and explaining the purpose of the hearing and the child's role in the court proceedings. The way in which the child is addressed, the questions asked, the tone of voice, and the order in which the topics are taken up (first, a "loose talk" on general topics, without rushing, without any pressure on the child, then moving on to the issues related to the case) is important.[51] It follows that the child should be allowed to speak spontaneously, after which he/she can be asked brief clarifying questions relating to it. The judge should communicate with the child using language adapted to the child's age and intellectual level. Above all, however, the content and form of the child's speech depend on whether the person conducting the hearing has succeeded in establishing a good rapport with the child, gaining the child's trust, making the child feel secure, and, at the same time, asking questions in a way that they are fully understood by the child and do not suggest the direction of the answer.[52] Questions asked of the child should be open-ended. The degree of difficulty of the questions depends on the child's

49 Czerederecka, 2010, p. 41.

50 Ordinance of the Minister of Justice of 28 September 2020 on the manner of preparation of the interrogation conducted in accordance with the procedure set out in Articles 185a-185c of the Code of Criminal Procedure, Dz. U. 2020, item 1691.

51 Cieśliński, 2017, p. 146.

52 Czerederecka, 2010, p. 37.

subjective qualities. Questions should be graded, from easiest to most difficult. In the course of the conversation with the child, the judge should use an active listening technique, paraphrase the child's statements to make sure the child's utterances are properly understood, and avoid judging the child, his/her statements, and those close to him/her.

Children's hearing shall be documented by an official note. The course of the hearing shall not be recorded by means of a sound or video recording device[53]. An activity documented by means of an official note is an appropriate solution, as the aim of the hearing is not to gather evidence, but to learn about the child's position. The official note also has the advantage of excluding the presence of third parties during the hearing. The date and time of the hearing, the place and conditions of the hearing, the content of the information given to the child about the rules of the hearing, the type of case on which the child is to be heard, the child's position, the conclusions of the hearing, and the signature of the judge drawing up the document should all be recorded in such a note. The official note should, of course, reflect the hearing as fairly as possible.

Once the hearing is complete, the resulting conclusions should be communicated to the parties/participants in the proceedings at the next court session.

## 8. Conclusions and Recommendations

A child hearing is necessary if the case concerns a child; the child has an understanding of the nature of the case; the child's mental development, state of health, and degree of maturity make a hearing possible; and it is not contrary to the child's welfare. When properly conducted, it makes it possible in almost every case to establish the child's current care and educational situation and his/her relationship with his/her parents, as well as the child's preferences and expectations regarding the court's decision. It undoubtedly enables the court to understand how the child perceives the family problems and his/her situation and provides a broader perspective of the case to be decided. The hearing complements the evidence gathered in the case. It should be advocated that listening to the child and taking into account his/her position should intensify as the child grows and acquires further intellectual and emotional competences.

A properly conducted hearing not only gives the child a chance to protect himself/herself by helping make a decision aligned with the child's best interests but also shows the child that he/she has the right to be heard. Hearing the child not only helps make the most appropriate decision for the child's welfare but also influences the child's coming to terms with the changes taking place by giving him/her the feeling that his/her views will also be taken into account. It also fulfils the educational objective of developing the child's sense of co-responsibility in deciding matters that concern

53 Art. $216^2$ para. 3 of CPC.

him/her. By having the opportunity to be heard and to have their views taken into account, children have the chance to build up a positive self-image as an individual who has a say about their own life and their own needs, who, in one way or another, have some control over their life and can cope with the worries of everyday life.[54]

Though the opportunity to be heard undoubtedly realises the child's right to be heard on the issues at stake in the court proceedings, the information obtained from the child, without proper knowledge of how to interpret it, may lead to hasty conclusions and, consequently, be contrary to the child's welfare. Hence, there is a need for intensive ongoing training of judges in developmental psychology and techniques for establishing contact with the child and conducting interviews in a hearing. It follows that, in addition to the legal regulations, which must be consistent, logical, transparent, and as precise as possible, the substantive preparation of the judge to conduct the child hearing is also very important. Indeed, the value of the information obtained from the child depends not only on the individual capacities of the child but also on the manner in which this activity is conducted and on the knowledge, experience, and interpersonal skills of the hearing officer.[55]

Not every judge is predisposed to conduct this kind of activity. A lack of skills in listening to a child may not only fail to realise the child's right to be heard but also harm the child's welfare. The hearing of a child by unprepared persons may not only lead to a misperception of the child's position but even to an undermining of confidence in court or, more broadly, the justice system, which may have far-reaching consequences in the future. Proper preparation of the judge is, therefore, an important element of an effective and friendly hearing.

The judges should have to go through training covering the basic principles of child psychology. They should have the knowledge to ask questions in a manner adapted to the maturity and mental development of the child and to interpret the answers obtained both verbally and non-verbally.[56] Furthermore, judges should be able to properly assess the child's behaviour and the way he/she reacts in order to draw appropriate conclusions. He/she must have the ability to shape the course of the conversation in such a way as to obtain the child's position rather than a reflection of the position of one of his/her parents. It follows that a proper hearing should also be accompanied by adequate training in communication with children of different age groups. This applies in particular to family court judges, who should be the first to be trained in the proper tactics of listening to a child.

This, of course, requires continuous training within the various judicial specialisations. Require everyone to be good in every area of law is difficult. Lack of specialisation and inadequate staffing result in judges losing out on the emotional weight of care cases. They are also often unable to empathise with the situation of the parties or minor children. Hence, there is a need for professional specialisation of family court

54 Gardziel, 2022, p. 100.
55 Borkowska, 2014, p. 34.
56 Słyk, 2015, pp. 25–26.

judges and the elimination of situations where cases involving children are handled by random people.[57]

Nevertheless, pre-hearing activities are important in order to prepare judges for meetings with the children. Each interview is unique and has its own peculiarities resulting from the personality of the interviewees, their mutual attitude to the subject of the interview, their state of health, and the nature of the case before the court. The judge must be duly prepared for such a meeting, must know the details of the case, gather as much information about the child as possible, and conduct the interview in partnership, without emphasising or using his/her advantage. Only such an approach will meet the objectives of the hearing and allow a decision to be made that is in the best interests of the child.

57 Gardziel, 2022, p. 111.

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| Chapter 6 |

# Child-Friendly Justice – Romanian Perspective

Zsolt Fegyveresi

**ABSTRACT**

Given that children can also be involved in various civil, administrative and criminal proceedings, it is very important that there are legal instruments in place in each state to guarantee their rights in such situations. Children's right to participation is a fundamental principle that gives them the opportunity to express their views and have a say in their lives. They must have the opportunity to receive the information necessary and relevant to them in order to form and express their views. In addition to the child's right to take part in decisions, the right to participation also includes the right to involvement, action or information. This right is closely linked to the child's development and maturation process. Romanian legislation in line with the Convention on the Rights of the Child ensures that children who are capable of discernment have the right to freely express their opinion on any issue that concerns them not only in their daily life, but also in moments that are less comfortable for them, such as administrative or judicial proceedings.

**KEYWORDS**

child-friendly justice, the right to participate, special protection measure, juvenile justice, hearing of the minor

It is crucial to have legal instruments at the level of each state that guarantee children's rights to development, protection, and participation. Children, after all, have the same rights as everyone else; however, these rights must be adapted to their special needs. Under Article 49 para. 1 of the Romanian Constitution, children and young people enjoy special protection and assistance in the pursuit of their rights. These constitutional provisions, as we shall see, are found in several national laws, in line with European and international legislation in this field.

Children may be involved in various civil, administrative, and criminal proceedings, thus becoming participants in these proceedings that are often too complicated not only for them but also for their parents or legal representatives. Among the civil procedures, we can mention, as an example, the adjudication of claims placed by the Civil Code under the jurisdiction of the guardianship court, claims related to registrations in civil status registers, or claims in matters of inheritance, divorce, or adoption. According to some estimates, almost 200,000 children are involved in civil

Zsolt Fegyveresi (2025) 'Child-Friendly Justice – Romanian Perspective' in Benyusz, M., Zombory, K. (eds.) *Child-Friendly Justice. The Participation and the Rights of the Child in Court Proceedings From a Central European Comparative Perspective.* Miskolc–Budapest: Central European Academic Publishing, pp. 125–139.; https://doi.org/10.71009/2025.mbkz.cfj_6.

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proceedings each year, either directly or through their legal representative, seeking remedies for violations of their rights. Another 100,000 children are involved in civil family law cases. In the sphere of administrative procedures, the establishment of measures for the protection of minors, the granting of social assistance services, or benefits and asylum applications are notable.[1] In criminal proceedings, children may appear in court either as persons in conflict with the criminal law, as injured parties (victims), or as witnesses.

The right of children to participate is a fundamental principle laid down in the Convention on the Rights of the Child (hereinafter Convention) adopted by the General Assembly of the United Nations on 20th November 1989. The Convention has been assumed and ratified by Romania through the adoption of Law No. 18/1990. The right of participation allows children to have a say in their lives and in decisions that affect them. They must have the opportunity to receive the information necessary and relevant to them to form and express their views. The Romanian Constitution on participatory rights guarantees everyone, children and adults, freedom of expression (Article 30), i.e. the right to seek, receive, and impart information and ideas. In addition to the child's right to take part in decisions, the right to participate also includes their right to be involved, to act, or to be informed. This right is closely linked to the child's development and maturation process.[2]

The child's right to freedom of expression under the Constitution is also guaranteed by other national legislation. The articles of Law No. 272/2004 on the protection and promotion of children's rights (hereinafter Law 272/2004) explicitly allow children to have a say after a certain age. This right, however, also has certain limits, such as the child's capability to be able to form his/her own opinions. The law states that in determining the best interests of the child, the child's opinion is also taken into account, depending on his/her age and maturity.

According to Article 28, the child has the right to freedom of expression, i.e. the freedom to seek, receive, and impart information of any kind, including online, designed to promote his/her social, spiritual, and moral well-being and physical and mental health, in any form and by any means of his/her choice. This freedom is considered an inviolable right. Parents or, where appropriate, the child's legal representatives, foster carers, and persons who, by virtue of their office, promote and ensure respect for children's rights are required by law to provide them with information, explanations, and advice in accordance with their age and level of understanding and to allow them to express their views, ideas, and opinions. Parents may not restrict the right of a minor child to freedom of expression except in cases expressly provided for by law.[3]

1 Strategia națională pentru protecția și promovarea drepturilor copilului "Copii protejați, România sigură" 2023-2027 p. 40 [Online]. Available at: https://www.juridice.ro/wp-content/uploads/2023/10/0942Bis.pdf (Accessed: 15 December 2023).

2 Pivniceru and Luca, 2016, p. 11.

3 Moloman, 2016, p. 58.

The child's right to participate also includes the right to be heard in judicial or administrative proceedings. This right gives the child the opportunity to receive information, to be consulted, to express his/her opinion, and to be informed of the consequences of having his/her opinion respected. In line with the Convention on the Rights of the Child, Article 29 para. 1 of Law 272/2004 provides that a child capable of forming his/her own views has the right to express those views freely on any matter affecting him/her. Further, Article 29 para. 2 of Law No. 272/2004 and Article 264 para. 1 of the Civil Code stipulates that in administrative or judicial proceedings concerning him/her, it is compulsory for a child who has reached the age of 10 to be heard. As stated in para. 4 of the same article, the views of the child heard shall be taken into account in relation to his/her age and degree of maturity.[4] According to one opinion, the inclusion in the Civil Code, but also Law No. 272/2004, of age thresholds for establishing the obligation to hear the child reflects the way the legislator intended to provide a suitable procedural framework for the child's hearing to become an effective right that can be freely exercised by the child.[5]

However, a child under the age of 10 may also be heard if the competent authority considers this necessary for the resolution of the case. Moreover, every child has the right to ask to be heard.[6] This right implies the possibility for the child to ask for and receive any information appropriate to his/her age, to express his/her opinion, and to be informed of the consequences this may have, as well as of the consequences of any decision concerning him/her. The hearing of the child in these situations may be ordered by the competent court or requested by the child, provided that the hearing is considered necessary. Reasons must be given by the court for refusing to hear a child under 10 years of age.

In addition to the right of the child to be heard, the Romanian legislator has also regulated the child's right to express his/her consent. Article 463 para. 1 point b) of the Civil Code on adoption provides that, in order for adoption to be granted, the consent of the adoptee who has reached the age of 10 years must be expressed. This article was also reproduced in Article 15 of Law No. 273/2004 on adoption procedure. According to these legal texts, adoption cannot be carried out without the freely expressed consent of the child concerned. As expressed in the literature, the provisions of Article 463 para. 1 point b) imposes an imperative condition in the matter of expressing consent to adoption, and the legislator has presumed a maturity from the perspective of the effects of adoption for the minor who has reached 10 years of age. Thus, the Civil Code has extended the obligation of the minor's consent imposed from the age of 14 years by the Strasbourg Convention to any minor who has reached the age of 10 years.[7]

4 By Decision 555/2014 in case No. 16125/196/2013, the Court of Braila did not consider it necessary to hear the minor, given that he has not reached the age of 10 [Online]. Available at: https://legeaz.net/spete-civil-tribunalul-braila-2014/stabilire-domiciliu-minor-decizia-16-10-2014-nv2 (Accessed: 15 December 2023).

5 Ghiță, 2023, pp. 82–115.

6 Florian, 2007, p. 22.

7 Ivan, 2020, p. 229; Togan, 2023, pp. 315–338.

The procedure for expressing consent does not consist of a simple hearing of the child, which the court can later censor, depending on the age and maturity of the child. Rather, it is transformed into a special legal capacity with the aim of stopping the adoption procedure in the event of a refusal by the future adoptee.[8] Prior to the expression of consent, the Directorate-General for Social Assistance and Child Protection in whose territorial area the child who has reached the age of 10 is resident will advise and inform the child, taking into account his/her age and maturity, in particular on the consequences of the adoption and of his/her consent to the adoption, and will draw up a report to this effect. The child's consent to adoption is given in front of the court at the stage of granting the adoption.

The methodological rules for the implementation of Law No. 273/2004 on adoption procedure stipulate that during adoption procedures, the child must be encouraged and supported in expressing his/her opinion, which is recorded and taken into account according to his/her age and degree of maturity. Also, in accordance with his/her age and degree of maturity, the child must be provided with clear and concrete information and explanations during the adoption procedures concerning the duration and stages of the adoption process. Per the Methodological Rules, the case manager is obliged to collaborate with the reference person(s) for the child as well as with the child's case manager throughout this process.[9]

The national legislation does not contain the terms used in international and European Union regulations, such as "capable of forming an opinion" or "sufficient level of understanding". In the translated text of the Convention, the phrase "capable of forming his/her opinion" is translated as "capable of discernment", a term also used in Law No. 272/2004. Romanian legislation does not establish an age threshold representing the limit for acquiring discernment. Indeed, a person has discernment only from a certain age, depending on his life experience and on his state of mental health, i.e. the existence or lack of discernment are factual states that can characterise a person regardless of his age.[10]

We can conclude that a child who has reached the age of 10 is considered by national law to be mature enough to understand certain aspects of the proceedings in which he/she is involved. In one case, the High Court of Cassation and Justice held that Romanian law considers that it is only after the age of 10 that the child acquires the degree of maturity that makes it obligatory to express his/her opinion.[11]

The child's age also influences his/her civil capacity. According to the Civil Code, civil capacity has two components: *capacity of use* and *capacity of exercise*. The capacity

8 Avram, 2022, p. 336.

9 Normele metodologice de aplicare a Legii No. 273/2004 privind procedura adopției, din 28.07.2021. [Online]. Available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/245189 (Accessed: 15 December 2023).

10 David and László, 2021, p. 15.

11 Decision of the Court of Cassation No. 1335/2017 [Online]. Available at: https://www.scj.ro/1093/Detalii-jurisprudenta?customQuery%5B0%5D.Key= id&customQuery%5B0%5D.Value=143031 (Accessed: 16 December 2023).

of use, i.e. a person's legal capacity to have civil rights and obligations, begins at birth and ceases with the person's death; so, during life, all persons enjoy it. The rights of the child are recognised from conception, but only if the child is born alive. With regard to the capacity to exercise rights, i.e. the ability of a person to enter into civil legal acts alone, the Civil Code states that only a person of *full* age has *full capacity of exercise*. A person becomes of full age on reaching the age of 18. With regard to children, Article 41 para. 1 of the Civil Code provides that a minor who has reached the age of 14 has *limited capacity of exercise*, and a minor who has reached the age of 16 and marries acquires full capacity of exercise.[12] According to Article 41 of the Civil Code, the legal deeds of a minor with limited capacity of exercise are concluded by the minor with the consent of the parents or, as the case may be, of the guardian, and in cases provided by law, also with the authorisation of the tutorship court. However, a minor with limited capacity may enter alone into deeds of conservation, deeds of administration without prejudice thereof, as well as into deeds of disposition of low value, of a current nature, and executed on the date such deeds were entered into.

Further, according to the Civil Code, a minor may enter into legal deeds concerning work, artistic or sports occupations, or related to the minor's profession, with the consent of the parents or guardian, as well as in compliance with the provisions of the special law, if applicable.[13] In this case, the minor exercises their rights alone, and as such shall also execute the obligations arising from these deeds and may dispose of the acquired income alone.

With regard to a child's social relations, the parents or legal representatives of the child may obstruct, for justified reasons, the correspondence and personal connections of the child up to the age of 14. Disputes shall be settled by the tutorship court upon the hearing of the child, under the terms provided for in Article 264 of the Civil Code.[14] With regard to the liability of minors, the Civil Code provides that a minor who has not reached the age of 14 shall not be liable for the damage caused, unless their discernment at the time of the deed is proven. If the minor has reached the age of 14, he/she shall be liable for the damage caused unless it is proven that they lacked discernment at the time of the deed.

12 According to Article 272 para. 2 of Civil Code: For good reasons, a minor who has reached the age of 16 may marry on the basis of a medical certificate, with the consent of their parent or, as the case may be, of the guardian and upon the authorisation of the tutorship court, with jurisdiction in the area where the minor's domicile is located. If one of the parents refuses to consent to the marriage, the tutorship court shall also decide on such divergence, taking into account the best interests of the child.

13 For example, according to the first paragraph of Article 13 of the Romanian Labour Code, an individual acquires the capacity to work when he/she reaches the age of 16. This means that a minor who has reached the age of 16 can conclude an employment contract on his/her own without any authorisation.

14 According to the first paragraph of Article 264 of the Civil Code: In administrative or judicial proceedings concerning a child, the hearing of a child who has reached the age of 10 is mandatory. However, a child who has not reached the age of 10 may also be heard if the content authority deems it necessary to settle the case.

With regard to the hearing of certain categories of persons as witnesses in civil proceedings, the Code of Civil Procedure stipulates that children who have not reached the age of 14 and those who are not competent at the time of the hearing may be heard without an oath; however, the court shall call on them to tell the truth and shall take into account their special situation when assessing their testimony. We note, therefore, that minors and persons lacking discernment are exempted from the obligation to take an oath. The hearing of minors as witnesses takes place in the *council chamber,* and the court decides whether parents, guardians, or other persons will be present at the hearing.

As shown in legal literature, the procedure of hearing a child, regulated by Article 264 of the Civil Code, in order to ascertain the child's opinion on certain proceedings concerning him/her, is a different institution from the administration of evidence with witnesses provided for by Article 320 of the Code of Civil Procedure. A child heard under Article 264 of the Civil Code does not provide testimonial evidence, and what he/she states during the hearing procedure is not to be taken into account by the court with probative value but can be taken into account when pronouncing the decision.[15] The hearing of the child must be free, without pressure, in a stress-free environment, and in language accessible to the child.[16]

Article 101 of Law No. 272/2004 provides for a special form of hearing of abused, neglected, exploited, and otherwise abused children in the case of the establishment of a special protection measure. According to this article, if the court deems it necessary, it may summon the child to appear before it to be heard. The hearing takes place only in the courtroom, in the presence of a psychologist, and only after prior preparation of the child.[17] The court may, of its own motion, give the child's written statement on the abuse, neglect, exploitation, or any form of violence against the child as evidence in the proceedings. The child's statement may be recorded by audio-visual technical means. Recordings must be made with the assistance of a psychologist and only with the child's prior consent.[18]

Another situation in which a child must be heard is when parents fail to agree on the child's place of residence. According to Law No. 272/2004, in such cases, the guardianship court will determine the child's place of residence in accordance with Article 496 para. 3 of the Civil Code. When assessing the child's interests, the court may also take into account aspects such as the history of violence of the parents against the child or against other persons. This history may also be proved by means

15 Székely, 2021, p. 129.

16 Pivniceru and Luca, 2016, p. 71.

17 In a case concerning a request for a change of the visitation schedule of the father of the minor child, the Bucharest Court of Appeal established that the hearing of the minor child was not done in violation of Article 101 paragraph 3 of Law 272/2004, because the situation was not about "protection of the child against abuse and neglect" and the presence of the psychologist at the hearing of the minor child by the judge was not necessary. Bucharest Court of Appeal, Decision no. 805/2009 in case No. 574/2009 [Online]. Available at: https://legeaz.net/spete-civil-minori-familie/stabilire-program-vizitare-minor-805-2009-yo1 (Accessed: 16 December 2023).

18 Domocoș, 2021, pp. 116–139.

of psychological expert reports on the minor or by hearing the minor in the courtroom, in conjunction with any other means of proof provided for by law. Article 496 para. 3 regarding the establishment of the child's residence states, inter alia, that the conclusions of the psychosocial investigation report must be taken into account, but the parents and the child who has reached the age of 10 must also be heard.

Criminal law does not set an age limit from which a child can be heard in a criminal case. However, we cannot say that minors can be heard in criminal cases regardless of their age or legal capacity. Here, it needs to be mentioned that according to the provisions of Article 29 para. 2 of Law No. 272/2004, in any judicial or administrative proceedings concerning him/her, it is mandatory to hear the child who has reached the age of 10 years; however, a child who has not reached this age may also be heard if the competent authority deems it necessary for the resolution of the case. Thus, the hearing of a child who has reached the age of 10 is mandatory in criminal proceedings. Furthermore, in the case of a child who has not reached that age, the judicial authorities are free to decide whether or not it is appropriate to hear him/her.

With regard to the criminal liability of minors, Article 113 of the Criminal Code[19] provides that a minor who has not reached the age of 14 is not criminally liable, a minor between 14 and 16 is only criminally liable if it is proven that he/she committed the act with discernment, and a minor who has reached the age of 16 is criminally liable according to the law. We, therefore, note that the criminal law establishes an absolute presumption of lack of discernment in the case of a minor who has not reached the age of 14. Minority is, therefore, a ground for non-liability governed by Article 27 of the Criminal Code. According to this text of the law, an act provided for by the criminal law committed by a minor who, at the time of its commission, did not meet the legal conditions for criminal liability is not imputable. In the case of a minor aged between 14 and 16, the law establishes a relative presumption of lack of discernment. For criminal liability to operate, the existence of discernment must be proven, which consists of a forensic psychiatric expert report. Lastly, a minor who has reached the age of 16 is criminally liable, but the penalty regime is different from that for adults.[20]

The Code of Criminal Procedure contains special provisions on preventive measures for minors. Thus, taking in custody and pre-trial arrest may be ordered exceptionally against a minor only if the effects of their deprivation of freedom on their personality and development are not disproportionate to the objective pursued by such measure. In determining the duration of a pre-trial arrest measure, the minor's age at the date of ordering, extending, or maintaining such measure shall be considered. Minor defendants may enter into plea agreements with the consent of their legal representative.

19 Penal Code 2009 [Online]. Available at: https://legislatie.just.ro/Public/DetaliiDocument/109855 (Accessed: 16 December 2023).
20 Tudorel et al., 2014, p. 10.

According to Article 504 of the Code of Criminal Procedure, the prosecution and trial of offences committed by minors shall be conducted per the rules of ordinary procedure, with certain additions and exceptions contained in the chapter entitled *Procedure in cases involving juvenile offenders*. This procedure shall also apply to persons who have reached the age of 18, up to the age of 21, if they were minors at the time they became suspects, when the judicial body deems it necessary, taking into account all the circumstances of the case, including the maturity and vulnerability of the person concerned. Where the suspect or accused person is a minor, his/her legal assistance shall be mandatory. If the person detained or arrested is a minor, he/she shall also benefit from special conditions for the execution of detention and custody. With regard to the summons of a minor, the law provides that a minor under 16 years of age shall be summoned through his parents or guardian unless this is not possible.

Following the amendment of the Criminal Procedure Code in 2020[21], some special provisions applicable to the hearing of children in conflict with criminal law have been introduced in the text of the law. According to these provisions, when the suspect or the accused is a minor, at any hearing or confrontation of the minor, the prosecution body shall summon the parents or, as the case may be, the guardian, curator, or the person in whose care or supervision the minor is temporarily placed, as well as the general directorate for social assistance and child protection of the locality where the hearing is held. At any other act of criminal proceedings to which the suspect or accused minor is summoned, the minor's legal representatives are also summoned if the judicial body considers that their presence is in the best interest of the minor and is not likely to prejudice the proper conduct of the criminal proceedings[22].

Before the first hearing in cases involving juvenile suspects or defendants, they must be informed of a series of information concerning, inter alia, the main stages of the criminal proceedings, the preventive measures that may be applied to them, the right to protection of privacy, the right for parents or legal representatives to receive the same information communicated to the juvenile, the right to be evaluated by means of the evaluation report, the right to be present at the trial, etc. All communications to the minor shall be made in simple and accessible language appropriate to the minor's age and to the minor's parents or, where appropriate, guardian, curator, or the person in whose care or supervision the minor is temporarily placed, and shall not be contrary to the minor's best interests.

In cases involving juvenile defendants, the prosecuting authorities may, where they deem it necessary, request a report on the assessment of the juvenile by the probation service. If the juvenile is committed for trial, the request for the assessment report is mandatory unless it would be contrary to the best interests of the juvenile. Even during the trial, the court may require the probation service to make an

21 Law No. 248/2020 transposed into national law Directive (EU) 2016/800 of the European Parliament and of the Council of 11 May 2016 on procedural safeguards for children who are suspected or accused persons in criminal proceedings.
22 Art. 505 of the Code of Criminal Procedure.

assessment report. Cases with juvenile defendants are tried urgently and in a pretrial hearing, which is not public.

When the defendant is a minor person aged less than 16, the court, if it feels that hearing certain items of evidence can exercise a negative influence on the defendant, can have the defendant temporarily removed from the courtroom. A minor defendant can only be heard once, and hearing them again shall only be allowed by the judge in thoroughly justified situations.

Law No. 304/2022 on the organisation of the judiciary[23] stipulates that within the courts, depending on the complexity and number of cases, there shall be divisions or, where appropriate, specialised panels for juvenile and family cases, which shall try both offences committed by minors and offences committed against minors. In reality, there is only one specialised court and prosecutor's office for minors and family offences in Romania, located in Brașov, which started operating 20 years ago in 2004. Unfortunately, however, neither the old nor the new law on the organisation of the judiciary makes it compulsory to set up specialised courts for minors and families at least at the level of each county.[24]

We consider that the provisions introduced into the Code of Civil Procedure by Law 248/2020 are not sufficient to effectively protect the rights and interests of children in conflict with the criminal law. It would be necessary for the law to lay down special provisions applicable to the stage of the hearing of the child suspect or accused, mandatory minimum procedural rules provided for in, for example, the *European Convention on the Exercise of Children's Rights* (ETS 160) or the *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (The Beijing Rules).[25] These mandatory minimum procedural rules provide, among other things, for an immediate hearing upon discovery of the criminal offence and its perpetrator.[26]

The main procedural rights and safeguards applicable to the hearing of injured parties are set out in the Code of Criminal Procedure. With regard to the hearing of child victims, the law provides only for a few special provisions introduced into the Code by Law No. 51/2023.[27] Thus, according to Article 111 para. $8^1$, the hearing of the injured person under the age of 14 takes place in the presence of one of the parents, the guardian, or the person or representative of the institution to which the minor is entrusted for upbringing and education, as well as in the presence of a psychologist, established by the judicial body. The psychologist will provide expert advice to the minor throughout the court proceedings. Cases involving injured minors are also tried urgently and with priority.

23 Law No. 304/2022 on the organisation of the judiciary [Online]. Available at: https://legislatie.just.ro/Public/DetaliiDocumentAfis/261410 (Accessed: 14 December 2023).
24 Rus, 2023, pp. 40–65.
25 Council of Europe, 1996; United Nations, 1985.
26 Pivniceru and Luca, 2009, pp. 122–149.
27 Law No. 51/2023 on amending and supplementing Law No. 135/2010 on the Code of Criminal Procedure.

With regard to the hearing of witnesses, the Code of Criminal Procedure provides that any person who has knowledge of facts or factual circumstances constituting evidence in a criminal case may be heard as a witness. The hearing of a witness who is a minor up to the age of 14 takes place, as in the case of the hearing of an injured person who is a minor of the same age, in the presence of a parent, guardian, or the person or representative of the institution to which the minor is entrusted for upbringing and education, as well as in the presence of a psychologist, who will provide expert advice to the minor throughout the court proceedings. The hearing of the minor witness must avoid any negative effect on the minor's mental state. A minor who has not reached the age of 14 at the time of the hearing shall not be told that he/she is required to give truthful statements and shall not be made aware that the law punishes the offence of perjury. At the same time, a minor who has not reached the age of 14 does not take an oath but is warned to tell the truth.

In criminal matters, in addition to the Code of Criminal Procedure, which provides the general framework at the national level for dealing with offences committed by or against minors, there are also two guidelines on the working methodology for hearing minors. *The methodological guide on hearing minors who are victims of violence*[28] was adopted in April 2017 as part of a project co-funded by a grant from Switzerland. Furthermore, the *guide on hearing children in judicial proceedings*[29] adopted under the aegis of the National Institute of Magistracy was published in 2009. The hearing methodology proposed by the first guide is based on the interview protocol developed by the *National Institute of Child Health and Human Development*. This Protocol is designed to encourage the use of open-ended questions likely to elicit concrete, detailed answers in the form of a verbal account. The second guide, according to its authors, represents a practical application of a complex of interdisciplinary psychological concepts and practices and national and international legal rules, all aimed at enhancing and respecting the rights of the child in relation to the legal situations in which he/she finds himself/herself. [30]

As we can see, in both civil and criminal proceedings, the hearing of minors takes place in the courtroom. These chambers serve as a framework for activities of a jurisdictional nature. In 2014, as part of a project carried out by the Federation of Non-Governmental Organisations for Children (FONPC), two specialised rooms for hearing minors were set up in two large Romanian cities (Cluj, Craiova). Later, in 2016, the official inauguration of the room for hearing minors took place at the Prosecutor's Office of the Bucharest Court. The provision of more separate spaces for the hearing of minors is still a priority, as minors are often heard in inappropriate places full of stressors. Currently, Romanian courts and prosecutors' offices have a total of 8 such rooms for hearing minors. Although, according to the strategy for the development of

28 Badea and Trandafir, 2021.
29 Ibid.
30 Pivniceru and Luca, 2009, p. 13.

the judicial system, between 2022-2025, 30 more such rooms will be set up specifically for minor victims in both criminal and civil proceedings.[31]

In Romania, the People's Advocate (Avocatul Poporului) is the institution where the Child Ombudsman (Avocatul Copilului) operates. According to Law No. 35/1997,[32] the Child's Advocate, under the coordination of the People's Advocate, acts to promote and protect the rights of children up to the age of 18 and supports and encourages the respect and promotion of children's rights. In fulfilling the specific mandate in the field of protection and promotion of the rights of the child, the Children's Advocate performs tasks such as dealing with individual complaints made by children or their representatives in relation to the actions of public institutions in the field of health, education, or special protection of children, in the field of application of custodial and non-custodial measures provided for in the Penal Code, dealing with complaints in relation to the violation of one or more rights of the child, and promoting the rights of the child among children and adults. The Children's Advocate collaborates with the formal structures for children, formulates proposals for measures to encourage children's participation in decision-making that concerns them, draws up studies on the exercise and respect for children's rights, and recommends, where appropriate, measures for the respect of children's rights at the public policy and legislative levels, including by drawing up special reports, and immediately refers cases to the criminal prosecution authorities, either ex officio or on request when finding evidence of offences against children under criminal law.

In the special report on respect for children's rights in Romania[33] of November 2019, on the right of the child to justice adapted to his/her needs, it is very clearly underlined that the hearing of minors is a real challenge due to the lack of adequate conditions, such as special hearing rooms, audio-video equipment for recording hearings, and the presence of multi-disciplinary teams. Children's right to be heard is closely linked to their right to feel safe when speaking and their right to be in a place where they feel comfortable. The direct effect of not providing adequate conditions for their hearing is to rehear them and thus prolong court proceedings. The child witness or victim, in many cases, is exposed to the presence and proximity of the perpetrators, which means re-victimisation. However, progress can also be observed, such as the project carried out by the Federation of Non-Governmental Organisations for Children to set up specialised rooms for hearing minors and the Public Prosecutor's Office's plans to create a network of prosecutors specialising in cases involving children and strengthen the capacity for hearings carried out in accordance with legal provisions.

31 Annex to the Decision on the approval of the Strategy for the Development of the Judicial System 2022- 2025 and its Action Plan [Online]. Available at: https://sgg.gov.ro/1/wp-content/uploads/2022/03/ANEXA-50.pdf (Accessed: 19 December 2023).

32 Law No. 35/1997 on the organisation and functioning of the People's Advocate Institution [Online]. Available at: https://legislatie.just.ro/Public/DetaliiDocument/11200 (Accessed: 19 December 2023).

33 Onu et al., 2019.

Initial and continuous professional training and education of magistrates is organised by the National Institute of Magistracy (NIM). According to the *Thematic Monitoring Report on the Investigation and Resolution of Sexual Offences Cases with Child Victims,*[34] several training activities were organised till 2022 focusing on the topic of hearing child victims. For example, seminars on *Juvenile Justice* and the *Hearing of Minors* were organised as part of the continuous training of magistrates. These seminars presented the psychological aspects to be taken into account when hearing a minor in judicial proceedings, as well as the steps and rules to be followed to ensure an effective hearing. The need for a clear and effective protocol for the hearing of minors has increasingly become part of the didactic strategy of continuing professional development.

Within the project *Justice 2020: professionalism and integrity,* from 2018 until the end of 2023, 12 seminars were organised on the topic of *Hearing techniques in criminal proceedings,* including 5 seminars with specificity in the case of hearing vulnerable persons, including children. Also, under this project, 8 training seminars on *Juvenile Justice* were organised for 20 judges and prosecutors dealing with juvenile cases.[35]

According to the *Thematic Control Report* for the initial training in *Criminal Procedural Law,* the resolution of cases involving minors is the subject of a separate seminar, which deals with procedural issues concerning both minor offenders and minor victims. It also includes issues concerning the hearing of a minor victim of sexual abuse and specific issues related to the assessment of the credibility of the statements of those involved in the commission of such crimes.

Since 2014, the Romanian Government has been developing national strategies for the protection and promotion of children's rights. The first strategy for the period 2014-2020 aimed to ensure an effective framework for the implementation of the main priorities in the field of children's policies to allow conditions for the development and training of children from birth to adulthood.[36] The non-governmental sector, associations, and foundations whose mission is to defend and promote children's rights played a key role in the development of the strategy. This first strategy for the hearing of minors in conflict with the criminal law already proposed to create hearing rooms to provide a favourable framework for an optimal hearing. An evaluation showed that the number of hearing rooms in the units under the Ministry of Internal Affairs increased during the reporting period, but these rooms were not exclusively intended for the hearing of minors and do not have specific facilities to make them child-friendly. According to the evaluation report, the number of child-friendly rooms for children visiting their parents increased from 9 to 40 during the period under review.

34 Inspecția Judiciară, 2022.

35 Badea, 2019.

36 Strategia națională pentru protecția și promovarea drepturilor copilului pentru perioada 2014-2020 și a Planului operațional pentru implementarea Strategiei naționale pentru protecția și promovarea drepturilor copilului 2014-2016 [Online]. Available at: https://legislatie.just.ro/Public/DetaliiDocument /164656 (Accessed: 15 December 2023).

Finally, the report found with regard to the reform of the child justice system that both police and court procedures and infrastructure remained child-unfriendly.[37]

The new national strategy for the protection and promotion of children's rights 2023-2027 includes among its priorities the continuation of the reform process of the juvenile justice system in Romania, given that the child-friendly infrastructure in legal proceedings is still deficient. According to the *EU Justice Scoreboard 2020,* although Romania invests in training judges on child-friendly and child rights-based communication, it ranks last in the EU in terms of investment in training judges on topics such as hearings. With regard to making information on proceedings available to children, there is a concern for adequate preparation of children in court proceedings. However, there are no child-friendly websites that provide online information on the justice system. Another problem according to the *EU Justice Scoreboard* is that there is no data available on the experience of child witnesses in civil, criminal, or administrative proceedings. Furthermore, the Romanian authorities do not regularly or systematically collect data on children's needs and their experiences throughout court proceedings. Although a legal framework on children's rights exists in Romania, children are not sufficiently informed about their rights, including their right to development, protection, and participation. Thus, there is a lack of adequate knowledge of how these rights are implemented.

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| Chapter 7 |

# Child-Friendly Justice – Serbian Perspective

Marko S. Knežević

**ABSTRACT**

The UN Convention on the Rights of the Child (CRC) was ratified by Serbia in 1991, but the specific rights of children to participate in court proceedings were more clearly defined with the Family Act of 2005. Serbian law establishes a strong foundation for child-friendly justice, aligning closely with CRC obligations. Children capable of forming opinions have the right to express them in court proceedings relevant to them, with no age threshold for such fundamental judicial participation right. Court accessibility in all procedures is governed by the principle of the child's best interests. Special regulations exist particularly for criminal cases involving juvenile offenders and minors who are victims, prioritising children's interests. Nonetheless, challenges remain in effectively implementing these normative frameworks to achieve a truly child-friendly justice system.

**KEYWORDS**

participation rights of children in Serbian law, child's right to be heard in Serbian court proceedings, access to the court proceedings in Serbian Law, child-friendly justice in Serbia

## 1. Legal Framework of Participation Rights of Children in Serbian Law

When discussing the legal framework of participation rights of children in Serbian law, it is foremost necessary to outline the Serbian legal system. It is described as a typical continental legal system in which legal sources are primarily laws in a functional, non-technical sense, whereas case law is not. The nomenclature of legal sources implies that the Constitution (*Serbian: Ustav*) is the highest legal act, and all other legal sources, including international treaties, as well as laws and bylaws, have to be in accordance with the Constitution.

The current Constitution was adopted in 2006[1] and amended in 2022.[2] The Constitution does not explicitly mention the participation rights of children; instead, it

1 Službeni glasnik Republike Srbije [*Official gazette of Republic of Serbia*], No. 98/2006.
2 Službeni glasnik Republike Srbije [*Official gazette of Republic of Serbia*], No. 16/2022.

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envisages other rights of the child,[3] emphasising that children enjoy human rights according to their age and mental maturity.[4] However, the Constitution also stipulates that human and minority rights, guaranteed by generally accepted principles of international law and confirmed by international treaties, are directly applicable through the Constitution.[5]

Since the UN Convention on the Rights of the Child (CRC) was ratified in 1991, there is no doubt that participation rights, as shaped in the CRC, hold constitutional status. Additionally, the Constitution includes a rule for interpreting human rights norms, stating that such norms shall be interpreted to the benefit of promoting the values of a democratic society, pursuant to valid international standards in human and minority rights, as well as the practice of international institutions which supervise their implementation.[6]

The specific regulation of the participation rights of children in court proceedings is outlined in various acts. From the perspective of Article 12 of the CRC, the Family Act (*Serbian: Porodični zakon*; hereinafter FA), enacted in 2005,[7] is undoubtedly the most crucial, aiming for the complete implementation of obligations arising from the CRC. For the first time, the right of children to be heard in court proceedings, including the ability to express their own opinions, has been officially established, even if the regulation is not flawless from a nomotehnical perspective. In addition to the FA, the position of the child in court proceedings is sporadically addressed in the codifications of procedural law – in the Criminal Procedure Code (*Serbian: Zakonik o krivičnom postupku*),[8] the Civil Procedure Code (*Serbian: Zakon o parničnom postupku*),[9] and the Non-litigious Procedure Code (*Serbian: Zakon o vanparničnom postupku*).[10] However, concerning the participation rights of children in criminal proceedings, the Law on Juvenile Criminal Offenders and the Criminal Legal Protection of Juveniles (*Serbian: Zakon o maloletnim učiniocima krivičnih dela i krivičnopravnoj zaštiti maloletnih lica*; hereinafter: Law on Juveniles), enacted in 2005,[11] is much more significant. It not only governs criminal court proceedings for juvenile offenders but also addresses the unique status of juvenile victims of various crimes.

3 E.g. right to personal name, entry in the registry of births, the right to learn about his/her ancestry, the right to preserve his/her own identity, protection from every kind of exploitation or abuse, equality between children born out of wedlock and children born within, Art. 64 paras. 2–4 of the Constitution.

4 Ibid., Art. 64 para. 1.

5 Ibid., Art. 18 para. 2.

6 Ibid., Art. 18 para. 3.

7 Službeni glasnik Republike Srbije [*Official gazette of Republic of Serbia*], No. 18/2005, with amendments.

8 Službeni glasnik Republike Srbije [*Official gazette of Republic of Serbia*], No. 72/2011, with amendments.

9 Ibid.

10 Službeni glasnik Socialist Republike Srbije [*Official gazette of Socialist Republic of Serbia*], No. 25/1982, with amendments.

11 Službeni glasnik Republike Srbije [*Official gazette of Republic of Serbia*], No. 85/2005.

## 2. Right to Be Heard in Court Proceedings: Reception of Article 12 CRC

### *2.1. General Overview*

Article 65 of the FA enshrines and partially clarifies the child's right to be heard, as outlined in Article 12 of the CRC. While the order of paragraphs may appear somewhat random, it addresses key aspects of the right to express opinions, particularly in court proceedings. It discusses how to ensure conditions for exercising this right, the process for determining the child's opinion, and the eventual impact of that opinion on decision-making. Subsequent provisions further elaborate on these foundational principles.

The right to be heard, as will be demonstrated, is enjoyed by every child capable of forming his/her opinion.[12] Hence, Serbian law does not recognise an age threshold, consistently embracing the concept of Article 12 of the CRC in this regard. Although referred to by a different name in Serbian, the right to be heard fundamentally represents a subjective right in the context of court proceedings that is not merely formal but also substantive. It is not enough to allow a child to express their opinion; the court is required to consider that opinion.[13] On the other hand, the right to be heard is distinct from a child testifying as a witness in court. When a child expresses his/her opinion, they are not providing testimony about facts relevant to the case; rather, they are sharing their personal perspective on their situation.[14] Procedurally, this involves an independent position that has not yet been adequately explored in theory.[15]

### *2.2. Scope of Application*

While Article 65 of the FA is designed to encompass all court proceedings, it appears to limit the application of the right to be heard in other provisions. Specifically, it states that the court must provide essential information to a child, allow them to be heard, and enable them to express their opinion when the child is a party to the proceedings.[16] This implies, by contrast (*e contrario*), that the court has no such obligation when the child is not a party, even in cases that affect the child's interests, such as parental rights and marital disputes. However, both case law and scholarly literature agree that the court must ensure the effective participation of the child, even if they are not a party to the proceedings. This obligation stems not only from the fundamental provision of Article 65 but is also justified from a teleological perspective[17]

12 Art. 65, para. 1 of the FA.
13 Ibid., Art. 65, para. 3.
14 Ponjavić, 2012, p. 48; Novaković, 2012, p. 192 fn. 33.
15 Ćorac, 2014, pp. 327–328.
16 Art. 266, para. 3 of the FA.
17 The aim of Art. 65 of the FA was to fully implement Art. 12 of the CRC; cf. Ponjavić and Vlašković, 2022, p. 258. On the other hand, Art. 12 of the CRC does not limit right of the child to be heard in court proceedings in such manner, that only child who is party to the court proceeding is entitled.

and is logically necessary. In any situation where decisions affect a child's rights, the substantive legal standard is the child's best interests. Established case law indicates that a child's "wishes and feelings in relation to age and maturity" are important for determining the best interests of child,[18] and this cannot be assessed without hearing the child's perspective.

Case law indicates that the obligation to uphold the child's right to be heard extends beyond legal proceedings that directly determine the child's rights or interests. Even in enforcement proceedings concerning the child's rights, it is essential to allow the child to express their opinion prior to any enforcement actions, as per general rules. For instance, when enforcing a decision about maintaining personal contact between a non-custodial parent and the child, the child's voice must be considered before any enforcement measures are implemented.[19]

### *2.3. Prerequisites For the Child's Right to Be Heard*

According to Article 65, para. 1 FA, a child capable of forming his/her opinion has the right to freely express that opinion. On the other hand, according to Article 65, para 4 FA, a child who has reached the age of 10 can freely and directly express his/her opinion in any court or administrative proceeding deciding on his/her rights. When these two provisions are examined systematically, they reveal a somewhat conflicting relationship. Paragraph 1 has a general nature, applying to all instances of a child's expression without age restrictions. In contrast, paragraph 4 appears to be a specific rule applicable to court and administrative proceedings, which includes an age limit. This interpretation suggests that a child under the age of 10 does not have the right to express their opinion in court or administrative proceedings concerning their rights, regardless of their ability to form an opinion. This viewpoint is supported by some legal scholars[20] and certain appellate decisions.[21]

Conversely, one could argue that the relationship between the mentioned provisions is not exclusive but rather complementary, allowing for specific differentiation. For children who have reached the age of 10, there is a legal presumption of their ability to form an opinion, although this presumption is rebuttable. For those under the age of 10, it is essential to evaluate their capacity to form an opinion in each case. This perspective is widely accepted in legal theory[22] and is supported by the case law of the supreme instance. Supreme Court of Serbia[23] stated already back in 2007, only two years after the enactment of the FA, that '...right of the child to freely express

18 Judgement of Supreme Court of Cassation, 1. 2. 2023, No. Rev 1201/23; Judgement of Supreme Court of Cassation, 28. 9. 2022, No. Rev 11946/22.

19 Judgement of Higher Court Novi Sad, 20. 8. 2019, No. Gži 306/19.

20 Petrušić, 2007; Jović Prlainović, 2021, pp. 51–52.

21 E.g. Judgement of Appellate Court Kragujevac, 11. 5. 2011, No. Gž 212/11.

22 Ponjavić, 2012, pp. 39–40; Ponjavić and Vlašković, 2022, pp. 258–259; Draškić, 2022, p. 191–192; Ćorac, 2014, pp. 329–330; cf. Novaković, 2012, p. 193.

23 N.B.: Serbian highest court has changed it's names in last two decades: until 2010 it was named "Supreme Court of Serbia"; from 2010 until 2022, it was named "Supreme Court of Cassation"; from 2022 it is named "Supreme Court".

opinion is limited by his capability of forming own opinion, and accordingly no age threshold for exercising such right is prescribed by law'.[24]

There are at least two reasons to support this doctrine. First, from the historical legislator's perspective, the purpose of Article 65 of the FA was to implement Article 12 of the CRC, which notably does not set any age limit on a child's right to express an opinion. Second, from an objective-teleological viewpoint, the right to a child's expression of opinion is intended to uphold the dignity of their personality and ensure decisions are made in their best interest, which is independent of age.

Regarding the undefined legal concept of "capacity to form an opinion", case law has yet to clarify this condition for a child's right to express an opinion. Meanwhile, legal theory has made efforts to define it, primarily by referencing foreign literature and the opinions of the Committee on the Rights of the Child. In this context, a narrow interpretation – one that limits the capacity to two cumulative elements: the intellectual ability to understand one's actions and the ability to freely decide regarding those actions – has been rejected. Such a definition would significantly reduce the number of children recognised as having the right to express themselves. In line with the Committee's position, there is support for a broader understanding of the capacity to form an opinion in Serbian law, which is viewed as the competence to develop and articulate one's will, regardless of whether that will is free, reasonable, or meaningful.[25]

The determination of whether a child is capable of forming an opinion ultimately rests with the court, and this assessment must occur prior to the child's hearing. However, the court typically lacks the expertise necessary for this evaluation. As a result, assessments are carried out by professionals such as psychologists and social workers.[26] A hearing can only take place if the expert provides a positive assessment. Contrary to some authors,[27] the evaluation of a child's capacity to form an opinion is not a matter of judicial discretion; any negative determination must be justified and can be contested on that basis.

The child's right to be heard is, however, constrained by a careful balance between the principles of participation and the best interests of the child. The court should refrain from hearing a child if doing so would clearly contradict their best interests.[28] For example, this might occur in situations where the child is facing a loyalty conflict, and there is a valid concern that expressing an opinion could harm their relationship with one parent or negatively affect his/her mental health.[29]

24 Decision of Supreme Court of Serbia, 19. 4. 2007, No. Rev 123/07.
25 Cf. Ponjavić, 2012, pp. 38–39.
26 Cf. Judgement of Supreme Court of Cassation, 4. 6. 2020, No. Rev 2263/20; Judgement of Supreme Court of Cassation, 13. 1. 2022, No. Rev 8643/21.
27 Ponjavić, 2012, pp. 40, 42, 46.
28 Art. 266 para. 3 of the FA.
29 Cf. Appellate Court of Niš, 17. 11. 2022, No. Gž2 427/22.

### *2.4. Informative Duties*

To ensure the effective right to be heard, Article 65, para 2 of the FA stipulates that a child has the right to receive timely information necessary for forming an opinion. This obligation is further detailed in the responsibilities of the court and the child's representative (parent or temporary guardian) to make sure the child receives this information.[30]

### *2.5. Impact of the Child's Opinion*

The child's right to express his own opinion does not imply a subjective right, meaning that the decision in question must be based on the child's opinion. The court's duty is to give due weight to the child's opinion,[31] which means that it must be taken into account when making a specific decision. Whether the decision will align with the child's opinion depends on whether such alignment is in the best interests of the child.[32] In this regard, Serbian law consistently implements Article 12, para. 1 of the CRC, ensuring that the due weight to the child's opinion shall be given in accordance with the age and maturity of the child.[33]

## 3. Access to Court Proceedings

### *3.1. Civil Proceedings*

When discussing access to civil court proceedings, it is necessary to start from a doctrinal framework that influences the systematisation of the issues. In this sense, one question is who can be a party in the proceedings in general. Another question involves participation in the proceedings through the performance of procedural acts, which includes issues related to the representation of parties. Additionally, there are other aspects that affect a child's access to the court, such as issues related to legal aid.

#### *3.1.1. Party Capacity of the Child*

In Serbian procedural law, party capacity (*German: Parteifähigkeit*) refers to the ability to be a party in a legal proceeding, encompassing the capacity to hold procedural rights and obligations.[34] Every natural person has party capacity.[35] Therefore, every child – regardless of age, maturity, or other characteristics – holds party capacity and can participate as either a plaintiff or a defendant.

30 Arts. 265–266 of the FA.
31 Art. 65 para. 3 of the FA.
32 Judgement of Supreme Court of Cassation, 31. 3. 2021, No. Rev 1334/21; Judgement of Supreme Court of Cassation, 13. 1. 2022, No. Rev 8643/21.
33 Art. 65 para. 3 *in fine* of the FA; cf. Judgement of Supreme Court of Cassation, 4. 6. 2020, No. Rev 2263/20.
34 In general, see Poznić and Rakić-Vodinelić, 2015, pp. 196–198; Jakšić, 2017, pp. 254–257.
35 Art. 74 para. 1 of Civil Procedure Code.

*3.1.2. Litigation Capacity and Representation of the Child*

In Serbian law, litigation capacity (*German: Prozessfähigkeit*) implies the ability to independently undertake procedural actions.[36] If a party lacks litigation capacity, he/she must be represented by a legal representative. In this context, the regulation of litigation capacity is based on ensuring the effective right to be heard as a constitutional category.[37]

Litigation capacity is functional equivalent to legal capacity (*German: Geschäftsfähigkeit*) in substantive law and is closely linked to it. A party is deemed to have litigation capacity when they possess full legal capacity,[38] which is generally acquired at the age of 18.[39] However, under certain circumstances, children can also obtain full legal capacity and, consequently, litigation capacity. For example, a minor who is 16 years old may enter into marriage with judicial approval, thus gaining full legal and litigation capacity.[40] Additionally, a court may grant full legal capacity to a 16-year-old minor who has become a parent and has demonstrated the necessary physical and mental maturity to independently manage their own person, rights, and interests.[41]

However, even children without full legal capacity can have litigation capability "within the limits of their legal capacity".[42] The prevailing interpretation of this concept pertains to disputes involving legal transactions for which the party has legal capacity.[43] For instance, a minor who is at least 15 years old can establish an employment relationship and manage their earnings independently. This means that in disputes related to employment or income, a minor has litigation capacity.[44] Additionally, in certain non-contentious proceedings, children can independently undertake procedural actions, including initiating legal proceedings. This applies to cases seeking permission for a child older than 16 to marry; in such cases, the child is fully procedurally capable.[45] The same holds true for the process of recognising legal capacity for a child over 16 who has become a parent.

A party who is litigation-incapable cannot participate in court proceedings independently and must be represented by a legal guardian, typically their parents, in the case of children. Given the potential for a conflict of interest between the child and their legal guardian, the Civil Procedure Code allows for the appointment of a temporary representative for a litigation-incapable party.[46] Additionally, the FA provides further mechanisms to ensure the child's effective right to be heard and access to

36 Art. 75 para. 1 of Civil Procedure Code; in general, see: Poznić and Rakić-Vodinelić, 2015, pp. 199–202; Jakšić, 2017, pp. 257–261.
37 Cf. Knežević, 2023, p. 420.
38 Art. 75 para. 1 of Civil Procedure Code.
39 Art. 37 para. 2 of Constitution; Art. 11 para. 1 of the FA.
40 Art. 11 para. 2 of the FA.
41 Ibid., Art. 11 para. 3.
42 Art. 75 para. 3 of Civil Procedure Code.
43 Jakšić, 2017, p. 259; Stanković and Boranijašević, 2023, p. 132; cf. Poznić, 2009, p. 189.
44 Jakšić, 2017, p. 259.
45 Stanković and Boranijašević, 2023, p. 682.
46 Art. 81 para. 2 point 2 of Civil Procedure Code.

the court. Consequently, the court must assess throughout the proceedings whether the child is adequately represented, and if not, it shall appoint a temporary representative.[47] While the provision does not specify who this representative should be, it is generally understood, in line with civil procedure rules, that it must be a lawyer. Furthermore, to facilitate the child's participation rights as outlined in Article 12 of the CRC and Article 266 of the FA, the temporary representative is tasked with ensuring that the child receives necessary information in a timely manner, explaining the potential consequences of actions taken, and conveying the child's opinions to the court if the child has not expressed them directly.[48]

As a fundamental aspect of the right to access the court, parties in all civil proceedings have the right to be represented by counsel of their choice, known as "voluntary representation". Granting a procedural power of attorney is considered a procedural act, meaning only a party with litigation capacity can appoint counsel. For parties without such capacity, their legal guardian has the authority to appoint counsel. In the context of children, this means that if a child is litigation-capable, they can appoint their own counsel. Conversely, if the child is litigation-incapable, the legal guardian appoints counsel on their behalf. Nevertheless, in both cases, the counsel represents the child, not the legal guardian.

Under general rules, a counsel in civil matters cannot be just anyone; representation is limited to a specific group of individuals.[49] In addition to lawyers, individuals can be represented by blood relatives in the direct line, siblings, and (non)marital partners through a power of attorney.[50] Furthermore, in labour disputes, an employee may be represented by a union representative who has passed the state judicial exam.[51] Given that a child over 15 can establish an employment relationship, such a union representative can represent the child as a party in a labour dispute under a power of attorney.

Serbian law recognises what is known as mandatory representation by counsel, theoretically defined in terms of postulational capacity (*German: Postulationsfähigkeit*). Even when a party is legally capable of litigation, there are instances where they cannot independently undertake legal actions and must do so through a lawyer's representation. In other words, "litigation pro se" is not permitted. According to current law, parties lack postulational capacity in all proceedings involving so-called extraordinary legal remedies. Thus, even if a child has litigation capacity in labour disputes, they cannot directly file a second appeal as an extraordinary legal remedy. Instead, this must be done on their behalf by a lawyer.

In any case, Serbian law does not envisage any specialisation of lawyers in all civil proceedings, including family law disputes. Every lawyer is entitled to act as a counsel.

47 Art. 266 para 2 of the FA.
48 Ibid., Art. 267 of the FA.
49 For further reading, Knežević, 2023.
50 Art. 85 para. 2 of Civil Procedure Code.
51 Ibid., Art. 85 para. 3.

#### *3.1.3. Free Legal Aid*

A key factor in ensuring effective access to justice in civil proceedings is the regulation of free legal aid. Although Serbian law does not generally require legal representation by attorneys, the involvement of a lawyer significantly impacts not only the outcome of proceedings but also the initiation of legal actions. In Serbia, the Law on Free Legal Aid (*Serbian: Zakon o besplatnoj pravnoj pomoći*) was enacted in 2018,[52] granting privileged status to children regarding the assignment of a free attorney. Unlike the general framework, which ties the assignment of a free attorney to the financial circumstances of the party, free legal aid is available to a child when their rights, obligations, or interests are determined in court.[53] However, this provision applies only if the child is a citizen of the Republic of Serbia, stateless, a foreign national with permanent residence in Serbia, or covered by a ratified international treaty.[54]

### *3.2. Administrative Court Proceedings*

A key characteristic of administrative disputes in Serbia is the minimal regulation of the procedure itself. Any issues that are not explicitly addressed are resolved through the analogous application of the Civil Procedure Code.[55] With this in mind, the principles regarding access to civil court proceedings also apply *mutatis mutandis* to administrative court proceedings.

### *3.3. Criminal Proceedings*

The issue of children's access to the criminal justice system can be fundamentally analysed from two perspectives: the child as a defendant and the child as a victim of a crime. The criminal procedure for minors, along with the special protections for children who are victims of various offences, is governed by the Law on Juveniles.

#### *3.3.1. Defendant's Perspective*

A child can only be in the role of the accused for a criminal offence if they were at least 14 years old at the time of committing the alleged act, as the age threshold for criminal responsibility under Serbian law is 14 years.[56]

In criminal proceedings involving juveniles, the general guarantees applicable to the accused in regular criminal cases primarily apply. However, given the unique circumstances of the accused's status and the objectives of juvenile criminal law, their position – and the related issues concerning access to the court – differ.[57] There are additional mechanisms designed to facilitate their access to the court in various ways. It can be stated that the fundamental principle guiding criminal proceedings against

52 Službeni glasnik Republike Srbije [*Official gazette of Republic of Serbia*], No. 87/2018.
53 Art. 4 para. 3, point 1 of Law on Free Legal Aid.
54 Ibid., Art. 4 para. 3.
55 Art. 74 of Administrative Dispute Code.
56 In general, see: Škulić, 2020, pp. 23–45.
57 Cf. Lukić and Samardžić, 2012, p. 356.

juveniles is procedural protectionism, which aligns with the nature and purpose of these proceedings.[58]

Like any accused individual, juveniles have the full right to defence. They are not merely objects of the proceedings; they have access to all defence procedural actions. For instance, they can directly question witnesses and experts, as well as file legal remedies. Additionally, in juvenile criminal proceedings – consistent with the goals of juvenile criminal law – there is a requirement for mandatory defence starting from the first hearing. Whether a juvenile has defence counsel is not at their discretion. While the juvenile has the right to appoint their own defence counsel, this can also be done by their legal guardian or relative.[59] If no appointment is made, a defence counsel will be appointed by official duty.[60]

According to Article 49, para 3 of the Law on Juveniles, a juvenile's defence counsel must be a lawyer with specialised knowledge in children's rights and juvenile delinquency. There is some debate regarding whether this requirement applies only to defence counsel appointed by official duty or also to those chosen by the juvenile. The prevailing view in legal literature is that the specialisation requirement applies in all cases, even when the juvenile appoints their own counsel.[61] Conversely, another perspective argues that the specialisation requirement pertains only to counsel appointed by official duty, as imposing it otherwise would violate constitutional rights, which, similar to the ECHR, state that the accused has the right to freely choose their defence counsel.[62] However, this interpretation of constitutional and convention norms is countered by the ECHR's view, which holds that the right to freely choose a defender is not absolute and that a requirement for a lawyer's specialisation is justifiable when the specific nature of the proceeding justifies it.[63]

The principle of protectionism is evident in several ways. For instance, unlike adult criminal proceedings, trials *in absentia* are categorically prohibited for juveniles.[64] Additionally, juvenile offenders benefit from easier access to the court due to different rules regarding territorial jurisdiction. According to Article 45 of the Law on Juveniles, the court in the juvenile's place of residence is generally deemed competent. This principle is justified not only by the need to facilitate a more straightforward examination of the juvenile's circumstances and living conditions but also by the need to protect the juvenile's identity.[65] Such regulation of territorial jurisdiction aligns with the principle of the best interests of the child.

58 Škulić, 2020, pp. 181–182.
59 Art. 49 para. 2 of Law on Juveniles; cf. Škulić, 2020, p. 185.
60 Art. 49 para. 2 of Law on Juveniles.
61 Lukić and Samardžić, 2012, p. 358; Stojanović-Milošević, 2012, p. 86; Banić, 2012, pp. 117–118.
62 Škulić, 2020, pp. 185–186.
63 See, for instance: ECtHR, *Meftah and Others v. France* [GC], Nos. 32911/96, 35237/97, and 34595/97, 26 July 2002, para 47.
64 Art. 48 para. 1 of Law on Juveniles.
65 Cf. Škulić, 2020, pp. 158–159.

Moreover, juvenile offenders are typically summoned through their parents or legal representatives. If they need to be brought to trial forcibly, police officers must be in civilian clothing.[66] Lastly, as part of a protectionist approach, a judge may order the exclusion of certain individuals from the juvenile's hearing.[67] This measure aims to protect the juvenile, primarily in psychological terms, as their presence could be uncomfortable during discussions of sensitive topics, such as their psychological status, intelligence, or emotional maturity.[68]

#### *3.3.2. Victim's Perspective*

The Law on Juveniles grants a special status to minors who are victims of various criminal offences,[69] stipulating that the victim must be a minor at the time of the trial. Regarding access to the court, the provisions of this law are closely linked to the requirement for legal representation. A minor victim must have counsel from the first hearing of the defendant. If the minor does not have a lawyer, the court president will appoint one who has specialised knowledge in children's rights and the criminal legal protection of minors.[70]

The literature emphasises that the presence of such counsel is crucial for helping the minor victim understand the criminal proceedings, individual procedural actions, rights, and responsibilities; the counsel should provide support to ensure credible testimony.[71] However, this perspective should be nuanced, as the primary responsibility for preparing the minor victim for testimony lies with guardianship authorities, educators, psychologists, and other professionals[72].

## 4. Enforcement of Child-Friendly Justice

### *4.1. Special Regulations for Hearing a Minor Child*

Child-friendly justice is closely tied to how the hearing of a child in court proceedings is structured. Whether the child is being heard as a witness, expressing their opinion, accused of a crime, or recognised as a victim, it is crucial to implement mechanisms that consider their needs. In Serbian law, the regulation of child hearings follows a fragmented approach: different laws govern individual cases, and the concepts involved often differ significantly. Furthermore, many cases involving the hearing of children lack explicit provisions.

66 Art. 54 para. 2 of Law on Juveniles.
67 Ibid., Art. 65 para. 2.
68 Škulić, 2022, p. 248.
69 Those criminal offenses are enlisted in Art. 150 para. 1 of Law on Juveniles.
70 Ibid., Art. 154 para. 2.
71 Miljuš, 2022, p. 96.
72 See: Section 4.1.3.

*4.1.1. Civil Proceedings*

When considering the hearing of a child in civil court proceedings, two distinct scenarios must be addressed.

In the first scenario, the child is heard to express their opinion. The FA does not clearly specify whether the child is to be heard directly by the judge or through a psychologist, educator, or other expert. Article 65, para 5 of the FA indicates that the court should determine the child's opinion in collaboration with a psychologist or the guardianship authority and in the presence of a person chosen by the child.[73] In practice, this provision is typically interpreted to mean that the court relies on experts to assess the child's capacity to form their own opinion before conducting the hearing. Usually, these professionals carry out the hearing, allowing the child to select who will be present. It is recommended that the hearing be conducted in a child-friendly manner, particularly regarding the language used.

In the second scenario, the child serves as a witness. The Civil Procedure Code lacks specific provisions for children called to testify. The general provision states that anyone capable of providing information about relevant facts can serve as a witness,[74] suggesting that legal age is not a requirement. However, it is advisable to adopt a more innovative approach, where the judge conducts a preliminary discussion with the child to introduce them to the judicial process and explain all relevant circumstances. Additionally, the judge is required to conduct the hearing in a way that is appropriate for the child's age and maturity, using suitable language for communication.

*4.1.2. Administrative Court Proceedings*

There is no specific regulation for hearing a child in administrative court proceedings, and the Administrative Dispute Code does not include any provisions regarding the hearing of parties or witnesses. Instead, these matters are governed by the analogous application of the civil procedure rules.

*4.1.3. Criminal Proceedings*

Hearing a child in criminal proceedings can occur in several contexts: first, when the child is a juvenile accused of a criminal offence; second, when the child is a victim of certain crimes; and third, when the child serves as a witness in other criminal cases.

While the process for juveniles mirrors that of adult defendants, there are key differences in the focus of questioning. Adults are primarily interrogated about the specific circumstances of the alleged offence (*causa criminalis*), whereas juveniles are assessed regarding their maturity, personality, and living environment. Additionally, the methods of questioning are adapted to create a child-friendly atmosphere, which significantly differs from adult procedures.

73 According to the case law, it is the child's right to determine not only person as such, but to determine the very presence of such person, see: Judgement of Supreme Court of Cassation, 13. 1. 2022, No. Rev 8643/21.

74 Art. 244 para. 2 of Civil Procedure Code.

The Law on Juveniles, particularly Article 48, para. 2, emphasises the well-being and development of the juvenile, requiring all participants in the proceedings to exercise care during hearings. This includes considering the juvenile's maturity and individual characteristics while protecting their privacy to avoid any negative impact on their development. The questioning of a juvenile must utilise language appropriate for their age and maturity,[75] reflecting the principle of acting in the child's best interests.

If needed, the questioning can involve the assistance of professionals such as psychologists or educators.[76] Furthermore, the presence of the public prosecutor and defence counsel is mandatory during the juvenile's hearing; typically, a parent or guardian is also present to provide emotional support.[77] However, the judge has the discretion to exclude a parent or guardian if their presence is deemed contrary to the juvenile's best interests,[78] such as when sensitive family matters are being discussed, which could affect the credibility of the testimony.

The process for hearing minor victims of specific criminal offences is carefully regulated to prevent secondary victimisation.[79] Both the public prosecutor and judicial panel members must consider the victim's age, personality, education, and living conditions, aiming to avoid any negative impact on their well-being and development. The hearing should be conducted with the support of a psychologist, educator, or another qualified professional.[80]

Two key rules are particularly important: first, a minor victim is generally allowed to be questioned no more than twice;[81] second, the court can use video links for hearings, allowing the minor to participate from a separate room without the presence of the parties involved. Additionally, hearings may occur in the minor's home or at a social welfare centre.[82]

In cases where a child is called to testify as a witness, specific provisions are generally lacking. The court must assess, with expert assistance if necessary, whether the child is capable of testifying.[83] However, a child witness may be classified as particularly sensitive.[84] In such cases, their treatment largely aligns with the previously mentioned procedures; however, the child may not require legal counsel, nor is the presence of a psychologist or educator always necessary during the hearing.

75 Cf. Lukić and Samardžić, 2012, p. 357.
76 Art. 64 para. 4 of Law on Juveniles.
77 Lukić and Samardžić, 2012, p. 358.
78 Art. 65 para. 3 of Law on Juveniles.
79 For further reading Škulić, 2022, pp. 489–514.
80 Art. 152 para. 1 of Law on Juveniles.
81 Ibid., Art. 152 para. 2.
82 Art. 152 paras. 3–4 of Law on Juveniles; cf. Brkić, 2006, p. 443.
83 Art. 131 para. 2 of Criminal Procedure Code.
84 For further reading, see: Ilić, Majić, Beljanski and Trešnjev, 2018, pp. 368–369.

### *4.2. Specialisation of Judges*

In many court proceedings, the law mandates a form of specialisation for judges. In criminal cases involving juvenile offenders, judges are required to have expertise in child law and the criminal protection of minors.[85] This requirement also extends to cases where minors are victims of specific crimes.[86] Judges must complete training organised by the Judicial Academy, which has evolved from a basic program to a more comprehensive curriculum aimed at effective ongoing professional development. Conversely, lay judges in juvenile cases do not receive specialised training; instead, they are selected from among teachers, caregivers, and other professionals experienced in working with children and youth.[87] In family law disputes, judges are also required to have specialised knowledge in child law,[88] with training organised by the Judicial Academy that spans six working days, followed by an assessment.[89]

### *4.3. Promotion of Child-Friendly Justice*

The effectiveness of the child-friendly justice concept does not solely rely on the legal framework; it also requires essential conditions for consistent and coherent law application. Success depends on promoting the concept comprehensively, addressing both theoretical and practical aspects. While there has been a notable increase in scholarly interest in children's justice, empirical research on the functionality of the current Serbian model is particularly important. Unfortunately, this research reveals that legislative intentions often fall short, mainly due to courts neglecting legal obligations or lacking the necessary infrastructure. For example, even though hearings for juvenile victims or especially sensitive witnesses are meant to occur in designated child-friendly spaces, often called "child-friendly rooms", many courts lack these facilities. Nonetheless, ongoing efforts from both the NGO sector and the state, particularly through the Judicial Academy, are helping to advance child-friendly justice.

Ultimately, the success of this concept also depends on how well-informed children are about their rights to participate. Currently, most efforts in this area are led by NGOs. The Centre for Children's Rights,[90] the leading NGO, published a brochure in 2021 titled "Child-friendly Justice", specifically designed for children.

85 Art. 44 para 1 of Law on Juveniles.
86 Art. 150 para. 1.
87 Ibid., Art. 44 para. 2.
88 Art. 35 para. 5 of Civil Procedure Code.
89 Regulation on the program of acquiring specialised knowledge in the field of child law for judges adjudicating cases related to family relations (2006), Službeni glasnik Republike Srbije [*Official gazette of Republic of Serbia*], No. 44/2006.
90 For more see: https://cpd.org.rs/?lang=en (Accessed: 29 December 2023).

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| Chapter 8 |

# Child-Friendly Justice – Slovakian Perspective

Peter Koromház

**ABSTRACT**

The chapter offers a comprehensive analysis of the rights and participation of minor children in civil, criminal, and administrative court proceedings in the Slovak Republic, from a child-friendly justice perspective. The Slovak legal system does not currently contain a dedicated procedural code for minors. Relevant provisions are dispersed across multiple legal statutes, including the Civil Litigation Code, the Civil Non-Contentious Procedure Code, the Administrative Court Code, and the Criminal Procedure Code. Particular attention is paid to the Family Act and its influence on interpreting the best interests of the child in both judicial and administrative decision-making. The chapter focuses on assessing how these legal statutes address the procedural capacity, representation, and participatory rights of minors, including the right to be informed and to express their opinion.

**KEYWORDS**

the best interests of the child, Court, civil proceedings, criminal proceedings, administrative proceedings

## 1. Introduction to the Issues and Fundamental Sources of Domestic Procedural Legal Regulation in the Slovak Republic

The right to judicial and other legal protection is guaranteed to every individual by the Constitution of the Slovak Republic. Article 46 of the Constitution of the Slovak Republic stipulates that every individual may seek redress for their rights before an independent and impartial court or, in cases specially provided by law, before another body of the Slovak Republic. Within the declared approach to judicial protection, the Constitution of the Slovak Republic specifically emphasises that all participants are equal in proceedings before courts, other state bodies, or public administration bodies. The Constitution of the Slovak Republic thereby recognises these fundamental rights for every individual, without distinction based on age or any other differentiating criteria. Notably, according to the second chapter, seventh section, regulating the

Peter Koromház (2025) 'Child-Friendly Justice – Slovakian Perspective' in Benyusz, M., Zombory, K., (eds.) *Child-Friendly Justice. The Participation and the Rights of the Child in Court Proceedings From a Central European Comparative Perspective.* Miskolc–Budapest: Central European Academic Publishing, pp. 157–178. https://doi.org/10.71009/2025.mbkz.cfj_8.

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right to judicial and other legal protection does not regulate the status of the minor child and does not grant special rights.

The only specific reference to a minor child is found in section 5, chapter 2 of the Constitution of the Slovak Republic, which regulates economic, social, and cultural rights. This particular article of the Constitution of the Slovak Republic recognises this right for every individual, again without distinction of age, where we discuss rights and freedoms from the category of political rights, which are not specifically and exclusively connected with the right to judicial protection and the course of the judicial process. Article 41, incorporated in this part of the Constitution, expressly states that special protection of children and young people is guaranteed, with details of these rights to be established by law.

Thus, it can be summarised that the Constitution of the Slovak Republic does not contain an explicit mention of the right of a minor child to access to judicial protection or a specific mention of the right to express one's opinion in proceedings before a court, or to be informed about the progress of judicial proceedings, which also concern the rights relating to a minor child. These rights are found specifically regulated in legal statutes of lower legal force, both in laws regulating the legal regulation of family relationships from the perspective of substantive law and the procedural rules for conducting judicial proceedings. There is no specific codified procedural legal regulation that exclusively governs the conduct of judicial or other proceedings involving a minor child. These rules are incorporated into individual procedural statutes, thereby ensuring the special protection of children and young people, declared by the Constitution of the Slovak Republic in this area of life as well. We are of the opinion that the presented concept of legal regulation is adequate from the perspective of protecting the rights and interests of a minor child. We do not consider the adoption of a separate procedural code regulating proceedings involving a minor child to be necessary, taking into account the comprehensive procedural legislation in the Slovak Republic.

In 2015, the Slovak Republic completed a major recodification of civil procedural law, resulting in the adoption of three procedural codes, Act No. 160/2015 Coll. Civil Litigation Order (hereinafter "Civil Litigation Code"), Act No. 161/2015 Coll. Civil Non-Contentious Procedure Code (hereinafter "Civil Non-Contentious Procedure Code,"), and Act No. 162/2015 Coll. Administrative Court Order (hereinafter "Administrative Court Code"), which systematically and by their existence also bring about differentiation of the judicial process (typology of the judiciary as such), taking into account the subject of the court proceedings.[1]The numbering and ordering of these legal statutes are not coincidental. The legislator conceived these legal statutes in such a way that the Civil Litigation Code represents *lex generalis* in relation to the regulation of the Civil Non-Contentious Procedure Code and the Administrative Court Code, as these expressly refer, in some parts, to the regulation of the Civil Litigation Code. The Civil Litigation Code primarily regulates the resolution of private law disputes, while

1 Čollák et al., 2024, p. 134.

the Civil Non-Contentious Procedure Code regulates the hearing and adjudication of matters outside contentious cases.[2] The Civil Litigation Code initially enumerates fundamental principles, which are correspondingly applicable in proceedings according to the Administrative Court Code, while it supplements them with fundamental principles defined in § 5 of the Administrative Court Code. The Civil Non-Contentious Procedure Code separately enumerates fundamental principles applicable in non-litigation proceedings, justified by the uniqueness of proceedings conducted according to the Civil Non-Contentious Procedure Code. However, the Civil Non-Contentious Procedure Code in Art. 2 para. 1 emphasises that the provisions of the Civil Litigation Code are also applicable to proceedings conducted according to this law unless expressly excluded by law. Thus, when analysing these procedural legal statutes, it is essential to interpret them in a mutual context and respect that the provisions of the Civil Litigation Code are, in some cases, also applicable to proceedings according to the Civil Non-Contentious Procedure Code and the Administrative Court Code.

The conduct of criminal proceedings is regulated by previously issued legal statutes compared to the legal regulation of civil procedural law. The procedure of bodies active in criminal proceedings and courts is regulated by Act No. 301/2005 Coll. Criminal Procedure Code (hereinafter "Criminal Procedure Code"), which is connected to the substantive law regulation of Act No. 300/2005 Coll. Criminal Code (hereinafter "Criminal Code"). Both of these legal statutes contain provisions specifically addressing the rights of young persons.

In analysing the aforementioned procedural legal statutes from the perspective of the position and protection of a minor child as a participant in judicial proceedings, it will be necessary to assess and interpret the position and rights of a minor child in accordance with the provisions of Act No. 36/2005 Coll. on Family (hereinafter "Family Act"). This legal statute provides a codified substantive law regulation of family relationships while specifically reflecting the obligations of the Slovak Republic arising from its commitments in international treaties and documents, to which it has pledged to ensure enhanced protection of the rights of minor children, into domestic legal regulation. However, given its content, especially the regulation of the fundamental principles of family law, this substantive law regulation also influences the concept of procedural legal regulation.

## 2. The Opinion of a Minor Child and Its Significance in Decisions Concerning the Minor Child (Not Only in Judicial Proceedings)

The most crucial provision, from the perspective of the analysed issue, is Article 5 of the Family Act, which addresses one of the main principles of family law – the interest of the minor child, which must be the primary consideration in all matters concerning the minor child. It is possible to agree with Pavelkova's view that this is a

2 Števček et al., 2022, p. 73.

kind of guiding principle of the whole of family law.[3]This principle not only highlights the need to evaluate the interest of the minor child but also demonstratively lists the circumstances that must always be taken into account when assessing what is in the best interest of the minor child. According to this principle, when determining and assessing the best interest of the minor child, it is necessary, among other things, to always consider the child's own opinion, as well as their possible exposure to a conflict of loyalty and subsequent feelings of guilt. Given that this principle essentially reflects the international legal obligations of the Slovak Republic into its domestic legal regulation, it is necessary to always take into account the need to consider the best interest of the minor child, even in judicial proceedings that concern questions directly or indirectly related to minor children. The courts in the Slovak Republic repeatedly emphasise the need to assess the best interests of the minor child when making decisions in proceedings that concern the child.[4] Moreover, the Constitutional Court of the Slovak Republic has repeatedly stated that the evaluation of the best interests of the minor must always be considered by the courts with regard to the specific circumstances of the particular case. Among other things, the Constitutional Court of the Slovak Republic has noted that an objectively and explicitly established statutory criterion for decisions concerning the regulation of parental rights in relation to minors is "the best interests of the child," which the general court must evaluate and justify not merely mechanically and formally, but specifically, taking into account the circumstances of the case under consideration.[5] In this context, we particularly emphasise that the aforementioned principle fundamentally contributes to the protection of human values within the legal environment of the Slovak Republic.[6]

This principle is further elaborated by specific provisions of the Family Act, which particularly emphasise that when making decisions about a minor child and matters concerning them, it is always necessary to take into account the child's opinion. It is necessary to emphasise that a minor child is not merely a passive object of the parental responsibility of their parents, or other persons and the state; rather, the child also has participatory rights, which are guaranteed by the legal provisions of the Family Act.[7] Specifically, Article 43 of the Family Act expressly states that a minor child has the right to express their opinion independently and freely on all matters concerning them. This right belongs to the minor child regardless of whether the matters concerning them are being decided in proceedings before a court or another institution or are part of the routine, everyday decision-making by parents within the

3 Pavelková, 2019, p. 6.

4 On this see, for example: the decision on the Supreme Court of the Slovak Republic of 22 June 2016, No. 5Cdo/492/2015; the Decision of the Supreme Court of the Slovak Republic of 31 October 2017, No. 6 Cdo 224/2016 published in the Collection of Opinions of the Supreme Court and Decisions of the Courts of the Slovak Republic under R68/2018; the Ruling of the Constitutional Court of the Slovak Republic of 2 July 2019, No. I. ÚS 298/2018, and the Ruling of the Constitutional Court of the Slovak Republic under I. ÚS 298/2018.

5 Ruling of the Constitutional Court of the Slovak Republic No. II. ÚS 101/2022 of 10 May 2022.

6 On this see: Bačárová et al., 2023, pp. 10 and 144.

7 Králičková et al., 2022, p. 27.

exercise of their parental rights and responsibilities. This concept is confirmed by the wording of Article 43 of the Family Act, which, in its second sentence, specifies the generally formulated right of the child to express their views on matters concerning them by talking about the right of the minor child to be heard in proceedings deciding on matters concerning them.

However, Article 43 para. 1 of the Family Act goes even further when, in the last sentence, it formulates a fundamental rule for considering the opinion of the minor child. According to this provision, due attention must be given to the opinion of the minor child, which, however, must be appropriate to their age and mental maturity. The legislator, by this provision, points to the need to evaluate the opinion of the minor child in accordance with their age and mental maturity, implying that not every decision, whether by the parents or the court, has to align with the opinion presented by the minor child. This provision essentially assumes that with the increasing age of the minor child, an increase in their mental maturity can be observed, as a result of which it can be presumed that the child is increasingly better able to evaluate what is in their best interest as they grow older. Of course, this does not apply unconditionally. It is always the task of parents, guardians, or the court to evaluate a matter concerning the minor child by considering their opinion but also considering what is in the best interest of the child given all the circumstances of the case. The legal regulation of the Slovak Republic does not provide any specific age threshold for minor children, from the attainment of which it would generally be possible or obligatory to decide exclusively in accordance with the opinions of minor children. We evaluate this positively because we are of the opinion that such a concept of legal regulation corresponds to the need to consider the individuality and specific characteristics of each minor child. It is noted here that the Family Act does not explicitly define up to what age a child is considered a minor. However, based on the spirit of the law and the legal regulation that emphasises the need to consider the best interest of the minor child, and thus their opinion, it is to be understood that a child is considered a minor until they attain full legal capacity.

According to Act No. 40/1964 Coll. Civil Code (hereinafter "Civil Code"), full legal capacity is acquired upon reaching the age of majority. In the Slovak Republic, majority can be attained in two ways: either by reaching the age of eighteen or by entering into marriage (if the person is older than sixteen years and with the consent of the court). If the minor was under the age of 16 at the time of the marriage's formalisation, it can only be a so-called sham marriage, in which case the minor cannot attain the age of majority.[8]

The Family Act regulates the age threshold of the minor child, from which their express consent is required for specific actions, only in one provision. This is Article 40 para. 3 of the Family Act, according to which changing the name or surname of a minor child older than fifteen years can only be done with the child's consent. Thus, in Slovakia, the legislator deemed it necessary to establish a fifteen-year age threshold

8 Vojčík et al., 2021, p. 128.

for decisions made by parents regarding a change of name and/or surname of a child, beyond which such a change cannot occur against the child's will. Setting the age limit at 15 years in this single instance appears to be conceptually inconsistent within the context of the overall legal framework. Moreover, we agree with Pavelková that the current legal regulation completely denies the participatory right of a child under the age of 15 and reduces the child to merely an object of parental upbringing.[9]

The Family Act further elaborates on two specific provisions that, while not setting a specific age threshold requiring the consent of the minor child in proceedings affecting them, explicitly mention the need to obtain the minor child's consent. The first is Article 52 para. 5 of the Family Act, which allows for the possibility of extending foster care for up to one year after reaching adulthood, but only if both the foster parent and the minor child in their care consent. Although the law does not specify the age from which the minor child's consent is required, logically, decisions regarding the extension of foster care into adulthood would be made as the child approaches adulthood, and their decision would affect them even after they become of age. Hence, the legislator did not set a specific age threshold for the minor child's consent in this case and formulated the provision in such a way that obtaining consent is a mandatory condition for extending the duration of foster care. The second provision, Article 101 para. 4 of the Family Act, relates to the process of adopting a minor child. This provision is the most vaguely formulated; it neither specifies a particular age threshold of the minor child whose consent is necessary for adoption nor does it require obtaining consent under all circumstances. This is notable because, according to this provision of the Family Act, the consent of the minor child to their adoption is required if the child is capable of assessing the impact of adoption. Thus, this represents a specification of the general rule that the opinion of the minor child should be given due attention appropriate to their age and mental maturity. In the case of adoption, it is necessary not only to consider their opinion but also to obtain their consent to the adoption, provided they are capable of assessing the legal consequences of adoption due to their age or health condition. In our opinion, the presented concept of legal regulation places particularly high demands on the courts and their decision-making activities when ruling on adoption cases. However, respecting the uniqueness of each individual case, we believe that the current concept of legal regulation in this matter is correct and corresponds to the protection of the best interests of the minor. We agree with Löwy's view that the term "best interests of the child" is flexible and adaptable, and as such, it must always be defined according to the specific situation of the affected child, taking into account the child's personal context, circumstances, and needs.[10] This is all the more applicable in adoption proceedings.

It is also worth mentioning the legal regulation of healthcare provision, which also touches upon the rights of minor children to information and their right to express their own opinions in matters directly concerning them. Except for

9 Pavelková, 2013, pp. 67–85.
10 Löwy, 2022, p. 117.

emergency healthcare and some other specific cases prescribed by law, any provision of healthcare must be preceded by patient education and subsequent granting of informed consent. When the patient is a minor child, the legal regulation of Act No. 576/2004 Coll. on Healthcare, Healthcare-related Services, and on Amendments and Supplements to Certain Acts (hereinafter "Healthcare Act") grants the right to receive instruction and give subsequent informed consent to the child's legal representative, the person providing alternative personal care for such a minor child, or their guardian or custodial guardian.[11] However, Art. 6 para. 1 point b) of the Healthcare Act also considers the right of the minor child to be informed about matters concerning them. Thus, it is the duty of the treating healthcare professional to inform such a minor patient in an appropriate manner about the purpose, nature, consequences, and risks of the provided healthcare. The content of the information should also include information about the options for the proposed procedures and the risks of refusing healthcare provision.

Distinct from the general legal regulation concerning the provision of healthcare and the acquisition of informed consent, the matter of legal regulation of informed consent in the case of confidential childbirth and abortion is specifically legislated. In instances of instruction and informed consent regarding confidential childbirth, the Healthcare Act in Article 6a explicitly states that instruction is provided to the woman who has requested the confidentiality of her identity and the informed consent is also given by the woman who has requested in writing the confidentiality of her identity in relation to childbirth. Although the statutory provision does not expressly state whether this applies if the woman requesting confidentiality in connection with childbirth is a minor, the law explicitly enumerates those general provisions of the Health Care Act that are to be applied in such a case. Absent from this enumeration is precisely Article 6 para. 1 of the Healthcare Act, which regulates the obligation to instruct the legal representative in the case of a minor patient. Given this, it is considered that in the case of a pregnant minor requesting confidentiality of her identity in relation to childbirth, her opinion should be respected without the legal representative having the opportunity to make a relevant statement. A similar conclusion is reached by Humeník, who, however, points out that the analysed legal regulation is not formulated unambiguously.[12] This statement can be agreed with and, therefore, it would be appropriate for the legislator to consider amending this part of the legal regulation in the future so that a clear conclusion can be reached when applying the grammatical interpretation of the law. Thus, this legal regulation in the Health Care Act, from the perspective of respecting the opinion of a minor child, represents a significant deviation from the generally applied concept under the Family Act. This deviation can be justified by the effort to provide increased protection to the underage pregnant patient as well as her unborn child.

11 Humeník, 2011, p. 69.
12 Humeník, 2023, p. 266.

In the case of abortion involving a woman who is concurrently a minor, the legal regulation within the Health Care Act is specific, as Article 6b para. 4 of the Health Care Act explicitly stipulates that, besides the informed consent of the minor's legal representative, the informed consent of the minor patient herself is also required for the performance of such a procedure. In this context, it is pertinent to refer to the still valid specific legal regulation of Act No. 73/1986 Coll. on Abortion, as amended (hereinafter "Abortion Act"). According to this Act, the age limit is set at sixteen years, with the requirement that for patients younger than sixteen years, the consent of the legal representative is necessary for the performance of an abortion. If an abortion is to be performed on a patient older than sixteen years and younger than eighteen years, the Abortion Act does not require the prior consent of the legal guardian, only their subsequent notification about the fact by the healthcare facility. Thus, the legal regulation of the Health Care Act and the Abortion Act are mutually contradictory on this issue. Although the Health Care Act discusses informed consent while the Abortion Act mentions consent in general, it is considered that these two forms of consent can be regarded as similar in their significance. Respecting the fact that the regulation of informed consent in the Health Care Act regarding abortion is special alongside the general regulation of informed consent in said Act, it is believed that the aforementioned contradiction between the two laws can be resolved by applying the principle *lex posterior derogat legi priori* (later law repeals the earlier law). For this reason, the legal conclusion is drawn that in the case of abortion involving a minor patient, it is always necessary to obtain her consent as well as the consent of her legal representative, even if the patient is older than sixteen years. At the same time, however, we add that, for the sake of legal certainty, it would be appropriate for the legislator to amend the Act on Artificial Termination of Pregnancy from 1986 and align its wording with the subsequently adopted Act on Health Care.

To conclude this section, we once again refer to the Family Act, specifically Article 31, which indicates that in the case of representing minor children by their parents in actions where there could be a conflict of interest between the parents and the minor children, it is necessary for the court to appoint a conflict guardian by decision, who will represent the minor child either in a specific proceeding or in a particular legal act. The provision for a conflict guardian thus comes into consideration also in those cases where the opinion of the minor child differs from that of their legal representative, which may result from a diversity of their interests.

## 3. The Rights of a Minor Child in Civil Proceedings

### *3.1. Civil Litigation Code*

As initially mentioned, the primary source of procedural civil law in the Slovak Republic is the Civil Litigation Code. This legal statute regulates the procedural legal framework for disputes arising from the threat or violation of subjective rights adjudicated before an impartial and independent court. The Civil Litigation Code resolves

disputes that commence upon the petition of a disputing party alleging a violation or threat to their subjective rights. The parties to the dispute are the plaintiff and the defendant, with their procedural standing contingent upon their procedural subjectivity. Procedural subjectivity of a party typically correlates with their substantive legal capacity for rights and obligations. This is not absent for a minor child; hence, the minor can be a party in litigation.

In the case of a minor child, it is always necessary to address whether, due to their age, they possess the procedural capacity to act in proceedings or not. Article 67 of the Civil Litigation Code stipulates that anyone may independently act in court to the extent of their legal capacity for acts. From a substantive legal perspective, it is established that full legal capacity for acts, and thus procedural capacity, is acquired upon reaching the age of majority. Until this point, every individual possesses limited legal capacity for acts corresponding to their mental and volitional maturity. The decisive moment for acquiring full legal capacity for acts, and hence procedural capacity, is the attainment of majority. We have previously mentioned the conditions under which majority is achieved according to Slovak legal regulation. It can be attained either by reaching the age of eighteen or by entering into marriage for persons older than sixteen years with the court's approval. Therefore, a minor child may lack procedural capacity due to insufficient legal capacity for acts, consequently being unable to act independently in court. This assessment depends on the evaluation of the minor's legal capacity for acts, i.e. the assessment of the mental and volitional maturity of the minor corresponding to their age. This may vary among individuals of the same age; thus, it should be individually assessed by the court in each case. However, some opinions suggest that this question should be objectively assessed to maintain a degree of predictability in judicial decisions.

The limited legal capacity for acts of a minor child and the associated lack of procedural capacity are not direct impediments to conducting litigation. This is justified by the fact that the lack of procedural capacity is a removable procedural deficiency that can be eliminated either by the court appointing a guardian for such a party or by summoning their legal representative to represent them in the litigation.[13] Article 69 of the Civil Litigation Code expressly anticipates court action in cases where it is found that an individual cannot act independently before the court. According to this provision, if such an individual does not have a legal representative or their legal representative cannot act for them or is inactive, the court is obliged to appoint a procedural guardian for such an individual.[14] This provision connects to the previously analysed substantive legal regulation, which also considered the emergence of a situation where the interests of the legal representative are in conflict with the interests of the minor they represent. Simultaneously, this provision of the Civil Litigation Code also provides a solution for when the legal representative is inactive upon the

13 For more details on the procedural capacity of a minor in civil proceedings, see: Kušníriková, 2022, pp. 78–88.
14 On this see: Löwy, 2022, p. 264.

court's request to represent the minor in litigation. Naturally, this legal regulation is not exclusively applicable to minors, as a party may suffer from a lack of capacity not only due to young age but perhaps also due to their health condition and the associated limitation on legal capacity for acts. Nonetheless, this legal provision of the Civil Litigation Code ensures access for a minor child to court in civil litigation and concurrently contributes to the real protection of their rights in litigation. Therefore, in our opinion, it can be perceived positively from the perspective of protecting the minor.

Please note that if the acting court refuses to proceed based on a lawsuit filed by a minor child on the grounds that such a child lacks the procedural capacity to file a lawsuit, it would constitute a violation of the law. In such cases, the court is obligated to appoint a procedural guardian for the minor child or to summon the legal representative to represent them in the proceedings.[15] Failure to do so would burden the respective litigation with a defect that can be challenged through ordinary or extraordinary legal remedies, seeking the annulment or alteration of such a court decision.

The Civil Litigation Code details the process of appointing a procedural guardian for individuals lacking procedural capacity. Preferably, a close individual or another person from the family environment who has full legal capacity and agrees to be appointed as a procedural guardian should be appointed for such a person. This individual must also meet the expectation of acting in the interests of the represented party during the proceedings. Exceptionally, a legal entity, such as the municipality where the party had their last permanent residence, may also be appointed as a procedural guardian. The representation of a procedural guardian, as well as a party lacking procedural capacity by a lawyer, is not mandated by the Civil Litigation Code.

Regarding the protection of the rights of a minor child as a party to a dispute, Article 95 of the Civil Litigation Code specifically addresses the court's ability to join a public authority responsible for the protection of fundamental human rights and freedoms or a legal entity whose activity is the protection of rights under a special regulation, to safeguard the rights of a party to the dispute. The court can do so even without a request from the concerned disputing party. If this occurs, the entity designated and joined by the court is entitled to all actions that the disputing party itself could perform, except for those actions that can only be carried out by the subject of a specific legal relationship. In the case of a minor as a party to proceedings, the inclusion of the Commissioner for Children could be considered. According to Act No. 176/2015 Coll. on the Commissioner for Children and the Commissioner for Persons with Disabilities and on amendments to certain acts, participating in the protection of children's rights is precisely what can ensure active involvement in litigation. In our opinion, this right can be actively exercised, for example, by entering litigation proceedings based on a court decision on their inclusion.

15 Ibid., p. 265.

A minor child may also appear in other capacities during litigation, not only as a party to the proceedings. Theoretically, a minor child can be a witness required to be heard in the proceedings. However, the Civil Litigation Code does not specify any special procedure for such cases. Generally, the court conducts evidence at a hearing; however, according to the Civil Litigation Code, evidence can also be taken outside of a hearing if it is possible and appropriate.[16] Therefore, theoretically, the hearing of a minor witness as evidence could be conducted outside of a hearing and even outside court premises. This, however, depends on the assessment of the acting court, and such a procedure for a minor witness in litigation is not specifically anticipated in the Civil Litigation Code. The only special protection anticipated by the Civil Litigation Code concerning a minor child is regulated in the provision regarding the presentation of a person at a hearing. This provision outlines the court's procedure if a summoned person fails to appear at a hearing, interrogation, or expert examination without justification. In such cases, the court may request the presentation of the person by the relevant Police Corps unit or municipal police. According to Article 101 para. 2 of the Civil Litigation Code, however, if it concerns a minor child, the court may proceed in this manner only exceptionally and under the condition that the presence of such a person cannot be ensured otherwise. We believe it is necessary for courts to assess such matters with particular sensitivity in the interest of protecting minor children.

### *3.2. Administrative Judicial Order*

In accordance with Article 2 para. 2 of the Administrative Judicial Order, anyone who claims that their rights have been violated by a decision of a public administration body, an action of such a body, its inaction, or another intervention may seek protection under this law at an administrative court. The originality and specificity of administrative judiciary lie in the fact that an administrative court (with certain exceptions – for example, the prosecutor general's action for the dissolution of a political party under Art. 384 et seq. or some proceedings concerning local self-government under Arts. 313–336) deals with a matter that has already been addressed, or should have been addressed, by a public administration authority, resulting in the issuance of an administrative act, or, in cases of inaction, by reviewing the reason for the inaction of the public administration authority.[17] The provisions of the first and second parts of the Civil Litigation Code, i.e. the general provisions of the Civil Litigation Code and the provisions on proceedings at first instance, apply to proceedings under the Administrative Judicial Order unless explicitly excluded by this Order. The Administrative Judicial Order regulates procedural capacity in Articles 35 and 36, similarly linking it to the legal act capacity of the proceeding participant as the Civil Litigation Code. According to the Administrative Judicial Order, to the extent that an individual does not have the capacity to act independently before the administrative court, they

16 On this see: Grešková, 2022, p. 779; Čollák et al., 2024, p. 267 and subsequent pages.
17 Baricová, 2018, p. 21.

are represented by a legal representative or a procedural guardian appointed by the administrative court. The legal regulation for administrative judicial proceedings involving a minor child is the same as that in the Civil Litigation Code.

The most significant difference in proceedings before the administrative court, compared to proceedings under the Civil Litigation Code, is that participants must be represented by a lawyer regardless of their age. This obligation applies to all participants, not only minor children. The Administrative Judicial Order does not provide any special protection for the rights of minor children as participants in the proceedings or as individuals otherwise involved in administrative proceedings before the court.

Proceedings before the administrative court are typically preceded by administrative proceedings in accordance with Act No. 71/1967 Coll. on Administrative Procedure, as amended (hereinafter: "Administrative Order"). Similarly, the Administrative Order does not exclude the participation of minor children in such proceedings, but in these cases, their capacity for legal acts must also be assessed. If the administrative body concludes that a minor participant in the proceedings cannot act independently due to limited legal capacity, it will require that they be represented by their legal representative or appoint a guardian for such a minor child. This contributes to the protection of the minor.

### *3.3. Civil Non-Contentious Code*

The highest degree of protection, in our opinion, is afforded to a minor child when they are a participant in proceedings according to the Civil Non-Contentious Code. This is, among other reasons, because proceedings conducted under the Civil Non-Contentious Code specifically consider the public interest and good morals, justified by the nature of non-contentious proceedings.[18] Such proceedings may be initiated upon the proposal of a participant in the proceedings or the prosecutor, as well as without a proposal. In certain cases anticipated by the Civil Non-Contentious Code, proceedings under this law may commence by the court *ex offo*, justified by the public interest, within which the interest of the minor child is specially protected. The special degree of protection provided to a minor child in proceedings under the Civil Non-Contentious Order arises from the basic principles of these proceedings, which are defined at the beginning of the statute.

According to Article 4 of the Civil Non-Contentious Code, if a minor child is a participant in the proceedings, the court is obliged to act in their best interest. This rule differs from the proceedings under the Civil Litigation Code and the Administrative Judicial Code, justified by the nature of each type of proceeding. While in proceedings under the Civil Litigation Code and the Administrative Judicial Order, there is no specific public interest in their outcome, as they are about the protection of the subjective rights of the dispute parties or participants depending on their personal activity, in proceedings under the Civil Non-Contentious Code, although the subjective rights of

18 See more: Števček, 2024, p. 2.

the participant are also protected, they are in cases where there is also a public interest in their protection.

The Civil Non-Contentious Code, in the first chapter of its second part, regulates proceedings in some family law matters. These proceedings include, for example, proceedings for permission to marry (in the case of a person younger than eighteen years), proceedings in matters of determining parentage, proceedings regarding the return of a minor abroad in cases of wrongful removal or retention, proceedings in matters of adoption, and proceedings concerning court guardianship of minors.

The last group of proceedings is more specifically defined in Article 111 of the Civil Non-Contentious Code, according to which the court in proceedings concerning court guardianship of minors decides on: the name and surname of the minor, arrangements for the exercise of parental rights and obligations, maintenance for the minor, contact with the minor, guardianship, custodianship of the minor, handing over the minor, matters concerning the minor which the parents cannot agree on, approval of the legal act of the minor, representation of the minor, management of the minor's property, institutional care, educational measures, protective measures, foster care, entrusting the child to alternative personal care, and other matters if arising from a special regulation.

The Civil Non-Contentious Procedure Code, unlike the Civil Litigation Code and the Administrative Judicial Order, imposes a specific duty on the court to inform the child about all essential matters relating to the proceedings and the subject matter itself, assuming the minor child is a participant in the proceedings. Importantly, a minor child can be a participant in proceedings under the Civil Non-Contentious Procedure Code not only if they themselves file a motion to initiate proceedings but also if their rights and obligations are the subject of proceedings that can begin without a motion or in proceedings initiated at the request of someone other than the minor child. In this context, Article 115 of the Civil Non-Contentious Procedure Code is significant, stating that the court addresses suggestions and warnings from individuals and legal entities and takes measures to ensure proper care for minor children. For this purpose, the court can, for example, even before the commencement of proceedings, carry out necessary procedural actions, including hearing the parents or inspecting the residence.

Specifically, beyond the adjustment of the basic principles of non-contentious proceedings, the right of the minor child to be informed about the course of proceedings is regulated in the part of the Civil Non-Contentious Procedure Code dealing with certain matters concerning court care for minors. From Article 116 of the Civil Non-Contentious Procedure Code, it follows that the court is obliged to inform the minor child about the course of the proceedings, provided it does not contradict the purpose of the proceedings and assuming the minor child is capable, considering their mental and volitional maturity, of understanding the significance of the proceedings. The court must also explain to the minor child the implications of the court's decision on the matter itself.

The Civil Non-Contentious Procedure Code also addresses the question of procedural capacity differently by regulating situations where a participant in the proceedings could act independently regarding the subject matter and the extent of their legal capacity for acts but, given the circumstances of the case, it is reasonable for the court to appoint a procedural guardian for them or require their representation by a legal representative. Specifically, this rule is adjusted in Article 9 of the Civil Non-Contentious Procedure Code, according to which, if circumstances require, the court may decide that one who does not have full legal capacity must be represented in the proceedings by their legal representative or a procedural guardian, even if it concerns a matter in which they could act independently. The purpose of this provision is to provide an enhanced degree of procedural protection, especially to minor children as participants in proceedings under the Civil Non-Contentious Procedure Code.[19] Specifically, the procedural capacity to act independently before the court in proceedings concerning the adoptability of a child and its placement in pre-adoption care is regulated. In this proceeding, the minor parent of the child has the procedural capacity to act independently from the age of sixteen years. Notably, Slovak law does not recognise the institution of a child advocate or mandate legal representation in proceedings conducted under the Civil Non-Contentious Procedure Code.

Regarding the appointment of a procedural guardian, the court is obligated, upon request, to appoint a close person as guardian for the minor child, assuming that this person will act in the minor's interest. If such a request is not made or cannot be accommodated, the court appoints the child social protection and social guardianship authority, which is the Office of Labor, Social Affairs, and Family, as the guardian.

The access of minor children as participants in proceedings to the court is also ensured by the rule of special local jurisdiction of the court for the above-identified matters concerning court care for minors. In such proceedings, the locally competent court is the one in whose district the minor child has residence determined by the agreement of the parents or by another legal method. Additionally, Article 6a of the Civil Non-Contentious Procedure Code is meant to ensure the protection of the minor child by stipulating that in proceedings under the first head, third part, and fourth part of this law concerning the same minor child or their siblings having the same parents, the same judge assigned the first motion to initiate proceedings concerning the affected minor child shall decide. This provision aims to maintain continuity in the court's decision-making on matters concerning the minor child and ensure the necessary speed of proceedings since the family circumstances are already known to the given judge or judges from previous proceedings, and these are subsequently only verified from the perspective of whether there have been any significant changes in the meantime. The adopted legal regulation, to the extent mentioned, in our opinion, definitely contributes to the protection of the minor child.

Another provision of the Civil Non-Contentious Procedure Code supporting the access of minor children to judicial protection of their rights is Article 13, according

19 Smyčková, 2024, p. 93.

to which the prosecutor may enter into commenced proceedings (with the exception of proceedings concerning the divorce of a childless marriage). Similarly, the prosecutor may file a motion with the court to initiate proceedings under the Civil Non-Contentious Procedure Code if it concerns proceedings that can also be initiated without a motion, and the law expressly allows this. Such proceedings may include, for example, some proceedings concerning court care for a minor child. In this context, judicial practice has previously been divided on the issue of whether a prosecutor can file a motion to initiate proceedings only if specifically authorised by law or in any case where the court may initiate proceedings *ex officio*. This question appears to have been resolved following a decision published in the Collection of Opinions of the Supreme Court and Court Decisions of the Slovak Republic under R 64/2024. According to the published decision, a prosecutor may file a motion to initiate proceedings even in cases concerning legal capacity, which can be initiated *ex officio*, despite the fact that the Civil Non-Contentious Procedure Code does not explicitly regulate the prosecutor's right to submit a motion in such proceedings.[20] In light of the above, we agree with the opinion of Smyčková, who argues that Art. 14 of the Civil Non-Contentious Procedure Code is an incorrect legislative expression of the scope of the prosecutor's authority to initiate proceedings. The provision wrongly cumulatively ties the prosecutor's right to submit a motion in proceedings that can be initiated *ex officio* to an additional condition that this right must be explicitly provided for in this law or another regulation.[21] Given the aforementioned, and respecting the case law of the Supreme Court of the Slovak Republic, we believe that it would be appropriate to adopt an amendment to the cited provision of the Civil Non-Contentious Procedure Code to correct this inaccuracy.

The participation of the Commissioner for Children might also be considered in proceedings conducted according to the provisions of the Civil Non-Contentious Procedure Code, despite the fact that their participation, unlike the Commissioner for Persons with Disabilities, is not specifically anticipated in the provisions of this law. This statement holds because, according to Article 2, the provisions of the Civil Litigation Code are also applicable to proceedings under the Civil Non-Contentious Procedure Order unless expressly excluded by the Civil Non-Contentious Procedure Code.

Certain proceedings under the Civil Non-Contentious Code are specifically addressed, in which the law mandates their consolidation with proceedings concerning the adjustment of parental rights and obligations to minor children. This ensures the protection of the rights of minor children, in our opinion, and essentially their access to legal protection, as it is not necessary for them to initiate the proceedings themselves. The law necessitates action on matters directly concerning them. This applies in the case of divorce, which is linked to proceedings adjusting the conditions

20 Decision of the Supreme Court of the Slovak Republic of 10 July 2024, No. 3CdoR/2/2024, published in the Collection of Opinions of the Supreme Court and Decisions of the Courts of the Slovak Republic under R 64/2024.

21 Smyčková, 2024, p. 109.

between spouses and their minor children post-divorce. Within this context, the question of exercising parental rights and obligations towards a minor child is addressed. Furthermore, proceedings determining paternity relate to proceedings adjusting the exercise of parental rights and obligations and the maintenance of a minor child.

The Civil Non-Contentious Code also specifically regulates the evidence process in proceedings where a minor child is a participant. In such cases, the court is obliged to consider the opinion of the minor child as a participant in the proceedings if they are capable of expressing their opinion independently. This rule, set forth in Article 38 of the Civil Non-Contentious Code, builds on the previously analysed legal regulation of the Family Act. However, this procedural legal regulation of non-contentious proceedings is even more detailed when it also outlines how the opinion of the minor child should be ascertained. The court is to ascertain the minor child's opinion in a manner corresponding to their age and maturity, with the stipulation that, depending on the nature of the matter, the court is to ascertain the minor child's opinion without the presence of other persons. The law does not further specify how the minor child's opinion should be ascertained by the court, nor does it establish any age limit from which the court is obliged to consider the minor child's opinion or to hear them directly at the hearing. From the provisions of the Civil Non-Contentious Code, as well as the Family Act and the purpose and meaning of the relevant legal regulation, it can be concluded, in our opinion, that the hearing of the minor child should be carried out in a suitable and appropriate manner so as not to cause undue stress to the minor child. Slovak legal regulation does not exclude the indirect ascertainment of the minor child's opinion, i.e. without the child being heard by the judge. Čipková states that indirect (mediated) ascertainment of the opinion of a minor child is still preferred in current application practice, despite the legal preference for direct ascertainment.[22] This view can be agreed with. We also perceive negatively the courts' efforts to use the indirect form of determining the opinion of minors even in cases where it is not justified by their age and the protection of their interests. This occurs mainly based on the submission of a report from the Office of Labor, Social Affairs, and Family as the authority for social and legal protection and social guardianship, the request for which is anticipated by the court under the provisions of Act No. 305/2005 Coll. on Social and Legal Protection of Children and Social Guardianship, as amended. Of course, the child's opinion can also be ascertained directly by the court, where, depending on the age of the minor child, their hearing in an informal manner and ideally in a specially designated and equipped room of the court, adapted for minor children, is preferred. However, such court equipment is not mandatorily required by law and, therefore, is not available in all courts in the Slovak Republic. We perceive this negatively and are of the opinion that it is necessary for this situation to be changed in the future and for the equipment of the courts to be improved.

Regarding the ascertainment of the minor child's opinion, the jurisprudence of the Supreme Court of the Slovak Republic confirmed that ascertaining their opinion

22 Čipková, 2024, p. 199.

without the presence of the parent's legal representative does not result in depriving the parent of the opportunity to act before the court; thus, this procedure is in accordance with the law. In the collection of opinions of the Supreme Court and decisions of Slovak courts, a judgment identified as R 34/2014 was published as follows: "The procedural approach of the court, in which it ascertains the opinion of the minor (§ 100 para. 3 OSP [author's note – now § 38 CMP]) without the presence of the parent's legal representative, does not result in depriving the parent of the possibility to act before the court."

## 4. Rights of a Minor Child in Criminal Proceedings

### *4.1. Criminal Code*

The criminal policy of the Slovak Republic, as codified in the Criminal Code and its accompanying procedural legislation, reflects the need for special protection of minor children and considers their age when assessing their criminal liability. The Criminal Code includes specific provisions for the prosecution of juvenile offenders. The application of general provisions in relation to a juvenile is only possible when the special provisions on the prosecution of juveniles do not establish a specific regulation.[23]

For the purposes of the Criminal Code, a juvenile person is considered to be someone who, at the time of committing a criminal act, has reached the age of fourteen but has not yet reached eighteen. In the case of persons younger than fourteen years, it is not possible to consider their criminal liability.

All provisions of the Criminal Code apply to juvenile offenders, except for those differently adjusted in the special part about the prosecution of juveniles in the fourth head of the Criminal Code. Special emphasis is placed on the intellectual and moral maturity of juveniles. This is taken into account in Article95 of the Criminal Code, which stipulates that for persons older than fourteen but younger than fifteen years, the assessment of the unlawfulness of their actions must consider whether, at the time of committing the act, they had reached a level of intellectual and moral maturity that allowed them to recognise the unlawfulness of their actions or to control this behaviour. If not, the person will not be criminally liable for the act committed.

A material corrective is also specifically regulated in the case of criminal activity committed by juveniles, requiring the seriousness of the act committed by the juvenile to be at least minor for the act to be considered a criminal offense. Otherwise, the act will not constitute a criminal offense. However, it applies that the mentioned criterion for assessing criminal liability can only be taken into account in the case of misdemeanours, i.e. in the case of criminal offenses committed through negligence or in the case of intentional criminal offenses for which the Criminal Code prescribes a prison sentence with an upper limit of the penalty of a maximum of 5 years. The criteria used to determine the seriousness of a misdemeanour relates to the conduct

23 Záhora, 2010, p. 754.

and its consequence (the test of the objective aspect) and the degree of culpability in terms of motive (i.e. the subjective aspect). These criteria are so diverse and variable that they allow, in a specific case, for a sufficiently clear distinction of the degree of seriousness of the committed misdemeanour or an act displaying the characteristics of a misdemeanour.[24]

In the case of juvenile persons, the Criminal Code specifically regulates the imposition of sanctions and educational measures, prioritising educational measures and other types of punishments over criminal imprisonment. Regarding the actual sentence of imprisonment for a juvenile offender, the sentence is imposed at the rates provided by the Criminal Code after being reduced by half. We view the presented concept of legal regulation positively because, in our opinion, it contributes to ensuring that the imposed sentences truly fulfil their educational function. It also supports the idea that juvenile offenders, after serving their sentence, have a real chance of reintegration into society without being excluded from it due to serving a disproportionately long prison term. We also positively assess the fact that a prison sentence for individuals who are not older than 18 is served in a correctional facility specifically for juveniles. The court may even decide that the prison sentence will be served in such a special facility in the case of a convicted person who has already exceeded the age of 18. Similarly, the Criminal Code differently adjusts the length of limitation periods for crimes committed by juveniles compared to general provisions. As a general rule, in most cases, the statute of limitations for criminal prosecution in relation to an offense committed by a juvenile offender expires sooner than the statute of limitations for criminal prosecution in the case of an offense committed by an offender who is not a juvenile.

### *4.2. Criminal Procedure Code*

The Criminal Procedure Code distinguishes between the terms child and juvenile. A child is a person younger than 18 years of age. A juvenile is a person who, at the time of committing a criminal offense, had not reached the age of 18. The Criminal Procedure Code specifically regulates the conduct of criminal proceedings against a juvenile who, upon being charged, must always have a defender. If the juvenile does not choose a defender, one must be appointed by the court from among the attorneys, as this constitutes a case of mandatory defence pursuant to Article 37 para. 1 point d) of the Criminal Procedure Code.

The provisions regarding proceedings against a juvenile apply if the criminal act was committed by the juvenile exclusively before reaching eighteen years of age, provided that the charge is made before the juvenile offender turns nineteen years old. Therefore, if an act was committed by a person who was a juvenile (14 to 18 years old) at the time, the act will always be assessed according to the provisions of the Criminal Code concerning juvenile offenders. However, if charges are brought against

24 Resolution of the Supreme Court of the Slovak Republic of 21 September 2021, No. 3Tdo/25/2021.

such a person only after they have reached the age of nineteen, the provisions of the Criminal Procedure Code regarding proceedings against a juvenile will no longer apply to them. We consider the given legal regulation to be justified. In our opinion, there is no reason for proceedings to be conducted according to procedural provisions specifically formulated for the protection of juveniles at a time when these persons have already reached adulthood.

The Criminal Procedure Code specifically regulates the criminal liability of a person younger than 15 years of age. If such a person, at the time of committing the act, had not reached the level of intellectual and moral maturity necessary to recognise the unlawfulness of the act or control their conduct, they would not be held criminally liable for the act. This legal regulation conceptually builds upon the principle that a person is criminally liable only if, at the time of committing the act, they were at least 14 years old.

Further, Article 337 of the Criminal Procedure Code specifically mandates the obligation of criminal justice authorities and the court to thoroughly examine the level of intellectual and moral development of the juvenile, their character, circumstances, and the environment in which they lived and were raised, their behaviour before and after committing the criminal act, as well as other circumstances important for choosing the appropriate means for their rehabilitation. The investigation of these facts about the juvenile accused or defendant is imposed, in accordance with the Criminal Procedure Code, also on the body of social and legal protection of children and social guardianship, i.e. the Office of Labor, Social Affairs, and Family, as well as the municipality. In the case of a juvenile, their character reference from the educational institution they attend is also typically secured for the investigative and court files. All facts discovered about the juvenile based on these actions subsequently form the basis for imposing an appropriate penalty on the juvenile offender.

For proceedings against a juvenile according to the special provisions of the Criminal Procedure Code, there is also an obligation to include the body of social and legal protection of children and social guardianship, whose representative has the right to make procedural proposals in the proceedings, ask questions to the persons being interrogated, as well as deliver the closing speech at the main trial. They are included in the proceedings from the pre-trial stage of the criminal proceedings. In addition to the Office of Labor, Social Affairs, and Family, the legal representative of the juvenile must also be informed about all actions in the criminal proceedings conducted against the juvenile. During the interrogation of the juvenile accused, besides their defender, a representative of the body of social and legal protection of children and youth must always be present.

The Criminal Procedure Code also specifically regulates the obligations of criminal justice authorities in case of detention or arrest of a juvenile person, where it is necessary that the juvenile's legal representative and the body of social and legal protection of children and social guardianship be informed. This also aims to fulfil the purpose of the law, which is to provide an increased level of protection for juvenile persons, even if they are reasonably suspected of committing a criminal act.

A special entitlement is granted to the body of social protection of children and social guardianship regarding the use of legal remedies. These can be utilised and applied in criminal proceedings even against the will of the juvenile accused or defendant, provided the legal remedy is filed in their interest. The same entitlement belongs to the juvenile's legal representative, their guardian, and even the prosecutor.

Protection of the juvenile accused or defendant is further ensured by the Criminal Procedure Code in such a way that the court may decide to exclude the public from the proceedings if necessary to protect the interests of the juvenile. Furthermore, this can occur not only in proceedings against a juvenile accused but also in proceedings in which, although the accused is not a juvenile, a minor person is a victim or a participant. In the case of proceedings against a juvenile accused, it is even possible, in accordance with the Criminal Procedure Code, for the presiding judge to order the juvenile to leave the courtroom during certain parts of the main trial if such a part of the proceedings could adversely affect their moral development. Upon the juvenile's return to the courtroom, however, they must be informed of the essential content of the proceedings conducted in their absence.

Protection of juvenile persons is further specifically ensured by the Criminal Procedure Code in Article 6, which mandates that criminal justice authorities and the court, when informing the public about criminal proceedings, must act in a manner that considers the interests of the juvenile accused, whose personal data are not to be disclosed. Although criminal proceedings are governed by the principle of publicity, this can be restricted during the main trial by the court denying access to the main trial to juveniles. This procedure should be justified either to prevent disruption of the dignified course of the main trial or to protect the interests of juvenile persons. The fact that such a person is being heard should also be reflected in their instruction, which should be provided in a manner appropriate to their age and mental level.[25]

The Criminal Procedure Code does not explicitly regulate the age requirements for a witness's legal capacity, nor does it limit the range of potential witnesses.[26] During criminal proceedings, a juvenile person can also be interrogated. The Criminal Procedure Code specifically regulates the rules and procedures for questioning a witness who is a child. The questioning of such a person should be conducted in a way that avoids the need for it to be repeated later. For this reason, such questioning can be recorded, and the recorded evidence can be presented during the main trial by playing it back. This is intended to prevent the secondary victimisation of the witness. It is also mandatory to ensure the presence of a psychologist during the questioning of a minor witness. The psychologist's role is to supervise the questioning process and contribute to its conduct in a manner that will not adversely affect the mental state of the witness. We positively evaluate the fact that the legal regulation has been amended so that these special rules for questioning apply in the case of a child and

25 Ivor et al., 2010, p. 476.
26 Polák, 2011, p. 176.

not only in the case of a person younger than 15 years, as was the case under the legal regulation effective until mid-2013.

Provided that the examination of a minor witness takes place during the main trial, Article 261 para. 4 of the Criminal Procedure Code provides the presiding judge the authority to decide that they will conduct the witness interrogation themselves, especially if the witness is under fifteen years of age. This procedure can also apply to witnesses older than fifteen, but in such cases, another reason stipulated by the law must be present for this approach. For instance, if the witness being interrogated is a victim of a crime against human dignity.

The Criminal Procedure Code specifically addresses the representation of an injured party in criminal proceedings by a legal representative or guardian. This must occur, among other scenarios, if the injured party has limited capacity for legal acts. This premise is also fulfilled in the case of an injured party who is a juvenile, as, according to the legal regulations of the Civil Code, they do not have full capacity for legal acts.

In conclusion, the criminal law regulations of the Slovak Republic do not prescribe the establishment of a special court division specialised in conducting proceedings against juveniles accused. It is also noted that such specialisation is not present in civil procedural law, at least in terms of proceedings at the district or municipal court level as the court of first instance. However, it is a fact that most civil courts in the Slovak Republic have specialised departments where judges dedicate themselves specifically to family law matters. Furthermore, regarding the legal regulation of appellate proceedings, according to the legal regulations of non-contentious proceedings, selected regional courts are competent to decide on appeals in cases concerning certain family law matters, which should contribute to a higher degree of court specialisation and, thus, to enhanced protection of minors' interests.

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| Chapter 9 |

# Child-Friendly Justice – Slovenian Perspective

Lina Burkelc Juras

**ABSTRACT**

The article presents the position, rights, and participation possibilities of children in different civil and criminal proceedings in Slovenia. It introduces the constitutional framework for the protection of children's rights and some fundamental guarantees for children in all types of proceedings. It provides a systematic overlook of the fundamental legislation dealing with children's rights in civil litigation, non-contentious civil proceedings, administrative proceedings, and criminal proceedings. Furthermore, it highlights some key findings from all these different types of proceedings involving the principle of the best interest of the child and the child's right to express their opinion, as well as certain procedural adaptations that were made to accommodate children's interests and their specific position throughout the relevant legislation in different fields of law. Through examination of the relevant provisions, it concludes that progress has been made, particularly with the unification of family law proceedings with the relatively new Family Code and Non-Contention Civil Procedure Act; however, further harmonisation is still needed, especially in criminal cases involving minors. Overall, Slovenia's legal system demonstrates a commitment to prioritising children's participation, representation, and best interests and sufficiently protects children's rights in various civil and criminal proceedings.

**KEYWORDS**

protection of children's rights, children's participation, civil proceedings, criminal proceedings, administrative proceedings, best interests of the child, the right to express opinion

## 1. Introduction

It is the reality of life that, just as adults, children might also come into contact with the judicial system. A child might be involved in family matters like the separation of his/her parents that need to arrange his/her maintenance and contact rights or can be put up for adoption or in foster care. He/she might be involved in administrative matters, where his/her citizenship or his/her social security and habitation needs to be arranged. Additionally, the child might also be connected to a criminal proceeding in the role of a victim, witness, or even the perpetrator. Children cannot always

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understand the role they have been put into or the proceedings they are a part of. Adapting justice to their needs is, therefore, necessary. These adaptations help make sure that the procedures are carried out in the child's best interest.

There is no single legislative act protecting children's rights in Slovenia. They are ensured in a wide variety of areas, such as health, education, social care, and family legislation and are, therefore, regulated in numerous legal acts. Before further analysing a child's position in civil, administrative, and criminal proceedings in Slovenia, let us first examine the constitutional framework for children's rights in Slovenia.

Article 53 of the Constitution of the Republic of Slovenia,[1] which defines marital and family relations, imposes the State with the duty to protect children and youth and create conditions necessary for their protection. Article 54 of the Constitution further provides the rights and duties of parents and the protection of children for their best interest. Children's rights are also established in Article 57, which provides for the freedom of education and the obligation of primary education, which is financed by public funds. With this legal framework, the State creates opportunities for children to acquire an appropriate education, thus developing and, consequently, integrating more easily into society when they become adults. Additionally, Article 52 deals with the rights of disabled persons and children with physical or mental disabilities and provides these children with the right to education and training for an active life in society.

The Constitution of the Republic of Slovenia also determines that children shall enjoy special protection and care, as well as human rights and fundamental freedoms consistent with their age and maturity. Children shall be guaranteed special protection from economic, social, physical, mental, or other exploitation and abuse, which shall be regulated by law. Finally, the Constitution determines that children and minors who are not cared for by their parents, have no parents, or are without proper family care shall enjoy the special protection of the State and their position shall be regulated by law. Children can, therefore, enjoy their human rights and freedoms in accordance with their age and maturity.[2] While most of their rights are required from birth (for example, the right to life, to safety, to physical integrity), they are exercised for them by parents in the context of their care for the child. Also, the rights and freedoms of the child are limited by the rights of others; therefore, when they come into conflict with the rights of others, a weighing of rights must be carried out.[3] Some

1 Constitution of the Republic of Slovenia, Official Gazette No. 33/91-I with amendments.

2 Art. 56 of the Constitution of the Republic of Slovenia.

3 Art. 15 para. 3 of the Constitution of the Republic of Slovenia. It is worth highlighting the decision VSL IV Cp 1440/2020, in which the Ljubljana High Court, after weighing the rights, decided that the rights of the child to respect for private and family life and to ensure healthy growth and personal development take precedence over the right of parents to express their views about their children on social networks.

human rights and fundamental freedoms become important for a child only later (for example, freedom of conscience, freedom to decide on the birth of children, etc.).[4]

The question, unanswered by the Constitution, remains who is considered a child under the Slovenian law. A definition of a child, which also takes into account the provisions of international legal sources,[5] is provided by the Family Code.[6] In Article 5, the Family Code defines a child as a person who has not yet reached the age of 18, unless he/she has previously acquired full legal capacity.[7] This would be possible, e.g. if the child got married or was granted legal capacity by the court because it became a parent. It is considered that a minor who can take care of himself/herself no longer needs special protection granted to the child.[8] The milestone between a child and an adult is therefore the acquisition of legal capacity, not the age of majority.[9] The Non-Contentious Civil Procedure Act,[10] which is used in most family law proceedings, defines a child in the same way.[11]

The internal relationship between parents and children is broken down in time, which means that the content of this relationship and the rights arising from it change over time. With the age and maturity of the child, the range of duties of parents decreases. The more mature the child is, the more parents need to consider the child's opinion. This is also reflected in the regulation of the position of the child in the proceedings: the child first acquires the right to express his/her opinion, then the procedural ability to perform all procedural actions independently and validly.[12] Procedural capacity corresponds to legal capacity in substantive law. Anyone with legal capacity is also able to perform procedural actions independently in legal proceedings. A person who is not capable of proceedings must perform procedural acts through his/her legal representative, just as a person who is legally incompetent must conclude legal transactions through his/her legal representative.[13] While legal capacity is acquired by children from birth, procedural capacity is acquired later.

It is important that the legislator provides sufficient procedural guarantees to a child involved in a certain proceeding. In part, this was established when the legislator

4 Some authors consider that children do not enjoy human rights and freedoms that are not yet applicable to them because of their physical or mental underdevelopment (Zupančič, 1999, p. 35). Others believe that children enjoy all human rights and freedom, however, they enjoy them in line with their age and maturity, meaning that it is important to distinguish between the capability of having (or gaining) these rights and the capability of enforcing them (Končina Peternel in Šturm, 2002, para 3).

5 Novak, 2022, p. 79.

6 Family Code, Official Gazette No. 15/17 with amendments.

7 It is worth noting that, as a rule, parents are obliged to support their children until they reach the age of majority, but exceptionally, the duty to support can also be extinguished earlier or later depending on different circumstances (legal capacity, schooling of the child etc.).

8 Korošec, 2009, p. 36.

9 Zupančič, 1999, p. 17.

10 Non-Contentious Civil Procedure Act, Official Gazette No. 16/19 with amendments.

11 Art. 6 para. 3 of the Non-Contentious Civil Procedure Act.

12 Končina Peternel, 2019, p. 93.

13 Ude et al., 2005, p. 330.

transferred decisions on all measures for the protection of the interests of children from social work centres to courts when the new Family Code, the fundamental Act in the field of family law in Slovenia, came into force in 2019. Thus, the decisions in family law matters should no longer be dealt with partly in separate administrative proceedings and partly in civil proceedings in front of courts as before, but merely in proceedings in front of courts.

Some of the most important provisions regarding the position and rights of children in various civil (civil litigation, non-contentious civil proceedings, and administrative proceedings) and criminal proceedings are presented below.

## 2. A Child's Position in Different Civil Law Proceedings

### *2.1. Civil Litigation and Non-Contentious Civil Proceedings*

The position of a child in civil litigation and non-contentious civil proceedings mainly depends on the provisions of the following three sources of law: Civil Procedure Act,[14] Non-Contentious Civil Procedure Act, and the Family Code.

As previously mentioned, full legal capacity in accordance with Article 152 of the Family Code is acquired by a child from the age of 18, exceptionally earlier. A child who has reached the age of 15 has limited legal capacity.[15] This means that the child can make transactions on his/her own unless otherwise provided by law. The child can also enter into an employment relationship.[16] However, if the legal transactions are so important that they have a significant impact on the child's life, the permission of the parents (of other legal representative) is needed for the validity of such transactions.[17] Until the child reaches full legal capacity, he/she is represented by the parents or guardian. The parents or guardian also represent the child in other legal proceedings. If the legal representative has initiated the proceedings, he/she may perform actions in the proceedings only until the child, who has reached the age of 15 and is capable of understanding his/her own actions and the consequences of such actions, declares that he/she will independently perform procedural actions.[18]

In civil proceedings, the child is also guaranteed the right to a special representative (collision guardian). A social work centre or court shall appoint a collision guardian to a child for whom parents exercise parental responsibility in cases where

14 Civil Procedure Act, Official Gazette No.73/07 with amendments.
15 Art. 146 of the Family Code.
16 Končina Peternel, 2019, p. 94.
17 Art. 145 para. 2 of the Family Code.
18 Art. 45 para. 3 of the Non-Contentious Civil Procedure Act.

their interests are in conflict.[19] At the same time, the child has the right to express his/her opinion during a certain proceeding with the help of a confidant or defender (attorney).[20] The child has this right, but not also the duty (if he/she wishes so, the child does not have to express his/her will).[21] A confidant is a person chosen by the child because he/she trusts him/her; a defender is a person assigned to the child under the Human Rights Ombudsman Act[22] with the consent of the parents, unless they are deprived of parental responsibility, or if the court, upon application by the Ombudsman, deems the confidant to be in the child's favour.[23]

With the amendment of the Civil Procedure Act in 1999, Article 410 was added. Said article regulated the right of the child to express his/her opinion in the proceedings.[24] Article 410 of the Civil Procedure Code ceased to be valid when the Family Code and the new Non-Contentious Civil Procedure Act entered into force; however, the stance on the child's right to express himself/herself was largely considered in the new legislation as well. Regarding procedures for the protection of the interests of children, the court, therefore, requires the social work centre to inform the child (if the child is able to understand the meaning of the procedure and the consequences of the decision) of the procedure and of his/her right to express his/her opinion.[25] When a child wishes to express his/her opinion, he/she may do so at the social work centre or in an interview with an advocate assigned to him/her in accordance with the Human Rights Ombudsman Act or, depending on age and other circumstances, at an informal interview with the judge, also with the participation of a professionally qualified person, always without the presence of the parents. At the interview at the social work centre or with the judge, the person whom the child trusts and chooses or the child's advocate may be present. Such a person or advocate can help the child express his/her opinion. The court may prohibit the presence of a person if it considers that it is not a person whom the child trusts and has chosen or that the participation of that person in the proceedings would be contrary to the best interests of the child. A record is drawn up about the interview, and the judge or the social work

19 Arts. 269 para. 1 and 269 para. 2 of the Family Code, Article 45(5) of the Non-Contentious Civil Procedure Act. As explained by the Ljubljana Higher Court in its decision IV Cp 1716/2023, the decision to appoint a collision guardian has the necessary basis in Art. 269 para. 1 of the Family Code, according to which a collision guardian is appointed for a child over whom parental care is exercised by the parents, if their interests are in conflict. It is not a conflict of interests between the parents, but a conflict of interests between the parents and the child. A collision guardian is appointed when doubts are raised as to whether the parents are able to protect not only their own interests in the proceedings, but first and foremost the interests of the children.

20 Art. 69 para. 3 of the Non-Contentious Civil Procedure Act.

21 See more in: Končina Peternel, 2019, p. 93.

22 Human Rights Ombudsman Act, Official Gazette No. 109/12 with amendments.

23 Novak, 2022, p. 308.

24 Ogrizek, 2000, pp. 35–52.

25 For example, the Ljubljana Higher Court clarified in VSL IV CP 1454/2022 that in order to protect the best interests of the child, the court must actively and, where necessary, innovatively and flexibly, endeavour to present to the child with the possibility of taking part in the proceedings and the benefits that he/she may derive from his/her active participation.

centre may also decide that the interview is recorded in audio or video. To protect the best interests of the child, the court may decide not to allow parents to view the record or listen to or view the recording. There is no special appeal against such a court order.[26] In this case, the court summarises parts of the statements from the interview with the child in the reasoning of its decision if it based its decision on such a statement. The court serves the decision to a child who has already reached the age of 15 and has expressed his/her opinion in the process, and this child has the right to appeal against it.[27] The court shall also take into account the opinion of the child when making the decision on the protection, upbringing, and maintenance of the child, on contacts, implementation, and granting of parental care, if the child expresses it himself/herself or through a person whom he/she trusts and has chosen, and if he/she is able to understand its meaning and consequences.[28]

A child has the right to make a statement and express an opinion, and this statement can play a decisive role (but not necessarily) in the process of deciding on his/her rights.[29] As explained by the Ljubljana Higher Court in the decision IV Cp 609/2023, the principle of best interests of children cannot be judged without taking into account the opinion of a child who is old and mature enough to exercise his/her right to make a statement.[30] The competent authority or court will take such statements into account and assess them in each individual case, trying to determine what is most beneficial for the child. It should be noted that the right of the child to express an opinion is only a right, not a duty of the child. As such, the court has the informational duty to explain to the child that he/she does not necessarily have to express an opinion. It should also not force a child to express an opinion.[31] Moreover, this right of a child is not absolute, which means that state authorities or courts are not always required to hear the child in person. The need for hearing the child's opinion depends on the circumstances of the individual case and the age and maturity of the child. This can also be seen in Article 158 of the Family Code, which specifies when and how the court

26 See also: VSL IV Cp 503/2020.

27 Art. 96 of the Non-Contentious Civil Procedure Act.

28 Ibid., Art. 143.

29 Respect for the child's will does not mean that the court must necessarily decide in accordance with the child's will, it is only one of the circumstances that the court must consider in the substantive fulfilment of the notion of the best interests of the child (Novak, 2019, p. 489). In certain cases, the court cannot, of course, follow the child's opinion. This was the case, for example, in the case of the Ljubljana Higher Court IV Cp 212/2023, in which the court clarified that the issues of placement or custody, maintenance and contact should be resolved jointly, which is in line with the principle of the best interests of the child, which must be respected already in the conduct of the proceedings, not only when making the decisions. In a situation where it has been established that the father's conduct endangers the children, the wishes or opinions of the two children with regard to contact cannot be taken into account. The failure to obtain the children's opinion therefore did not constitute a breach of the procedural provisions.

30 In the specific case, it was a statement about whether the child wished to have contact with the other parent or not.

31 See e.g.: VSRS II Ips 658/2007, VSL IV Cp 3485/2005 and VSL IV Cp 3196/2014.

takes into account and obtains the opinion of the child when deciding on a measure for the protection of the best interests of the child.[32]

Children's rights are also protected by the provisions determining that court hearings in family law cases are closed to the public.[33]

*2.1.1. A Child's Position Under the Civil Procedure Act*

At all times during the proceedings in civil litigation, the court shall be bound *ex officio* to pay attention to whether the person appearing as a party may actually be a party to the litigation and whether he/she has litigation capacity, whether a party who lacks litigation capacity is represented by his/her statutory representative and whether the statutory representative has a special authorisation when such authorisation is necessary, and whether the party is represented by a counsel in line with the Civil Procedure Act.[34] It follows, that the court keeps an eye on the proper representation of the parties to the proceedings at all times. Where the court finds that a party does not have a legal representative or that the legal representative does not have the necessary qualifications, it requires the social works centre to appoint a guardian to the litigiously incompetent person and requires the legal representative to obtain the necessary authorisation or to do what is necessary to ensure that the litigiously incompetent party is properly represented.[35] The stated also applies to the position of a child – in civil litigation and non-contentious civil procedures.[36]

*2.1.2. A Child's Position Under the Non-Contentious Civil Procedure Act*

The new law on the non-contentious procedure came into force on 15 April 2019. The need for the new law was shaped by the reform of family legislation, which was outlined in 2017 with the adoption of the Family Code (which came into force later in 2019). The law regulated family substantive law relations and fully transferred the power to decide in family law matters from the social work centres to the courts. This law, thus, contains several provisions regulating the position of a child in non-contentious proceedings that the courts (judges that deal mainly with family law in so-called "family departments" in the district courts)[37] use when deciding on these matters.

As a preliminary point, it should be clarified that the court, participants, and other persons participating in the proceedings are required to make every effort throughout the proceedings to have the rights and legal interests of the participants

32 The court considers the child's opinion or that of a person he/she trusts and has chosen, provided that the child is capable of understanding its meaning and consequences. The court may also make an interim order without first obtaining the child's opinion.

33 In accordance with Article 43 of the Non-Contentious Civil Procedure Act, the public is excluded in proceedings regulating civil statuses and family relations.

34 Art. 80 of the Civil Procedure Act.

35 Ibid., Art. 81 para. 2.

36 The Civil Procedure Act also contains specific provisions on territorial jurisdiction in disputes over statutory maintenance obligations. See: Art. 50.

37 These departments are not officially established in all the district courts.

established and protected as soon as possible. This is demanded by the principle of expeditiousness of proceedings, enshrined in Article 6 of the Non-Contentious Act. The court must also adopt *ex officio* any measures aimed at protecting the rights and legal interests of children and persons who, owing to mental developmental disorders or other mental health problems or other circumstances, lack the capacity to look after their own rights and interests.

The already mentioned right to a declaration is regulated in Article 5 of the Non-Contentious Civil Procedure Act. The article does not specifically mention children; however, since under certain conditions, children may also participate as participants in certain non-contentious proceedings, the right to a declaration under Article 5 of the Non-Contentious article also applies to them. In this way, the Non-Contentious Procedure Act follows the regulations of the Convention on the Rights of the Child and the European Convention on the Exercise of Children's Rights. The child's opinion is then judged on a case-by-case basis since it is important to take into account the age of the child and his/her ability to understand the position he/she is in and the fact that the child can be influenced by various factors, e.g. experience, environment, religious circumstances, social and cultural expectations, etc.[38] Each child, therefore, has the right to express his/her opinion, and the weight of this opinion is then judged by the court in accordance with the child's age and maturity.

Article 5 of the Non-Contentious Civil Procedure Act is complemented by Articles 6(2) and 96 of the same Act. Article 96 focuses on all procedures for the protection of the best interests of the child. Following this provision, the court must call upon the social work centre to inform the child, who is capable of understanding the meaning and importance of the procedure and the consequences of the decision, in an appropriate manner, of the opening of the proceedings and the consequences of the decision to express his/her opinion. When a child wishes to express his/her opinion, he/she may do so at the social work centre or in an interview with the advocate assigned to him/her in accordance with the law governing the ombudsman or, depending on age and other circumstances, at an informal interview with a judge, also with the participation of a professionally qualified person. When the child expresses his/her opinion, the parents are not present.[39] At the interview at the social work centre and with the judge, the person whom the child trusts and chooses may be present, or the advocate for the child, if assigned in accordance with the law governing the ombudsman. Such a person or advocate of the child can help the child express his/her opinion. The court may prohibit the presence of a person if it considers that it is not a person whom the child trusts and whom the child has chosen or that the cooperation of that person in the proceedings would be in conflict with the best interests of the child. A record is then drawn up about the interview, and the judge or social work centre can also decide that the interview is recorded in audio or audio-video. Interestingly, in order to protect the best interests of the child, the court may decide not to allow

38 Kraljić et al., 2022, p. 55.
39 Ibid, p. 56.

parents to view the record or listen to or view the recording; no special appeal can be raised against such a court decision. In such cases, the court summarises parts of the statements from the interview with the child in the reasoning of the decision if it has based its decision on them. It is important to note that the court serves its decision to a child who has already reached the age of 15 and has expressed his/her opinion in the process; this child has the right to appeal against it.

In non-contentious proceedings regulating civil statuses and family relations, the court allows a child who has reached the age of 15 and is capable of understanding the meaning and legal consequences of his/her actions to implement procedural acts in the proceedings independently as a participant. The statutory representative of such a child may implement acts in the proceedings only until the child declares that he/she will independently perform procedural actions. However, a child who is not yet 15 years old or is considered by the court to be unable to understand the meaning and legal consequences of his/her actions must be represented by a statutory representative. If the interests of the child and his/her representative contradict each other, the court appoints a collision guardian to the child.[40] In the proceedings, the court may, taking into account restrictions on the use of evidence already taken, use the audio or audio-video recordings of the interview with the child. In certain cases, the court may also use a written expert opinion from another judicial procedure.[41]

The Non-Contentious Civil Procedure Act provides that the procedure for obtaining full capacity by a child who has become a parent is also carried out in non-contentious proceedings. According to Article 71, proceedings shall be initiated upon the petition of a child who has become a parent or with the child's consent to the petition of the social work centre.[42] The same applies to the procedure for obtaining permission for the conclusion of a marriage in line with Article 75 and 77 of the Non-Contentious Civil Procedure Act. Before allowing a child to marry, the court hears the child, the person with whom it intends to marry, and the child's parents or guardian.[43] The procedure for establishing and challenging paternity can (among others) also be initiated at the suggestion of the child.[44]

Regarding procedures for the protection of the best interests of the child, the Non-Contentious Civil Procedure Act first introduces which proceedings fall into

40 Art. 45 para. 2 of the Non-Contentious Civil Procedure Act.
41 Ibid., Art.
42 According to the provisions of the Non-Contentious Civil Procedure Act, proceedings may be initiated at the request of the child (although other petitioners are also possible) to decide on contact, custody and maintenance and to decide on measures to protect the best interests of the child. In these provisions, the law specifically provides that to start the proceedings, the child must be at least 15 years of age and "capable of understanding the meaning and legal consequences of his/her actions".
43 Art. 78 of the Non-Contentious Civil Procedure Act.
44 Ibid., Article 88.

this category.[45] If the court considers that this is in the best interest of the child in the proceedings before the court, it may, on application by the ombudsman, appoint the person proposed by him/her as the defender of the child. It shall decide on the proposal within 8 days of receipt of the proposal.[46] In proceedings for the protection of the best interests of the child, the Non-Contentious Civil Procedure Act sets quite strict time limits for decision-making in Article 99. The Act further stipulates that the court will schedule the first hearing within 45 days from the receipt of the full petition for the initiation of the proceedings or within 8 days after the receipt of the opinion of the social work centre. It also sets the deadline for the expert's work. Namely, the Non-Contentious Civil Procedure Act provides that in proceedings for the protection of the best interests of the child, the expert, if he/she is appointed, must draw up an opinion within 60 days from the receipt of the decision on the appointment of an expert, and must prepare a supplementary expert opinion, if necessary, within 15 days.[47] The Act also provides for the issuance of interim orders for the protection of the interests of children[48] under the conditions established by the Family Code and in accordance with the procedure laid down in the Enforcement and Security Act.[49]

*2.1.3. A Child's Position Under the Family Code*

Certain specifics regarding the position of children in proceedings before the court and the social work centre are also regulated in the Family Code.[50] As mentioned above, the Family Code provides that children are represented by their parents unless otherwise provided by law. This also means that if a document is to be served or communicated to the child, it can be validly served or communicated to one or the other of the parents, and if the parents do not live together, to the one with whom the child lives or to the one indicated in the court settlement or the court decision on joint custody of the child.[51]

45 These are the proceedings for deciding on the care and upbringing of the child, maintenance of the child, contact with the child, issues relating to exercising parental care which have a significant impact on the child's development, measures to protect the best interests of the child, placing the child under guardianship, placing the child in foster care, granting parental care to a relative, adoption of the child and annulment of the adoption of the child. The procedure for the protection of the best interests of the child is also the procedure for deciding on the maintenance of a person that is already 18 years old as long as there is a maintenance obligation under the Family Code. See also: Art. 93 of the Non-Contentious Civil Procedure Act.

46 Ibid., Art. 97.

47 Unfortunately, in practice, these deadlines are not always respected, mostly because of the severe shortage of experts in certain disciplines. More in: Burkelc, 2023, pp. 53–72.

48 Art. 100 of the Non-Contentious Civil Procedure Act.

49 Enforcement and Security Act, Official Gazette No. 3/07 with amendments.

50 This includes, for example, the specifics of the mediation process in disputes concerning children. The mediator may also involve a child in the mediation if the child is „capable of understanding the meaning and consequences of the mediation" if the mediator considers that this is in the child's best interests. See: Art. 210 of the Family Code.

51 Arts. 139 and 145 of the Family Code. The court's decision must in certain cases also name which of the parents will receive post packages for the child. For more, see: Kraljić, 2019, p. 453.

When a child reaches the age of 15, he/she can enter legal transactions on his/her own unless otherwise provided by law. However, in cases where these transactions significantly affect the child's life before or after the age of majority, parental consent is required for a valid conclusion of the legal transaction. The validity of a legal transaction concluded by a child without the permission of the parents is otherwise assessed according to the rules of law of obligations.[52] Also, the child's property in his/her favour is managed by his/her parents.[53] They may use the income from his/her property primarily for his/her maintenance, upbringing, and education; however, if they do not have sufficient resources themselves, they may also use this income for the urgent needs of the family community. The property of the child may be disposed of or encumbered by the parents only for the purpose of his/her maintenance, upbringing, and education or if some other benefit requires it. If there is a risk that, by disposing things from the property of their child, the parents will jeopardise their financial interests, the court must impose appropriate measures to protect the financial interests of the child. If the child has already reached the age of 15 and is employed, he/she can dispose of his/her salary but must also contribute to his/her livelihood and education.[54]

In Slovenia, in exceptional cases, the child may also be the adoptive parent of the child. Although the Family Code provides that only an adult person who is at least 18 years older than the child (that is, he/she is not a child himself/herself) can be an adoptive parent, in exceptional cases, they can also allow the adoption to a person who is not 18 years older than the child, when all the circumstances of the case have been investigated, and it is established that such an adoption would be in the child's best interests. In the process of adoption, the court also takes into account the opinion of the child expressed by the child himself/herself or through a person whom he/she trusts and has chosen, if he/she is able to understand the meaning and consequences of doing so. If the child can understand the meaning and consequences of the process, the child's consent is also required for adoption.[55]

The already repeatedly indicated age limit of 15 years and the capability to understand the meaning and legal consequences of their actions are also taken into account in the procedures for placing a child under guardianship. In proceedings relating to dismissals and appointments of a custodian for a special case, the social work centre allows such a child to independently perform procedural actions as a party to the proceedings in accordance with Article 273 of the Family Code. In such cases, the legal representative may perform actions in the proceedings for such a child only until the child declares that he/she will independently perform procedural actions. A child who is not yet 15 years old or who is deemed by the social work centre to be unable to understand the meaning and legal consequences of his/her actions is represented by a

52 Article 146 of the Family Code.
53 Ibid., Art. 147.
54 Ibid., Arts. 148–150.
55 Ibid., Art. 215.

legal representative. If the interests of the child and his/her legal representative contradict each other, the social work centre appoints a collision representative for the child. In addition, the social work centre must also inform the child, who is capable of understanding the importance of the placement procedure and the consequences of this decision, in an appropriate manner about the initiation of the procedure and about his/her right to express his/her opinion. Depending on the age of the child and other circumstances, the social work centre can also conduct an interview with the child using an expert. A person whom the child trusts and chooses himself/herself may be present in the process. The social work centre may prohibit the presence of a person if it considers that the participation of that person in the proceedings would be contrary to the best interests of the child. The expert then draws up a record of the interview, which the parents can also be denied access to. A child who has already reached the age of 15 and has expressed his/her opinion in the process is served the decision of the court and can appeal against it.[56]

### *2.2. A Child's Position in Administrative Proceedings*

Administrative procedure is a procedure before administrative and other state bodies, bodies of self-governing local communities, and holders of public authority. These bodies are bound by the provisions of the Administrative Procedure Act.[57] Administrative jurisdiction is established by law. The authority shall decide only when an administrative matter is involved.[58] The fundamental characteristics of the administrative proceeding are its speed and simplification of the procedure. As a result, the dispositive principle, the principle of debate, the principle of mutual hearing, and the principle of immediacy are undermined. However, this does not necessarily interfere with the protection of children's rights[59] since, in certain cases, administrative proceedings may be even more appropriate than judicial proceedings due to their economy and speed.

In Slovenia, the social work centre is responsible for assisting in the protection of children and their rights based on a public mandate. Until April 2019, the administrative dispute also provided judicial protection in the field of custody for children and adults, as well as on the issue of foster care and adoption. However, with the entry into force of the new Family Code, these issues were transferred under the jurisdiction of the district courts, which is why social works centres are now cooperating with

56 Ibid., Art. 275.

57 Administrative Procedure Act, Official Gazette No. 24/06 with amendments.

58 Ibid., Art. 2.

59 In 1999, the Constitutional Court, in its decision U-I-237/98, stated that both the administrative procedure conducted by the social work centre and the judicial procedure conducted by a judge are not unconstitutional and are appropriate for the protection of children and the regulation of their relationships. There is no urgent need for a judge and for judicial protection since sufficient protection was also guaranteed in administrative proceedings. It merely took the view that everything should be dealt with in one procedure, to avoid a situation where the subject matter is the same, but the result may be different because two different authorities are deciding.

the courts in these proceedings.[60] However, social work centres still work in the field of international protection and children seeking asylum. In this area, social work centres are responsible for setting up legal representatives for unaccompanied children and for children travelling and seeking asylum accompanied by their parents in the event of a conflict of interests with their parents or guardians. The social works centre can also name a guardian for a special case for a child who is in the process of return or deportation to a foreign country. The decisions of administrative authorities in these situations may then be reviewed in an administrative dispute before the administrative court.

The ability to be a party to administrative proceedings is defined in Article 42 of the Administrative Procedure Act. The ability to be a party is a procedural premise and a condition for conducting an administrative process.[61] Legal capacity is not limited by age, so every child has the ability to be a party to the process from birth. At all times during the proceedings, the authority must pay *ex officio* attention as to whether a person who acts as a party can actually be a party to the procedure and whether a party without procedural capacity is represented by their statutory representative.[62]

The Administrative Procedure Act does not contain any special provisions regarding the representation of minors. Therefore, in administrative proceedings, the previously mentioned regulations apply, according to which a minor becomes partially legally capable when he/she reaches the age of fifteen; otherwise, except exceptionally (if he/she acquires legal capacity), he/she is not legally capable and, therefore, needs someone to perform all procedural actions in administrative proceedings on his/her behalf. However, every child has procedural legitimacy in administrative proceedings, as this is not linked to procedural capacity but only to the existence of the ability to be a party to the proceedings.[63]

In administrative proceedings, a child acts as a subject of administrative proceedings when his/her rights are decided on obligations or legal benefits. The child is not fully legally capable until he/she comes of age. This means that until then, by his/her own actions, he/she cannot acquire rights and assume obligations, as well as independently perform actions in the administrative process. Instead of the child, these actions are performed by his/her legal representative or guardian[64] or by

60 All the powers to decide on measures that had been in the hands of administrative authorities were transferred to the civil district courts (Art. 155 of the Family Code). This change was made because social work centres were not considered to be the best suited to decide on administrative proceedings using coercive means, as this was not always compatible with their professional social welfare work. The aim of this was to regulate family matters more thoroughly and to transfer competence to a single body (administrative or judicial), which was a need, also emphasised by the Constitutional Court in its decision U-I-273/98.

61 Breznik, Štucin and Marflak, 2001, pp. 146–147.

62 Art. 49 of the Administrative Procedure Act.

63 Kerševan and Androjna, 2017, p. 144.

64 Art. 47 para. 1 of the Administrative Procedure Act.

another person designated by the administrative authority in the absence of a legal representative.[65]

Children can also be participants in an administrative dispute or bear rights or legal benefits decided before an administrative court.[66] In these areas, the administrative court provides judicial protection in cases decided in administrative proceedings before various competent authorities, acting in accordance with the provisions of the Administrative Dispute Act.[67] This Act, which is primarily applicable to the conduct of judicial proceedings before administrative courts, does not contain any specific provisions explicitly relating to the position of the child in administrative proceedings. The previously mentioned general principles, therefore, also apply to administrative court proceedings involving or relating to children. This is in line with Article 22(1) of the Administrative Dispute Act, which specifically determines that in an administrative dispute, the provisions of the Act regulating civil procedure shall apply unless otherwise provided by this Act. Among the general principles that come into play is the principle of non-discrimination. In addition to the general rules of procedure, the administrative courts directly apply the European Convention on the Exercise of Children's Rights and the United Nations Convention on the Rights of the Child while also relying on the case law of the CJEU for specific issues.

## 3. A Child's Position in Criminal Proceedings

Children may be involved in criminal proceedings as victims, witnesses, or perpetrators of a crime. The main concern in these proceedings is to look after their best interests and reduce the harm and harmful effects of secondary victimisation that children might suffer as a result of their involvement. In addition to child protection being provided by the Criminal Code,[68] which contains several special provisions relating to crimes against children,[69] child protection in proceedings is also provided by the Criminal Procedure Act[70] and other laws. Though the system currently in force is often criticised for its fragmentation, it addresses several different situations in which a child may find himself//herself in connection with criminal proceedings.

It is important to note that in Slovenia, children under the age of 14 are not criminally liable. Their liability is limited with regard to their age. The Criminal Code states that they can commit an unlawful act, but they cannot be the perpetrators of a criminal offence. By the age of 14, persons become younger minors (from 14 to 16 years of age) and later older minors (from 16 to 18 years of age) and can be

65 Ibid., Art. 51 para. 1.
66 These can be issues such as education, migration status, nationality, etc.
67 E.g. The Slovenian Institute of Education, social work centres, Ministry of Education, Ministry of the Interior, etc. Administrative Dispute Act, Official Gazette No. 105/06 with amendments.
68 Criminal Code, Official Gazette No. 50/12 with amendments.
69 See e.g.: Arts. 192–194 of the Criminal Code.
70 Criminal Procedure Act, Official Gazette No. 176/21 with amendments.

held criminally liable for their actions. However, even after reaching the age of 18, the Criminal Code treats them in a special way until they reach the age of 21 (young adults); namely, although in principle, the Criminal Code stipulates that it applies equally to all persons of legal age, regardless of whether they are Slovenian citizens or foreigners, Article 5(3) presumes a special legal act that defines the criminal liability of minors and may also determine that young adults may, due to their personal development, receive a punishment similar to minors. The division of minors into younger minors, older minors, and later into younger adults is, therefore, important mainly due to the type of punishment they might receive.

Article 5(2) of the Criminal Code predicts the criminal liability of minors to be determined by a special regulation. Since such regulation has not yet been adopted, provisions of the Criminal Code and Criminal Procedure Act still *mutatis mutandis* apply, since they both contain specific chapters or provisions relating to the treatment of minors. In 2019, the Liability of minors for Criminal Offences Act, the Act that is intended to combine the treatment of minors from the current multiple regulations into one, was put into public discussion. Since 2021, the Protection of Children in Criminal Procedure and their Comprehensive Treatment in Children's House Act[71] has been in force.[72] The procedural legal basis for the court's decision-making in criminal proceedings does not change with this Act; the Criminal Procedure Code provisions still apply. However, it is expected that by reducing the administrative burden, the courts will be able to focus more easily on the substantive treatment of the situation of the minor witness or the injured party and on the substantive conduct of the hearing itself.

Slovenian legislation, however fragmented, provides for a system with several protective elements for children. These protective elements include, for example, the educational measures, the fact that the exclusion of a minor from his/her environment is considered a last resort, and the fact that social work centres also play an active role in the process. Most clearly, the protective attitude of the Slovenian model is manifested in the imposed sanctions that are adapted to minors.[73]

Court hearings in criminal proceedings are usually public to ensure that courts operate openly and that their decisions are subject to public scrutiny. In criminal proceedings, the court may decide to close the hearing to the public (for example, if the victim is a minor) and, in such a way, protect the child's rights.[74]

71 Protection of Children in Criminal Procedure and their Comprehensive Treatment in Children's House Act, Official Gazette No. 54/21 with amendments.

72 The Protection of Children in Criminal Procedure and their Comprehensive Treatment in Children's House Act provides for the protection of juvenile victims and witnesses of offences under the chapters against humanity (Chapter 14), against life and body (Chapter 15), against sexual integrity (Chapter 19), against marriage, family and children (Chapter 21), and Arts. 131-138, 140, 141, 143, 283, 284, 286, 296, 323, 324 of the Criminal Code. If the court deems it necessary for the protection of the best interests of the child, the law may also be applied to the hearing and comprehensive treatment of a child who is a victim or witness of another criminal offence.

73 Ibid.

74 Ibid.

### *3.1. Child as Witness or Victim of a Criminal Offense*

Criminal proceedings in Slovenia consist of preliminary proceedings and formal criminal proceedings. During preliminary proceedings, namely the investigation phase of the proceeding, the police are allowed to exercise police measures or powers. They have the power to collect notices from persons, not only from adults but also minors, whereby the law does not prescribe the mandatory presence of parents or guardian.[75] The need for the police to provide considerate treatment to such children is imposed in the Police Powers and Tasks Act.[76] In essence, this Act merely provides in general terms that, when dealing with children and minors, police officers must take into account their age, physical and mental development, sensitivity, and any other observable characteristics.[77]

The pre-trial procedure is then followed by the investigation stage, during which the investigating judge carries out investigative actions, including the examination of a witness. The current regime for hearing victims and underage witnesses in the Criminal Procedure Act is fragmented. The Act regulates different interrogation regimes for different categories of injured parties and minor witnesses.[78] According to Article 240(4) of the Criminal Procedure Act, when interrogating a minor, especially if such person has suffered harm from the criminal offence concerned, it must be conducted with particular care to avoid possible detrimental consequences to his/her mental state. If necessary, the hearing of a minor shall be carried out with the assistance of an educational or other expert. In hearing a witness who is less than 15 years old, a person whom the witness trusts may be present. The hearing of a witness who is a victim with a special need for protection may be carried out, depending on his/her personal circumstances, in specially adapted premises. The hearing of a witness who is less than 15 years old and who was the victim of the criminal offence referred to in Article 65(3) of the Criminal Procedure Act[79] shall be carried out in specially adapted premises unless this is not necessary for justifiable reasons that must be specifically substantiated by the court.[80] If necessary, the court may impose protection measure for a witness in line with Article 240.a of the Criminal Procedure Code.[81]

75 Šepec et al., 2023, p. 795.

76 Police Tasks and Powers Act, Official Gazette No. 15/13 with amendments.

77 Ibid., Art. 18.

78 For example: Art. 240a provides for the protection of witnesses at risk, Art. 244a provides for the possibility of videoconferencing and Article 240(4) establishes the duty to act with due diligence and provides for the possibility of questioning with the assistance of an expert, etc.

79 These include crimes against sexual integrity under Chapter 19 of the Criminal Code, crimes against marriage, family and youth under Chapter 21 of the Criminal Code, the crime of enslavement under Article 112 and the crime of trafficking in human beings under Article 113 of the Criminal Code.

80 Art. 240 para. 5 of the Criminal Procedure Act.

81 The court may order one or more of the following measures to protect the witness or his/her close relative: removal of all or particular data, marking of all or some of the data as data not available to the public due to the interests of the proceeding, issuing an order to keep particular facts or data secret, the assignment of a pseudonym to the witness, hearing the witness by means of technical equipment.

In certain criminal proceedings,[82] an injured party who is a minor must have, throughout the criminal proceedings, a counsel to ensure his/her rights, particularly regarding the protection of his/her integrity during the hearing before the court and the enforcement of pecuniary claims. Minors as victims of criminal offences referred to in the preceding sentence must also have a counsel during the hearing in pre-trial proceedings. Minors as victims who do not have a counsel shall be assigned one by the court *ex officio* from among the attorneys.[83] In pre-trial and criminal proceedings, a minor as victim, an injured party who is a victim of violence or another injured party, if so required by the nature and gravity of the crime, his/her personal circumstances, or the degree of threat to his/her life and body, may be accompanied by a person of his/her choosing, unless this is contrary to the interests of the successful implementation of pre-trial or criminal proceedings or the benefit of the injured party.[84]

It follows that the legislator focused primarily on the protection of minors as victims and did not put special regard toward child witnesses.[85] It is true that children as victims of criminal offences are in a particularly difficult situation, especially when they are victims of crime by family members. Furthermore, the very decision to report a crime can be extremely traumatic for them.[86] They find themselves in an environment created by adults and adapted to adults that they do not understand and most likely find hostile or at least uncomfortable.[87] Nevertheless, it is questionable whether such a distinction between underage witnesses and victims is appropriate. Minor witnesses are placed in a very difficult position as well, especially when their role in the proceedings may affect their family relationships outside the proceedings. The distress of a minor witness is all the greater because it is also subject to the duty to respond to the summons of the court and testify to the truth. In the interests of criminal proceedings, this further exacerbates the child's distress.

As aforementioned, the legislator additionally provided for a special Protection of Children in Criminal Procedure and their Comprehensive Treatment in Children's House Act. The procedural solutions proposed in this Act strive for a uniform,

82 In criminal proceedings conducted for crimes against sexual integrity under Chapter 19 of the Criminal Code, crimes against marriage, family and youth under Chapter 21 of the Criminal Code, the crime of enslavement under Article 112 and the crimes of trafficking in human beings under Article 113 of the Criminal Code.

83 Art. 65 para. 3 of the Criminal Procedure Act.

84 Ibid., Art. 65 para. 4.

85 More in: Filipčič, 2015, p. 96.

86 More in: Božič, 2006, pp. 28–29.

87 Šugman Stubbs, 2000, p. 207.

comprehensive treatment of the child in the hearing,[88] either as a witness or (also) as an injured party. They are designed in such a way that the court also decides on the application of all measures aimed at protecting the child's mental integrity: avoiding contact with the defendant, using adapted premises, hearing with the help of an expert, and minimising the number of hearings (so-called one-stop-shop approach).[89] The Act also provides for special procedures in the case of physical examination of the child, crisis support and psychosocial assistance to the child,[90] and predicts special training for the providers of the planned activities.[91]

### *3.2. A Child as the Person Who Committed a Criminal Offense*

The Criminal Procedure Act also contains a chapter related to proceedings against minors. The provisions of this chapter apply to proceedings against persons who committed a criminal offence as minors and have not yet attained the age of twenty-one at the time of the institution or conducting of proceedings.[92] The chapter contains multiple provisions in regard to minors, among other general provisions the proceedings involving minors, provisions on composition of the court, institution of proceedings, legal remedies, etc. This section only highlights selected ones.

If it is established during the proceedings that the minor, at the time of committing a criminal offence, had not yet attained the age of 14, the criminal proceedings are discontinued, and the social welfare authority (social work centres) is informed.[93] Where the age of the perpetrator cannot be established, in doubt as to whether he/

88 The principle of comprehensive treatment of a child, stemming from Article 3 of the Protection of Children in Criminal Procedure and their Comprehensive Treatment in Children's House Act, requires state authorities and other actors to exercise special care in ensuring holistic treatment to respect the dignity and best interests of the child while ensuring equal protection of rights, respect for due process guarantees and the rights of the defence. They need to take into account the child's age, maturity, capacity to understand the meaning and consequences of his/her actions and other personal characteristics, and the nature, character and circumstances of the offence, and they shall ensure that the child is provided with the necessary information and explanations to ensure the child's protection and personal safety, to prevent exposure to secondary victimisation, that the interrogation and physical examination of the child are carried out only as far as it is strictly necessary and in the minimum possible number in order to prevent further victimisation, that the child is heard and that the actions are carried out without undue delay.

89 Special protection of the child is reflected, for example, in the possibility of a hybrid nature of the interrogation (with the participation of an expert), in the concretisation of the principle of care and consideration in the physical examination, in the provision for crisis support and psychosocial assistance to the child (support at the time of the interrogation itself, psychosocial assistance being a more permanent form of assistance which follows in the aftermath of the interrogation and lasts for a period of up to 6 months), etc. See Arts. 16-28 of the Protection of Children in Criminal Procedure and their Comprehensive Treatment in Children's House Act.

90 Arts. 33-37 of the Protection of Children in Criminal Procedure and their Comprehensive Treatment in Children's House Act.

91 Ibid., Art. 38.

92 Art. 451(1) of the Criminal Procedure Act.

93 Ibid., Art. 452.

she has already reached the age of 14, 16, 18, or 21, it is presumed that he/she has not reached the age of which there is doubt.[94]

A minor may not be tried *in absentia*, and the authorities involved in the proceedings must take into account his/her interests in all proceedings. In the course of the proceedings, all persons involved in proceedings against the child, lawyers, experts, experts, etc., must respect his/her dignity and act with particular care and consideration, taking into account the minor's age, maturity, mental development, level of understanding, sensitivity, personal and psychological characteristics, and any special needs, so that the proceedings do not adversely affect his/her development.[95] The Criminal Procedure Act also prescribes that all stakeholders participating in the proceedings must acquire additional knowledge in the field of juvenile delinquency. For this purpose, basic training and regular training are organised for them by the competent authorities.[96] This is important since Article 454 of the Criminal Procedure Act stipulates that a minor may have a defence counsel throughout the proceedings against him/her.[97] In any case, a minor must have a defence counsel if he/she is deprived of his/her liberty; if he/she does not, the court shall appoint him/her one *ex officio*. Furthermore, there are special juvenile panels in the district, higher, and supreme courts that decide on these matters. District courts also have one or more juvenile judges.[98]

A minor also has the right to be accompanied in the process by his/her parents or guardian.[99] The competent authority must inform the minor without delay that he/she is suspected or accused of having committed a criminal offence and all his/her rights

94 Ibid., Art. 452.a.
95 Ibid., Art. 453.
96 Ibid., Art. 452.b.
97 In addition to the other instances provided for in the Criminal Procedure Act, a minor must have a defence counsel from the start of the preparatory proceedings if he/she is being tried for an offence punishable by a term of imprisonment exceeding three years. However, for other offences for which a lighter penalty is prescribed, he/she shall have a defence counsel if the juvenile judge considers that he/she needs one, taking into account, in particular, the mental development, the capacity for understanding and the personal characteristics of the minor, the complexity of the case and the severity of the sanction or other measures which he/she may apply to the minor in the particular proceedings.
98 Art. 462 of the Criminal Procedure Act.
99 In accordance with Art. 452c of the Criminal Procedure Act, if the presence of such persons would be contrary to the best interests of the minor, if they could not be contacted despite reasonable efforts by the authority, if their identity is unknown, or if it would be contrary to the interests of the successful conduct of the pre-trial or criminal proceedings, the minor may choose another adult in whom he/she can confide. If the minor does not choose another adult, or if the reasons referred to in the preceding sentence also apply in respect of a person chosen by the minor, the authority before which the proceedings are pending shall, taking into account the best interests of the minor, appoint the other adult or inform the competent social work centre that it will appoint him/her without delay.

in his/her mother tongue or language he/she understands. The same informational duty goes for his/her parents or guardian.[100]

Furthermore, special provisions are in place for dealing with situations when a minor is deprived of his/her liberty. According to Article 452.d of the Criminal Procedure Act, he/she must be immediately informed of his/her rights, and he/she may only be deprived of his/her liberty in exceptional cases where the same purpose cannot be achieved by a milder measure; the deprivation of liberty may only last the minimum time necessary and regular judicial review must be ensured. When deprived of his/her liberty, a minor must be kept separately from adults.[101] The same goes for exceptional cases when a minor is detained in accordance with Article 472 of the Criminal Procedure Code. A minor must be detained separately from an adult. An exception is allowed only on the condition that the stay together with the adult detainee is in the minor's favour. Such regulation is consistent with Article 37 of the Convention on the Rights of the Child. Both regulations clearly allow an exception only if this protects the best interests of the child and does not allow the pursuit of any other purposes.[102]

If a minor has participated in a criminal offence jointly with adult persons, the proceedings against the minor shall be separate. Proceedings against a minor may only be joined with proceedings against adults and conducted in accordance with the general provisions of this Act if the joinder is necessary for a comprehensive clarification of the case.[103]

Finally, it is also important to note that criminal proceedings against minors shall, in respect of all criminal offences, only be instituted upon the request of the state prosecutor.[104] In the case of a criminal offence punishable by up to three years of imprisonment or a fine, the state prosecutor may decide not to request the institution of criminal proceedings even where evidence exists that a minor has committed a criminal offence, if in view of the nature of the criminal offence, the circumstances

100 The minor must be informed of these rights in an understandable way, orally and in writing, which he/she must confirm with a signature.

101 However, pursuant to Art. 452d of the Criminal Procedure Act, a police officer may exceptionally decide that a minor should be detained together with an adult where, in the light of the minor's personality and other circumstances of the particular case, it is in the minor's best interests or where, in exceptional circumstances, it is not possible to provide for separate accommodation, provided that the minor is detained together with the adult in a manner consistent with the minor's best interests. The detention order shall state the reasons for such placement. A minor who is already of legal age at the time of detention but who has not yet reached the age of twenty-one may be detained together with the minor if, in the light of the minor's personality and the other circumstances of the particular case, it is in the minor's best interests and in the best interests of the minor who is detained together with him/her to do so. The competent authority shall inform the minor's parents or guardian as soon as possible of the deprivation of liberty and shall give the minor the opportunity to contact them.

102 This was also emphasised by the Constitutional Court of the Republic of Slovenia in its decision U I 103/95 which emphasised that the reason for ordering the joint residence of a minor with an adult detainee should not be the solution of space constraints in prisons or the inability to provide for the separate detention space for minors.

103 Art. 456 of the Criminal Procedure Act.

104 Ibid., Art. 465.

in which it was committed, and the past life and personal traits of the minor, the prosecutor realises that the proceedings against the minor would not be expedient.[105]

## 4. Conclusion

Just like adults, children (defined by the Family Code as persons who have not yet reached the age of 18, unless they have previously acquired full legal capacity) might also encounter the judicial system in different civil procedures or even in criminal matters. They can be put in the role of the plaintiff, initiator of non-contentious civil proceedings, witness, victim, or even the perpetrator of a criminal offence. While Slovenia recognises children's rights in various legal acts, a unified framework outlining their specific procedural guarantees is still lacking due to the fragmentation and different nature of the proceedings. The position of a child in civil litigation and non-contentious civil proceedings mainly depends on the provisions of the following three sources of law: the Civil Procedure Act, the Non-Contentious Civil Procedure Act, and the Family Code. In administrative proceedings, an analysis of the Administrative Procedure Act and the Administrative Dispute Act is necessary. Finally, the main provisions on child participation and rights in criminal proceedings can be found in the Criminal Code and the Criminal Procedure Act.

Following the analysis of a child's rights in civil (civil litigation, non-contentious civil procedure and administrative procedure) and criminal proceedings, some general takeaways can be made. Firstly, the relationship between parents and children changes over time. With the age and maturity of the child, the range of duties and responsibilities of parents decreases, which is also reflected in the rules on the child's capacity and rights in the proceedings: the child first acquires the right to express his/her opinion and then also the procedural ability to perform all procedural actions independently and validly. Full legal capacity, in accordance with Article 152 of the Family Code, is acquired by a child from the age of 18, exceptionally earlier. A child who has reached the age of 15 has a limited legal capacity. This means that he/she can make certain transactions on his/her own unless otherwise provided by law. In this regard, the child's capability of understanding the procedure and its consequences is used as a non-defined legal standard, filled in individual situations. If the transactions are so important that they have a significant impact on the child's life, the permission of the parents (or other legal representative) is needed for the validity of such transactions.

Secondly, all of the proceedings strive to follow the principle of the child's best interest. Though this might show in different ways considering the nature of a particular proceeding, it is key for all authorities to keep the child's best interest in mind.

105 To establish these circumstances, the public prosecutor may request information from the minor's parents or guardian and from other persons and institutions. See: Art. 466 of the Criminal Procedure Act.

Thirdly, in all the proceedings, the Slovenian legislator makes procedural adaptations when proceedings involve children, whatever their role in the proceeding might be. These adaptations need to be applied to specific situations while recognising the age and maturity of the child involved. The analysis shows that the legislator found this to be of crucial importance. The adaptations also include granting children the right to express opinions (which is considered a right, not a duty) and the right to name their confidants, i.e. a person whom they confide in and want them to be present at hearings and when making statements, naming a collision guardian, and also generally making the legislation child friendly by giving them the option to participate in the proceedings according to their capacities, which ensures that their voices are heard.

Next, the analysis shows that the legislator tried to ensure that all the legal professionals and other participants of the proceedings involving children are equipped with the necessary skills and knowledge to effectively represent and advocate for children. To achieve this, the legislator predicted special training programs or prescribed an education or skills that a certain participant must have in order to be involved in such proceedings.

Lastly, in all the proceedings, the legislator either made sure that a child is protected from public scrutiny in sensitive proceedings by closing the hearings for the public (for example, in family law matters, in line with the relevant provision of the Non-Contentious Civil Procedure Act) or at least gave the authorities an option to do so (in criminal proceedings) and safeguarded the children's rights and dignity in this way.

Though the legislator took a big step toward unifying the legislation in the field of family law proceedings by transferring decisions on all measures for the protection of the interests of children from social work centres (and administrative proceedings) to courts (and non-contentious civil procedures) with the new Family Code and Non-Contentious Civil Procedure Act in 2019, such unification step is still to be made in the field of criminal proceedings, in particular, regarding minors who commit a criminal offence.

In conclusion, while fragmented, the Slovenian legislation provides a sufficient legislative framework for ensuring children's participation, representation, and best interests in all the examined proceedings. Slovenian legal system, therefore, sufficiently prioritises the best interests and participation of children in the proceedings. It is ensured that children's voices are heard and their rights protected, this way paving the way for a more just and equitable society for all.

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# Part II
# The Child's Right to Participate: International and EU Regulation

| Chapter 10 |

# Article 12 of the UN Convention on the Rights of the Child and the Understanding of the Committee on the Rights of the Child

Márta Benyusz

**ABSTRACT**

The current book chapter provides an in-depth analysis of Article 12 of the United Nations Convention on the Rights of the Child, which is the very basis of children's fundamental right to participate. It focuses on the legal analysis of Article 12 and the understanding and approach that is elaborated by the Committee on the Rights of the Child. Besides the analysis of Article 12, it provides an outline of the approach that shall be taken when implementing Article 12 in any life setting.

**KEYWORDS**

children's rights, the child's right to be heard, the child's right to express views, genuine participation, United Nations Convention on the Rights of the Child, best interest of the child, capability of forming his or her views, practical implementation, consultative process, participation process, self-advocacy

## 1. Introduction

The *United Nations Convention on the Rights of the Child* (hereinafter UNCRC or CRC) is the most widely ratified human rights treaty in the world.[1] It declared the rights of children after a ten-year-long drafting process initiated by the Polish State. It contains the human rights of children with special regard to their special status and vulnerability.

1 As of 16 March 2024, all State Parties to the UN have ratified the CRC, except for the United States of America.

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The UNCRC was born at the end of the XXth century, called the century of the child,[2] and represents the shift from the so-called caring, protecting model to a rights-based approach towards children. It means that, unlike the preceding documents, i.e. the Geneva Declaration[3] and the Declaration on the Rights of the Child, the UNCRC does not consider children as objects of protection but as subjects of their rights. In other words, children's evolving capacity is taken into consideration when granting them important participatory rights in connection with issues in which they are involved or which affect them to any extent.

The shift from the caring model to a rights-based approach[4] is mostly tangible in Article 12 of the UNCRC, a core provision of the UNCRC.[5] Article 12 is the very basis of child-friendly justice and, as such, the basis of the participation and the rights of the child in civil, criminal, and administrative court proceedings. Article 12 addresses the legal and social status of children, who, on the one hand, lack the full autonomy of adults but, on the other, are subjects of rights.[6] It refers to the participation rights of an individual child as well as to participation rights of children altogether. Article 12 introduced a fundamentally new right into international human rights law.[7] In recognition of children's lack of legal autonomy in decision-making, it provides that every child capable of forming a view must be assured the right to express that view and have it given due weight in accordance with the child's age and maturity.[8]

This chapter analyses Article 12 of the UNCRC in depth by examining attributes to genuine participation of children, reviewing fields where Article 12 has great importance in the realisation of the rights of the child, and presenting participation models for children which allow them to raise their voice in a manner that aligns with the spirit of Article 12.

## 2. Legal Analysis of Article 12 of the UNCRC

Article 12 of the UNCRC provides

> '1. State Parties shall assure to the child who is capable of forming his/her own views the right to express those views freely in all matters affecting the child,

2 Van Bueren, 1995.
3 The Geneva Declaration was the first international instrument adopted on an international level (under the umbrella of the League of Nations) declaring the rights of children. The document was drafted and initiated by Eglantyn Jebb, an English woman, being the founder of the International Save the Children Fund.
4 Similar shift can be examined in the legal protection of people with disabilities, where this shift is represented by the Convention on the Rights of Persons with Disabilities.
5 Daly and Rap, 2019.
6 UN Committee on the Rights of the Child, 2009, para 1.
7 Lansdown, 2022, p. 44; Daly and Rap, 2019.
8 Daly, 2011.

> the views of the child being given due weight in accordance with the age and maturity of the child.
> 2. 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.'

Paragraph 1 is about the "right to free expression of views" in all matters affecting the child, linked to the capability of forming views. However, apart from the mere possibility of expressing views, it is strongly about the genuine consideration of these views and giving them due weight in accordance with age and maturity.

Paragraph 2 is about the "right to be heard" in formalised, namely judicial and administrative proceedings, where the child is affected.

It is very important to note before going into an in-depth analysis of the right to free expression of views and the right to be heard that both of them are obligations on the side of the State, indirectly on the side of adults, i.e. parents, and a right on the side of the child, being individual or belonging to a group of children. This right can never turn into an obligation on the side of the child and must always remain a free choice of the child, where he/she receives all the necessary information in order to be able to make this free choice as safely as possible in the given situation.

### *2.1. The Right to Free Expression of Views*

The provision on the free expression of views contains *five attributes* to which, by taking a closer look, one may gain a better understanding of Article 12.[9]

These attributes are (I) *shall assure, (II) capable of forming his/her own views*, (III) *the right to express those views freely*, (IV) *in all matters affecting the child*, and (V) *being given due weight in accordance with the age and maturity of the child*.

The term "shall assure" refers to the obligation of the State to undertake all legislative, administrative, and other measures in order to implement Article 12 in a manner that solicits the views of the child in all matters affecting her/him and to give due weight to those views.[10]

The term "capability of forming his/her own views" shall be understood in a wide manner with the presumption that a child has the capacity to form her/his views[11] and recognise that she/he has the right to express them.[12] In connection to this term, the CRC Committee consequently underlines that there is no age limit to the right of the child to express views and, therefore, usually, the concluding observation issued to state reports as well as other documents (i.e. General Comments, decisions etc.)

9 The analysis is made on the basis of General Comment No. 12 of the CRC Committee and on the basis of the text of the UNCRC.
10 UN Committee on the Rights of the Child, 2009, para. 19.
11 It means that the implementation of Article 12 cannot begin with an assumption that a child, based on age or any other characteristic, is not capable of forming his/her views.
12 Ibid., para. 20.

of the Committee discourages states from introducing age limits either in law or in practice.[13] Such laws and practices have the capability to restrict the child's right to be heard.

Nevertheless, the "approach of not introducing age limit" calls for the recognition of different communication methods, as obviously, the wide-spread and usually firstly recognised verbal communication forms may not fully reflect the views of a younger child or a child with some kind of disability. This is also addressed by the Committee,[14] by underlining that full implementation of Article 12 requires the recognition of and respect for non-verbal forms of communication, including play, body language, facial expressions, drawing, and painting, through which also very young children or children with a disability that does not hinder them from expressing views, can demonstrate understanding, choices, and preferences. The Committee also highlights that efforts must be made to ensure the right to express views to children of minorities, children belonging to Indigenous or migrant groups, and other children who do not speak the majority language.[15]

The approach of not introducing age limits also needs to address that the child does not necessarily have a comprehensive knowledge of all aspects of the matter by which he/she is affected, but that he/she has sufficient understanding of the issue and, thus, is capable of forming a view. Furthermore, a situation where there is an inadequate implementation of Article 12 can have a negative consequence, such as in case of children who became victims of criminal offences, sexual abuse, violence, or other form of mistreatment.[16]

The term "expressing those views freely" refers to the exercise of this right on a voluntary basis, without any kind of manipulation, undue influence, or pressure.[17] In other words, it means that the child needs to be given a free choice to benefit from this right and cannot be forced to express any other view but his/her own. In order to be able to express views freely, one should feel safe in the given environment. Therefore, the conditions in which the right is exercised must take into account the individual and social situation of the child.[18] The free expression of views also requires a sufficient amount and quality of information, which should be given both to children and to parents or guardians of children who have the possibility to facilitate directly the exercise of Article 12 para 1 by children.

The term "in all matters affecting the child", similarly to the other attributes, shall be understood broadly. The Open-ended Working Group established by the Commission on Human Rights, which coordinated the drafting process of the UNCRC, rejected a proposal to define these matters by a list limiting the consideration of a child's or children's views. Instead, it was decided that the right of the child to be heard should

13 Ibid.
14 Ibid., para. 21.
15 Ibid.
16 Ibid.
17 Ibid., para. 22.
18 Ibid., para. 23.

refer to "all matters affecting the child".[19] This underlines the intention of the drafters to understand Article 12 in as broad a manner as possible, with a limitation, of course, provided by the best interest of the child principle.

The term "being given due weight in accordance with the age and maturity of the child" means that it is not enough to merely listen to the child, but his/her opinion needs to be taken seriously into account. It refers to the capacity of the child, which has to be assessed in order to give due weight to her/his views or to communicate to the child in a way in which those views have influenced the outcome of the process.[20] Similarly to "capability of forming his/her views", the Committee underlines here as well, what is also a clear consequence stemming from the text and, as such, a mere literal analysis of the UNCRC itself, that the age cannot in itself determine the weight that is given to the expressed views, but maturity[21] needs to be assessed equally, on a case-by-case basis. Research has shown that information, experience, environment, social and cultural expectations, and levels of support contribute to the child's capacity to form a view.[22]

### *2.2. The Right to Be Heard*

Article 12 para 2, i.e. the right to be heard, consists of three attributes (I) *the right to be heard in any judicial and administrative proceedings affecting the child,* (II) *either directly or through a representative or an appropriate body,* (III) *in a manner consistent with the procedural rules of national law.*

In connection to the term "the right to be heard in any judicial and administrative proceedings affecting the child", it needs to be emphasised that the drafters placed the word "any" in order to avoid any limitation to these judicial and administrative proceedings, meaning that the scope does not only include "official" dispute resolutions but it involves alternative dispute resolution mechanisms such as arbitration or mediation. The provision applies, for instance, but not limited to separation of parents, custody, care and adoption, children in conflict with the law, child victims of physical or psychological violence, sexual abuse or other crimes, health care, social security, unaccompanied children, asylum-seeking and refugee children, and victims of armed conflict and other emergencies.[23] Typical administrative proceedings include, for example, decisions about children's education, health, environment, living conditions, or protection.[24] The right to be heard needs to be applied in

19 Ibid., para. 27.
20 Ibid., para. 28.
21 "Maturity refers to the ability to understand and assess the implications of a particular matter, and must, therefore, be considered when determining the individual capacity of a child to express his or her views on issues in a reasonable and independent manner. The impact of the matter on the child must also be taken into consideration. The greater the impact of the outcome on the life of the child, the more relevant the appropriate assessment of the maturity of that child." (UN Committee on the Rights of the Child, 2009, para 30.)
22 Ibid., para. 29.
23 Ibid., para. 32.
24 Ibid.

proceedings which are initiated by the child as well as to those initiated by someone else.[25] At first thought, judicial and administrative proceedings are not places which are considered child-friendly. In order for an effective and genuine implementation of Article 12 para 2, the right to be heard, can only be exercised in an environment that is safe, sensitive, and appropriate to the child's age. Proceedings must be accessible and child-appropriate, with special attention 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.[26]

The voluntary basis applies not only to the right to express his/her views but it is equally valid in terms of the right to be heard. Therefore, the second term in Article 12 paragraph 2, i.e. "either directly, or through a representative or an appropriate body" can be interpreted after the decision of the child on exercising the right to be heard. If a child decides to exercise this right, he/she shall be given the opportunity to decide whether he/she would prefer to exercise the right directly or through a representative. The CRC Committee recommends that whenever there is a possibility, the child must be given the opportunity to be directly heard in any of the proceedings.[27] Whenever the child is not heard directly, the question of who shall be the representative arises. In situations where it is clear that the parents (guardians) have no conflict of interest with the child, they can be adequate representatives. Nevertheless, there can be situations where due to a conflict of interest, a parent cannot be a representative. In such cases, lawyers (child attorneys) or social workers can step into the feet of representatives. All representatives, be it a parent, a guardian, a lawyer, or a social worker, must always bear in mind that he/she must represent the interests of the child and not the interests of other persons or institutions.[28]

The representation shall be in line with "procedural rules of national law". Nevertheless, these procedural rules shall not restrict the exercise of Article 12 para 2; on the contrary, they need to facilitate the broadest application possible.[29]

## 3. Article 12 as a General Principle to the UNCRC

The UN Committee on the Rights of the Child (hereinafter the Committee or CRC Committee) identified Article 12 as one of the *general principles* of the UNCRC. It means that Article 12 is not only the right of every human being under the age of 18 but also serves as a framework provision for the interpretation and implementation of all other rights enshrined in the UNCRC.

25 Ibid., para. 33.
26 Ibid., para. 34.
27 Ibid., para. 35.
28 Ibid., para. 37.
29 Ibid., para. 38.

The CRC Committee identified altogether four general principles.[30] Apart from Article 12, i.e. the consideration of the viewpoint of the child these general principles are, non-discrimination, provided for in Article 2,[31] the best interest of the child, encompassed in Article 3[32] of the UNCRC, and the right to life, survival, and development, enshrined in Article 6.[33] These principles can be supplemented by the right to be brought up in a loving and caring family environment. It can be found in the Preamble and several articles of the CRC and is one of the basic conditions of a nourishing childhood.

According to the CRC Committee, Article 12, as a general principle, highlights the role of the child as an active participant in the promotion, protection, and monitoring of his/her rights, and applies equally to all measures adopted by States to implement the UNCRC.[34] The Committee believes that Article 12 is also about involving children in government decision-making processes and, for instance, considering reducing the voting age below 18. Besides, the direct involvement of the CRC Committee also underlines that, apart from voting rights, consultation rights can be given to children in order to channel their views into decision-making. If consultation is to be meaningful, documents as well as processes need to be made known and accessible to both children and adults.[35]

The Committee also underlines that merely listening to children does not reflect the real intentions of Article 12. Listening to children should not be seen as an end in itself, but rather as a means by which States make their interactions with children and their actions on behalf of children ever more sensitive to the implementation of

30 UN Committee on the Rights of the Child, 2003, para. 12.

31 UNCRC Article 2. "1. States Parties shall respect and ensure the rights set forth in the present Convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's or his/her parent's or legal guardian's race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth, or other status.
2. States Parties shall take all appropriate measures to ensure that the child is protected against all forms of discrimination or punishment on the basis of the status, activities, expressed opinions, or beliefs of the child's parents, legal guardians, or family members."

32 UNCRC Article 3. "1. In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities, or legislative bodies, the best interests of the child shall be a primary consideration.
2. States Parties undertake to ensure the child such protection and care as is necessary for his/her well-being, taking into account the rights and duties of his/her parents, legal guardians, or other individuals legally responsible for him/her, and, to this end, shall take all appropriate legislative and administrative measures.
3. States Parties shall ensure that the institutions, services, and facilities responsible for the care or protection of children shall conform with the standards established by competent authorities, particularly in the areas of safety, health, the number and suitability of their staff, as well as competent supervision."

33 UNCRC Article 6. "1. States Parties recognise that every child has the inherent right to life.
2. States Parties shall ensure, to the maximum extent possible, the survival and development of the child."

34 Ibid.

35 Ibid.

children's rights.[36] The real challenge is, therefore, giving due weight to their views. The Committee considers that Article 12 requires consistent and ongoing arrangements and that involvement of and consultation with children must also avoid being tokenistic and aim to ascertain representative views. The emphasis on "matters that affect them" in Article 12 para 1 implies the ascertainment of the views of particular groups of children on particular issues – for example, children who have experience of the juvenile justice system on proposals for law reform in that area or adopted children and children in adoptive families on adoption law and policy.[37] It is important that governments develop a direct relationship with children, not simply one mediated through non-governmental organisations (hereinafter NGOs) or national human rights institutions (hereinafter NHRIs). It serves the interest of children to have direct contact not only with governments but with all the authorities, judicial bodies, etc., but only in cases where the processes are developed age-appropriately, child-friendly, and with sufficient expertise on the side of the adults to communicate with children in such a way that considers the intention of Article 12 genuinely, i.e. children remain the subject of their rights and not become objects of the participation processes.

Article 12 has its relevance, influence, and correlation in connection with other general principles as well as with other rights that are enshrined in the UNCRC.

*The best interest of the child principle* cannot be realised without giving due weight to Article 12.[38] It means that assessment of a child's best interests must include respect for the child's right to express his/her views freely, and due weight needs to be given to the views that are expressed in all matters affecting the child.[39] Article 12 and Article 3 have complementary roles, there is no tension between the two provisions. Article 3 aims to realise the child's best interests, and Article 12 provides the methodology for hearing the views of the child or children and their inclusion in all matters affecting the child, including the assessment of his/her best interests. Article 3, para 1, cannot be correctly applied if the requirements of Article 12 are not met. Similarly, Article 3, para 1, reinforces the functionality of Article 12 by facilitating the essential role of children in all decisions affecting their lives.[40] The evolving capacities of the child, enshrined in Article 5,[41] must be taken into consideration when the child's best interests and right to be heard are at stake. In other words, the child's views are definitely identified as one of the elements that need to be taken into account when assessing the child's best interest.

36 Ibid.
37 Ibid.
38 UN Committee on the Rights of the Child, 2013.
39 Ibid, point B., para. 3.
40 Ibid.
41 UNCRC Article 5 "States Parties shall respect the responsibilities, rights, and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians, or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention."

Any decision that neglects to take into account the views of the child cannot be interpreted as a decision based on the best interest of the child. The fact that the child is very young or in a vulnerable situation does not deprive him/her of the right to express his/her views, nor reduces the weight given to the child's views in determining his/her best interests.[42] The adoption of specific measures to guarantee the exercise of equal rights for children in such situations must be subject to an individual assessment which assures a role to the children themselves in the decision-making process, and the provision of reasonable accommodation and support, where necessary, to ensure their full participation in the assessment of their best interests.[43] Article 3 is devoted to individual cases but also explicitly requires that the best interest of children as a group are considered in actions concerning the group of children.[44] The best interests of children as a defined group have to be established in the same way as when weighing individual interests, i.e. the views of those children need to be taken into account.[45]

*The principle of non-discrimination* is also strongly connected to Article 12. The right to express her/his views, as well as the right to be heard, needs to be guaranteed to each and every child, regardless of age, religion, colour, sex, race, etc. The principle of non-discrimination also supports the CRC Committee's opinion on the approach of no age limit.

The *principle of the right to life, survival, and development* is also in correlation with the right to express views and the right to be heard. Every child has an inherent right to life, and a right to survival and development, which means that each and every child is entitled to survival and development to the maximum extent possible. The experience of exercising the right to express views and the right to be heard contributes to a development that allows children to be members of society to the fullest extent possible. The CRC Committee underlines that promoting opportunities for the child's right to be heard (as part of child participation) is a tool to stimulate the full

42 UN Committee on the Rights of the Child, 2013, point A para. 1 point a).
43 Ibid.
44 UN Committee on the Rights of the Child, 2009, para. 72.
45 Ibid., para. 73.

development of the personality and evolving capacities of the child.[46] This is consistent with Article 6 and Article 29,[47] on the aims of education.

As mentioned earlier, the principle of the *right to live in a loving and caring family environment* is there in the Preamble of the UNCRC and enshrined in several other Articles. When examining the interconnection between this principle and Article 12, it is worth looking at the wording of the Preamble,[48] i.e. 'Recognising that the child, for the full and harmonious development of his/her personality, should grow up in a family environment, in an atmosphere of happiness, love and understanding (...)'. Additionally, Article 5 states,

> 'States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the UNCRC.'

The sentence of the Preamble and the provision of Article 5 cannot be understood to the full extent without putting them in light of Article 12. A full and harmonious development can hardly be guaranteed without providing a space for the views of the child in line with his/her evolving capacities. Similarly, the child is entitled to parental guidance that takes into account his/her evolving capacities to form an opinion and, therefore, respects and gradually guarantees participatory rights. It means that, as children acquire capacities, they become entitled to an increasing level of responsibility for the regulation and influence of the matters that affect them.[49] The respect for Article 12 by the people providing the parental guidance (parents,

46 Ibid., para. 76.

47 UNCRC Article 29. "1. States Parties agree that the education of the child shall be directed to:
a) The development of the child's personality, talents, and mental and physical abilities to their fullest potential;
b) The development of respect for human rights and fundamental freedoms, and for the principles enshrined in the Charter of the United Nations;
c) The development of respect for the child's parents, his/her own cultural identity, language and values, for the national values of the country in which the child is living, the country from which he/she may originate, and for civilisations different from his/her own;
d) The preparation of the child for a responsible life in a free society, in the spirit of understanding, peace, tolerance, equality of sexes, and friendship among all peoples, ethnic, national, and religious groups, and persons of Indigenous origin;
e) The development of respect for the natural environment.
2. No part of the present article or article 28 shall be construed so as to interfere with the liberty of individuals and bodies to establish and direct educational institutions, subject always to the observance of the principles set forth in paragraph 1 of the present article and to the requirements that the education given in such institutions shall conform to such minimum standards as may be laid down by the State."

48 Wopera, 2023.

49 UN Committee on the Rights of the Child, 2009, para. 85.

legal guardians) contributes to a family environment that provides the atmosphere of happiness, love, and understanding. It will obviously not necessarily mean that the child's view or opinion prevails the opinion or guidance of the parent, but it will be a space for the child to learn, in a safe environment, how to express opinions and get feedback (positive or negative).

## 4. Interconnection with Article 13 and Article 17

Article 13, the freedom of expression guaranteed for children in the UNCRC, provides,

> '1. 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.
> 2. 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 17 is on the right to access to information. Its provision of the UNCRC declares,

> 'States Parties recognise the important function performed by the mass media and shall ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his/her social, spiritual and moral well-being and physical and mental health. To this end, States Parties shall:
> a) Encourage the mass media to disseminate information and material of social and cultural benefit to the child and in accordance with the spirit of article 29;
> b) Encourage international co-operation in the production, exchange and dissemination of such information and material from a diversity of cultural, national and international sources;
> c) Encourage the production and dissemination of children's books;
> d) Encourage the mass media to have particular regard to the linguistic needs of the child who belongs to a minority group or who is Indigenous;
> e) Encourage the development of appropriate guidelines for the protection of the child from information and material injurious to his/her well-being, bearing in mind the provisions of articles 13 and 18.'

Except Article 12, both Article 13 and Article 17 are those provisions where children, as the subject of rights, become outstandingly visible.

Article 12 and Article 13 are often confused with each other. Even though they are very much correlated, they cover different rights.[50] Article 13, the freedom of expression, stipulates the right to hold and express opinions and seek and receive information through media. It requires the State to take a passive attitude, i.e. not to interfere in the expression of opinion of children but to protect them from harm. Article 12, however, imposes an obligation on the State Parties to introduce the legal framework and mechanisms that facilitate the involvement of the child in all actions affecting his/her life and decision-making and to fulfil the obligation to give due weight to those views once they are expressed.[51]

The child's right to information, as declared in Article 17, is a prerequisite for the effective realisation of the right to express views.[52] When implementing Article 17, due consideration and balance shall be given to the implementation of this right to the furthest while protecting children from the information and influences that have the capacity to harm them and wrongfully affect their childhood development.

## 5. Interconnection with Article 5

Article 5 of the UNCRC provides,

> 'States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.'

Stemming from this provision, the child has the right to direction and guidance, which shall compensate for the lack of knowledge, experience, and understanding.[53] At the same time, this guidance is restricted by the evolving capacity of the child, as it is clearly stated in Article 12, meaning that a parent shall exercise the right to give direction and guidance to the child by constantly taking into consideration Article 12, which, in practice, means constant attention to the evolving capacities of children and giving their opinion due weight within their evolving capacities.

50 Ibid., para. 81.
51 Ibid.
52 Ibid., para. 81.
53 Ibid., para. 84.

## 6. Implementation of Article 12

### *6.1. Outline of General Requirements*

Implementation of an international convention is always an obligation on the side of the State to review the existing legislation and make the necessary amendments in order to ensure that national law corresponds to the provisions of the obligations taken upon by ratification of the given convention.[54] This review and amending process shall ideally be done in the years after the ratification, nevertheless by evolvement of law. Implementation is an ongoing process by nature and also shall follow the national structures as well as correspond to scientifically proven research of other disciplines – which is particularly true in the case of the rights of the child.

Accordingly, the implementation of the UNCRC and, in a narrower sense, the implementation of Article 12, starts after ratification and is constantly ongoing by examining the effectiveness from the point of view of children and their rights. In order to fulfil the obligation of review and amendment, i.e. the obligation of implementation, State Parties shall follow some general strategies:[55] review and withdraw restrictive declarations and reservations to Article 12; consider the establishment of national human rights institutions and adhere them to the national legal system, with an eye on the genuine involvement of children; provide a real understanding of Article 12, including training to professionals; ensure that children have the adequate support and encouragement to express their views and that these views are given due weight; attempt to form attitudes of wider society by public campaigns and any other means that have the ability to combat negative attitudes and form the general opinion on the concept of the child.

According to the implementation guideline provided by the CRC Committee, there are *five steps* that need to be taken in order for the implementation to be effective.[56] These are (i) preparation, (ii) hearing, (iii) assessment of the capacity of the child, (iv) information about due weight given to the views of the child, and (v) complaint, remedies and redress.

The "preparation"[57] means that those who are responsible for hearing the child (giving her/him an opportunity to express her/his views) make sure that the child is adequately informed about her/his rights. The information shall be given in a manner that is understandable for the child; he/she understands that he/she may benefit from the right but he/she can also reject the opportunity. It shall also be clear that the right can be exercised directly or through a representative, and the child shall also be informed about the consequences of exercising the given right. Preparation basically means that the adult who is responsible for hearing the child (and will be the final

54 UN Committee on the Rights of the Child, 2003.
55 UN Committee on the Rights of the Child, 2009, para. 49.
56 Ibid.
57 Ibid., para. 41.

decision maker) should do everything to make the child feel comfortable and safe and know all the information in a child-sensitive, child-friendly manner.

The "hearing", if done in line with Article 12, is an atmosphere for the child that encourages and enables the child to exercise the right to express views. Nevertheless, it also accepts if the child decides not to exercise that right. The hearing shall always take place in child-friendly spaces. It is rather advisable to avoid court hearings and prefer the format of a talk.[58]

In order for the child's views to be given due weight, a case-by-case analysis needs to be done to assess the capability of forming his/her own views, i.e. *capacity of the child*.[59] If the assessment of capability shows that the child is capable of forming a view, then due weight to this view shall be given, without discretion.

Article 12 does not mean that the decision will be made according to the child's decision or opinion. It is very important to underline that Article 12 is about genuine participation and does not put the responsibility of the decision on the child; on the contrary, it has to stay at the adults. However, genuine participation presumes feedback and, as such, *information about the weight that is given to the views of the child*, even if the final decision, taking into account the best interest of the child, does not reflect the opinion of the child. The feedback[60] is a guarantee that the views of the child are not only heard as a formality but are taken seriously.[61]

The final step for implementation, according to the CRC Committee, is the possibility of *remedy* in case Article 12 has been violated. Children need to have access to complaint procedures and remedies when their right to be heard and for their views to be given due weight is disregarded and violated.[62] Complaint mechanism and adequate remedies needs to be developed on a national level.

To sum up, the requirements that all processes shall ideally follow, the processes designed for implementing the child's rights to be heard and the child's rights to express his/her opinion (Article 12) are: transparency and informative manner; voluntary manner; respectful setting for the child's dignity and his/her rights; relevancy; child-friendliness; inclusivity; supported by training for both children and adults; safe and sensitive to any risk that might affect the child; accountability.

### *6.2. Implementation in Different Judicial and Administrative Procedures*

The right to be heard and the right of the child to express views freely needs to be applied in all life settings of the child. Nevertheless, it becomes even more sensitive and needs more attention when a child becomes attached to any kind of judicial or

58 Ibid., para. 43.
59 Ibid., para. 44.
60 "The information may prompt the child to insist, agree, or make another proposal or, in the case of a judicial or administrative procedure, file an appeal or complaint." (UN Committee on the Rights of the Child, 2009, para. 45.)
61 UN Committee on the Rights of the Child, 2009, para. 45.
62 UN Committee on the Rights of the Child, 2003, para. 24.

administrative procedure. Hereinafter, those aspects will be discussed which need particular attention when implementing Article 12 in these procedures.

### *6.2.1. Judicial Proceedings*

#### *6.2.1.1. Civil Proceedings*

There are several civil procedures by which a child can be affected. Here, three of them, (I) divorce and separation, (II) separation from parents and placing in alternative care, and (III) adoption, will be discussed.

a. *Divorce and separation*[63]
   The separation and divorce of parents always affect children, and it is always a crisis for all the parties involved. Most jurisdictions involved the obligation of the court of paramount consideration of the best interest of the child when deciding in such cases. The best interest of the child, as already analysed above, cannot be considered without giving the possibility to the child to express views as well as to give those views due weight. For this reason and also for genuine implementation of Article 12, legislation shall include an express opportunity for the child to be heard in the divorce proceedings.[64]
b. *Separation from parents and alternative care*[65]
   When a child is at risk, and there is a decision regarding removing him/her from home and placing in any format of alternative care, the views of the child shall be listened to and given due weight. Otherwise, the best interest of the child, as indicated in Article 20[66] of the UNCRC on alternative care, cannot be met. The implementation in these cases needs to be particularly sensitive and systematic, giving the opportunity for a case-by-case analysis and considering very thoroughly that children in these kinds of situations are most probably outstandingly vulnerable.

63 On the basis of UN Committee on the Rights of the Child, 2009, paras. 51–52.

64 When we look at national implementation, in many cases, there is an age limit for this right to be exercised. According to the opinion of the CRC Committee, age limits shall be abolished and the analysis shall be done on a case-by-case basis.

65 Ibid., paras. 53-54.

66 "1. A child temporarily or permanently deprived of his/her family environment, or in whose own best interests cannot be allowed to remain in that environment, shall be entitled to special protection and assistance provided by the State.
2. States Parties shall, in accordance with their national laws, ensure alternative care for such a child.
3. Such care could include, inter alia, foster placement, kafalah of Islamic law, adoption, or, if necessary, placement in suitable institutions for the care of children. When considering solutions, due regard shall be paid to the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural, and linguistic background."

c. *Adoption*[67]
Similarly to alternative care, the UNCRC states clearly that in the case of adoption, the best interest of the child shall be the paramount consideration.[68] Hence, no decision can be made without listening to the child. In order for Article 12 to be effectively implemented in these situations, it is important to make sure that the child, who is the right holder, knows the consequences of adoption and has the possibility to express views in this framework.

*6.2.1.2. Criminal (Penal) Proceedings*

Children who are affected in criminal proceedings, either as victims or witnesses of an offence or as the ones who commit the offence, need particular attention by the States when implementing Article 12.

a. *The child victim and child witness*
Apart from Article 12 of the UNCRC, the basis of participation rights of child victims and child witnesses are also provided in the United Nations Economic and Social Council resolution 2005/20, "Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime".[69] On the basis of this document and Article 12, every effort has to made to ensure that a child victim or/and witness is consulted on the relevant matters with regard to involvement in the case under scrutiny and is enabled to express freely views and concerns regarding her/his involvement in the judicial process.[70]
In the case of child victims and witnesses, the right to information also appears quite strongly as in these kinds of procedures information that is child-friendly but still contains the merits is essential in order to effectively exercise the right to be heard and the right to express views.[71]

67 Ibid., paras. 55–56.
68 Article 21 UNCRC: "States Parties that recognise and/or permit the system of adoption shall ensure that the best interests of the child shall be the paramount consideration and they shall:
a) Ensure that the adoption of a child is authorised only by competent authorities who determine, in accordance with applicable law and procedures and on the basis of all pertinent and reliable information, that the adoption is permissible in view of the child's status concerning parents, relatives, and legal guardians and that, if required, the persons concerned have given their informed consent to the adoption on the basis of such counselling as may be necessary;
b) Recognise that inter-country adoption may be considered as an alternative means of child's care if the child cannot be placed in a foster or an adoptive family or cannot, in any suitable manner, be cared for in the child's country of origin;
c) Ensure that the child concerned by inter-country adoption enjoys safeguards and standards equivalent to those existing in the case of national adoption;
d) Take all appropriate measures to ensure that, in inter-country adoption, the placement does not result in improper financial gain for those involved in it;
e) Promote, where appropriate, the objectives of the present article by concluding bilateral or multilateral arrangements or agreements, and endeavour, within this framework, to ensure that the placement of the child in another country is carried out by competent authorities or organs."
69 UN Committee on the Rights of the Child, 2009, para. 62.
70 Ibid., para. 63.
71 Ibid., para. 64.

b. *The child offender*

The child offender or, in other terminology, a child in conflict with the law shall be granted the rights enshrined in Article 12 in every stage of the procedure. It is also important to note that during the realisation of this right, the child in conflict with the law shall firstly be seen as a child, with his/her best interest the paramount consideration, and only secondly as someone who committed an unlawful act. The child shall always have the opportunity to give his consent in cases of diversion, including mediation, and to obtain legal and other advice and assistance in determining the appropriateness and desirability of the diversion that was proposed to him/her.[72] The child also has the right to receive prompt and direct information about the charges in a language that he/she understands and also about the juvenile justice process and the possible measures that the court might take.[73] In this kind of procedures, it is also important that the child receives other kinds of support, such as psychological support, support of social workers, and people that genuinely understand the language of children.

### *6.2.2. Administrative Proceedings*

Children are more likely to be involved in administrative proceedings than in court proceedings.[74] These procedures shall be developed in a child-friendly manner, where representation and direct hearing balance each other, making sure that every child can access the procedure if he/she is deciding to have it and benefit from this access. These procedures shall also grant the possibility to benefit from the aid of staff that has special knowledge about children.

#### *6.2.2.1. Implementation in Different Life Settings*

Apart from procedures in front of the court and in front of authorities, the right enshrined in Article 12 shall apply in all life settings of the child. Article 12 must be implemented not exclusively but outstandingly[75]in the *family*, in *alternative care*, in *health care*, in *education and school*, in play, recreation, sports and cultural activities, in the workplace, in *situations of violence*, in the *development of violence prevention strategies*, in immigration and asylum proceedings, in emergency situations, in national and international settings.

This chapter will elaborate on the implementation in family settings, alternative care, health care, education and school, situations of violence, and the development of violence prevention strategies.[76]

72 Ibid., para. 59.
73 UN Committee on the Rights of the Child, 2009, para. 64.
74 Ibid., para. 66.
75 Ibid., point C.
76 More detailed information on all other settings may be found in General Comment No. 12 of the CRC Committee.

a. *Article 12 in the family*
Family is the prime environment for the socialisation of a child. It is the family that provides the first impressions about society and teaches the child how to integrate within it. If one's family is able to provide an environment safe for expressing views while taking into due consideration the evolving capacity of the child, it may prepare the child to be more confident and aware of his/her rights outside of the family environment as well.
Implementing and applying Article 12 in a family setting – besides contributing to closer family relations – may result in an easier integration into society for children whose views were listened to and taken seriously throughout their childhood. Since parents – as adult members of the family – have the right to guide their children, they also bear the prime responsibility of implementing Article 12 in a family setting. Nevertheless, as it stems from both Article 12 and from the spirit of the UNCRC, parents shall not be left without help in this process. Thus, State Parties should encourage them by means of legislation and policies to listen to children and give due weight to their views in matters that concern them.[77] The CRC Committee advises the promotion of parenting styles that respect the child's right to be heard and address the necessity of mutual respect between parents and children, the importance of the views of every family member, the involvement of children in decision-making, the understanding of children's evolving capacities, and the ways of dealing with conflicts.[78]

b. *Article 12 in alternative care*
Children in alternative care are deprived of their family environment, i.e. the implementation of Article 12 in a family setting cannot happen. Children in alternative care are the responsibility of the State. The State is obliged to provide a substitute to the family environment where trauma from being deprived of a family environment can be mitigated to a maximum extent. The implementation of Article 12 in such settings where children's vulnerability rises even more becomes outstandingly important. Therefore, in all forms of alternative care (being an institution or foster care), it shall be ensured that[79] the child is provided a right to information about the placement, care and treatment plan, and meaningful opportunities to express his/her views; the child is provided the right to be heard and his/her views are given due weight; the implementation of Article 12 in alternative care is monitored by competent bodies as well as children are involved in the monitoring process.

c. *Article 12 in health care*
In most national legislation, the decision on children's health care, especially considering young children, is placed in the hands of parents. Even though

77 UN Committee on the Rights of the Child, 2009, para. 92.
78 Ibid., para. 94.
79 Ibid., para. 97.

the CRC Committee welcomes all State Party legislation, where there is a fixed age at which the right to consent is transferred to the child,[80] this life setting shall be approached very carefully when implementing Article 12. The implementation shall never result in placing too heavy decisions on the shoulders of children and, as such, transferring the responsibility from adults to them. Nevertheless, with this carefulness in mind, Article 12 is to be implemented in health care[81] as well, also with an eye on younger children.[82] It means that they have a right to be informed by physicians and healthcare facilities, with sufficient safeguards, that they have the right to consult doctors confidentially and access health care services without the express consent of the parent. This possibility may have importance in case of, for instance, domestic violence situations, where access to services in which the child can have confidence may provide efficient support.

d. *Article 12 in education and school*

Apart from family environment, school and education have an outstanding impact on children. Thus, the implementation of Article 12 is crucial in this life setting in terms of the development of the child in general as well as in the realisation of the right to education in particular.

The CRC Committee recommends that State Parties take action to build opportunities for children to express their views and for those views to be given due weight in planning curricula and school programmes, participating in human rights education, etc.[83]

Genuine child participation creates a social climate in the classroom, which stimulates cooperation and mutual support that is needed for child-centred interactive learning.[84] Giving children's views weight is also important in the elimination of discrimination, prevention of bullying, and disciplinary measures.[85]

e. *Article 12 in situations of violence*

As discussed in this chapter, the implementation of Article 12 contributes to the realisation of all children's rights and, in many situations, the genuine implementation of mechanisms that allow child participation may prevent the breach of the rights of the child. This is particularly tangible in case of violence. The UNCRC takes the position of zero tolerance to violence. Protection from all forms of violence is easier to be realised by consultation with

80 Ibid., para. 102.

81 This applies to individual healthcare decisions, as well as to children's involvement in the development of health policy and services.

82 The CRC Committee strongly recommends that State Parties ensure that, wherever a younger child can demonstrate a capacity to express an informed view on his/her treatment, this view is given due weight.

83 UN Committee on the Rights of the Child, 2009, paras. 107–108.

84 Ibid., para. 109.

85 Ibid.

children. Thus, the CRC Committee encourages State Parties to consult with children[86] in the development and implementation of legislative, policy, educational, and other measures to address all forms of violence.[87]

The lack of education of children on the content and exercise of Article 12 and on the zero tolerance of violence may result in unchallenged violence against children as they will accept certain forms of abusive behaviour as accepted practice and will lack child-friendly reporting mechanisms, i.e. they will have no one to turn to in confidence in case of experienced maltreatment.[88]

f. *Article 12 in the development of prevention strategies*

Child participation can be a powerful force in the prevention of child rights violations. Therefore, children should be consulted in the formulation of legislation and policy related to these and other problem areas, and involved in the drafting, development, and implementation of related plans and programmes.[89]

## 7. Guiding Role of the CRC Committee

The *CRC* Committee, as the mechanism responsible for overseeing the implementation of the CRC, has an important role to play.[90] While various tools are utilised to shape rights and obligations and promote compliance with treaty requirements, the fundamental and most pervasive approach adopted by treaty bodies are concluding observations and, from the perspective of effecting change, recommendations.[91] The CRC Committee also issues general comments which set the terms of implementation, as discussed previously. Besides the general tools, the CRC Committee also plays an important role in individual complaint mechanisms under the Optional Protocol on a communications procedure (hereinafter OPIC). The CRC Committee serves as a last-instance remedy forum in cases where national remedies are exhausted and the state where the breach occurred ratified OPIC.[92]

86 Paricular attention needs to be paid to ensure that marginalised and disadvantaged children, such as exploited children, street children, or refugee children, are not excluded from consultative processes designed to elicit views on relevant legislation and policy processess.
87 Ibid., para. 118.
88 Ibid., para. 120.
89 Ibid., para. 122.
90 Molloy, 2024, pp. 669–693.
91 Ibid.
92 The aim of this chapter is to provide a general overview of Article 12 and only to highlight the existence of such jurisprudence, and not to provide an in-depth analysis.

## 8. Practical Aspects for the Implementation and Best Practices for Applying Article 12

### *8.1. Principles of Practical Implementation*

In order for Article 12 to be genuinely implemented, not only by legislation but also in practice, some basic principles need to be followed:[93]a) Children need to *understand* what the project or the process in which they may exercise their participation rights is about, what it is for, and what is their exact role in it. Unless children have a genuine understanding, based on accessible and age-appropriate information, their participation may easily become exploitative; b) The structure of participation shall be *transparent*; c) Children shall be *involved in the process from the earliest stage possible* of any initiative, so they have the opportunity to shape their participation; d) Non-discrimination as indicated in *Article 2* of the UNCRC shall be applied throughout the process; e) Adults need to settle ground rules to be followed for both children and adult participants. These rules may provide boundaries and a framework for participation which increases the safety of children in the given situation and, as such, enhances genuine participation. It is even better to negotiate these ground rules with children and set them as a compromise for greater acceptance; f) Participation shall always be voluntary for children; it is always a right and never an obligation; g) It is outstandingly important that children shall always be taken as seriously as possible throughout the participation process. They are entitled to respect for their views and experience. Participation is not a gift but a fundamental human right.

In conclusion, following these principles may contribute to genuine participation. Nevertheless, it is also important to note that *there are no blueprints* for effective consultation and participation with children.[94] Creating blueprints would deny children the opportunity to be involved in the design and development of projects; therefore, every project needs to develop its own methodology appropriate to its own aims.[95]

### *8.2. Best Practices for Involving Children and Implementing Article 12 in a Broad Sense*

Child participation, in its broadest sense, can be[96] *consultative*, which is adult-initiated and adult-led and managed, where children have no real control over the outcomes; *participative*, where the aim is to create opportunities for children to understand and apply democratic principles as well as to involve children in the development of services and policies that have an impact on them; *promoting self-advocacy*, where the aim is to empower children to identify and fulfil their own initiatives

93 UNICEF and Lansdown, 2001, p. 9.
94 Ibid., p. 10.
95 Ibid.
96 Ibid., p. 16.

A good example of the consultative process is the *Children's Parliament in Slovenia*.[97] At the same time when the parliamentary democracy was introduced, a Children's Parliament was also established in Slovenia. Each year, there is a different topic which is introduced in Slovenian schools, and schools elect and delegate 100 children between the age of 13-15 years to the Children's Parliament where this topic is discussed. The topics include, e.g. healthy environment, child-friendly schools, friendship without violence, war, etc. The Children's Parliament is listened to by the Parliament of Slovenia each year.

Good examples of participative processes are the programmes that aim to mitigate violence in schools and involve children in the elaboration of prevention strategies. In the early 1990s, in the UK in Highfield,[98] school children and teachers, as a result of such a process, established a school council with real power, and created a bullying box where children could, in confidence, give information about being bullied, and appointed "guardian angels" who were there for children who needed support, were without friends, or were bullied. As a result, the school became a safer place for children.

## 9. Role of the CRC Committee

The CRC Committee as the mechanism responsible for overseeing the implementation of the CRC has an important role to play.[99] While various tools are utilised to shape rights and obligations and promote compliance with treaty requirements, the fundamental and most pervasive approach adopted by treaty bodies are concluding observations and, from the perspective of effecting change, recommendations.[100] The CRC Committee issues also general comments, which are important in terms of navigating the impementation, nevertheless they are not legally binding. The CRC Committee has consistently emphasized that meaningful participation goes beyond formal consultation, requiring that children be actively involved in decision-making processes at local, national, and international levels. The Committee encourages governments, civil society, and institutions to create environments where children's opinions are genuinely sought, listened to, and taken into account, whether in families, schools, judicial proceedings, or policy development. Through its General Comments and Concluding Observations, especially General Comment No. 12 (2009) on the right to be heard, the Committee has provided detailed guidance on child participation[101] and has continued to engage directly with children by incorporating their perspectives in reviews, consultations, and reporting processes. By doing so, the Committee makes

97 Lansdown, 2022.
98 UNICEF and Lansdown, 2001, p. 26.
99 Molloy, 2024, pp. 669–693.
100 UNICEF and Lansdown, 2001, p. 26.
101 Molloy, 2024.

the effort to recognise children as active rights holders and agents in their own lives and communities.

## 10. Concluding Remarks and Pros and Cons for the Implementation of Article 12

Besides being a fundamental human right, as well as a right of the child, listening to children can lead to better decisions,[102] support children's understanding of democratic decision-making,[103] and strengthen the effectiveness of child protection.[104] Nevertheless, the necessity and added-value of child-participation is very often challenged by arguments which can be summarised in the following non-exhaustive list[105]:

1. Children lack the competence or experience to participate.
2. Children must, firstly, learn to take responsibility before they are granted rights.
3. Providing children the right to be heard can put a big pressure of injuring their childhood.
4. It will lead to a lack of respect for adults (parents).
5. However, these arguments can be contra challenged, which can, moreover be backed by several arguments that underline the importance of Article 12 in the realisation and exercise of children's rights.

As to the *lack of competence*, similarly to adults, children have different levels of competence in different parts of their lives.[106] Even little children are able to speak about issues that affect them in their everyday life. It is the means of communication that decides on effectiveness, as well as the level of support provided by adults.

As to *taking responsibilities*, genuine education on rights always stresses that behind the rights there is the responsibility of also respecting the rights of others. Therefore, the stress shall rather be put on a genuine education of children's rights rather than excessively emphasising the responsibilities.

As to the *too big pressure and presumable injury* to their childhood, it is important to underline that Article 12 is never an obligation, but a right and, as such, an opportunity for children. Childhood is a period of life which prepares and, in a way, also strengthens individuals for adulthood. The "stress" and "pressure" stemming from participation is better experienced from an early age in a safe environment, which takes into consideration the child's evolving capacity throughout childhood.

Finally, the argument about the *lack of respect* for adults can be challenged at its very root. Listening to children is about respecting them and helping them learn the

102 UNICEF and Lansdown, 2001; Molloy, 2024, p. 4.
103 Ibid., p. 6.
104 Marrus and Laufer-Ukeles, 2021.
105 UNICEF and Lansdown, 2001, p. 8.
106 Ibid.

value and importance of respecting others. Article 12, as well as the whole UNCRC, is about teaching children that they indeed have rights, however, these rights are not limitless but have boundaries that are provided by respecting the fundamental rights of others.

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Chapter 11

# Legal Standards Provided by the Council of Europe and the Case-Law of the European Court of Human Rights

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**ABSTRACT**

The European Convention on Human Rights (ECHR) and the European Court of Human Rights (ECtHR) play a significant role in protecting and promoting children's rights in Europe. Despite the limited explicit references to children's rights in the ECHR, the ECtHR has developed a substantial body of case law dealing with children's rights, frequently referencing the UN Convention on the Rights of the Child (CRC). The dynamic character of the ECHR and its interpretative approaches have contributed to its growing impact on the development of children's rights in Europe, especially when consistent with other international and European instruments. The Council of Europe (CoE) has made protecting children's rights and promoting child-friendly justice a priority, aligning with the principles of the CRC and addressing this issue in its conventions, action plans, guidelines, and handbooks.

**KEYWORDS**

Council of Europe, ECHR, ECtHR, best interest of the child, right to be heard, right to participation in proceedings

## 1. The Aim of CoE and ECtHR

Besides our main source of law, the Convention on the Rights of the Child (hereinafter CRC)[1], children's rights are protected by other international instruments, including general human rights treaties such as the European Convention of Human Rights (hereinafter ECHR) and its case law, as well as specialised instruments that deal with precise aspects of children's rights like adoption, child-friendly justice, and juvenile detention, which have been developed by the Council of Europe (hereinafter CoE).

The CoE was formed after the Second World War, bringing together the European states to uphold human rights, democracy, and the rule of law in Europe. Today, the

1 United Nations, 1989.

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CoE is composed of 47 Member States, including all EU Member States. In 1950, the CoE adopted the ECHR.[2]

The CoE has had, since its establishment, a clear mandate to protect and promote human rights. Its primary human rights treaty, ratified by all CoE Member States, the Convention for the Protection of Human Rights and Fundamental Freedoms, and the ECHR and its additional protocols, contain specific references to children. The ECHR was the first instrument to crystallise and give binding effect to the rights set out in the Universal Declaration of Human Rights. The ECHR applies equally to adults and children.[3] It means that all the other general provisions, civil rights, and freedoms laid down in the ECHR are applicable to everyone, including children, without explicitly mentioning children's rights. It lays down absolute rights, which the States can never breach, such as the right to life or the prohibition of torture. Furthermore, it protects certain rights and freedoms that can be restricted by law only when necessary in a democratic society, for example, the right to liberty and security or the right to respect for private and family life. Some of them have been shown to have particular relevance to children.

Article 19 of the ECHR established the European Court of Human Rights (hereinafter ECtHR) as a judicial mechanism to ensure that states observe their obligations under the ECHR.[4] The ECtHR examines complaints from individuals, groups of individuals, or legal persons alleging violations of the ECHR. It can also examine interstate cases brought by one or more CoE Member States against another Member State. Furthermore, since the entry into force of Protocol 16 to the ECHR on 1 August 2018, the highest courts and tribunals of a State Party may request the Court to give advisory opinions on questions of principle relating to the interpretation or application of the rights and freedoms defined in the ECHR or the protocols thereto.[5] By using interpretative approaches that focus on the positive obligations inherent in the ECHR provisions, the ECtHR has developed a large body of case law dealing with children's rights, including frequent references to the CRC. The ECtHR analyses applications on a case-by-case basis and, therefore, does not offer a comprehensive overview of children's rights under the ECHR.[6]

As all EU Member States and CoE Member States are parties to the UN CRC,[7] the guiding principles of the CRC, such as the principle of the best interests of the child, the prohibition of discrimination, the right to survival, and the right of the child to be heard, have been incorporated into EU and CoE legal instruments.[8]

2 Council of Europe, 1995.
3 European Union Agency for Fundamental Rights (FRA) and ECtHR, 2022, pp. 16–17.
4 See the details of its process: Tóth, 2022, pp. 181–183.
5 European Union Agency for Fundamental Rights (FRA) and ECtHR, 2022, pp. 16–17; Liefaard, 2016, p. 914.
6 Ibid., pp. 24–25.
7 United Nations, 1989.
8 European Union Agency for Fundamental Rights (FRA) and ECtHR, 2022, p. 18.

Over the last decade, the ECHR has had a growing impact on the development of children's rights in Europe. One reason for this development is that the ECHR is the international instrument in the field of human rights that has the most effective mechanism for enforcing the rights of a Court which is open to individual applications and which delivers legally binding decisions.[9] When interpreting the rights of the ECHR, the ECtHR takes more and more account of other international and European instruments in the field of the guarantee in question. This includes the CRC when it is consistent with the reasoning of the Court.[10] The ECHR has been interpreted by the ECtHR to apply to children even though it contains few specific references to children's rights.[11] The absence of explicit children's rights provision limits the extent to which the ECHR can be interpreted to advance children's rights, although references to the CRC in its case law have enhanced its potential in this area.[12]

Furthermore, the ECtHR has repeatedly stressed that the ECHR is a living instrument which must be interpreted in the light of present-day conditions. Keeping in mind the significant changes in social and family structures over the last decades, the dynamic character of the ECHR is of particular relevance to children's issues.[13]

For the CoE, protecting children's rights and promoting child-friendly justice is a priority. The issue of protection of children was addressed by the Action Plan of the 3rd Summit of Heads of State and Government of the Council of Europe in Warsaw in 2005.[14]

The following guidelines are the CoE's direct response to Resolution No. 2 on child-friendly justice adopted at the 28th Conference of European Ministers of Justice (Lanzarote, 25-26 October 2007), which requested concrete guidance for the Member States in this field. The Committee of Ministers thus instructed four CoE bodies to *prepare guidelines on child-friendly justice,* proposing solutions to assist Member States in establishing judicial systems in response to the specific needs of children, to ensure children's effective and adequate access to and treatment in justice, in any sphere: civil, administrative, or criminal. With that transversal perspective in mind, the CoE adopted an innovative integrated approach bringing together three of its major intergovernmental committees dealing with civil and administrative law (the European Committee on Legal Cooperation – CDCJ), criminal law (the European Committee on Crime Problems – CDPC), general human rights (the Steering Committee for Human Rights – CDDH), and the European Commission for the Efficiency of Justice (CEPEJ). The guidelines were also drafted in close cooperation with the program "Building a Europe for and with children", which made child-friendly justice one of the core pillars of the CoE's "Strategy on Children's Rights" for 2009-11.

9 See: Kilkelly, 2001, pp. 308–326.
10 An example can be seen in ECtHR, *Söderman v. Sweden,* (GC), 12 November 2013.
11 See: Kilkelly, 1999, pp. 6–12.
12 See: Kilkelly, 2001, pp. 308–326.
13 Council of Europe, 2014, p. 14.
14 Council of Europe, 2011b, p. 37.

The CoE started this work in 2008 with the preparation of four expert reports assessing the challenges and obstacles faced by children in accessing justice at the national level in all sectors of the judicial system. It gives examples such as the cost of proceedings and the lack of legal counsel and recommends other obstacles that shall also be removed.[15] These reports were presented and used as a basis for discussions at high-level Council of Europe conferences held under the auspices of the Swedish chairmanship of the Committee of Ministers, "Building a Europe for and with Children – Towards a strategy for 2009-2011", (Stockholm, 8-10 September 2008), and Spanish chairmanship of the "The protection of children in European justice systems", (Toledo, 12-13 March 2009). The findings of the reports and the conclusions of the conferences paved the way for the drafting of the guidelines and provided valuable material for the Group of Specialists on child-friendly justice (CJ-S-CH), which was established to prepare the guidelines in 2009-10. This Group of Specialists was composed of 17 independent specialists selected by the Council of Europe in consultation with the CDCJ, CDPC, and CDDH based on their personal expertise in children's rights. The group included judges, attorneys, prosecutors, academics, psychologists, police officers, social workers, and representatives of the governments of the Member States and was, therefore, characterised by its multidisciplinary composition. The draft guidelines and their explanatory memorandum were examined and approved by the CDCJ during its 85th plenary meeting held from 11 to 14 October 2010, before their transmission to the Committee of Ministers for adoption on 17 November 2010.[16]

At the policy level, the CoE has, since 2006, implemented the program "Building a Europe for and with children", a transversal plan of action involving national governments, civil society, the EU, and other international organisations and stakeholders. The CoE's intergovernmental work in the area of the rights of the child is guided by consecutive strategies for the rights of the child. The CoE's "Strategy for the Rights of the Child" is implemented in synergy with priorities and actions proposed by other CoE strategies and action plans.[17] The first Stockholm Strategy (2009-2011) set out three priority areas: promoting children's access to justice, eradicating all forms of violence against children, and participation of children and their influence in society. The next one was the Monaco Strategy (2012-2015), which had four objectives: promoting child-friendly services and systems (in the areas of justice, health and social services), eliminating all forms of violence against children (including sexual violence, trafficking, corporal punishment and violence in schools), guaranteeing the rights of children in vulnerable situations (such as those with disabilities, in detention, in alternative care, migrant children and minorities, including Roma children), and promoting child participation.

The previous Strategy for the Rights of the Child (2016-2021) was adopted in Sofia in April 2016, guided by the "Steering Committee for the Rights of the Child (CDENF)",

15 See: Berro-Lefèvre, 2008, pp. 69–78.
16 Council of Europe, 2011b, pp. 37–39.
17 European Union Agency for Fundamental Rights (FRA) and ECtHR, 2022, pp. 27–28.

established in 2020 as the successor to the Ad Hoc Committee for the Rights of the Child (2016–2019) and guiding the intergovernmental work in this area. It guides the CoE's work in this field by advising the Committee of Ministers on appropriate action and proposals concerning the overall priorities to be taken in its field of competence and future work. Where appropriate, it undertakes actions for the development and promotion of activities and instruments. That Strategy had five priority areas: equal opportunities for all children, participation of all children, a life free from violence for all children, child-friendly justice for all children, and rights of the child in the digital environment.

The CDENF also oversees the implementation of the CoE Strategy for the Rights of the Child (2022-2027), which was adopted in Rome on 23 February 2022. It ensures that the rights of the child are mainstreamed into all relevant Council of Europe committees and bodies, and supports Member States in mainstreaming children's rights.[18] The new Strategy has six key priority areas: freedom from violence, equal opportunities and social inclusion, access to and safe use of technologies for all children, child-friendly justice, giving a voice to every child, and children's rights in crisis and emergency situations.

To strengthen the rights of children in every justice system, CoE published the "Handbook on European law relating to the rights of the child",[19] providing an overview of the fundamental rights of children in the EU and CoE Member States. The Handbook acknowledges children as holders of all human/fundamental rights, as well as subjects of special regulations given their specific characteristics. It focuses on the areas of law which are of specific importance to children.

Since the first edition was published in 2015, there have been a number of legislative changes as well as important case law relevant to the rights of the child. The ECtHR has delivered several important judgments, notably in the areas of violence against children and detention of migrant children. In the CoE, a large number of conventions and their respective treaty bodies focus on specific aspects of the protection of the rights of the child, including protection from sexual abuse and exploitation, cybercrime, trafficking, gender-based violence, and violation of data protection rights. These conventions contribute to enhancing the protection granted to children under the ECtHR and the European Social Charter, including by the jurisprudence of the ECtHR and the decisions of the European Committee of Social Rights.

In addition, the CoE has adopted a number of treaties that address a range of specific children's rights issues, including the following: Lanzarote Convention[20]; Convention on the Exercise of Children's Rights[21]; Convention on the Legal Status of Children Born out of Wedlock[22]; Convention on the Adoption of Children, revised in

18 See: Council of Europe – Children's rights web page [Online]. Available at: https://www.coe.int/en/web/children/cdenf (Accessed: 27 December 2023).
19 European Union Agency for Fundamental Rights (FRA) and ECtHR, 2022.
20 Council of Europe, 2007.
21 Council of Europe, 1996a.
22 Council of Europe, 1975.

2008[23]; Convention on Contact concerning Children[24]; Convention on Preventing and Combating Violence against Women and Domestic Violence (Istanbul Convention)[25]; Convention on Cybercrime (Budapest Convention)[26].

### *1.1. Guidelines on Child-Friendly Justice*

In 2010, a broad consultation instigated by the CoE and by the Committee of Ministers, children, and youth reported a general mistrust of the system, and pointed out many shortcomings such as intimidating settings, lack of age-appropriate information and explanations, a weak approach to the family, as well as proceedings that are either too long or, on the contrary, too expeditious. The CoE adopted the Guidelines**,** as previously mentioned, specifically to ensure that justice is always friendly towards children, no matter who they are or what they have done. The Guidelines give the definition of "child-friendly justice", which refers to justice systems that guarantee the respect and the effective implementation of all children's rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child's level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age-appropriate, speedy, diligent, and 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.[27] A child-friendly justice system has to be accessible, understandable, and reliable. It listens to children, takes their views seriously, and makes sure that the interests of those who cannot express themselves (such as babies) are also protected. It adjusts its pace to children; it is neither expeditious nor lengthy, but reasonably speedy. The Guidelines are intended to ensure all this and guarantee that all children have adequate access to and treatment in justice respectfully and responsively. The Guidelines aim to ensure that, in any such proceedings, all rights of children, among which the right to information, representation, participation, and protection, are fully respected with due consideration to the child's level of maturity and understanding and to the circumstances of the case. However, respecting children's rights should not jeopardise the rights of other parties involved.[28]

The Guidelines should apply to all ways in which children are likely to be, for whatever reason and in whatever capacity, brought into contact with all competent bodies and services involved in implementing criminal, civil, or administrative law.[29]

It is also notable that the ECtHR has increasingly engaged with the Guidelines on child-friendly justice in its case law on various aspects of the justice system, both

23 Council of Europe, 2008a.
24 Council of Europe, 2003.
25 Council of Europe, 2011.
26 Council of Europe, 2001.
27 Council of Europe, 2011b, p. 17.
28 Ibid., pp. 7–8.
29 Ibid., p. 16.

inside and outside the juvenile justice system. As far as juvenile justice is concerned, the Court has referred to the Guidelines as a relevant source of law. It has also directly engaged with the content of the Guidelines. This shows the legal relevance of the document, which was primarily meant to serve as a set of recommendations to the 47 Council of Europe Member States.[30]

## 2. Right of the Child Protected by ECHR

In this chapter, we would like to present an overview of rights and freedoms that impact children's rights. We will focus on Articles in connection with Child-friendly justice: the participation and the rights of the child in civil, criminal, and administrative court proceedings. It analyses the right of the child to freedom of thought, conscience, and religion[31]; to freedom of expression and information[32]; to be heard[33]; and to freedom of assembly and association[34]. In this chapter, we would like to focus on statements made in the Handbook and the Guidelines of CoE in accordance with the rights of children who have been involved in the justice system in some form. First, we will examine civil and administrative procedures, and in another chapter, we will examine the rights of the child in criminal procedures.

### *2.1. The Definition of a Child*

In contrast to the CRC, the ECHR does not contain any provisions dealing with the end of childhood at a certain age limit. Member States enjoy a wide margin of appreciation in this matter.[35] Under CoE law, most instruments, and in its jurisprudence, the ECHR has accepted the CRC's definition of a child,[36] endorsing the "below the age of 18 years". Under international law, the CRC establishes in its Article 1 that 'child means every human being below the age of eighteen years'. Examples include Article 1.1 of the European Convention on the Exercise of Children's Rights (ETS No. 160), Article 4 (d) of the CoE Convention on Action against Trafficking in Human Beings,[37] and Article 3 (a) of the CoE Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse (Lanzarote Convention).[38] The ECHR does not contain a definition of a child; however, its Article 1 obliges States to secure rights under the convention to "everyone" within their jurisdiction. Article 14 of the ECHR guarantees the enjoyment of the rights set out in the convention "without discrimination on any

30 Liefaard, 2020, pp. 13–14.
31 Arts. 9 (freedom of religion) and 14 (prohibition of discrimination) of ECHR.
32 Ibid., Art. 10.
33 Ibid., Art. 6.
34 Ibid., Art. 11.
35 Kilkelly, 1999, p. 21 et seq.
36 See, for example: ECtHR, *Güveç v. Turkey*, No. 70337/01, 20 January 2009; ECtHR, *Çoşelav v. Turkey*, No. 1413/07, 9 October 2012.
37 Council of Europe, 2005.
38 Council of Europe, 2007.

ground", including grounds of age.[39] The ECtHR has accepted applications by and on behalf of children irrespective of their age.

The "prohibition of discrimination" is also a well-established principle in international human rights law. Article 2 of the UN CRC is viewed as one of its guiding principles.[40] The rights of children shall be secured without discrimination on any grounds such as sex, race, colour or ethnic background, age, language, religion, political or other opinion, national or social origin, socio-economic background, status of their parent(s), association with a national minority, property, birth, sexual orientation, gender identity, or other status. 'Specific protection and assistance may need to be granted to more vulnerable children', such as migrant children, refugee and asylum-seeking children, unaccompanied children, children with disabilities, homeless and street children, Roma children, and children in residential institutions.[41]

On the specific question of "race", the CoE's "European Commission against Racism and Intolerance (ECRI)", in its General Policy Recommendation No. 7 on national legislation to combat racism and discrimination, indicates 'Since all human beings belong to the same species, ECRI rejects theories based on the existence of different "races"'. Some categories of particularly vulnerable children may need special protection in this respect,[42] as we have seen in the case of, e.g. Roma children.

Another important factor of discrimination in the area of children's rights is age and capacity. For these children, alternative systems of representation need to be developed in order to avoid discrimination.[43] (See the details in the chapter dealing with the right to be heard)

The question of whether an embryo/foetus enjoys the protection of the right to life guaranteed by Article 2 has not been answered by the ECtHR[44] and is certainly one of the questions most disputed among member states. Other unanswered questions concern the end of childhood and the applicability of Article 5 (1) (d) to the detention of minors; Article 6 (1), second sentence, on the exclusion of the press and public from trials when required in the interest of juveniles; or Article 12, which guarantees the right to marry.[45]

In cases of certain specific crimes committed against children or certain aspects of civil or family law, access to court should be granted for a period of time after the child has reached the age of majority, where necessary.[46] The CoE's "Convention on

39 ECtHR, *Schwizgebel v. Switzerland*, No. 25762/07, 10 June 2010. See also: European Union Agency for Fundamental Rights (FRA) and ECtHR, 2018, p. 103. The ECtHR has held that in Article 14, 'age' is included among 'other status.

40 Council of Europe, 2011b, p. 55.

41 Ibid., p. 19.

42 Ibid., p. 56.

43 Ibid.

44 Explicitly leaving the question unanswered ECtHR, 8/7/2004 (GC), *Vo v France*, No. 53924/00, para. 79 et seq; Peukert,1988, p. 511; p. 515 et seq.

45 Kilkelly, 1999, p. 21 et seq.

46 Council of Europe, 2011b, p. 26.

the Protection of Children against Sexual Exploitation and Sexual Abuse (CETS No. 201)" could usefully serve as an inspiration in this regard (see later).[47]

### *2.2. The Best Interest of the Child*

Member States should guarantee the effective implementation of one of the most important principles of CRC, namely the 'right of children to have their best interests as a primary consideration in all matters involving or affecting them'. While the judicial authorities have the ultimate competence and responsibility for making the final decisions, Member States should make, where necessary, concerted efforts to establish multidisciplinary approaches with the objective of assessing the best interests of children in procedures involving them.[48] This chapter does not wish to deal with rules of CRC in detail; however, we have to emphasise that the best interests of the child must always be considered in combination with other children's rights, for example, the right to be heard, the right to be protected from violence, the right not to be separated from parents, etc. A comprehensive approach must be the rule.[49]

In all proceedings involving children, the "urgency principle" should be applied to provide a speedy response and protect the best interests of the child, while respecting the rule of law. In family law cases (for example, parentage, custody, parental abduction), courts should exercise exceptional diligence to avoid any risk of adverse consequences on family relations. In two cases against Germany,[50] the time element was discussed by the Court, which found that in cases of parent–child relationships, there is a duty to exercise exceptional diligence since the risk of passage of time may result in a *de facto* determination of the matter and that the relation of a child with one of his/her parents might be curtailed.

In the case of *Paulsen-Medalen and Svensson v. Sweden*, the Court found that Article 6, paragraph 1, of the ECHR had been violated since the authorities had not acted with the required exceptional diligence when handling a dispute on access.[51]

When necessary, judicial authorities should consider the possibility of taking provisional decisions or making preliminary judgments to be monitored for a certain period of time in order to be reviewed later. In accordance with the law, judicial authorities should have the possibility to make decisions that are immediately enforceable in cases where this would be in the best interests of the child.[52]

In many cases, particularly civil cases, the judgment does not necessarily mean that the conflict or problem is settled: family matters could be a good example. In this sensitive area, there should be clear rules on 'avoiding force, coercion, or violence

47 Ibid., p. 76.
48 Ibid., p. 18.
49 For practical suggestions see: United Nations High Commissioner of Refugees, 2008.
50 ECtHR (Grand Chamber), judgment of 13 July 2000; *Elsholz v. Germany*, No. 25735/94, and judgment of 8 July 2003, *Sommerfeld v. Germany*, No. 31871/96.
51 ECtHR (Chamber), judgment of 19 February 1998, *Paulsen-Medalen and Svensson v. Sweden*, No. 16817/90.
52 Council of Europe, 2010, pp. 28–29.

in the implementation of decisions', for example, visitation arrangements, to avoid further traumatisation. Therefore, parents should rather be referred to mediating services or neutral visitation centres to end their disputes instead of having court decisions executed by the police or executor. In cases of enforcement of decisions on family law issues, such as access and custody rights, the Court held on several occasions that what is decisive is the question of whether national authorities have taken all necessary steps to facilitate the execution as can reasonably be demanded in the special circumstances of each case.[53]

We think one of the most important suggestions of the CoE's "Guidelines on Child-Friendly Justice" is that Member States shall consider the establishment of a system of specialised judges and lawyers for children and further develop courts in which both legal and social measures can be taken in favour of children and their families. Furthermore, they shall promote to ensure that all concerned professionals working in contact with children in justice systems receive appropriate support and training, and practical guidance in order to guarantee and implement adequately the rights of children, in particular while assessing children's best interests in all types of procedures involving or affecting them.[54]

Within the theme of best interest, we have to deal with the rules on data protection and the protection of the personal identity of the child. The privacy and personal data of children who are or have been involved in judicial or non-judicial proceedings and other interventions should be protected in accordance with national law. This generally implies that no information or personal data shall be made available or published which could reveal or indirectly enable the disclosure of the child's identity, including images, detailed descriptions of the child or the child's family, names or addresses, audio and video records, etc., to third persons. Member States should stipulate limited access to all records or documents containing personal and sensitive data of children, in particular in proceedings involving them. If the transfer of personal and sensitive data is necessary while taking into account the best interests of the child, Member States should regulate this transfer in line with relevant data protection legislation.[55]

#### *2.2.1. Right to Respect for Private and Family Life*

Article 8 of the ECHR is an important article in the field of children's rights and the ECHR. The Court's case law already embraces many different situations with which children are confronted: e.g. family life in general, adoption, child abduction, decisions on custody, visiting rights, or identity issues. Article 8 of the ECHR names four different spheres of protection: private life, family life, home, and correspondence. Generally, all of them are equally applicable to adults and children. There are many situations that fall within the scope of Article 8 of the ECHR where not only children's

53 Council of Europe, 2011b, p. 91.
54 Council of Europe, 2011b, p. 33–34; See: Liefaard, 2016, p. 912.
55 Council of Europe, 2011b, p. 22.

rights are affected but also the rights of other family members, so a fair balance must, therefore, be struck between the different positions. Children may often require a greater amount of protection under Article 8 of the ECHR than adults.[56]

Anonymity and protection of personal data in relation to mass media may be necessary for the child, as stipulated by several instruments.[57] In this respect, special mention should be made of the CoE's "Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108)",[58] which lists the set of commonly accepted standards concerning, in particular, the collection and processing of data and data quality. As in the case of the ECHR, children enjoy all rights under this convention even though it does not explicitly refer to children's rights. Other categories of data could be defined as sensitive by domestic law or treated as such by public authorities, allowing for the better protection of children's privacy.[59]

In the case of *B. and P. v. the United Kingdom*, the Court decided that proceedings concerning the residence of children after divorce or separation are prime examples of cases where the exclusion of the press and public may be justified in order to protect the privacy of the child and other parties and avoid prejudicing the interests of justice.[60]

In the cases of *V. and T. v. the United Kingdom,* where criminal proceedings against two young boys who murdered a toddler, the Court stated,

> 'It follows that, in respect of a young child charged with a grave offence attracting high levels of media and public interest, it would be necessary to conduct the hearing in such a way as to reduce as far as possible his/her feelings of intimidation and inhibition.'[61]

The issue of privacy is particularly relevant in some measures intended to tackle the anti-social behaviours of children. More specifically, the implementation of so-called "Anti-Social Behaviour Orders (ASBOs)" in the United Kingdom, including the policy of "naming and shaming", shows that, in such cases, personal data is not always kept away from the general public. Guideline 10 imposes a strict obligation in this respect

56 Council of Europe, 2014, p. 15.

57 Article 11.3 of the Convention on Action against Trafficking in Human Beings (CETS No. 197) deals with privacy and protects personal data while urging states to set up regulatory measures for the press. The United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (ECOSOC Res 2005/20, 22 July 2005), paragraph X, 27, states: 'Information related to a child's involvement in the justice process should be protected. This can be achieved through maintaining confidentiality and restricting disclosure of information that may lead to identification of a child who is a victim or a witness in the justice process.'

58 CoE Convention for the Protection of Individuals with regard to Automatic Processing of Personal Data (ETS No. 108), Strasbourg, 28 January 1981.

59 Council of Europe, 2011b, p. 61.

60 ECtHR *B. and P. v. UK*, Nos. 36337/97 et 35974/97, 24 April 2001.

61 ECtHR (Grand Chamber), judgments of 16 December 1999, *T. v. UK*, No. 24724/94, and *V. v. UK*, No. 24888/94.

on all professionals working with children except where there is a risk of harm to the child.[62]

The right to respect for family life is guaranteed not only to parents but also to other family members, in particular children. The scope of the right to family life was soon extended by the ECtHR's case law from a marriage-based relationship with or without minor children to other de facto "family" ties. Cohabitation is, therefore, not a necessary requirement for Article 8 to apply under the head of "family life" nor for there to be a family tie between the parents and their child. The natural family relationship is not terminated if the child is taken into public care; however, the relationship is terminated by adoption.[63] It is also the child's opinion that should be taken into account concerning its adoption once the child has attained the necessary maturity to give its opinion on the matter.

Interferences with the right to respect for family life protected by Article 8 of the ECHR can be found in all measures that hinder the mutual enjoyment by parent and child of each other's company. Member States enjoy a wide margin of appreciation for decisions on rights of custody and rights of access because the ECtHR considers that national authorities have the benefit of direct contact with all the persons concerned. National authorities must strike a fair balance between the interests of the child and those of the parents. Particular importance should be attached to the best interests of the child, which may override the interests of the parents. In particular, a parent is not entitled under Article 8 to have such measures taken as would harm the child's health and development.[64]

In the case of *Sahin v. Germany*,[65] the mother prohibited all contact between the applicant and his four-year-old daughter. The German regional court decided that granting the father access to his daughter would be harmful to the child because of the serious tensions between the parents. It did so without hearing the child on whether she wanted to continue seeing her father. On the question of hearing the child in court, the ECtHR referred to the expert's explanation before the regional court in Germany. After several meetings with the child, her mother, and the applicant, the expert considered that the process of questioning the child could have entailed a risk for her, which could not have been avoided by special arrangements in court. The ECtHR found that, in these circumstances, the procedural requirements implicit in Article 8 of the ECHR – to hear a child in court – did not amount to obliging the direct questioning of the child on her relationship with her father. Article 8 requires that the domestic authorities should strike a fair balance between the interests of the child

62 Council of Europe, 2010, p. 63 and see Article 12 of the CoE Convention on the Protection of Children Against Sexual Exploitation and Sexual Abuse.

63 Council of Europe, 2014, pp. 15–16.

64 Ibid., p. 16.

65 ECtHR, *Sahin v. Germany* [GC], No. 30943/96, 8 July 2003, para. 73. On the specific aspect of national courts having to assess the evidence they have obtained, as well as the relevance of the evidence that defendants seek to adduce, see also ECtHR, *Vidal v. Belgium*, No. 12351/86, 22 April 1992.

and those of the parents and that, in the balancing process, particular importance should be attached to the best interests of the child, which, depending on their nature and seriousness, may override those of the parents. In particular, a parent cannot be entitled under Article 8 to have such measures taken as would harm the child's health and development.

*Maslov v. Austria*[66] concerns the deportation of the applicant, who had been convicted of a number of criminal offences as a child. The ECtHR held that, where expulsion measures against a juvenile offender were concerned, the obligation to take the best interests of the child into account included an obligation to facilitate the child's reintegration, in line with Article 40 of the CRC. In the ECtHR's view, reintegration would not be achieved by severing the child's family or social ties through expulsion.[67] The CRC was thus one of the grounds used to find that the expulsion was a disproportionate interference with the applicant's rights under Article 8 of the ECHR (respect for family life).

### *2.3. Right to Participation*

The CoE's "Recommendation on the Participation of Children and Young People Under the Age of 18"[68] refers to their right to be heard in all settings, including in schools, communities, and the family, as well as at national and European levels. It also contains guidelines for Member States when implementing the recommendation, such as protecting children's and young people's right to participate, promoting participation and informing children and young people about it, and creating spaces for participation. The CoE's "Child Participation Assessment Tool"[69] provides specific and measurable indicators to measure progress in implementing this recommendation.

According to the Guidelines, all children have the right to be informed about their rights, to be given appropriate ways to access justice, and to be consulted and heard in proceedings involving or affecting them, which should be respected.[70] The domestic law should facilitate, where appropriate, the possibility of access to court for children who have a sufficient understanding of their rights and of the use of remedies to protect these rights, based on adequately given legal advice. Guideline 35 recommends that Member States remove all obstacles to children's access to court.

From their first involvement with the justice system or other competent authorities (such as the police, immigration, educational, social or health care services) and throughout that process, children and their parents should be promptly and adequately informed of, inter alia: their rights, in particular the specific rights children have with regard to judicial or non-judicial proceedings in which they are or might be involved, and the instruments available to remedy possible violations of their rights, including the opportunity to have recourse to either a judicial or non-judicial

66 ECtHR, *Maslov v. Austria* [GC], No. 1638/03, 23 June 2008.
67 Ibid., para. 83.
68 Council of Europe, 2012.
69 Council of Europe, 2016.
70 Council of Europe, 2011b, p. 17.

proceeding or other interventions. This may include information on the likely duration of proceedings, possible access to appeals, and independent complaints mechanisms; the system and procedures involved, taking into consideration the particular place the child will have and the role he/she may play in it and the different procedural steps; the existing support mechanisms for the child when participating in these procedures; the appropriateness and possible consequences of given in-court or out-of-court proceedings; where applicable, the charges or the follow-up given to their complaint; the time and place of court proceedings and other relevant events, such as hearings, if the child is personally affected; the general progress and outcome of the proceedings or intervention; the availability of protective measures; the existing mechanisms for review of decisions affecting the child; the existing opportunities to obtain reparation from the offender or from the State through the justice process, through alternative civil proceedings, or through other processes; the availability of the services (health, psychological, social, interpretation and translation, and other) or organisations which can provide support and the means of accessing such services along with emergency financial support, where applicable; any special arrangements available in order to protect as far as possible their best interests if they are resident in another State.

As a rule, both the children and parents or legal representatives should directly receive the information. The information and advice should be provided to children in a manner adapted to their age and maturity, in a language that they can understand.[71] Provision of the information to the parents should not be an alternative to communicating the information to the child.[72] Children may experience a lack of objective and complete information. Parents may not always share all pertinent information, and what they give may be biased. In this context, the role of children's lawyers, ombudspersons, and legal services for children is very important.[73]

"Children should have the right to their own legal counsel and representation", in their own name, in proceedings where there is, or could be, a conflict of interest between the child and the parents or other involved parties. In cases where there are conflicting interests between parents and children, the competent authority should appoint either a guardian *ad litem* or another independent representative to represent the views and interests of the child. Children should have access to free legal aid under the same or more lenient conditions as adults.

It is also important that the "legal fees of the children's lawyer are not charged to their parents", either directly or indirectly. If a lawyer is paid by the parents, in particular in cases with conflicting interests, there is no guarantee that the lawyer will be able to independently defend the child's views.[74]

71 See: Stalford, Cairns and Marshall, 2017, pp. 207–218.
72 Council of Europe, 2011b, pp. 20–21.
73 Ibid., p. 59.
74 Ibid., p. 78.

Lawyers representing children should be "trained in and knowledgeable on children's rights and related issues", receive ongoing and in-depth training and be "capable of communicating with children at their level of understanding". If children are to have access to justice that is genuinely child-friendly, Member States should facilitate access to a lawyer or other institution or entity which, according to national law, is responsible for defending children's rights and be represented in their own name where there is, or could be, a conflict of interest between the child and the parents or other involved parties. This is the main message of Guideline 37.[75] The European Convention on the Exercise of Children's Rights[76] states, 'Parties shall consider granting children additional procedural rights in relation to proceedings before a judicial authority affecting them, in particular [...] a separate representative [...] a lawyer.' Children should be considered as fully-fledged clients with their own rights, and lawyers representing children should bring forward the opinion of the child.[77] It is important to clarify the exact role of the child's lawyer. The lawyer does not have to bring forward what he/she considers to be in the best interests of the child (as does a guardian or a public defender) but should determine and defend the child's views and opinions, as in the case of an adult client. However, combining the functions of a lawyer and a guardian *ad litem* in one person should be avoided because of the potential conflict of interests that may arise. The competent authority should, in certain cases, appoint either a guardian *ad litem* or another independent representative to represent the views of the child. This could be done at the request of the child.[78]

The child's lawyer, guardian *ad litem*, or legal representative should "communicate and explain" the given decision or judgment to the child in a language adapted to the child's level of understanding and should give the necessary information on possible measures that could be taken, such as appeal or independent complaint mechanisms.[79]

The Lanzarote Convention,[80] Article 9, addresses the participation of children in the development and implementation of state policies, programmes, or other initiatives concerning the fight against sexual exploitation and sexual abuse of children. Article 14 (1) of the same Convention provides that assistance to victims must take due account of the child's views, needs, and concerns.[81]

### *2.4. Freedom of Expression and Receiving Information*

The CRC under Article 13 (1) recognises the child's right to freedom of expression and includes the freedom to seek, receive, and impart information and ideas of all kinds,

75 Ibid., p. 77.
76 Council of Europe, 1996a, Article 5.b.
77 Council of Europe, 2011b, p. 27.
78 Ibid., p. 78.
79 Ibid., p. 31.
80 CoE, Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse, CETS No. 201, 25 October 2007.
81 Gál, 2021, pp. 33–34.

regardless of frontiers, orally, in writing, or in print, in the form of art, or through any other medium of the child's choice.[82] Under CoE law, freedom of expression is guaranteed by Article 10 of the ECHR and may be limited only when prescribed by law, in pursuit of one of the legitimate aims listed in Article 10 (2), and when necessary in a democratic society. We have to deal with this Article because we consider the content is an element of the right to effective participation and to fair trial. Moreover, according to the interpretation of CRC, the child has a choice on how to be heard in a court proceeding: orally or in writing, directly by the judge or through an expert. The European Convention on the Exercise of Children's Rights[83] deals with the right of children to express their views freely.
In its case law, the ECtHR has stressed that

> '[f]reedom of expression constitutes one of the essential foundations of [a democratic] society, one of the basic conditions for its progress and for the development of every man [...] it is applicable not only to "information" or "ideas" that are favourably received or regarded as inoffensive or as a matter of indifference, but also to those that offend, shock, or disturb the State or any sector of the population.'[84]

A relevant case under Article 10 of the ECHR concerns the right of children placed in care to access information. The case *Gaskin v. the United Kingdom*[85] concerns a person who was placed in care for most of his childhood, during which period the local authority kept confidential records. These included various reports by medical practitioners, school teachers, police and probation officers, social workers, health visitors, foster parents, and residential school staff. When the applicant sought access to those records to proceed for personal injuries against the local authority, he was refused. The confidentiality of such records had been warranted in the public interest for the proper operation of the childcare service, which would be jeopardised if contributors to the records were reluctant to be frank in their reports in the future. The ECtHR accepted that persons who were in state care as children had a vital interest 'in receiving the information necessary to know and to understand their childhood and early development'. While the confidentiality of public records needs to be guaranteed, a system like the British one, which made access to records dependent on the consent of the contributor, could, in principle, be compatible with Article 8 of the ECHR if the interests of the individual seeking access to records were secured when a contributor to the records was unavailable or improperly refused consent. In such a case, an independent authority should ultimately decide whether access should be granted. No such procedure was available to the applicant in the present case, and the

82 European Union Agency for Fundamental Rights (FRA) and ECtHR, 2022, p. 44.
83 Council of Europe, 1996a.
84 See, for example: ECtHR, *Handyside v. the United Kingdom*, No. 5493/72, 7 December 1976.
85 ECtHR, *Gaskin v. the United Kingdom*, No. 10454/83, 7 July 1989.

Court found a violation of the applicant's rights under Article 8 of the ECHR (right to respect for private and family life). The ECtHR, however, found no violation of Article 10 of the ECHR, reiterating that the right to freedom to receive information prohibits a government from restricting a person from receiving information that others wish or may be willing to impart but does not oblige a state to impart the information in question to the individual.

### *2.5. Right to Be Heard*

This principle has paramount importance in a child-friendly justice system because we can interpret the right to fair trial and effective participation through it. In all proceedings, children should be treated with respect for their age, their special needs, their maturity and level of understanding, and bearing in mind any communication difficulties they may have.[86] The CRC recognises that "children who are capable of forming their own views have the right to express their own views freely in all matters affecting them" as one of its general principles. Article 12 (2) of the CRC furthermore prescribes that children must be provided the opportunity to be heard in any judicial and administrative proceedings affecting them, on the manner in which they wish to be heard, either directly or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law. The CoE Guidelines on child-friendly justice[87] also emphasise the importance of children's right to be heard in all proceedings involving or affecting them. Whenever children are being heard or are giving evidence in judicial or non-judicial proceedings or other interventions, where appropriate, 'this should preferably take place on camera'. As a rule, only those directly involved should be present, provided that they do not obstruct children in giving evidence.[88]

The reference made to the term "capable of forming their own views" should not be seen as a limitation but rather a duty on the authorities to fully assess the children's capacity as far as possible. Instead of assuming too easily that the child is unable to form an opinion, states should presume that a child has, in fact, this capacity. It is not up to the child to prove this.[89]

We have to emphasise that in this part, we will introduce both civil and criminal cases because the conditions national courts have to take into consideration, whether the child has this capacity or not, are the same in both procedures. In the *S.C. v. United Kingdom* case of ECtHR, dealing with an accused minor with a low level of understanding, the Court found that

> 'effective participation in this context presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake

86 Council of Europe, 2011b, pp. 29–30.
87 Council of Europe, 2011a.
88 Council of Europe, 2011b, p. 22.
89 Ibid., p. 51.

> for him/her, including the significance of any penalty which may be imposed. It means that he/she, if necessary, with the assistance of, for example, an interpreter, lawyer, social worker or friend, should be able to understand the general thrust of what is said in court. The defendant should be able to follow what is said by the prosecution witnesses and, if represented, to explain to his/her own lawyers his/her version of events, point out any statements with which he/she disagrees and make them aware of any facts which should be put forward in his/her defence.'[90]

In the cases of both *V. and T. against the United Kingdom*, the Court noted that effective participation in the courtroom presupposes that the accused has a broad understanding of the nature of the trial process, including the significance of any penalty which may be imposed. Therefore, juvenile defendants must be, in any case, represented by skilled lawyers experienced in dealing with children.[91] But in another custody case, *Hokkannen v. Finland*, where the father claimed custody of his daughter who had been living with her grandparents for years but the girl did not want to live with him, the Court judged that the 12-year-old girl was 'sufficiently mature for her views to be taken into account and that access therefore should not be accorded against her wishes'.[92]

In family cases, children should be included in the discussions prior to any decision that affects their present and/or future well-being. All measures to ensure that children are included in the judicial proceedings should be the responsibility of the judge, who should verify that children have been effectively included in the process and are absent only when children themselves have declined to participate or are of such maturity and understanding that their involvement is not possible.[93]

Under CoE law, the ECtHR does not interpret the right to respect for private and family life[94] as always requiring the child to be heard in court.[95] As a general rule, it is for the national courts to assess the evidence before them, including the means used to ascertain the relevant facts. Domestic courts are not always required to hear a child in court on the issue of access to a parent who does not have custody rights. This issue has to be assessed in light of the specific circumstances of each case, giving due regard to the age and maturity of the child concerned. Moreover, the ECtHR will often ensure, under the procedural limb of Article 8, that the authorities have taken appropriate steps to accompany their decisions with the necessary safeguards.

90 ECtHR (Fourth Section), *S.C. v. UK*, No. 60958/00, 15 June 2004.
91 ECtHR (Grand Chamber), judgment of 16 December 1999, and *T. v. UK*, No. 24724/94, and judgment of 16 December 1999, *V. v. UK*, No. 24888/94.
92 ECtHR (Chamber), judgment of 23 September 1994, *Hokkanen v. Finland*, No. 19823/92.
93 Council of Europe, 2011b, p. 51.
94 Article 8 of the ECHR.
95 See also ECtHR, *N.Ts. v. Georgia*, No. 71776/12, 2 February 2016; ECtHR, *Iglesias Casarrubios and Cantalapiedra Iglesias v. Spain*, No. 23298/12, 11 October 2016; ECtHR, *C v. Croatia*, No. 80117/17, 8 October 2020; ECtHR, *M.N. and Others v. Belgium*, No. 3599/18, 5 March 2020; ECtHR, *Petrov and X v. Russia*, No. 23608/16, 23 October 2018.

The case of *M. and M. v. Croatia*[96] concerns a custody dispute, including allegations of child abuse by the father. The ECtHR was particularly struck by the fact that the child, at the relevant time aged 13 and a half, had still not been heard in custody proceedings, which had thus far lasted over four years, and had, thus, not been given the chance to express her views before the courts about which parent she wanted to live with. It cannot be said that children capable of forming their own views are sufficiently involved in the decision-making process if they are not provided with the opportunity to be heard and, thus, express their views. The circumscribed autonomy of children, which gradually increases with their evolving maturity, is exercised through their right to be consulted and heard. In the specific circumstances of the case, not respecting the first applicant's wishes regarding which parent she wished to live with breached her right to respect for private and family life under Article 8.

The Committee on the Rights of the Child emphasises that it is not enough that legislation should establish children's rights to be heard and have their views given due weight; children must be made aware of their rights. The right to information is a prerequisite for participation.[97]

Access to court can be based on a set age limit or the notion of a certain discernment, maturity, or level of understanding. Both systems have advantages and disadvantages. A clear age limit has the advantage of objectivity for all children and guarantees legal certainty. However, granting children access based on their own individual discernment gives the opportunity for adaptation to every single child, according to their levels of maturity. The capability, maturity, and level of understanding are more representative of the children's real capacities than their age. This system can pose risks due to the wide margin of appreciation left to the judge in question. A third possibility is a combination of both: a set legal age limit with a possibility for a child under this age to challenge this. This may, however, raise the additional problem that the burden of proof of capacity or discernment lies with the child.[98]

However, we have to emphasise that the right to be heard is a right of the children, not their duty. Where children are to be asked or express their wish to give evidence in family proceedings as a witness, due regard should be given to their vulnerable position in that family and to the effect such testimony may have on present and future relationships. All possible efforts should be made to ensure that the child is made aware of the consequences of the testimony and supported in giving evidence by any of the means already referred to.[99]

96 ECtHR, *M. and M. v. Croatia*, No. 10161/13, 3 September 2015.
97 Wopera, 2023, p. 4.
98 Council of Europe, 2011b, p. 75.
99 Guidelines, p. 89; See also: Visontai-Szabó, 2018, pp. 1–2.

Before proceedings begin, children should be familiarised with the layout of the court or other facilities and the roles and identities of the officials involved. When children are heard or interviewed in judicial and non-judicial proceedings and during other interventions, judges and other professionals should interact with them with respect and sensitivity. Interview methods, such as video or audio-recording or pre-trial hearings in camera, should be used and considered as admissible evidence. Regular breaks should be planned, and hearings should not last too long. As far as appropriate and possible, interviewing and waiting rooms should be arranged for children in a child-friendly environment. To facilitate the participation of children to their full cognitive capacity and to support their emotional stability, disruption and distractions during court sessions should be kept to a minimum.[100] Interviews of and the gathering of statements from children should, as far as possible, be carried out by trained professionals[101] and, if possible, by one person.

The aim is to avoid intimidation, humiliation, or distress for the child on trial. Elements of this practice direction are, *inter alia*: the possibility for the child to visit the courtroom before the trial to become familiarised with it, the possibility of police support to avoid intimidation or abuse by the press, no wigs or gowns to be worn, the explanation of the procedure in terms the child can understand, restricted attendance of court's hearings, etc.[102]

However, whenever children take the initiative to be heard in a case that affects them, the judge should not, unless it is in the children's best interests, refuse to hear the children and should listen to their views and opinions on matters concerning them in the case.

The European Convention on the Exercise of Children's Rights[103] grants children specific procedural rights in family proceedings before a judicial authority, in particular for proceedings involving the exercise of parental responsibilities, such as residence and access to children. Article 3 of the Convention grants children the right to be informed and to express their views in proceedings as a procedural right, thus "combines the right to be heard with the right to be informed". In judicial proceedings, children should receive all relevant information, be consulted and express their views, and be informed of the possible consequences of compliance with these views and the possible consequences of any decision to use the right to be heard effectively.[104]

In Article 4, the child is granted the right to apply for the appointment of a special representative in proceedings before a judicial authority affecting her/him. In line with Article 6, authorities must ensure that the child has received all relevant information, consult her/him in person, if appropriate, and allow the child to express her/his views.

100 Council of Europe, 2011b, pp. 29–30.
101 See: Herczog, 2023, p. 9.
102 Council of Europe, 2011b, p. 86.
103 Council of Europe, 1996a.
104 Council of Europe, 2011b, p. 79.

However, it should be explained to them that their right to be heard and have their views taken into consideration may not necessarily determine the final decision.[105]

### *2.6. Children's Rights Within Criminal Justice and Alternative (Non-Judicial) Proceedings*

Children's rights in the context of juvenile justice proceedings concern children accused of, prosecuted for, or sentenced for having committed criminal offences, as well as children who participate in judicial proceedings as victims and/or as witnesses. The position of children in the context of juvenile justice is regulated by general human rights provisions relevant to both adults and children. This chapter presents an overview of the CoE norms relevant to children involved in judicial and alternative proceedings. It addresses fair trial guarantees, including effective participation and access to a lawyer, the rights of detained young offenders, including pre-trial detention (substantive and procedural safeguards), conditions of detention and protection against ill-treatment, and the protection of child witnesses and victims.[106] Protection aspects are especially relevant for non-adversarial, alternative proceedings, which should be used whenever these may best serve the child's best interests.[107] In the case of children, objectives of criminal justice, such as social integration, education, and prevention of re-offending, are basic principles that are valued.[108]

The right to a fair trial is a core pillar of a democratic society. We examined many elements of it above, so now we will focus on the elements connected closely to criminal procedures. Children suspected or accused of a crime have the right to a fair trial, and they benefit from the same guarantees as any other person in conflict with the law. Fair trial guarantees apply from the child's first interrogation and subsist throughout the trial. Children in conflict with the law are, however, particularly vulnerable and need additional protection. For example, during the investigation, police should respect the personal rights and dignity of all children and have regard for their vulnerability, that is, take account of their age and maturity and any special needs of those who may be under a physical or mental disability or have communication difficulties. Children should be informed in a manner and in language that is appropriate to their age and level of understanding of the reason for which they have been taken into custody.[109] Children should be provided with access to a lawyer and given the opportunity to contact their parents or a person whom they trust. The parent(s) should be informed of the child's presence in the police station, given details of the reason why the child has been taken into custody, and be asked to come to the station.

105 Ibid., p. 28.
106 European Union Agency for Fundamental Rights (FRA) and ECtHR, 2022, p. 242.
107 Council of Europe, 2010, para. 24.
108 See also: FRA and ECtHR (2016), Handbook on European law relating to access to justice, 22 June 2016.
109 Liefaard, 2016, p. 919.

Police should ensure that, as far as possible, no child in their custody is detained together with adults.[110]

The ECHR fair trial guarantees are laid down in Article 6, which generates the most extensive case law of the ECtHR. Article 6 para. 1 of the ECHR includes some express fair trial guarantees: the right to a fair public hearing/ pronouncement (unless it is contrary to, among others, the best interests of juveniles), the right to a trial within a reasonable time, the right to a trial by an independent and impartial tribunal,[111] and the right to a trial by a tribunal established by law. Inherent to the concept of a fair trial, the ECtHR has developed guarantees: equality of arms and adversarial proceedings, the right to remain silent, access to a lawyer, effective participation, presence at the hearing, and reasoned decisions.

Everyone must be presumed innocent until proven guilty according to law[112]. In addition, everyone charged with a criminal offence shall have the following minimum rights: the right to be informed promptly about the charges in a language she/he understands[113], the right to have adequate time and facilities for the preparation of her/his defence[114], the right to have legal assistance of her/his own choosing (Article 6 (3) (c) of the ECHR), the right to examine or have witnesses examined[115], and the right to have the free assistance of an interpreter[116]. These guarantees apply to adults and children alike. However, aspects which have generated child-specific case law concern mainly the right to effective participation and the right to access a lawyer. These two specific fair trial guarantees are therefore further elaborated in this chapter.[117]

The CoE's Guidelines on Child-Friendly Justice are directly relevant to children who are suspected or accused. Even though they are not legally binding, the guidelines represent a milestone in ensuring that justice proceedings, including those part of the criminal justice system, take into account the specific needs of children. They build on existing ECtHR case law and other European and international legal standards, such as the UN CRC, and are a useful tool for professionals dealing with children. According to Section I (1), the guidelines apply to children in judicial (criminal or non-criminal) proceedings or in alternatives to such proceedings. The following sections are of specific importance for children in criminal proceedings: the right to have the information on criminal charges explained to both the child and the parents in a way that they understand the exact charge (Section IV.A.1.5), the right to be questioned only in the presence of the lawyer/parents or a person of trust (Section C (30)), the

110 Council of Europe, pp. 25–26.
111 ECtHR, *Nortier v. the Netherlands*, No. 13924/88, 24 August 1993; ECtHR, *Adamkiewicz v. Poland*, No. 54729/00, 2 March 2010.
112 Art. 6 para. 2 of the ECHR.
113 Ibid., Art. 6 para. 3 point a).
114 Ibid., point b).
115 Ibid., point d).
116 Ibid., point e).
117 See also: Council of Europe, 2007, Chapter VII.

right to speedy proceedings (Section D (4)), and the right to child-sensitive interviews or hearings (Section D (5)).

The ECtHR has elaborated under Article 6 of the ECHR specific requirements for ensuring children's effective participation in criminal trials, and it is also at the core of the CoE's Guidelines. Justice for children, including juvenile 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 right to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.'[118]

As a general rule, 'proceedings should ensure that the child's age, level of maturity and emotional capacities are taken into account'.[119] Concrete examples of "effective participation" requirements include the child's presence during the hearings, holding of in-camera hearings, limiting trial publicity, ensuring that the child understands what is at stake, and limiting the formality of court sessions. One of the most important Guidelines is that 'the minimum age of criminal responsibility should not be too low' and should be determined by law.[120] So far, the ECtHR has not held that setting the age of criminal responsibility too low constitutes, in itself, a violation of Article 6 of the ECHR. When assessing whether a child was able to participate effectively in national proceedings, the ECtHR looks at the concrete circumstances of each case.

The recognition of the "right to effective participation" is the next principle. Children should also be thoroughly informed and consulted on the opportunity to have recourse to either a court proceeding or alternatives outside court settings. This information should also explain the possible consequences of each option. Alternatives to court proceedings should guarantee an equivalent level of legal safeguards. Respect for children's rights as described in these Guidelines and in all relevant legal instruments on the rights of the child should be guaranteed to the same extent in both in-court and out-of-court proceedings.[121] The Guidelines provide specific guidance on how children should be treated during juvenile justice or other justice proceedings. Children should have access to court and judicial proceedings, and their rights to legal counsel and representation and to be heard and express their views should be safeguarded. Undue delay should be avoided, proceedings should be organised in a child-friendly way (which affects the environment and language), and special safeguards should be in place to take and respond to evidence/statements provided by children.[122]

118 Council of Europe, 2010, para. II. C.
119 ECtHR, *T. v. the UK* [GC], No. 24724/94, 16 December 1999; see also: Liefaard, 2016, pp. 909–910.
120 Council of Europe, 2011b, p. 25.
121 Ibid.
122 Ibid., Section D.

The Lanzarote Convention also stipulates that the effective participation of children in proceedings must be 'treated as priority and carried out without any unjustified delay'. It also provides rules for interviews with the child, which must be carried out without unjustified delays by professionals trained for this purpose and in premises designed for this purpose.

The case of *T. v. the United Kingdom*[123] concerns the murder of a two-year-old by two ten-year-olds. They were committed to a public trial under significant media attention. The court procedure was partly modified in that shorter sessions were held, the applicant's parents were placed close to him, a play area was available during breaks, etc. Nevertheless, the applicant and his co-accused were tried in an adult court, and most of the rigours of a criminal trial were preserved. The ECtHR held that the applicant had not been able to participate effectively in the proceedings due to the public nature of the sessions, combined with the high level of media attention, and his limited capacity to instruct his lawyers and provide adequate testimonies. His rights under Article 6 of the ECHR were, therefore, violated.

The ECtHR considers "access to a lawyer" to be one of the fundamental elements of the right to a fair trial. Individuals charged with a criminal offence have the right to access a lawyer from the early stages of a police investigation. That right may be limited in exceptional circumstances, provided that the limitation does not unduly prejudice the rights of the accused. The ECtHR's scrutiny of whether an applicant had effective access to a lawyer is stricter in cases involving children.[124]

The case of *Panovits v. Cyprus*[125] concerns a 17-year-old who was charged with murder and robbery. He was brought to the police station, accompanied by his father. He was then arrested and taken to a separate room for questioning in the absence of the father or a lawyer. While the applicant was being questioned, his father was informed of the applicant's right to contact a lawyer. Several minutes later, the father was told that his son had meanwhile confessed to having committed the crime. The ECtHR found that, because of his age, the applicant could not have been considered to be aware of his right to legal representation before making any statement. It was also unlikely that he could have reasonably appreciated the consequences of his being questioned without the assistance of a lawyer in criminal proceedings concerning a murder. Even though the authorities appeared to have at all times been willing to allow the applicant to be assisted by a lawyer if he so requested, they had failed to make him aware of his right to request the assignment of a lawyer free of charge if necessary. There was no evidence that the applicant or his father expressly and unequivocally waived their right to legal assistance. Consequently, the Court found a violation of Article 6 para. 3 point c) in conjunction with Article 6 para. 1 of the ECHR.

123 ECtHR, *T. v. the UK* [GC], No. 24724/94, 16 December 1999.
124 ECtHR, *Salduz v. Turkey* [GC], No. 36391/02, 27 November 2008; ECtHR, *Ibrahim and Others v. the United Kingdom* [GC], Nos. 50541/08 et al., 13 September 2016; ECtHR, *Beuze v. Belgium*, No. 71409/10, 9 November 2018.
125 ECtHR, *Panovits v. Cyprus*, No. 4268/04, 11 December 2008.

### *2.6.1. Rights of Young Offenders in Relation to Detention*

Every person has the right to liberty. Deprivation of liberty, therefore, constitutes an exception and includes any form of placement in an institution by decision of a judicial or administrative authority, from which the juvenile is not permitted to leave at will.[126] Given the importance of safeguarding the rights of the child, including their best interests, situations of liberty deprivation should be considered from that particular angle when concerning children.[127]

International instruments universally affirm that detention must be a measure of last resort, used for the shortest time possible and restricted to serious cases.[128] This means that state authorities faced with the question of placing a child in detention should first give adequate consideration to alternatives to protect the best interests of the child, as well as to further the reintegration of the child[129]. Alternatives can include, for example, 'care, guidance and supervision orders; counselling; probation; foster care; education and vocational training programmes'[130]. Only where alternatives are not feasible should detention be considered. Moreover, detention should only be ordered for the shortest period of time and under appropriate substantive and procedural guarantees. Because of their age and vulnerability, children benefit from special rights and guarantees when placed in detention.[131]

126 Council of Europe, 2008b, Rule 21.5.
127 European Union Agency for Fundamental Rights (FRA) and ECtHR, 2022, p. 252.
128 Recommendation of the Committee of Ministers, CM/Rec(2008) 11, para. 59.1.
129 Art. 40 para. 1 of the CRC.
130 Ibid., para. 4.
131 Ibid. p. 252

Article 5 of the ECHR[132] provides that everyone has the right to liberty. Detention is an exception which should be provided for by national law and should not be arbitrary. In addition, detention has to be justified under one of the six exhaustive situations listed under Article 5 para. 1 points a) to f). Detention of children in contact with the criminal justice system can be justified under paragraphs

a. detention after conviction by a competent court;
c. pre-trial detention; or
d. detention for the purpose of educational supervision, in particular.

The latter two shall be analysed, as they have given rise to specific duties for state authorities.

"Pre-trial detention" refers to situations where individuals are taken into police custody on suspicion of having committed a criminal offence or are held in remand. It starts when an individual is taken into custody and ends with the determination on the merits of the case by a court of first instance.[133] While children benefit from the same guarantees as adults, the ECtHR has laid down several additional principles to strengthen the position of children in domestic criminal proceedings. International children's rights bodies are very critical of applying pre-trial detention and are

132 Art. 5 Right to liberty and security
1. Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: (a) the lawful detention of a person after conviction by a competent court; (b) the lawful arrest or detention of a person for noncompliance with the lawful order of a court or in order to secure the fulfilment of any obligation prescribed by law; (c) the lawful arrest or detention of a person effected for the purpose of bringing him before the competent legal authority on reasonable suspicion of having committed an offence or when it is reasonably considered necessary to prevent his/her committing an offence or fleeing after having done so; (d) the detention of a minor by lawful order for the purpose of educational supervision or his/her lawful detention for the purpose of bringing him before the competent legal authority; (e) the lawful detention of persons for the prevention of the spreading of infectious diseases, of persons of unsound mind, alcoholics or drug addicts or vagrants; (f) the lawful arrest or detention of a person to prevent his/her effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition.
2. Everyone who is arrested shall be informed promptly, in a language which he understands, of the reasons for his/her arrest and of any charge against him.
3. Everyone arrested or detained in accordance with the provisions of paragraph 1 (c) of this Article shall be brought promptly before a judge or other officer authorised by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release pending trial. Release may be conditioned by guarantees to appear for trial.
4. Everyone who is deprived of his/her liberty by arrest or detention shall be entitled to take proceedings by which the lawfulness of his/her detention shall be decided speedily by a court and his/her release ordered if the detention is not lawful.
5. Everyone who has been the victim of arrest or detention in contravention of the provisions of this Article shall have an enforceable right to compensation.

133 ECtHR, *Idalov v. Russia*, No. 5826/03, 22 May 2012.

seeking to reduce it.[134] The ECtHR has generally interpreted Article 5 para. 1 point c) and Article 5 para. 3 as requiring that a person be placed in pre-trial detention only if there is a reasonable suspicion of him/her having committed a criminal offence. Further, pre-trial detention should not exceed a reasonable time and should be reviewed at reasonable intervals. The longer the period of detention, the stronger the reasons put forward by the authorities to justify it need to be. According to ECtHR case law, a person charged with an offence must always be released pending trial unless the state can show that there are "relevant and sufficient" reasons to justify the continued detention.[135] In addition, the continuation of pre-trial detention should be strictly necessary, and the state must examine all the facts arguing for or against the existence of a genuine requirement of public interest justifying a continued deprivation of liberty.[136]

In cases involving children, the ECtHR mandates that state authorities should pay particular attention to the child's age when balancing the relevant arguments for and against pre-trial detention; it should be used as a measure of last resort and for the shortest possible period.[137] This implies that the authorities should consider alternatives to pre-trial detention.[138] Furthermore, state authorities should display special diligence in bringing children to trial within a reasonable time.[139]

In *Nart v. Turkey,*[140] the 17-year-old applicant was arrested on suspicion of having robbed a grocery shop. He was placed in pre-trial detention in an adult prison for 48 days. With particular reference to the fact that the applicant was a child, the ECtHR stated that 'pre-trial detention of minors should be used only as a measure of last resort; it should be as short as possible and, where detention is strictly necessary, minors should be kept apart from adults'. In this particular case, the authorities attempted to justify the pre-trial detention on the basis of the "state of evidence", but the ECtHR found that this reason alone could not justify the length of the applicant's detention. Consequently, the ECtHR found a violation of Article 5 para. 3 of the ECHR. The reasoning was the same in *Selçuk v. Turkey,*[141] in which the applicant

134 See, for example, the Concluding Observations for Belgium: 'The Committee recommends that the state party: [...] (c) [...] ensure, in accordance with Article 37 of the Convention, that the deprivation of liberty is only used as a measure of last resort, for the shortest possible time, that guarantees of due process are fully respected and that persons under 18 are not detained with adults.' (CRC/C/15/Add. 178, para. 32, c, 13 June 2002).

135 ECtHR, *Smirnova v. Russia*, Nos. 46133/99 and 48183/99, 24 July 2003.

136 Ibid., paras. 58–59; ECtHR, *Ladent v. Poland*, No. 11036/03, 18 March 2008.

137 ECtHR, *Korneykova v. Ukraine*, No. 39884/05, 19 January 2012; see also: ECtHR, *Selçuk v. Turkey*, No. 21768/02, 10 January 2006; ECtHR, *J.M. v. Denmark*, No. 34421/09, 13 November 2012; *Koşti and Others v. Turkey*, No. 74321/01, 3 May 2007; ECtHR, *Güveç v. Turkey*, No. 70337/01, 20 January 2009.

138 ECtHR, *Dinç and Çakır v. Turkey*, No. 66066/09, 9 July 2013; ECtHR, *Güveç v. Turkey*, No. 70337/01, 20 January 2009.

139 ECtHR, *Kuptsov and Kuptsova v. Russia*, No. 6110/03, 3 March 2011; see also: European Committee of Social Rights, 2020.

140 ECtHR, *Nart v. Turkey*, No. 20817/04, 6 May 2008.

141 ECtHR, *Selçuk v. Turkey*, No. 21768/02, 10 January 2006.

had spent some four months in pre-trial detention when he was 16 years old, and in *Güveç v. Turkey,*[142] where the applicant was detained from the age of 15 and was kept in pre-trial detention for a period over four and a half years. The ECtHR reiterated its comments on excessive periods of detention, and found violations of Article 5 para 3 of the Convention.

This form of detention has been ordered in situations where the child has a particular need for "educational supervision" because of a disturbed personality and violent behaviour. Article 5 para. 1 point d) of the ECHR primarily targets forms of detention outside the scope of the juvenile justice system.[143]

In *Blokhin v. Russia*,[144] a 12-year-old suffering from attention-deficit hyperactivity disorder was arrested and taken to a police station on suspicion of extorting money from another child. Since he could not be prosecuted under domestic law, a court ordered his placement in a temporary detention centre for juvenile offenders for 30 days to 'correct his behaviour' and prevent his committing further acts of delinquency. Recalling that detention for educational supervision must take place in an appropriate facility with the resources to meet the necessary educational objectives and security requirements, the ECtHR noted that none of the domestic courts had stated that the applicant's placement in the correction facility was for educational purposes. Nor did it see how any meaningful educational supervision to change a child's behaviour and offer appropriate treatment and rehabilitation could be provided during a maximum period of 30 days. A violation of Article 5 was found.

The case of *Bouamar v. Belgium*[145] concerns the placement of a child in a remand adult prison on nine occasions for periods of around 15 days. The applicant was an adolescent considered to have a disturbed personality and violent behaviour. The Belgian Government submitted that he had been placed in the remand prison for the purpose of educational supervision. The ECtHR noted that interim placements in a remand prison are not, in themselves, contrary to Article 5 (1) (d), as long as the authorities pursue the purpose of placing the juvenile under educational supervision. However, the ECtHR found that in the applicant's case, the authorities failed to show they had the intention or possibility to place him in an institution where he could benefit from educational supervision. Consequently, the ECtHR found a violation of Article 5 para. 1 point d) of the ECHR. Furthermore, unjustified lapses of time were hardly considered to be compatible with the speed required by the terms of Article 5 para. 4 of the ECHR.

*D.G. v. Ireland*[146] concerns the placement of a child in a detention centre without charge or conviction. The applicant had a serious personality disorder. The ECtHR held that, in the context of the detention of children, the notion of educational supervision should not be equated strictly with notions of classroom teaching. Educational

142 ECtHR, *Güveç v. Turkey,* No. 70337/01, 20 January 2009.
143 European Union Agency for Fundamental Rights (FRA) and ECtHR, 2022, pp. 254–255.
144 ECtHR, *Blokhin v. Russia*, No. 47152/06, 23 March 2016.
145 ECtHR, *Bouamar v. Belgium*, No. 9106/80, 29 February 1988.
146 ECtHR, *D.G. v. Ireland*, No. 39474/98, 16 May 2002.

supervision entails many aspects of the exercise of parental rights by the local authority for the benefit and protection of the child. The ECtHR also held that it is permissible for domestic authorities to place juveniles in detention facilities on a temporary basis until suitable accommodation is found, as long as this happens speedily. In the applicant's case, the speediness requirement was not met as he was only placed in a suitable accommodation more than six months after his release from detention. The ECtHR, therefore, concluded that the applicant's detention was not compatible with Article 5 para. 1 point d) of the ECHR.

In addition to the guarantees mentioned above, state authorities must ensure that children have the "right to challenge the lawfulness of the detention" at reasonable intervals and that they have access to a lawyer during the proceedings determining the lawfulness of their detention. Furthermore, these legal challenges "need to be decided speedily" by domestic courts. The ECtHR derives these procedural guarantees from the text of Article 5 para. 4 of the ECHR. In *Bouamar v. Belgium*,[147] mentioned before, the ECtHR found a violation of Article 5 para. 4 because the hearings for the determination of the applicant's detention took place in the absence of his lawyers, they were not decided speedily, there was no actual decision on the "lawfulness of the detention", since the domestic courts dismissed the applicant's appeals as devoid of purpose.

In relation to the conditions of detention, the ECtHR found that 'detaining children together with adults might lead to a breach of Article 3'[148] or Article 5 of the ECHR. The ECSR has consistently interpreted Article 17 of the ESC to the effect that if children are detained or imprisoned, they should be separated from adults.[149] The CoE's "European Rules for Juvenile Offenders" also provide that juveniles should not be held in institutions for adults but in institutions specially designed for them.[150]

Further, the lack of adequate medical care in detention could also raise issues under Article 3. Other aspects which may potentially raise issues under Article 3 include available cell space, lighting, and recreational activities. In assessing the compatibility of conditions of detention with the standards of Article 3 of the ECHR, the ECtHR often relies on the set of standards developed by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which monitors prison conditions under the umbrella of the European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment[151] by conducting site visits to CoE member States.

147 ECtHR, *Bouamar v. Belgium*, No. 9106/80, 29 February 1988.
148 Prohibition of torture – No one shall be subjected to torture or to inhuman or degrading treatment or punishment.
149 European Committee of Social Rights, 2020, Art. 17 para. 1.
150 Council of Europe, 2008b, Rule 59.1.
151 European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ETS No. 126) Strasbourg 26/11/1987.

In *Güveç v. Turkey,*[152] a 15-year-old boy was arrested on suspicion of membership of the Kurdistan Working Party (PKK). He was detained by the State Security Court in a prison for adults for five years. The ECtHR observed that his detention contravened Turkish regulations and obligations under international treaties, including, among others, Article 37 point c) of the CRC, which requires that children are kept separate from adults. The Court also noted that the applicant began to have psychological problems in prison, as a result of which he repeatedly attempted to commit suicide. In addition, the authorities failed to provide the applicant with adequate medical care. Consequently, given the applicant's age, the length of his detention in prison together with adults, the failure of the authorities to provide adequate medical care for his psychological problems, and their failure to take steps to prevent his repeated attempts to commit suicide, the ECtHR had no doubt that the applicant was subjected to inhuman and degrading treatment. There had accordingly been a violation of Article 3 of the ECHR.

Given the vulnerability of children deprived of liberty, the Guidelines emphasise the importance of family ties and promoting reintegration into society. Furthermore, competent authorities should ensure respect and actively support the fulfilment of the rights of the child as set out in universal and European instruments. In addition to other rights, children, in particular, should have the right to: maintain regular and meaningful contact with parents, family, and friends through visits and correspondence, except when restrictions are required in the interests of justice and the interests of the child. Restrictions on this right should never be used as a punishment; receive appropriate education, vocational guidance and training, and medical care, and enjoy freedom of thought, conscience, and religion, and access to leisure, including physical education and sport; access programmes that prepare children in advance for their return to their communities, with full attention given to them with respect to their emotional and physical needs, their family relationships, housing, schooling, and employment possibilities, and socio-economic status.[153]

The ECtHR has repeatedly held that domestic authorities are responsible for protecting persons in detention from death, abuse, or ill-treatment caused by other inmates or the authorities themselves. States' obligations in this respect are particularly strong since detainees are under the authority and control of the state.[154] In addition to taking reasonable measures to protect inmates, state authorities must also conduct effective investigations into arguable allegations of ill-treatment or death.

The case of *Çoşelav v. Turkey*[155] concerns the suicide of a 16-year-old in prison who had previously unsuccessfully attempted to commit suicide on several occasions. Following those attempts, the authorities transferred him from a wing for juveniles to a detention facility for adults. Having first established that the authorities knew

152 ECtHR, *Güveç v. Turkey,* No. 70337/01, 20 January 2009.
153 Council of Europe, 2010, p. 24.
154 ECtHR, *Anguelova v. Bulgaria*, No. 38361/97, 13 June 2002; ECtHR, *H.Y. and Hü.Y. v. Turkey,* No. 40262/98, 6 October 2005.
155 ECtHR, *Çoşelav v. Turkey,* No. 1413/07, 9 October 2012.

or ought to have known of the existence of a real and immediate risk to the life of the applicants' son, the Court then noted that the authorities failed to take reasonable measures to prevent the risk of suicide. The ECtHR placed a strong emphasis on the age of the deceased and the fact that he had been detained together with adults. Consequently, the ECtHR found a violation of the substantive aspect of Article 2 of the ECHR (right to life). In addition, the Court also found a violation of the procedural limb of Article 2 due to the authorities' failure to conduct an effective investigation into the death of the applicants' son. The reasons supporting these findings include the failure of the authorities to promptly inform the applicants of their son's death, the failure of the prosecution to examine the alleged failures in preventing the suicide, and the excessive length of the ensuing administrative proceeding.

In general, a preventive and reintegrating approach should be promoted and implemented in matters of juvenile justice. The criminal law system should not automatically be set in motion by minor offences committed by children when more constructive and educational measures can be more successful. Moreover, Member States should react to offences in proportion not only to the circumstances and gravity of an offence but also to age, lesser culpability, and needs of the child and the needs of society.[156]

### *2.6.2. Protection of Child Victims and Witnesses*

The ECtHR ruled that it is the duty of the state to protect victims' interests, including victims who participate as witnesses in criminal proceedings. Their interests under ECHR provisions, such as Article 2 and Article 8, must be balanced against the interests of the defence.[157] The CoE's Guidelines on Child-Friendly Justice also pay attention to the protection of the child victim and witness, particularly when they give evidence in judicial proceedings. The Guidelines call upon Member States to make '[e]very effort [...] for children to give evidence in the most favourable settings and under the most suitable conditions, having regard to their age, maturity and level of understanding and any communication difficulties they may have'.[158] To this end, trained professionals should be involved, and, for example, audiovisual statements encouraged, while respecting the right of other parties to contest the content of such statements. When more than one interview is necessary, they should preferably be carried out by the same person to ensure coherence of approach in the best interests of the child. Children should also have the opportunity to give evidence in criminal cases without the presence of the alleged perpetrator. The guidelines also recognise that this child-friendly approach should respect the right of other parties to contest the content of the child's statements. In addition, the guidelines provide that the privacy and family life of child witnesses should be protected (Section IV (a) (9)), and proceedings should preferably be held in camera. Most importantly, a child's statements and

156 Council of Europe, 2011b, p. 70.
157 ECtHR, *Doorson v. the Netherlands*, No. 20524/92, 26 March 1996.
158 Council of Europe, 2010, para. 64.

evidence should never be presumed invalid or untrustworthy by reason only of the child's age.[159]

In the case of *W.S. v. Poland*,[160] the Court suggested possible ways to test the reliability of a young child victim and pointed out that this could be done in a less invasive manner than via direct questioning. Several sophisticated methods might be applied, such as having the child interviewed in the presence of a psychologist with questions being put in writing by the defence or in a studio, enabling the applicant or his lawyer to be present at such an interview via video-link or one-way mirror.

In *Kovač v. Croatia*,[161] a 12-year-old girl testified before an investigating judge that the applicant had committed indecent acts on her. The applicant had not been present or represented during the said testimony, nor was he given the opportunity to contest the victim's statement. The ECtHR reiterated that, as a rule, all evidence must be provided in the presence of the accused at a public hearing with a view to adversarial arguments. If statements at the stage of the police inquiry or the judicial investigation are used as evidence, this is not, in itself, inconsistent with Article 6 of the ECHR, provided that the defendant is given an adequate and proper opportunity to challenge and question the witness concerned, either at the time of making the statements or at a later stage of the proceedings. In the applicant's case, the victim's statements were the only direct evidence of the facts held against the applicant, and this evidence was decisive in the court's decision to issue a guilty verdict. However, the applicant had been unable to contest or obtain a reply from the domestic courts concerning his complaint in that respect. Furthermore, the victim's actual statement had never been read out before the trial court. Instead, the judge merely noted that the victim upheld her statement made before the investigating judge. Therefore, the ECtHR concluded that the applicant had not been afforded a fair trial, a breach of Article 6 (1) in conjunction with Article 6 (3) (d) of the ECHR.

The ECtHR has several rulings concerning sexual offences in which children testified against the alleged perpetrators. Concerning children as victims, the Guidelines of CoE are inspired by the principles of the "United Nations Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime",[162] and the CoE's "Convention on the Protection of Children against Sexual Exploitation and Sexual Abuse",[163] which calls for providing for the safety of children, their families, and witnesses on their behalf from intimidation, retaliation, and repeated victimisation. The Court recognised that criminal proceedings concerning sexual offences 'are often conceived of as an ordeal by the victim, in particular when the latter was unwillingly confronted with the defendant' and that this was even more prominent when children were concerned.[164] Consequently, the Court accepted that in such cases certain measures

159 Council of Europe, 2011b, p. 31.
160 ECtHR (Fourth Section), *W.S. v. Poland*, No. 21508/02, 19 June 2007.
161 ECtHR, *Kovač v. Croatia*, No. 503/05, 12 July 2007.
162 United Nations, 2005.
163 Council of Europe, 2007.
164 ECtHR, *S.N. v. Sweden*, No. 34209/96, 2 July 2002.

may be taken for the purpose of protecting the child victims. The Guidelines also emphasise that special precautionary measures should apply to children when the alleged perpetrator is a parent, a member of the family, or a primary caregiver.[165] However, it also noted that such measures may not jeopardise the adequate and effective exercise of the rights of the defence, and the judicial authorities may, therefore, be required to take measures which counterbalance the handicaps under which the defence operates.[166]

In *S.N. v. Sweden*,[167] a 10-year-old boy testified to the police that he was sexually abused by the applicant. The boy was interviewed twice by a police inspector with significant experience in child abuse cases. The first interview was videotaped, and the second was audiotaped. The lawyer of the applicant did not attend the second interview but agreed with the police inspector on the issues that needed to be discussed. During the trial, the District Court played the recordings of the child's interviews but did not examine him in person. The court ultimately convicted the applicant, relying almost entirely on the child's testimonies. The Court of Appeal upheld the conviction. It found that the police interviews provided sufficient evidence for the applicant's guilt to be established, even though it acknowledged that there was no technical evidence supporting the child's allegations, which were sometimes imprecise. The ECtHR accepted that, in sexual offence cases, cross-examination of a witness is not always possible and that, in such cases, witness testimonies should be treated with extreme care. Although the statements made by the child were virtually the sole evidence against the accused, the proceedings as a whole were fair. The videotape was shown during the trial and appeal hearings, and the transcript of the second interview was read out before the District Court; the audiotape was also played before the Court of Appeal. This gave the applicant sufficient opportunity to challenge the child's testimony and his credibility in the course of the criminal proceedings. Consequently, there had been no violation of Article 6 para. 3 point d) of the ECHR.

The case law of the ECtHR is not only about balancing the protection of child victims and the right of the defendant to a fair trial but also about the protection of the right to life of witnesses and their families, including children, under Article 2 of the ECHR, as shown by the following example. *R.R. and Others v. Hungary*[168] concerns a prisoner who testified in open court about his drug-trafficking activities and who was, along with his wife and two children, put in the official witness-protection programme for risk of retribution. When the authorities realised that the prisoner was still in contact with criminal circles, they removed him and his family from the witness protection programme for having breached its terms. Under Article 2 of the ECHR, the family claimed that their exclusion from the witness-protection programme had

165 Council of Europe, 2011b, p. 23.
166 ECtHR, *Bocos-Cuesta v. the Netherlands*, No. 54789/00, 10 November 2005; ECtHR, *A.L. v. Finland*, No. 23220/04, 27 January 2009; ECtHR, *W. v. Finland*, No. 14151/02, 24 April 2007; ECtHR, *Kovač v. Croatia*, No. 503/05, 12 July 2007.
167 ECtHR, *S.N. v. Sweden*, No. 34209/96, 2 July 2002.
168 ECtHR, *R.R. and Others v. Hungary*, No. 19400/11, 4 December 2012.

put their lives at risk of mafia retribution. The Court accepted that the applicants' inclusion in the witness protection programme and the father's collaboration with the authorities meant that the applicants' lives had been at risk when the measure was originally put in place. As the cancellation of their protection by the programme was not motivated by a reduction of that risk but by a breach of its terms, the Court was not persuaded that the authorities had proven that the risk had ceased to exist. Furthermore, it was not unreasonable to suppose that, following the withdrawal of the family's cover identities, their identities and whereabouts became accessible to anyone wishing to harm them. In that way, the authorities potentially exposed the family to a life-threatening danger in breach of Article 2 of the ECHR.

The case of *X and Others v. Bulgaria*[169] concerned allegations of child sexual abuse in an orphanage. In regard to the procedural part, the Court ruled that the Bulgarian authorities had breached their procedural obligation under Article 3 of the ECHR, which requires authorities to conduct an effective investigation into arguable claims of torture or inhuman or degrading treatment. Although the Bulgarian authorities had taken a series of investigative steps, the Court found that these had not met the required level of "effectiveness". One of the reasons for this was a failure to take any steps to involve the victims in the investigation. In its interpretation of Article 3, the Court took into account other applicable international instruments and, in particular, the Lanzarote Convention. Article 31 of the Lanzarote Convention indicates which general measures of protection Member States should take to protect the rights and interests of victims, including their special needs as witnesses, at all stages of investigations and criminal proceedings (Article 31 (1)). These measures include information about their rights as victims, the availability of services, and the general progress of the investigation or proceedings; the protection of their privacy and safety (including information on the release of the person prosecuted or convicted); and the avoidance of contact between victims and perpetrators in court and law enforcement agency premises. In addition, Article 31 provides that victims must have access to legal aid (Article 31 (3)). The information provided must be adapted to children's age and maturity and be in a language he/she understands (Article 31 (6)).[170]

Of course, particular health care and appropriate social and therapeutic intervention programmes or measures for victims of neglect, violence, abuse, or other crimes should be provided, ideally free of charge, and children and their caregivers should be promptly and adequately informed of the availability of such services.[171]

169 ECtHR, *X and Others v. Bulgaria*, No. 22457/16, 2 February 2021.
170 European Union Agency for Fundamental Rights (FRA) and ECtHR, 2022, p. 365.
171 Council of Europe, 2011b, p. 32.

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| Chapter 12 |

# Protection of the Rights of the Child Under the Auspices of the Hague Conference on Private Law

Agnieszka Tomczewska

**ABSTRACT**

In today's times of increasing globalisation and easy movement of people, the mobility of families between countries is very common. It is very important to secure the rights of the child as fully as possible in such situations. The most well-known convention constituting a substantive legal basis for a wide range of children's rights is the 1989 UN Convention on the Rights of the Child. However, this Convention alone would not be sufficient to guarantee the rights provided for therein, as well as to implement the principle of the best interests of the child in cross-border situations. The lack of international solutions common to states would result in the fact that in cross-border cases, different legal systems of individual countries in which the child resides or with which he/she has a certain relationship would apply.

The lack of regulation in this area would, therefore, cause legal uncertainty regarding the child's situation, expose him/her to the lack of necessary legal protection, and could lead to a violation of his/her rights. This state of affairs contributed to the creation of an international system of child protection under the Hague Conventions within the framework of the Hague Conference on Private Law. The most well-known and widely used conventions are the 1996 Convention and the 1980 Convention. These conventions harmonise the conflict-of-law and jurisdictional rules in cases involving children at the international level and, by creating a special return mechanism, address the situation of unlawful transfer of a child from one country to another without the consent of the parent in whose custody the child was also staying. Thanks to such solutions, the continuity of child protection and stabilisation of the child's legal situation is ensured. On the other hand, countries involved in the child's case may cooperate directly with each other to guarantee the child's legal protection and safety.

It is worth noting that cross-border situations in which the provisions of the Convention may apply can be very diverse. They may concern the ordinary movement of a child with his/her family, as well as cases of much greater dynamics and a high emotional load related to unlawful child abduction. The Conventions also regulate the situation of children who are left unaccompanied and do not have their habitual residence in the countries.

This article aims to show how the legal solutions contained in the two Hague Conventions of 1996 and 1980 contribute to the protection of the rights of the child and the best interests of the child in cross-border situations.

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**KEYWORDS**
1996 Hague Convention, 1980 Hague Convention, conflict of law rules, applicable law, cooperation between central authorities, habitual residence, right of access to the child's parents

## 1. Introduction

We live in times of high mobility and population movement. This creates various opportunities for citizens of individual countries to integrate into new environments, resulting from taking up work in other countries and starting a family in this way. In these circumstances, securing legal security for children from such international families and the realisation of their rights is necessary and should become a particular concern of every state authority. It is necessary to ensure the continuity of legal remedies taken for children and the mutual exchange of information between the countries in which the child resides, taking into account the best interests of the child. The Hague Conventions applicable in such situations, the 1996 Hague Convention on Jurisdiction, Applicable Law, Recognition and Enforcement and Cooperation in Respect of Parental Responsibility and the 1980 Hague Convention on the Civil Aspects of International Child Abduction, are widely used international instruments that provide a basis for ensuring continuity of legal protection and ensure uniform standards of child protection.

The 1996 Hague Convention provides for uniform rules of jurisdiction and consistent rules on applicable law while taking into account the situation of the movement of a child between states. The 1980 Hague Convention introduces an international mechanism to ensure the rapid return of a child to his/her country of habitual residence in a situation where a child has been wrongfully removed or retained in another country without the consent of the person having custody over the child. The introduction of uniform rules at the convention level ensures consistent jurisdictional norms in the states parties to the convention, making it possible to avoid situations where proceedings in the same case are initiated and conducted before courts of two different states on the basis of different jurisdictional connecting factors provided for in national law. Moreover, the unification of the rules on applicable law provided for in the 1996 Convention, offering flexible solutions regarding the possibility of taking legal measures to protect the child in urgent situations, allows international legal solutions to be adapted to the current situation of a given child.

All the solutions provided for in the Hague Conventions are supported by a system of mutual cooperation between the interested States Parties to the Convention. Namely, the system of cooperation between central authorities introduced in both conventions enables quick communication between individual countries and provides real support for parties to proceedings in cross-border cases. The above solutions aim to ensure a stable legal situation for the child in a cross-border situation in which the child moves to another country, as well as the implementation of children's rights under the UN Convention on the Rights of the Child.

It is worth noting that the range of measures covered by the 1996 Hague Convention is wide, including both civil and public law measures concerning the person or property of a child. This instrument covers issues related to both parental authority and representation of the child, as well as those related to the placement of the child in foster care in another state, a party to the Convention, or temporary or necessary measures aimed at securing the child's situation.

In addition, the solutions provided for in the 1980 Hague Convention also allow the quick return of the child in the event of unlawful removal or retention in a country other than the country of his/her previous habitual residence. Furthermore, they ensure contact with both parents.

The wide scope of application of both conventions, as well as the mutual exchange of experience in their application within the framework of an international organisation such as the Hague Conference on Private Law, allows the countries applying the Convention to discuss current problems, exchange good practices, as well as cooperation between states in specific cases.

This article presents the basic institutions and legal solutions contained in both these Conventions. At the same time, it should be emphasised that the regulatory area covered by these Conventions is also the subject of the EU regulation Brussels IIb,[1] which provides for even closer cooperation between the Member States of the European Union in the areas covered by the Hague Conventions.

### *1.1. Protection of the Rights of the Child in the Hague Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, The Hague, 19 October 1996*

The Convention on Jurisdiction, Applicable Law, Recognition, Enforcement and Cooperation in Respect of Parental Responsibility and Measures for the Protection of Children, done at The Hague on 19 October 1996, is the principal instrument for cooperation within the framework of the Hague Conference on Private Law. It contains uniform principles of private international law in matters of parental responsibility. It is the most widely ratified instrument of international law in the field of parental responsibility, covering a wide range of issues related to the protection of the child. Its main objective is to establish common legal regulations and ensure cooperation between States Parties in such a way that minors can be provided with legal remedies while eliminating delays caused by additional procedures.[2] This strengthens the protection of children in international cases and avoids conflicts between Member States' systems with regard to jurisdiction, applicable law, recognition, and enforcement of child protection measures.

More specifically, in international affairs between states that are parties to the Convention, it aims to define: the country whose authorities are competent to take

1 Council of the European Union, 2019.
2 Przytuła-Pieniążek, 2022, pp. 101–118.

measures aimed at protecting the person or property of the child; the law applicable by these bodies in the exercise of their jurisdiction in matters covered by the Convention; the law applicable to matters of parental responsibility; establishing cooperation between the authorities of the Contracting States necessary to achieve the objectives of the Convention (Article 1).

In the preamble, the Convention emphasises that the best interests of the child should be a priority. Its provisions take into account the provisions of the United Nations Convention of 20 November 1989 on the Rights of the Child. Like the UN Convention on the Rights of the Child, the 1996 Hague Convention applies to children from birth until they reach the age of 18. Such a procedure was aimed at leaving the issue of regulating the legal situation of the *nasciturus* in their national law to the discretion of the States Parties, leaving this issue outside the scope of the Convention's regulations and, thus, departing from a uniform approach in this matter.

As far as the scope of application of the 1996 Hague Convention is concerned, it applies to cases concerning measures for the protection of children, which should be understood (Article 3): the granting, exercising, and partial or total deprivation of parental responsibility, as well as its transfer; custody, including custody of the child and, in particular, the right to decide on the child's place of residence as well as the right to personal access, including the right to take the child for a limited period of time to a place other than the place of habitual residence; guardianship and other similar institutions; designation and scope of tasks of the person or entity who is responsible for the person or property of the child, represents him or her, or provides him or her with assistance; placing the child in a foster family or care facility or caring for him or her by a kafala or other similar institution; supervision of the child's care by public authorities by any person who is responsible for the child; management, protection, or disposal of the child's property.

In order to ensure uniform application of the 1996 Hague Convention in all countries applying it, the Convention introduced a definition of the concept of parental responsibility. Namely, parental responsibility within the meaning of the Convention should be understood as parental responsibility or any other similar relationship of authority that defines the rights and obligations of parents, guardians, or other statutory representatives in relation to the person or property of the child. Therefore, under the Convention, this definition takes on an autonomous character and is detached from the definition in national law.

To avoid doubt, the Convention clearly indicates in which cases it does not apply. These include matters concerning: establishing and denying paternity;[3] adoption decisions and measures to prepare for adoption, as well as annulment and revocation of adoption; the child's surname and first name; confirmation of age; maintenance obligations; trusts and inheritance; social insurance; public funds of a general nature in matters of education and health; decisions on the right to asylum and migration.

Taking the above into account, it can be indicated that the Convention will apply to children: who have international custody or contact parental disputes; who are abducted abroad (including in those countries that are not party to the 1980 Hague Convention on the Civil Aspects of International Child Abduction); who have been placed abroad as part of alternative forms of guardianship, and which do not fall within the definition of adoption and therefore do not fall within the scope of the 1993 Hague Convention on Intercountry Adoption; that are subject to cross-border trafficking and other forms of exploitation, including sexual exploitation; refugees or unaccompanied minors; children who move abroad with their families.

The 1996 Hague Convention contains jurisdictional norms that unify the rules of jurisdiction in the States Parties, allowing for the limitation of situations in which the authorities of two different States Parties could decide on the same matter. The primary connecting factor in matters falling within the scope of the Convention is the child's habitual residence. This means that the authorities of the state party in which the child has his/her habitual residence are competent (have international jurisdiction) to take measures aimed at protecting the child. It should be emphasised that the connecting factor of habitual residence is a connecting factor commonly used in the Hague Conventions concerning children. The Convention does not contain a definition of the concept of habitual residence, leaving these issues to be determined by the authorities applying the Convention on the basis of all the circumstances of the case. The connecting factor of the child's habitual residence takes into account the best interests of the child in the context of the possibility of hearing the case for the application of protection measures by the court located closest to the child. Therefore, the application of the connecting factor of the child's habitual residence is a matter of making certain factual findings on the part of the court, which applies its own law. In the absence of a conventional definition of the concept of habitual residence of a child, the literature indicates the criteria formulated in the interpretation of

3 Lagarde, 1998, pp. 578–579, observes that the conflict-of-law rules of the Convention do not apply to marital status (e.g. paternity as a result of the recognition of a child), which will be preliminary to the emergence of parental responsibility by operation of law and its recognition in the other Convention States under Article 16. At the same time, it stresses that "it would not be unreasonable" for the jurisdiction of law on this preliminary issue to be determined by the conflict-of-law rules of the child's country of habitual residence (that is to say, *legis causae*) and not by the forum's conflict-of-law law (para. 102). Theoretically, the author's position is divergent from the approach generally accepted in Polish doctrine, mainly due to ensuring uniformity of decisions in the same cases (i.e. the resolution of the preliminary issue signalled above on the basis of the applicable law indicated in the forum's conflict-of-law rules).

this concept adopted by the Court of Justice of the European Union in the context of Article 8 of the EU Brussels IIa Regulation,[4] which concerns jurisdiction in the field of parental responsibility.[5] This position is justified by the objective pursued by both acts, which is to protect the best interests of the child. The concept in question should be interpreted in light of that objective.[6] Thus, according to that view, it must be assumed that in order to determine the child's habitual residence in the context of the Convention, it is necessary to locate the place where the child is integrated to a certain extent into the social and family environment. In doing so, account should be taken, in particular, of the duration, legality, conditions, and reasons for the stay in the territory of the State concerned and of the family moving to that State, as well as the nationality of the child, the place and conditions of attendance at school, the knowledge of languages, and the family and social relations maintained by the child in that State.

In addition, the materials issued by the Permanent Office of the Hague Conference on Private International Law provide the following guidelines to determine whether there has been a change in the habitual residence of a child. First, if there are circumstances in the present situation which clearly indicate the parents' intention to start a new life in another State, it is, in principle, legitimate to consider that the child's previous habitual residence has changed to that of another State.[7] The circumstances referred to here may include, for example, the purchase by the parents of an apartment in the territory of that other State, the fact that they both have a job in that State, or the enrolment of the child in a school located in the territory of that State.[8] Second, if the move to another country is definitive or potentially definitive, it can also be assumed that the child's habitual residence has changed, even if a short period of time has elapsed since the child moved to that other State. If, on the other hand, the move is temporary, even if it is a long period of residence in another State, it is justified to consider that there has been no change in the child's habitual residence.[9]

Therefore, the determination of the "habitual residence" is related to the determination of the competent jurisdiction of the court and is, therefore, of fundamental importance for the consideration of the minor's case. The States Parties to the 1996 Hague Convention must, therefore, decide on their jurisdiction on the basis of domestic law while taking into account the overarching objective of the Convention. At the

4 Council of the European Union, 2003.

5 See judgments: CJEU of 2.4.2009, C-523/07, *A.*, ECLI:EU:C:2009:225, para. 44; CJEU, 22.12.2010, C-497/10, *Barbara Mercredi v. Richard Chaffe*, ECLI:EU:C:2010:829, para. 56; and 9.10.2014, C-376/14, *C. v. M.*, ECLI:EU:C:2014:2268, paras. 50 et seq., can also be applied to the child's habitual residence within the meaning of the Convention. See: Hamou 2015, pp. 277–279.

6 Carpaneto, 2019, pp. 265–285.

7 The Hague Conference on Private International Law Permanent Bureau, 2014, p. 177 (further: Manuel pratique).

8 See: Gallant, 2004, p. 235.

9 As is the case law in many countries; See: Manuel pratique, p. 177.

same time, the literature indicates that a child obtains habitual residence in a given country if he/she was moved there as a result of legal removal.[10]

10 Przytuła-Pieniążek, 2022. In the example of England, which, after leaving the EU in place of the previously applicable EU Regulation 2201/2003, applies the Hague Convention of 1996, it is possible to point to national case law concerning the conditions for establishing habitual residence. Thus, in Re *B* (*a minor*) (*habitual residence*) [2016] EWHC 2174, Judge Hayden set out thirteen conditions on the basis of which a child's habitual residence should be determined in the context of proceedings for the custody of minors. They can be presented as follows:
'(1) the child's habitual residence corresponds to a place which reflects a certain degree of integration of the child into the social and family environment;
(2) the factual investigation must concentrate entirely on the circumstances of the child's life which are likely to illuminate his/her habitual residence;
(3) the "best interests of the child" should be taken into account, in particular, the criterion of proximity, which in this context means the practical link between the child and the country concerned;
4) a parent may unilaterally cause a change in the child's habitual residence by transferring the child to another jurisdiction without the consent of the other parent;
5) usually, but not necessarily, the child will have the same habitual residence as his/her parents who are caring for him. Such an interpretation is more likely the younger the child is. However, it is largely about the child's usual place of residence, so the most important thing is to examine the degree of integration of the child;
6) the intention of the parents is important but not conclusive;
7) it is unlikely that the child will not have a habitual residence because, usually, the child loses his/her habitual residence when he/she acquires a new one;
8) when assessing whether the child has lost his previous habitual residence and gained a new one, the court must consider the degree of integration that the child had with the country in which he/she lived before the move. However, in the case of *Re M* [2020], the Court of Appeals referred to Condition No. 8 presented by Judge *Hayden* concerning the consideration of the degree of integration of the child with the state before moving. The Court of Appeals stated that the application of this condition 'could distract the court's attention from the basic activities related to the analysis of the child's situation on the date relevant to the purpose of determining jurisdiction or (...) whether the detention of the case was unlawful'. Therefore, it was recommended to omit this premise.
9) the stability of the child's place of residence is important as opposed to its permanence. This stability is measured qualitatively and not quantitatively, in the sense that it concerns the integration of the child into the environment, and is not a simple measurement of the time that the child spends in a given country;
10) an important question is whether the child has achieved the required degree of integration in the social and family environment. It is not necessary for the child to be fully integrated before his/her habitual residence can be established;
11) the required degree of integration may, in certain circumstances, develop quite rapidly, as was provided for in the Brussels IIa Regulation (a period of 3 months). It is also possible to acquire a new habitual residence in one day. Lord *Wilson*, in the case of *Re B*, referred to the "first roots" representing the required degree of integration, which a child can "grow" quite quickly after moving;
12) the place of permanent residence was a factual issue focused on the child's situation, and the goals and intentions of the parents were only one of the important factors. What was important was the stability of the place of habitual residence, not its permanent character. There was no requirement for the child to reside in the country for a certain period of time, let alone the parents' intention to live in the country permanently;
13) structure of the Regulation. Brussels IIa points out that it is in the best interests of the child to have a habitual residence and, therefore, it is highly unlikely, although possible, that the child may not have a habitual residence'.

At the same time, the 1996 Hague Convention introduces the principle of a change of jurisdiction in the event of a change of habitual residence of a child. This means that even if the child's habitual residence has changed in the course of the court proceedings, that court loses jurisdiction to hear the case in favour of the court of the country in which the child has acquired his habitual residence. Therefore, the Convention does not implement the principle of *perpetuatio jurisdictionis*, which is commonly applied in the systems of many states, including instruments of international (European) law. This regulation differs from the one that was in force under Regulation 2201/2003 Brussels II bis and now under Regulation 2019/1111 Brussels II ter. When considering the issue of a change in the child's habitual residence during the course of proceedings on parental responsibility, the Court of Justice of the EU, in the judgment of 14 July 2022, C-572/21, indicated that Article 8 para. 1 in conjunction with Article 61(a) of Regulation No 2201/2003 must be interpreted as meaning that a court of a Member State seised of a dispute concerning parental responsibility does not retain jurisdiction to rule on that dispute under Article 8 para. 1 if the child's habitual residence has been lawfully transferred in the course of the proceedings to the territory of a third country party to the Hague Convention. This means that the court hearing a case of parental responsibility will lose jurisdiction if, in the course of the proceedings, the child moves to another country where he/she will have a new habitual residence.

Due to the lack of a definition of habitual residence within the meaning of the 1996 Hague Convention, in practice, the assessment of the moment of occurrence of the habitual residence condition is questionable (the doctrine mentions the moment of filing an action, the date of the hearing, the moment of issuance of a ruling or

intervention by the competent authorities).[11] Given the departing from the principle of *perpetuatio jurisdictionis* in order to remove doubts that may arise as to the applicability of protection measures taken within a given jurisdiction after the child's habitual residence has been transferred to another State, Article 14 of the Convention clearly specifies that measures taken by the authorities in accordance with Articles 5-10 shall remain in force even if, as a result of a change in circumstances, the grounds for the child remain in force, on the basis of which jurisdiction was determined. They remain in force until measures are taken by the authorities of the State that has

11 Anna Przytuła-Pieniążek, analysing examples of the jurisprudence of English courts in the context of habitual residence under the 1996 Hague Convention, indicates that two positions are visible in the examples of judgments shown. Firstly, the one that indicates the assessment of whether the child has his/her habitual residence in a given country on the date of filing the action. However, such a position follows directly from the Brussels IIa Regulation, more specifically, from Article 8, and it should be remembered that the United Kingdom ceased to apply this regulation after the end of the transition period. The second way is to depart from the practice used when applying the regulation and to state that the appropriate moment to assess whether a child has a habitual residence in a given country is the day of the hearing. This position results from the lack of continuation of the principle *of perpetuatio fori* and has been applied in the most recent case law of the courts of England and Wales. Nevertheless, the most dangerous thing is to allow for a completely different interpretation of the regulations, and the lack of tools for control or harmonisation of interpretations does not inspire optimism. The presentation of Judge Lieven's view in this article marks a third, unexplored path. The indication that it would be possible to determine the date of determining the child's habitual residence on the day of the police intervention is not supported by any regulations. At the same time, it is worth noting that in the judgment issued in the case X *(A Child) X (A Child) (Jurisdiction and Habitual Residence Issue)* [2021] EWFC B81. of 30.11.2021, HHJ *Jonathan Bennett* indicated, as was the case in *the Warrington case*, that the determination of the habitual residence falls on the day of the court hearing. However, it was emphasised that determining when the place of habitual residence is determined is extremely important for the cases under consideration because many months may pass between the date of filing the action and the date of the hearing, during which the child's habitual residence may change. Przytuła-Pieniążek, 2022.

jurisdiction.[12] This means that measures to protect the person or property of the child taken by the competent authority remain within their limits until the authorities that have become competent in light of the new circumstances amend, replace, or repeal those measures. This rule is designed to ensure the continuity of the protection of the child but does not apply to the necessary protection measures referred to in Article 11 and temporary measures referred to in Article 12. The issue of the time limits of the binding force of measures belonging to the latter two categories is regulated separately, respectively in Articles 11 paras. 2 and 3 and Articles 12 paras. 2 and 3.[13] In principle, they are to apply until the protection measures taken by the authorities of the State having jurisdiction under Articles 5 to 10 of the Convention are recognised or, where the child has a habitual residence in a State not Party to the Convention, another relevant authority is recognised. In the case of interim measures, their scope is limited to the territory of the State concerned.

At the same time, Article 5 introduces the general principle that the authorities of the Contracting State in which the children are relocated as a result of the relocation have jurisdiction over refugee children and children who have been displaced abroad as a result of riots in their country (Article 6).

The Convention introduces exceptions to the general principle of basing jurisdiction on the connecting factor of the child's habitual residence, which, due to the fact that they constitute a departure from the general rule, require a restrictive interpretation. They concern situations such as: a) child abduction – Article 6; b) assumption of jurisdiction – Articles 8 and 9; c) the possibility of adjudicating on measures to protect the child in proceedings for divorce, separation, or annulment of marriage – Article

12 It is worth noting that P. Lagarde, gives, as an example of the application of Article 14, a situation in which 'the maintenance of the measure in force is necessary to ensure the permanence of protection', e.g. that the guardian, appointed in the child's habitual residence, continues to perform his/her function after a change in the child's habitual residence entails a change of jurisdiction. He also gives the example of granting parental responsibility by operation of the law of the child's new habitual residence to a person other than the one indicated by the protection measure taken in the country of previous residence. The author emphasises that 'legal certainty requires that an appropriate protection measure be taken in the country of new habitual residence in order to extinguish the function of the first person', i.e. that the measure issued earlier is effective by that time. However, the occurrence of such desirable effects already results from other provisions of the Convention, i.e. Articles 23 et seq. (first example) and Articles 16 paras. 3 and 18 of the Convention (second example). Doubts are also raised by the claim that the principle of *ex lege* recognition under Article 23 para. 1 would not be sufficient to guarantee the result described in Article 14, because it 'ensures the recognition of measures that are in force', and the provision in question resolves the question of whether the measure remains in force after the circumstances of the case have changed. This explanation is not convincing, as recognition by operation of foreign law of a judgment under Article 23 et al. does not depend on the whether circumstances at the time of the ruling there are still circumstances that previously justified the jurisdiction of the courts of the country of origin of the measure Lagarde, 1998, pp. 571-573.

13 Lagarde, 1998, pp. 570–572; Lagarde, 1997, p. 217; Manuel Pratique, pp. 85–86.

10; d) the possibility of adjudicating protection measures in urgent cases – Article 11; e) the possibility of adjudicating temporary protection measures – Article 12.

For cases concerning wrongful child removal or retention, the Convention clarifies in Article 6 para. 2 that the abduction or retention of a child is considered unlawful:

> '(a) where this has affected the custody right conferred on a person, authority, or other entity, exercised jointly or individually, in accordance with national law, in which the child had his habitual residence immediately before the removal or retention, and
> (b) if, at the time of the removal or retention, the right was, in fact, exercised jointly or individually or would have been exercised in the absence of the removal or retention.'

In the case of wrongful removal or retention of a child in a State other than the State of habitual residence, the principle of basing jurisdiction on the connecting factor of habitual residence is limited. This means that if, as a result of wrongful removal or retention, a child acquires habitual residence in that State, the authorities of that State do not automatically acquire jurisdiction over the measures of protection relating to that child under the Convention. In this situation, special regulations resulting from Article 6 of the 1996 Hague Convention apply; jurisdiction in these cases is vested in the authorities of the country in which the child had his/her habitual residence before the wrongful removal or retention, i.e. the Convention introduces the principle of maintaining the existing jurisdiction of the State prior to the wrongful removal or retention. On the other hand, the authorities of the State to which the child has been wrongfully removed or retained have jurisdiction over cases concerning measures to protect the child in a situation where the child acquires habitual residence in that State and at least one of the following conditions occurs: a) any person, body, or other entity entitled to custody has authorised the abduction or retention, or b) the child has been in that other State for at least one year after the person, authority, or other entity entitled to custody knew or should have known his/her whereabouts, any return application made during this period is no longer processed, and the child has adapted to the new circumstances.[14]

As long as the authorities of the State of habitual residence of the child retain their jurisdiction prior to the wrongful removal or retention, the authorities of the Contracting State to which the child has been removed or retained may take only urgent measures necessary to protect the person or property of the child, in accordance with Article 11 of the Convention.

Another exception to the general rule of jurisdiction based on the connecting factor of the child's habitual residence is the possibility of transferring or taking over jurisdiction by the authority of the country where the child does not have his/her

14 Article 7 para. 1 points a) and b).

habitual residence if it is better able to assess the best interests of the child in a particular case. After all, the best interests of the child are the principle in light of which all provisions of the Convention should be interpreted. Hence, the jurisdictional provisions have been shaped in such a way as to enable the case to be considered by the authority of the country in which the child does not have his/her habitual residence if it is justified in the best interests of the child. In this situation, the Convention provides for two solutions – the possibility of requesting the authority of the State, which is not the child's habitual residence, to assume jurisdiction (Article 8) and the possibility for the authority of the State, which is not the habitual residence of the child but with which the child has a relationship, to apply for the transfer of jurisdiction to the State in which the child has his habitual residence (Article 9).

The 1996 Hague Convention specifies the criteria for the transfer of jurisdiction to another state to be possible. Namely, the authorities of the State to which the authority of the State having jurisdiction on the basis of the connecting factor of habitual residence may apply in order to assume jurisdiction or which may apply to the State where the child has his habitual residence for the transfer of jurisdiction are: a) the country of which the child is a national, b) the country where the child's property is located, c) the country to which the petition for divorce or separation of the child's parents or for the annulment of their marriage was filed, d) the country with which the child has a close relationship.[15]

The indicated prerequisites are derived from the assumption that the court best placed to hear a case in the field of protection measures is the country with which the child has the closest relationship (such as the child's habitual residence) or another country with which the child demonstrates a relationship through citizenship, the location of the child's property, an ongoing matrimonial case between the child's parents, or another type of close relationship. In the situations described in Articles 8 and 9, the relevant authorities of the Contracting States concerned shall contact each other directly or through a central authority or ask the parties to submit a request to that effect.

A condition for the effective assumption of jurisdiction by a court of a State which is not the child's habitual residence is that such transfer serves the best interests of the child.

A specific jurisdictional basis, which is a derogation from the general principle of jurisdiction, is the possibility for the authority having jurisdiction to hear a case for divorce, legal separation, or annulment of marriage between the child's parents to take measures to protect the child. The condition is that the law of the country in question allows for the recognition of protection measures in proceedings in the indicated matrimonial cases.

Another basis for considering a case concerning measures for the protection of a child is that one of the parents has a habitual residence in a given country – if that parent has parental responsibility and this jurisdiction has been recognised by the

15 Article 8 para. 2 points a)–d).

parents or another person with parental responsibility. As in the case of the transfer of jurisdiction under Articles 8 and 9, a positive assessment is needed that the examination of a case in the field of child protection measures in matrimonial proceedings is in the best interests of the child.

A further exception to the rule of jurisdiction based on the habitual residence of a child is the possibility for any Contracting State in whose territory the child or its property is located to take the necessary protection measures in urgent situations. These measures shall remain in force until protection measures have been taken by the authorities having jurisdiction in accordance with Articles 5 to 10 – that is, the authorities of the child's habitual residence, by the authorities having jurisdiction under the transfer, as well as by the authorities having jurisdiction in matrimonial matters of the child's parents. In the case of issuing measures when the child does not have his/her habitual residence in the territory of a Contracting State, these measures cease to be effective if measures taken by the authorities of another State are recognised in each of the Contracting States in accordance with the requirements of the situation.

The 1996 Hague Convention also provides for temporary protection measures (Article 12). The application of such measures also requires the presence of the child or his/her property in the given State; however, the protection measures taken are temporary and apply only in the territories of the country in which they are taken. This means that these measures are not subject to recognition and enforcement under the provisions of the Convention. The Convention provides that they cease to apply when protection measures are taken by the authorities of the State having jurisdiction under Articles 5-10 in a situation where the child is habitually resident in the territory of a Contracting State. In a situation where the child does not have his/her habitual residence in any of the Contracting States, these measures cease to be effective if the measures are accepted in accordance with the requirement of situations taken by the authorities of another State.

In order to exclude parallel proceedings, Article 13 of the Convention imposes an obligation to refrain from taking protective measures in respect of the child or his/her property if, at the time of initiating the proceedings, an application for similar measures had already been submitted to the authorities of another Contracting State having jurisdiction under Articles 5-10 of the Convention.

In addition to the rules on jurisdiction, the 1996 Hague Convention also contains rules on applicable law. Within the meaning of the Convention, the term "applicable law" should be understood as all the provisions in force in the State, excluding conflict-of-law rules. This is a very important explanation because there are also voices in the doctrine that a reference to the legal system of a given state may also mean a reference to the conflict-of-law rules of that State. The applicable law indicated by the Convention connecting factors will apply even if it is the law of a State that is not a party to the Convention. The possibility of departing from the applicable law occurs in a situation where it is contrary to the legal order, taking into account the best interests of the child.

Regulations concerning the applicable law are contained in Article 15 of the Convention. According to this provision, in exercising the jurisdiction conferred in accordance with the provisions of Chapter II, the authorities of a Contracting State shall apply the provisions of their own law. However, if the protection of the person or property of the child so requires, they may, exceptionally, apply or take into account the law of another country with which the situation is closely linked. In the event of a change of habitual residence of a child to a residence in another Contracting State, the law of that other State, from the moment of the change, shall determine the conditions for the application of the measures taken in the State of former habitual residence.

The phrase 'in the exercise of jurisdiction conferred in accordance with the provisions of Chapter II' should not be taken literally. If, therefore, in a given case, the court's jurisdiction to take measures to protect the person or property of the child arises from the provisions of the Brussels IIb Regulation, Article 15 of the Convention is applicable. Such an interpretation of the provision in question is justified by the consideration of one of the main objectives expressly mentioned in the preamble, which the provisions of the Convention are intended to serve. Namely, the point is to 'avoid collisions between (...) legal systems with regard to (...) the law applicable' to parental responsibility and measures for the protection of children (taken by a judicial or administrative authority).[16]

Therefore, the rule adopted in the Convention is that these authorities apply their own law. The abovementioned regulation expresses the principle of the relationship between the competence of the authority and the jurisdiction of the law (fr. *lien entre la compétence et la loi applicable).* Measures aimed at the protection of the person or property of the child (taken by a judicial or administrative authority) include necessary measures taken in urgent cases and interim measures.[17] In this context, the literature writes about the jurisdiction of law derived from the international jurisdiction of the courts of a given State.[18] Thus, in light of the principle set out in Article 15 para. 1 of the 1996 Hague Convention, if the jurisdiction in the case rests with the Polish authority, then as far as the measures for the protection of the child are concerned, that authority applies Polish law.

16 See: Manuel Pratique, p. 91, fn. 251; on the broad understanding of the analysed wording – see also: Lowe and Nicholls, 2012, p. 58; Siehr, 2012, p. 77; Godechot-Patris and Lequette, 2012, para. 142–143; Devers, 2003, point 533.72. In the literature, it is argued that if a literal interpretation of Article 15(1) of the Convention were adopted, there would be a gap in those situations in which the basis for the court's competence to take measures to protect the child is another normative act, such as the aforementioned Brussels IIa Regulation. This would mean that in such cases, the above-described objective cannot be achieved by means of the Convention (see: Mostowik, 2014a, pp. 167–168; P. Mostowik, 2014b, p. 350; Ibid., in: Poczobut, 2017, pp. 870–871). In order to fill the gap, it would be necessary to look for an appropriate conflict-of-law rule in other sources of private international law, in particular in domestic normative acts. Furthermore, it should be noted that Articles 56 and 59 of the Polish Private International Law (Consol. Journal of Laws of 2023, item 503) cover only a reference to the 1996 Hague Convention and a regulation relating to the amendment of the statute.

17 Lagarde, 1997, p. 217; Lagarde, 1998, p. 16; Gallant, 2004, p. 44, 240; Revillard, 2011, pp. 29–47.

18 Mostowik, 2014a, p. 311.

These provisions are not absolute because, in a situation where the protection of a child or his/her property requires it exceptionally, the law of another country with which the situation is closely related may be applied or taken into account (Article 15). This is a derogation from the principle of the relationship between the competence of the authority and the jurisdiction of the law and constitutes the so-called corrective rule, allowing for the primacy of the best interests of the child to be taken into account. It is not based on the principle of the closest relationship but on the primacy of the good of the child being satisfied with the child's relationship with a given state, about which it is sufficient to be close.

The above solution is exceptional, so it is necessary to exercise restraint in reaching for it.[19] It offers the possibility for the authority to apply or take into account exceptionally the law of another country with which the situation is closely related if the protection of the child so requires. Examples of such a close relationship may be the child's former habitual residence, the place where the child's family members who intend to take care of the child live, the place where the parent who has the right of personal access to the child live, or the place where the child regularly visits members of his/her extended family.[20] Another example concerns the sale of immovable property belonging to a child, in which the court of the child's habitual residence may, for reasons of protection of the best interests of the child, apply the law of the place where the immovable property is situated, which requires authorisation for such a sale, and issue that authorisation on the basis of that law, even if the *lex fori* does not provide for a similar requirement.[21] And the opposite situation, concerning the example illustrating the possibility of taking into account the law of a *non-fori* State, is a case in which the authority examining a request for permission to sell a child's property located abroad takes into account *lege rei sitae* to justify its refusal to grant such a request.[22] In his Explanatory Report, P. Lagarde also cites, by way of example, a situation in which it may be appropriate to apply or at least to take account of the law of the child's mother tongue in respect of measures for the protection of the child. Namely, such a solution, as justified by the interest of the child, comes into play, m.in. in the case where the child in question is to return to his/her home country within a short period of time. In such a situation, the court should seek to avoid the application of such protection measures which can then not be enforced in the child's home State.[23] Another example of the application of this provision in the literature is a situation where the child is not related to the country of the envisaged new place of habitual residence through some additional circumstance, such as citizenship. In

19 Lagarde, 1998, p. 574; Bucher, 2003, p. 187; Manuel Pratique, p. 91.
20 Lagarde, 1998, p. 179.
21 Lagarde, 1998, p. 574; Lagarde, 1997, p. 217 and next; Lagarde, 1998, p; 16. See also: Clive, 1998, pp. 179–180; Bucher, 2003, pp. 186–187; Pirrung, 2012, p. 72.
22 Devers, 2003, point 533.71.
23 Lagarde, 1998, p. 574.

such a case, consideration of the child's welfare may speak in favour of the application of this law.[24] Taking into account the law of a State other than the *fori* State may also consist when using the terminology adopted in this law when drafting the ruling.[25]

In the event of a change of habitual residence, the law of that other country will apply from the moment of that change and, according to that law, the conditions for the application of the measures in the country of the former habitual residence will apply. It also adds, per Article 15(2), that the solutions contained in the more recent Convention are more flexible. The author also emphasises that the relationship of authority in relation to the child existing by operation of law – with the clarification that it is about its granting and expiration – is subject to the law of the child's habitual residence and not to the law of the child's homeland, which was the case against the background of previous conventions. Therefore, it signals the introduction of various conflict-of-law constructions, i.e. the jurisdiction of *legis fori* derived from the exercise of jurisdiction and jurisdiction based on this personal connecting factor concerning the child.[26]

The manner in which child protection measures are to be enforced in the event of a subsequent change in circumstances justifying the jurisdiction of the authority is laid down in Article 15 para. 3 of the 1996 Hague Convention. In accordance with Article 15 para. 3, from the moment of the change of the child's habitual residence to that of another Convention State, the manner in which measures taken in the State of the child's former habitual residence are to be implemented is governed by the law of the child's new habitual residence. This issue must be distinguished from the question of the existence of a measure to protect the child after the circumstances on which the jurisdiction is based have changed. The solution contained in Article 15 para. 3 covers only those situations in which the child's habitual residence has been changed to a residence in another Convention State. The concept of the manner of implementation (conditions of application) of child protection measures is not defined in the Convention. However, the materials issued by the Permanent Office of the Hague Conference on Private International Law indicate that the issue of the manner in which child protection measures should be implemented in the country to which the child has moved includes, in particular, the question of whether the guardian appointed in the country of the child's former habitual residence may independently perform a given legal act on behalf of the latter or whether it is required to obtain permission from the child Court.[27]

In the face of a change in the statute, there may be a risk of weakening the action or even degeneration of the measure taken in the country of the child's former habitual residence. In such cases, recourse to the method of adjustment comes into play. If, however, it is impossible to overcome difficulties in this way, a new measure

24 Bucher, 2003, p. 187.
25 Manuel pratique, p. 91; Lowe and Nicholls, 2012, p. 58.
26 Mostowik, 2014a, p. 131.
27 Lagarde, 1998, p. 574; Manuel Pratique, p. 92; Lagarde, 1997, p. 217; Lagarde, 1998, p. 16; Clive, 1998, p. 180; Gallant, 2004, p. 243; Lowe and Nicholls, 2012, p. 58.

of protection can be taken.[28] Per the instruments of international cooperation, such as the one provided for in Article 34 of the 1996 Hague Convention, the competent authority applies to the relevant authority of another Convention State in order to obtain the information necessary for the protection of the child (in the context under consideration, this is in particular information which makes it possible to establish in detail the reasons for the measure in question in the country of the child's former habitual residence) and what function the product was supposed to perform.

The Convention distinguishes between the issues of creation, termination, and exercise of parental responsibility.[29] In the event of liability arising or ceasing to exist by operation of law (without the participation of a judicial or administrative authority), it is subject to the law of the country of the child's habitual residence. Furthermore, a situation where parental responsibility arises or ceases by virtue of an agreement or unilateral legal act, without the participation of a judicial or administrative authority, is subject to the law of the child's countries of habitual residence from the moment the agreement or unilateral legal act becomes effective.

The term 'without the participation of a judicial or administrative authority' should be understood as the lack of the so-called active intervention of the authority, i.e. intervention consisting in the decision made by the authority after examining the merits of the case. Thus, the creation or cessation of parental responsibility referred to in Article 16 para. 1 occurs both when no interference by a judicial or administrative authority is necessary for such an effect to occur, and when the role of the competent authority is limited solely to registering the declarations of the parents whose parental responsibility arises by operation of law, or accepting an appropriate notification from them.[30] If the participation of the authority is active, i.e. when it consists in issuing a decision preceded by an assessment of the merits of the case, then it should be assumed that it is a measure to protect the child (taken by an administrative or judicial authority), and therefore the conflict-of-law rule under Article 15 should apply.[31] Under Article 16 para. 2, an agreement between parents on custody or access rights to a child should be classified as an "agreement". Whereas a unilateral legal act within the meaning of the norm in question is, for example, a will in which the only surviving parent indicates a guardian for the child.

At the same time, parental responsibility established under the law of the child's country of habitual residence continues even after the child's habitual residence has changed to another state. However, the granting of parental responsibility to a person who has not previously been entitled to such responsibility is governed by

28 Lagarde, 1998, p. 574; Manuel pratique, p. 93.

29 Article 16 of the Convention.

30 Lagarde, 1998, pp. 576–578; Manuel pratique, p. 95.

31 See: Manuel pratique, p. 95. As is apparent from Lagarde Report, when determining – at the qualification stage – whether the participation of an authority is necessary for parental responsibility to arise or cease to exist, and if so, whether it is participation in the so-called active intervention, one must be guided by the provisions of substantive *legis causae*, Lagarde, 1998, pp. 576–578.

the law of the country of the new habitual residence. On the other hand, according to Article 17 of the 1996 Hague Convention, the exercise of parental responsibility is governed by the law of the child's country of habitual residence. In the event of a change in the child's habitual residence, he/she is subject to the law of the country of the new habitual residence. It is, therefore, important to distinguish between the issue of exercise and the question of the existence of parental responsibility (movable conflict). This distinction becomes particularly important in the case of a change in the child's habitual residence. With regard to the exercise of parental responsibility arising in the abovementioned manner, the principle of variability of the statute has been adopted. Thus, a person who, according to the law indicated by the authoritative conflict-of-law rule under Article 16 paras. 1 or 2, is entitled to parental responsibility, retains his/her status in the event of a change in the child's habitual residence, on the basis of the norm in Article 16 para. 3. However, whether that person, as one of the two persons exercising parental responsibility, may independently bring an action on behalf of the child or whether a prior agreement with the other holder of parental responsibility is required in order to do so, is determined by the law of the child's new habitual residence, in accordance with the principle of jurisdiction of each statute expressed in Article 17. Similarly, regarding the possible requirement of the consent of the other person (all other persons) exercising parental responsibility to subject the child to surgical intervention in a situation other than an emergency, the new statute is authoritative.[32]

At the same time, in the Explanatory Report, P. Lagarde points out that,

> 'according to the law laid down in Article 17 para. 2, it is necessary to assess whether a person whose parental responsibility arose without the (active) participation of a judicial or administrative authority under the law of the child's former habitual residence may, after changing the child's habitual residence, perform a given legal act independently or only with the permission of the competent authority.'

However, this example raises doubts as to the fact that such authorisation is a measure for the protection of the child (taken by a judicial or administrative authority) to which the Convention generally provides for *legis fori* jurisdiction.[33] The issue of the possibility for a parent to submit a declaration of rejection of inheritance on behalf of a minor child without the permission of the court should be considered as part of the issue of exercising parental responsibility within the meaning of Article 17. The above issue is not covered by the exclusion under Article 4(f) because it is 'a matter concerning parental responsibility, not inheritance'. Also, the issue of requiring the parent to obtain permission from the family court to perform certain activities of

32 See: Manuel Pratique, p. 97.
33 Article 15 para. 1 of the Convention.

administering the property on behalf of the minor child falls within the scope of application of the regulation under Article 17 of the 1996 Hague Convention.

Against the background of the regulations under Article 17, the issue of possible intervention of the public policy clause is also considered in the literature. The subject of attention is, in particular, a situation where the law applicable to the exercise of parental responsibility allows the use of corporal punishment against a child.[34] At the same time, under Article 18 of the 1996 Hague Convention, parental responsibility provided for in Article 16 may be revoked and the conditions for its exercise altered by measures taken on the basis of the Convention. The order in question indicates that the fact that parental responsibility arose without the (active) participation of a judicial or administrative authority does not preclude the application of a child protection measure consisting in its withdrawal or change of the conditions under which it is exercised.

Article 19 of the Convention also provides for the protection of a third party who, in good faith, has entered into a legal transaction with a person acting as the child's legal representative. It is based on the assumption that a third party may, in certain circumstances, reasonably assume, albeit erroneous in light of the provisions of Articles 15, 16, or 17 thereof (whichever *is* applicable), that, in a given case, the question of competence to act as a child's legal representative is subject to the legal regime in force in the country in which the act was carried out.[35] Their protection is conditioned by the following premises:

1. The legal transaction was made with a person who, according to the law of the place where the transaction was performed, would be entitled to act as the statutory representative of the child.
2. The third-party acted in good faith, i.e. it did not know and could not be expected to know that parental responsibility, under the Convention, is governed by a law other than the law of the place where the legal transaction was performed (the measure of diligence that the third party should exercise in determining the jurisdiction of the law in this respect depends on the gravity of the legal transaction).[36]
3. The legal transaction was carried out between persons present in the territory of the same State.[37]

If all of the conditions described above are met, the validity of the legal transaction cannot be questioned, nor can a third party be held liable solely on the ground that it is governed by the applicable law under the Convention. The person acting as the

34 See: Lowe, 2002, p. 62; Twardoch, 2018, pp. 1081–1084.
35 Lagarde, 1998, p. 582; Lowe, 2002, p. 65; Manuel pratique, p. 175.
36 Lagarde, 1998, p. 582; Lowe and Nicholls, 2012, p. 65.
37 As is apparent from Lagarde Report, in the case of legal transactions between persons located in different States, the third party is required to exercise greater diligence in determining the jurisdiction of the law on parental responsibility. See: Lagarde, 1998, p. 582.

child's legal representative is not entitled to act in such a capacity (at all or to a certain extent).[38]

The Convention also regulates the rules for the recognition and enforcement of protection measures taken in other States Parties. It introduces the principle that the recognition of protection measures taken in one of the Contracting States takes place by operation of law in other Contracting States. This means automatic recognition of these protection measures. For this purpose, the law of the country in which the document is subject to recognition should not provide for any additional procedures leading to obtaining a ruling stating that a given measure is subject to recognition in the territory of another Contracting State.

In order to ensure basic procedural safeguards for the parties and the right to be heard for the child, as well as the jurisdictional bases provided for in the Convention, the Convention provides for the possibility of refusing recognition of a given protection measure. The Convention provides for common grounds for refusal of recognition of protection measures common to all Contracting States. Consequently, it is not possible to invoke grounds not provided for in the Convention and existing in the legal system of the country in which the legal measure is presented for recognition. This also creates predictability and legal certainty as to the recognition of protection measures in the other Contracting States. The grounds for refusal of recognition listed in Article 23 para. 2, according to which refusal of recognition is possible, are: a) if the measure was taken by an authority whose jurisdiction was not based on the grounds provided for in Chapter II of the Convention; b) if the measure has been taken, except in cases of urgency, in the context of judicial or administrative proceedings, without giving the child the opportunity to hear it, thereby violating the essential principles of the requested State; c) at the request of any person alleging that the measure violates his/her parental responsibility, if the measure has been taken, except in cases of urgency, without that person being given the opportunity to be heard; d) if recognition is manifestly contrary to the public policy of the requested State, the best interests of the child must be taken into account; e) if the measure is incompatible with a measure subsequently taken in the child's country of habitual residence that is not a party to the Convention, provided that the latter measure fulfils the conditions necessary for recognition in the requested State; f) if the assurance set out in Article 33, i.e. introducing the requirement of consultation and consent of the requested State to place the child in a foster family or care facility in another Contracting State, has not been complied with.

Notwithstanding the foregoing, any person concerned may apply to the competent authorities of a Contracting State for a decision on the recognition or refusal of recognition of a measure taken in another Contracting State. The procedure, in this case, is determined by the regulations of the requested State. This means that the 1996 Hague Convention only unifies the grounds for refusal to recognise protection measures and leaves the procedural requirements and further proceedings to

38 Twardoch, 2018, pp. 1081–1084.

the Contracting States. The advantage of obtaining a decision on the recognition or refusal of recognition of a given protection measure is that it obtains legal certainty in this respect in a given country and is binding on the other authorities of that State in the proceedings before which the parties invoke the given protection measure.

The Convention provides for the principle that the authority of the requested State is bound by the findings of fact on the basis of which the authority of the State that took the measure established its jurisdiction. This means that a different assessment of the facts and, on that basis, the assumption of a lack of jurisdiction on the part of the authorities which applied the protection measure in question, which is then subject to recognition in another contracting state, cannot be invoked as a ground for refusal to recognise a given measure.

As regards the protection measures that are enforceable, the 1996 Hague Convention requires that they be enforceable in another Contracting State or registered in that State. This means that, unlike measures subject only to the recognition that the enforcement of the protection measure can take place after a prior exequatur procedure, declaring the enforceability of a judgment in a given country means that no other authority of that State to which a protection measure is presented for enforcement may apply the grounds for refusal in the proceedings before it.

Refusal to execute may be made only on the basis of the grounds indicated in Article 23, i.e. the same ones that apply to refusal of recognition. At the same time, the Convention prohibits a substantive review of a measure subject to the procedure of declaring enforceability. This means that the legitimacy of a given measure may be subject to instance review only in the Contracting State in which the decision on the measure was issued as part of instance review.

The law of the Executing State shall apply to the enforcement of protective measures taken in another Contracting State which have been declared enforceable or which have been subject to registration for enforcement in another Contracting State and shall be enforced in accordance with the same conditions as national decisions, taking into account the best interests of the child. Such a solution guarantees, on the one hand, that the grounds for refusal to recognise and enforce judgments are harmonised in all the Contracting States and, on the other hand, that the enforcement of those measures for the protection of the child or his/her property arising from a judgment issued in another Contracting State on the basis of the law of the country of its enforcement allows that decision to be incorporated into the legal system of that State.

The Convention also establishes a reciprocal system of cooperation between the Contracting States in order to achieve the objectives of the Convention. To this end, each country designates its own central authority. The central authorities of the individual Contracting States are obliged to cooperate with each other and promote cooperation between the competent authorities in the States for the implementation of the tasks of the Convention. The central authorities provide information about their legislation as well as about services aimed at protecting children. They may act directly or through relevant public authorities or other entities. They may assist

in facilitating contacts and providing assistance provided for in Articles 8 and 9 of the Convention, facilitating agreements by conciliation or mediation concerning the protection of the person or property of the child, as well as establishing the child's residence at the request of another competent authority of the Contracting State, if there is a possibility that the child is in the territory of the requested State and is in need of protection.

At the request of the central authority or other competent authority with which the child has a close relationship, the central authority of the child's habitual residence or in which the child is present may, directly or through other public authorities or competent bodies: provide a report on the child's situation; ask the competent authority in your country to investigate the need for measures to protect the child or his/her property.

Article 33 of the 1996 Hague Convention also regulates situations where a child is placed in an educational institution or a kafala care or similar institution in another Contracting State. The provision requires consultation with the central authority or competent authority in that State, to that end, by ordering that it be provided with a report on the child and a statement of reasons for the placement or custody proposal. A decision on placement may be made only if the central authority or other competent authority in the requested State agrees to it.

The Convention also applies in a situation where it is necessary to obtain information from an authority of another Contracting State in order to take a measure to protect a child or his/her property.

The Convention also emphasises the importance of maintaining contact between the child and his/her parents. It provides for the facilitation of evidence in the form of the possibility of collecting evidence. Namely, at the request of a parent residing in that country and wishing to obtain or retain the right of personal access, the authorities of that country may collect evidence and comment on the parent's ability to exercise the right of personal access and the conditions under which he/she could exercise it. The authority with jurisdiction should take into account these motions and evidence when deciding on the right of access.

An important issue in the area of cooperation between contracting states is the possibility of concluding agreements. It seems that these agreements should be more far-reaching than the content of the Convention and contribute to the improvement of cooperation between individual States. It is worth noting that it is up to the decision of the Contracting State whether to make the intermediation of the central authority an obligatory element of communication between the Contracting States. The flow of information between States is then controlled in the performance of the tasks provided for in the Convention.

The Convention also provides for the possibility of issuing a certificate of entitlement to the person exercising parental responsibility or to whom the person or property of the child has been entrusted. This certificate can be issued by the authorities of the country where the child has his/her habitual residence or the country where the protection measure has been taken.

The Convention exempts documents issued on its basis from legalisation. The Convention is without prejudice to the 1980 Convention on the Civil Aspects of International Child Abduction.

In conclusion, the 1996 Hague Convention aims to introduce solutions leading to the unification of the rules for the recognition and enforcement of measures for the protection of children and their property, as well as the harmonisation of jurisdictional rules and conflict-of-law rules. This legislation serves to exercise parental responsibility in all Contracting States, increasing the guarantees of legal certainty and protection of the child in cross-border situations. At the same time, it contains detailed regulations on jurisdictional provisions in the event of unlawful child abduction or retention in a country other than the country of the child's current residence.

### *1.2. The 1980 Hague Convention on the Civil Aspects of International Child Abduction*

An important legal instrument to ensure and strengthen the protection of the rights of the child is the 1980 Hague Convention on the Civil Aspects of International Child Abduction, done in The Hague on 25 October 1980. Its essence is the implementation of the following goals: ensuring the immediate return of children wrongfully removed or retained ensuring respect for the right to care and visitation as defined by the legislation of one of the Contracting States in other Contracting States.

As in the case of the 1996 Hague Convention, the main principle of the 1980 Hague Convention is the best interests of the child, and its purpose is to protect the child at the international level against the harmful effects resulting from the wrongful removal or retention of a child. The Contracting States have laid down in the Convention the procedure to be followed to ensure the immediate return of the child to the State of his/her habitual residence. Thus, as follows from the above objectives of the 1980 Hague Convention, it implements the right of the child to maintain contact with both parents, which is guaranteed by the UN Convention on the Rights of the Child 1989. Due to the fact that the separation of the child from his/her parent, unjustified by the best interests of the child, is an undesirable situation, the States Parties to the Convention undertook to use the available emergency procedures in order to obtain the return of the child. The 1980 Hague Convention applies to children until they reach the age of 16 (after which the Convention ceases to apply) and when the child is habitually resident in the Contracting State immediately before the violation of custody or visitation rights.

At the same time, the Convention clarifies that the right to custody should be understood as the right to custody of the child; particularly, the right to decide on the child's place of residence and the right to visit should be understood as the right to take the child for a limited period of time to a place other than the place of his/her permanent residence.

Within the meaning of the 1980 Hague Convention,[39] wrongful child removal or retention occurs if: there has been a violation of the right to custody and the right

39 Art. 3 of the Convention.

to custody granted to a specific person, institution, or other organisation, exercised jointly or individually, under the legislation of the country in which the child was habitually resident immediately before the removal or retention, and at the time of the abduction or retention, these rights were effectively exercised jointly or individually or would have been exercised if the abduction or retention had not occurred.

At the same time, the right to custody may result, in particular, by operation of the law itself, from a judicial or administrative decision or from a settlement having legal force in light of the provisions of the legislation of that country. Furthermore, it follows from Article 14 that, when determining whether there has been wrongful removal or retention, the relevant authority of the requested State may directly take into account the provisions of legislation and judicial or administrative decisions, formally recognised or not recognised in the country of habitual residence of the child, without applying separate procedures to determine the jurisdiction of this legislation or to recognise decisions that would otherwise apply. Additionally, the competent authorities of the requested State may require the production of a judgment or declaration originating from the country of the child's habitual residence stating that the removal or retention was unlawful within the meaning of Article 3 of the Convention if such a decision or declaration can be obtained in that State.

As already mentioned, the purpose of the 1980 Hague Convention is to ensure the prompt return of a child wrongfully removed or retained to his/her country of habitual residence. Therefore, it grants jurisdiction to the authorities of the requested State only in cases concerning return. Such a solution is to counteract the legalisation of unlawful abduction by the authorities of the requested State. Only a finding that the return of the child is not justified, in light of the premises contained in Articles 12 and 13, causes the requested country to become the country of the child's habitual residence, which has jurisdiction to adjudicate on matters of parental responsibility. This is reflected in Article 16 of the Convention, from which it follows that the competent authorities of the requested State will not be able to decide on the substance of the right to custody of the child until it is established that the requirements set out in this Convention will not be met or if, within a reasonable time after this notification, an application for the return of the child has been submitted.[40] Similarly, the mere fact that a custody decision was made in the requested State or may be recognised in the requested State cannot in itself justify a refusal to return the child. Such a decision has an evidential effect, and the authorities of the requested State may take into account the reasons for issuing such a decision.

As with the 1996 Hague Convention, the 1980 Hague Convention is based on the cooperation of the Contracting States through a system of central authorities. Each Contracting State is obliged to designate a central authority to carry out its obligations

40 Zombory pointed out that the Convention allows only to take into account to a limited extent the specific situation of the individual child, which is the subject of today's approach to children's rights, in particular where the principle of the best interests of the child requires. See: Zombory, 2023, pp. 217–237.

under the Convention. The central authorities should cooperate with each other and promote cooperation between the competent authorities in their respective countries to ensure the prompt return of children and to achieve the other objectives of this Convention. The 1980 Hague Convention indicates examples of activities of central authorities that are important from the point of view of achieving the objectives of the Convention. Thus, central authorities, directly or through other units, should take all measures to: determining the whereabouts of the wrongfully abducted or detained child; prevent further risk to the child or further harm to the parties concerned by taking or causing interim measures; ensuring the voluntary return of the child or bringing about an amicable settlement of the dispute; if necessary, exchange of information about the child's social situation; provide information of a general nature concerning the provisions of their country's legislation relating to the application of the Convention; initiate or facilitate judicial or administrative proceedings to obtain the return of the child and, where applicable, establish or effectively exercise visitation rights; granting or facilitating legal and judicial aid, where appropriate, including the participation of a lawyer and legal adviser. take the necessary measures to ensure the child's safe return; inform each other about the functioning of the Convention and, as far as possible, remove any obstacles created by its application.

In addition to indicating the competencies of the central authorities, the Convention also regulates the detailed procedure to be followed in the case of wrongful child abduction.

It follows from Article 8 of the Convention that any person or institution which maintains that a child has been removed or retained in breach of custody rights may request the central authority of the child's habitual residence or the central authority of any other Contracting State for assistance in ensuring the return of the child.

The application for the return of the child contains information on the identity of the applicant, the child, and the person who is alleged to have abducted or retained the child; the date of birth of the child; the grounds relied on by the applicant to request the return of the child; all available information on the child's whereabouts; and the identity of the person who is presumed to be staying with the child. The application must be accompanied or supplemented by certified copies of the decision or settlement useful for the case, a certificate or certified benefit from the central authority or other competent authority of the country of habitual residence of the child, or a competent person, concerning the provisions of the legislation of that country in this respect.

The 1980 Hague Convention introduces an obligation to forward the application for the return of the child if the central authority has grounds to believe that the child is staying in another Contracting State. The central authority of the requesting country should be informed of this fact. Furthermore, the central authority of the country where the child is located should take action or cause action to be taken to ensure the voluntary return of the child.

The Convention, due to the need for applying quick procedures in proceedings aimed at obtaining the return of a child, specifies the deadlines for these proceedings

in order to ensure a uniform standard of the length of proceedings. Namely, the Convention in Article 11 indicates that all actions taken to return the child should be taken immediately. If, however, the relevant judicial or administrative authority does not take action within six weeks from the date of receipt of the request, then the applicant or the central authority of the requesting State (on its own initiative or at the request of the requesting State) may request a statement of the reasons for the delay. The reply shall be forwarded to the applicant or the central authority of the requesting State.

The purpose of the 1980 Hague Convention is to obtain the immediate return of a child wrongfully removed or retained to the country of his/her habitual residence. Therefore, the essence of the Convention and the mechanism provided for in it to ensure the return of the child is to restore the state from before the unlawful removal or retention. However, the guiding principle of the Convention, as well as other instruments of international law regulating issues concerning children, is the compliance of all actions taken on the basis of these instruments with the principle of the best interests of the child. Therefore, there are also situations where the best interests of the child, despite the fact that he/she has been unlawfully removed or retained with another Contracting State, speak in favour of his/her non-return to the country of his/her habitual residence.

Exceptions to the order for the return of a child to the country of his/her habitual residence prior to wrongful removal or retention are set out in Articles 12 and 13 of the Convention.

Namely, it follows from Article 12 that if a child has been wrongfully removed or retained and at the time of receipt of the application to the relevant authority of the country where the child is located, a period of less than one year has elapsed from the date of removal or retention, his/her immediate return is ordered. As such, in a situation where the application for the return of the child was filed after one year from the abduction or retention, there is no obligation to order the return of the child. This is due to the fact that during this period of time, the child could have settled in the new country and integrated with the social, family, and cultural environment of the country. In this situation, the fact of the child's integration with the new state, on the one hand, and the failure of the entitled person to submit an appropriate application for the return of the child for a period of one year, on the other, allows us to conclude that the return of the child was not a priority for that person and, in fact, *per facta concludentia*, he/she consented to the unlawful removal or retention. Thus, the failure to take appropriate legal measures by the entitled person (i.e. the person whose right to custody of the child has been violated) renders his/her application for the return of the child ineffective. However, the Convention is flexible regarding this one-year period, indicating that the relevant judicial or administrative authority may order the return of the child even after one year unless it has been established that the child has already adapted to the new environment.

The Convention also introduces the possibility of suspending proceedings or rejecting the application if there are grounds to believe that the child has been taken to another country.

Further grounds for refusal to return a child to the country of his/her habitual residence are found in Article 13 of the 1980 Hague Convention.

These grounds are independent of the period in which the child has been wrongfully removed or retained in another country. Thus, according to this provision, there is no obligation to order the return of the child if the person or institution opposing the surrender proves that: a) the person, institution, or organisation caring for the child did not actually exercise custody at the time of the removal or retention or subsequently consented to the removal or retention, b) there is a serious risk that the return of the child would expose him/her to physical or psychological harm or in any way put him/her at a disadvantage, c) the child opposes the return and that he/she has reached a level of maturity at which it is appropriate to take his/her opinion into account, d) in accordance with Article 12 of the Convention, the return of the child would not be permissible in light of the fundamental principles of the requested State concerning the protection of human rights and fundamental freedoms.

At the same time, when assessing the circumstances listed in Article 13, the interpretation of the provisions of the 1980 Hague Convention should be made in each case, taking into account the jurisprudence of the European Court of Human Rights (hereinafter: ECtHR), which consistently assumes that exceptions to the so-called principle of return under the 1980 Hague Convention should be interpreted strictly, and the circumstances presented before the national court should objectively exclude the possibility of the child's return to the of the State Party to the Convention from which the abducted was carried away. As it is accepted in the jurisprudence of the ECtHR issued on the basis of Article 13 para. 1 point b) of the Convention, the damage referred to in this provision cannot arise solely due to the separation (however difficult for the child) from the parent who is responsible for the unlawful removal or retention of the child. At the same time, the consideration of the directives for the systemic interpretation of the Convention leads to the conclusion that the exception regulated in Article 13 para. 1 point a) of the Convention cannot be understood in such a way that the actual failure to exercise custody by the applicant, caused by the abduction of a minor, could justify a refusal to order the return of the child.[41]

The application of the provisions of the 1980 Hague Convention is also the subject of extensive jurisprudence of the ECtHR issued on the basis of the Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950, which indicated that the procedure on the application under the Hague Convention is of an urgent nature. The ECtHR pointed out that although the six-week time limit set out in Article 11 of the 1980 Hague Convention and Article 11 of EU Regulation 2201/2003 on the recognition of judgments (applicable to both first-instance and appeal proceedings) was procedural in nature, exceeding it by approximately twenty-six weeks (in

41 See: Pérez-Vera, 1991, para. 115.

the absence of any circumstances capable of exempting national courts from the obligation to strictly comply with it) infringed the urgency requirement of the situation and was not consistent with the positive obligation to act quickly in the proceedings for the return of children.

Within the framework of the application of the 1980 Hague Convention, the child's expression of will to remain or consent to return is also not binding on the court. It is up to the court on the merits to assess in this respect, taking into account the circumstances of the specific case, including the maturity of the minor child, his/her attitude towards both parents, the correctness of contacts, emotional bonds, as well as independence in expressing views and his/her own will, and in particular the scope of possible influence of the parent under whose actual authority he/she remains. The child's welfare should always be assessed objectively in the realities of a specific case.[42]

Considering the application of the Convention in the context of Article 8 of the European Convention on Human Rights (ECHR), the Court pointed out that this provision is primarily intended to protect individuals against the arbitrary action of public authorities. In addition, there are positive obligations inherent in effective "respect" for family life. However, the boundaries between positive and negative obligations under these provisions are not subject to a precise definition. Nevertheless, the applicable rules are similar. In both contexts, the need to find a balance between the conflicting interests of individuals and the community as a whole must be taken into account; in both contexts, the State retains a certain margin of discretion[43]. At the same time, the Court reiterated that the 1980 Hague Convention must be applied in accordance with the rules of international law, particularly in the case of international protection of human rights. The Court held that, in the case of international child abduction, the positive obligations which Article 8 of the Convention imposes on the Contracting Parties must be interpreted in light of the Hague Convention of 25 October 1980 concerning the Civil Aspects of International Child Abduction[44] and the Convention of the Rights of the Child Act of 20 November 1989,[45] which gives the best interests of the child the utmost importance.[46] The Court also found that the present case concerns the return of a child from one EU Member State to another. In relations between EU countries, the provisions on child abduction contained in the Brussels IIa Regulation complement the provisions of the 1980 Hague Convention. Both provisions

42 Order of the Supreme Court – Civil Chamber of 14 January 2021 I CSKP 35/21.

43 See: i.a. *M.A. v. Austria*, No. 4097/13, Art. 104; *Raw and Others v. France*, No. 10131/11, Art. 78; *Maire v. Portugal*, No. 48206/99, Art 69; *Sylvester v. Austria*, Nos. 36812/97 and 40104/98, Art. 55; and *Ignaccolo-Zenide v. Romania*, No. 31679/96, Art. 94.

44 See: i.a. *Ignaccolo-Zenide*, Art. 95.

45 See for example: *Maire v. Portugal*, Art. 72.

46 See: *Raw and Others v. France*, Art. 82; *Neulinger and Shuruk v. Switzerland* [WI], No. 41615/07, Arts. 49-56 and 137; and *X v. Latvia*, [WI], No. 27853/09, para. 93 and 96.

are based on the approach that in all provisions concerning children, their interests are of the utmost importance.[47]

At the same time, it follows from Article 18 of the 1980 Hague Convention that an order for the return of a child may be issued at any time. It should also be emphasised that the decision ordering the return of the child does not violate the right to custody. As indicated earlier – Article 16, in principle, excludes the possibility of adjudicating on the return of the child by the authorities of the country to which the child was abducted. The main purpose of the Convention is to restore the state before the abduction and, thus, in principle, also to restore contact with both parents.

The 1980 Hague Convention also provides that a request for the organisation or protection of the effective exercise of visitation rights may be addressed to the central authority of a Contracting State.

The central authorities are obliged to cooperate to ensure the peaceful exercise of the right of visitation and meet all conditions related to the exercise of this right, as well as the obligation to take all possible measures to remove obstacles to the exercise of this right.

The central authorities may, directly or through an intermediary, initiate or support legal proceedings for the organisation or protection of visitation rights and the conditions on which the exercise of that right may depend.

As far as detailed legal arrangements are concerned, the 1980 Hague Convention, following the example of many international instruments, prohibits the requirement of any security deposit or any deposit to secure the costs of judicial or administrative proceedings as defined in this Convention. Nor does the 1980 Hague Convention require legalisation or any other similar formality in the context of actions taken under the Convention.

The Convention also regulates the translation requirements for documents submitted to the central authority. Namely, they should be provided in the original language, together with a translation into the language of the country concerned, and if this would be difficult, into English or French (a given country may object to the use of one of these languages).

The Convention guarantees, in matters related to the application of the Convention, the right to judicial or legal assistance for citizens of Contracting States or persons who are permanent resident in these States.

It should be emphasised that both of the presented conventions are of great importance for the implementation of children's rights in international trade – in the

47 See: *X v. Latvia*, cited above, Arts. 96-97, and *M.A. v. Austria*, cited above, Arts. 112–114. See also Župan, 2017, pp. 213–229, where is pointed out that the best interests of the child principle was significantly advanced by the introduction of a new methodology of adjudication in cross-border child-related issues, which entails more flexibility and requires sensitivity to the needs and interests of children in each case. Implementing the best-interests principle allows a more holistic approach to decisions relating to children in cross-border protection and involves the proactive power of interpretation of the adjudicatory authority.

context of maintaining the continuity of protection measures as well as counteracting unlawful child abduction and maintaining contact with both parents. The wide territorial scope of both instruments, as well as the cooperation of the States Parties to the Convention within the HCCH, allows for the unification of child protection standards in the indicated areas.

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| Chapter 13 |

# Child's Rights to Participate in Particular EU Legal Sources

Zsuzsa Wopera

**ABSTRACT**

This chapter of the book will analyse the most important European Union legal sources in which the child's right to participate appears. The chapter will primarily and intensively analyse EU legal sources concerned with family law cases with cross-border implications in the field of judicial cooperation in civil matters from the 1998 Brussels II Convention to the Brussels IIb Regulation, which entered into force on August 1st 2022. This chapter will also present the development of the regulation on the expression of the child's views in these legal sources and the relevant jurisprudence of the Court of Justice of the European Union. In addition to the secondary sources of EU law, this part of the book also deals in detail with the relevant provisions of the Charter of Fundamental Rights of the European Union and the EU Strategy on the Rights of the Child, as well as the joint project of the Council of Europe and the European Commission on child-friendly justice, launched in January 2024.

**KEYWORDS**

participation rights, judicial cooperation in civil matters, family law cases with cross-border implications, Charter of Fundamental Rights of the European Union, Brussels IIb Regulation, hearing of the child, child who is capable of forming views, genuine and effective opportunity to express views

## 1. Introduction – Definition of the Topic

The previous chapters of the book analysed in detail the child's right to participate based on the relevant provisions of the UN Convention on the Rights of the Child (hereinafter: CRC), in international conventions, guidelines and recommendations adopted within the framework of the Council of Europe and the Hague Conference on Private International Law.

The subject of this chapter is to analyse the relevant European Union's regulations on the child's right to participate. Two preliminary remarks should be made.

Firstly, that all Member States of the European Union are State Parties of the CRC, and all Member States of the European Union are members of the Council of Europe

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because after all, the EU itself joined the Hague Conference on Private International Law in 2007. So, in this chapter the provisions and its comments of the above-mentioned international legal conventions and European Council's guideline[1] and recommendations will only be referred to as required, given that these legal instruments are also the part of EU law.

Secondly that in this chapter the Charter of Fundamental Rights of the European Union as a primary EU legal legislation will be examined. Among the secondary sources of EU law, only those provisions of relevant EU regulations on the child's right to participate, which were adopted in the framework of judicial cooperation in civil matters will be analysed.

## 2. Defining a Child's Right to Participate in the Light of International Law Standards

A child's right to participate is multifaceted.[2] This means that children's participation in all matters affecting them, such as in family decisions, in school and community affairs, and in addition in civil court proceedings. The latter is otherwise known as "*the child's right to be heard*". This is crucial for the realisation of children's rights and one of the basic principles of the CRC.

The UN Committee on the Rights of the Child (hereinafter: Committee) has identified Article 12 as *one of the four general principles* of the CRC. The others being the right to non-discrimination, the right to life and development, and the primary consideration of the child's best interests,[3] which highlights the fact that the Article 12 establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights.[4] A child's right to participate in the procedures affecting them can be derived from the principle of the right to a fair trial under Article 6 of the European Convention on Human Rights.

In the relevant literature, most authors consider the child's right to be heard in Article 12 of the CRC to be the *most significant participation right*.[5] The CRC itself does not use the word "participation" in this Article. Its use is explained by the Committee in its General Comment in Article 12.[6]

In its general comment the Committee found that, Article 12 of the CRC is a unique provision in a human rights treaty; it addresses the legal and social status of children who, on the one hand lack the full autonomy of adults but, on the other, are subjects of rights. Paragraph 1 of Art 12 of CRC assures, to every *child capable of forming his or*

1 Council of Europe, 2010.
2 See more about the participation's rights: Percy-Smith and Thomas, 2010; Lundy, 2007, pp. 927–942; McMellon and Tisdall, 2020.
3 See more: UN Committee on the Rights of the Child, 2013, p. 11.
4 UN Committee on the Rights of the Child, 2009, para. 2.
5 Cf.: Tóth, 2021, pp. 178–205.
6 McMellon and Tisdall, 2020, p. 160.

*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 age and maturity. Paragraph 2 of Art 12 of CRC states in particular, that the child shall be afforded the right to be heard in any judicial or administrative proceedings affecting him or her.[7] In this study, only the participation of children in civil proceedings will be analysed.[8]

It is important to emphasise that the CRC ensures the right to be heard for all children *capable of forming views.*[9] According to the General comment of No 12. (2009) on the rights of the child to be heard, Article 12 *does not set any lower age limit on children's right to express views freely.* Some countries reported that they had set a minimum age for the right of the child to be heard, for example in custody proceedings following the separation or divorce of parents, but the Convention provides no support for this, and states cannot quote the best interests principle to prevent children from having an opportunity to express their views.[10]

The link between the paragraphs of Article 12 indicates that the second paragraph of Article 12 applies to children "capable of forming views," again emphasising that *very young children should have the formal right to be heard*. As previously noted, the Convention provides no support for a set minimum age. For the child to be "provided the opportunity" implies an active obligation on the State to offer the child the opportunity to be heard, although, again, it is important to emphasise that *there is no requirement that the child express views*.[11]

The *European Convention on the Exercise of Children's Rights* (hereinafter: ECCR) is a major instrument – adopted by the Council of Europe in 1996 – containing provisions aimed at protecting the best interests of children and promoting their rights, in particular in family proceedings (e.g. custody, access, questions of parentage, adoption, legal guardianship). The ECCR entered into force in 2000 and has been ratified by twenty European countries.[12] It provides a number of measures to allow children to exercise their procedural rights.

The ECCR essentially complements the CRC. While the CRC establishes the fundamental rights of children, the ECCR *detailed the procedural rights of children,* including the right to express views in Article 3 of the ECCR.

It is worth noting that while the CRC mentions "*child capable of forming views*" in Article 12, the ECCR refers to a "*child with sufficient understanding*" in Article 3. These are not the same legal categories. It is even more interesting that, while according to the CRC general comments, the child's capable of forming his or her views is not linked to age, the Explanatory report of the ECCR indicates that states parties can

7 UN Committee on the Rights of the Child, 2009, para. 1.
8 Ibid.
9 See more: Wopera, 2023b, pp. 341–355.
10 UNICEF, 2007, p. 153.
11 Wopera, 2023, p. 4.
12 Council of Europe, 1996.

define an age limit[13] above which a child can be considered as having a *sufficient level of understanding*.

## 3. The Charter of Fundamental Rights of the European Union

From the point of view of this chapter the Charter of Fundamental Rights of the European Union[14] (hereinafter: Charter) is of outstanding importance.

The Charter comprises rights derived from the Treaty on European Union (TEU) and the Treaty on the Functioning of the European Union (TFEU), both recognised as general principles of the EU by the Court of Justice of the European Union (hereinafter: CJEU), in addition to so-called second generation fundamental rights, i.e. economic, social and cultural rights, and also third generation rights that are not thoroughly secured by other relevant international treaties. Among the most innovative statutes are the rights to protection of personal data (Article 8), *the rights of the child (Article 24)*, the rights of the elderly to lead a life of dignity and independence (Article 25), the full integration of persons with disabilities (Article 26), environmental protection (Article 37), and consumer protection (Article 38).[15]

Article 24 on the 'Rights of the child' is included in Chapter III of the Charter entitled 'Equality'. According to Article 24 (1) of Charter "Children shall have the right to such protection and care as is necessary for their well-being. *They may express their views freely.* Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity." Article 24 of the Charter – in accordance with Article 12 of the CRC - ensures the right of the child to express their views freely. Nevertheless, it is worth mentioning, that paragraph 1 of Article 24 of the Charter ensures this right not only for children capable of forming a view, but for all children.

This provision is of general applicability and is not restricted to any particular proceedings. The Court of Justice of the European Union (hereinafter: CJEU) has interpreted the meaning of this provision in connection with the Council Regulation (EC) No 2201/2003 of 27th November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter: Brussels IIa regulation).[16]

13 Cf. Council of Europe, 1996, para. 6.

14 In accordance with Article 6 of the Treaty on European Union, the Charter has the same legal value as the EU treaties. It applies to EU institutions in all their actions and to EU countries when they are implementing EU law. See: https://eur-lex.europa.eu/EN/legal-content/glossary/charter-of-fundamental-rights.html (Accessed: 5 January 2024).

15 Bojarski, Schindlauer and Wladasch, 2014, p. 17.

16 See later in detail.

The CJEU in C-491/10. PPU. case *Joseba Andoni Aguirre Zarraga v Simone Pelz* interpreted the provisions of Article 24 (1) of the Charter.[17] The CJEU found that since the Brussels IIa Regulation may not be contrary to the Charter the provisions of which give effect to the child's right to be heard, it must be interpreted in the light of Article 24 of that Charter. Moreover, recital 19 in the preamble of that regulation states that the *hearing of the child plays an important role in the application of the regulation* and recital 33 emphasises, more generally, that the regulation recognises the fundamental rights and observes the principles of the Charter ensuring, in particular, respect for the fundamental rights of the child as set out in Article 24 of the Charter. In that regard, it must first be observed that it is clear from Article 24 of that Charter and from Brussels IIa Regulation that *those provisions refer not to the hearing of the child, but to the child's having the opportunity to be heard.* First, it is a requirement of Article 24(1) of the Charter that children should be able to express their views freely and that the views expressed should be taken into consideration on matters which concern the children, solely 'in accordance with their age and maturity', and of Article 24(2) of the Charter that, in all actions relating to children, account be taken of the best interests of the child, since those interests may then justify a decision not to hear the child. (...) Accordingly, while remaining a right of the child, *hearing the child cannot constitute an absolute obligation,* but must be assessed as having regard to what is required in the best interests of the child in each individual case, in accordance with Article 24(2) of the Charter.[18]

The CJEU in C-490/20. case *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* stated, that the right to respect for family life, as stated in Article 7 of the Charter, must be read in conjunction with the obligation to take into consideration the child's best interests, recognised in Article 24(2) of the Charter. Since Article 24 of the Charter, as the Explanations relating to the Charter of Fundamental Rights note, *represents the integration into EU law of the principal rights of the child referred to in the CRC* on the rights of the child, which has been ratified by all the Member States, it is necessary, when interpreting that article, to take due account of the provisions of that CRC.[19]

The right of a child to express their views freely is a fundamental right of the Charter and as such can be invoked directly before both international and national courts.[20] The significance of the Charter is further developed, in that the secondary sources of EU law must be created in accordance with Article 24 of the Charter.

17 See more: Raffai, 2016, pp. 76–86.

18 CJEU, C-491/10, *Joseba Andoni Aguirre Zarraga v Simone Pelz* 22. December 2010. paras. 60–63.

19 CJEU, C-490/20. *V.M.A. v Stolichna obshtina, rayon 'Pancharevo'* 14 December 2021. para 63.

20 The Charter introduced different kinds of provisions: rights, freedoms and principles. All of them are equally recognised in the Preamble, yet Article 51(1) provides that while "rights" should be respected, "principles" should be observed and the application of both should be promoted (freedoms are not mentioned in the article, but it is understood that freedoms are part of the broader category of rights. There are two types of rights and freedoms. The first group of rights and freedoms can be directly invoked in front of the institutions bound by the Charter. See more: Bojarski, Schindlauer and Wladasch, 2014, p. 20.

In the following, we examine how the child's right to express their views appears in secondary sources adopted in the field of judicial cooperation in civil matters. But before that, a few thoughts about the EU's children's rights strategy.

## 4. The EU Strategy on the Rights of the Child

The EU Strategy on the Rights of the Child (hereinafter: EU Strategy) was adopted in 2021.[21] It is a *new comprehensive EU policy framework* to ensure the protection of rights of all children.[22]

In the EU Strategy, the Commission addresses persisting and emerging challenges and proposes concrete actions to protect, promote and fulfil children's rights in today's ever-changing world. No policy regarding children should be designed without their voices. Thanks to the efforts of leading child rights agencies, the Strategy on the Rights of the Child benefitted from the input of more than 10,000 children. Their views were collected through an online questionnaire and other forms of consultation.[23]

The fourth thematic area of the Strategy is the 'Child friendly justice'. This thematic area of EU Strategy acts to support a national justice system that uphold the rights and needs of children.

EU Strategy describes that children can be involved in judicial proceedings, either directly, as a defendant, victim, or witness, or indirectly when decisions would have a considerable impact on their lives. This can be the case in divorce, or custody proceedings, or in migration and status determination procedures.

Under the new EU Strategy, the Commission is for example, committed to: propose in 2022 a horizontal legislative initiative to support the mutual recognition of parenthood between Member States;[24] contribute to the training of justice professionals on the rights of the child and child friendly justice, in line with the European judicial training strategy for 2021-2024, and through the European Judicial Training Network (EJTN), the Justice and CERV programmes, as well as the European Training Platform of the EU e-justice portal; strengthen the implementation of the 2010 Guidelines on Child-friendly Justice with the Council of Europe.[25]

21 See more: Benyusz, 2021, pp. 149–162.
22 European Commission, 2021a.
23 Ibid.
24 See: European Commission, 2022.
25 See: https://commission.europa.eu/strategy-and-policy/policies/justice-and-fundamental-rights/rights-child/child-friendly-justice_en (Accessed: 12 January 2024).

## 5. The Joint Council of Europe and European Commission Project on Child-Friendly Justice

This project started in January 2024 and is closely related to EU Strategy. The project objective is to contribute to improved protection of children in contact with the law – as offenders, victims or witnesses in non-judicial, judicial such as civil and criminal cases and administrative proceedings – across Europe by fostering a practical implementation of the Council of Europe Guidelines on Child-Friendly Justice.

This Project aims to develop child-friendly frameworks, strengthen the capacities of specialised staff so that they are able to use child-friendly procedures, and raise awareness of children in contact with the law and their parents on children's rights *before, during and after* judicial proceedings.

Belgium, Poland and Slovenia have been selected as the focus countries to pilot the implementation of activities at national and local levels. Three additional countries, Greece, Hungary and Portugal have joined the project as valued partners.

The project is co-funded by the European Commission and the Council of Europe and implemented by the Children's Rights Division of the Council of Europe in close co-operation with partner countries from 1st January 2024 to 31st March 2026.[26]

## 6. The Development of the Child's Right to Express Views in the Field of Judicial Cooperation in Civil Matters

The regulation of the child's right to express their views has undergone remarkable development in the field of judicial cooperation in civil matters.

Article 81 of the Treaty on the Functioning of the European Union (hereinafter: TFEU) defines the framework of judicial cooperation in civil matters in Title V 'Area of freedom, security and justice'.

According to Article 81 (3), measures concerning family law with cross-border implications shall be established by the Council, acting in accordance with a *special legislative procedure.* The Council *shall act unanimously* after consulting the European Parliament. The Council, on a proposal from the Commission, may adopt a decision determining those aspects of family law with cross-border implications which may be the subject of acts adopted by the ordinary legislative procedure. The proposal referred to in the second subparagraph shall be notified to the national Parliaments. If a national Parliament makes its opposition known within six months of the date of such notification, the decision shall not be adopted. In the absence of opposition, the Council may adopt the decision.

26 See more information: https://www.coe.int/en/web/children/child-friendly-justice-project (Accessed: 12 January 2024).

Legislation affecting the field of family law has a long history. In the following, the development of "European family law" in EU legal sources regarding the child's right to express views will be analysed.

### *6.1. The Brussels II Convention*

Above all, it must be noted that this source of law is not yet part of EU law, but rather an international treaty between the member states of the European Communities. However, given that it is the first step in family law legislation, its mention is obligatory.

On May 28th 1998, the Member States of the European Communities signed the *Convention, drawn up on the basis of Article K.3 of the Treaty on European Union, on Jurisdiction and the Recognition and Enforcement of Judgments in Matrimonial Matters* (hereinafter: Brussels II Convention), which the legal literature named the Brussels II Convention after the 1968 Brussels Convention on jurisdiction and the enforcement of judgments in civil and commercial matters (hereinafter: Brussels Convention).

The Brussels II Convention – as with the Brussels Convention – was a so-called "double treaty", containing provisions on jurisdiction as well as on the recognition and enforcement of judgments. Its purpose was primarily to create a unified jurisdictional system within the European Union, regarding civil proceedings relating to divorce, legal separation or marriage annulment and the issue of parental responsibility for the children of both spouses; and secondly, to ensure the free circulation of decisions within the Union in the areas under its scope.

These rules were included in the framework of an independent international convention because the scope of the Brussels Convention did not apply to matters relating to personal status. At the beginning of the 1990s, negotiations began on extending the scope of the Brussels Convention to family law matters, especially the dissolution of the marriage as a result of which a Working Committee was set up in 1993. However the draft prepared by the Working Committee soon focused on formulating an independent convention dealing with matrimonial matters, which following its regulatory technique, was based in many respects on the Brussels Convention.

The Brussels II Convention, due to its scope, *did not contain special rules for the hearing of the child* involved in the procedure. Nevertheless, among the rules dictating the grounds of non-recognition in Article 15 of the convention, a reference regarding the hearing of the child can already be found.

According to Article 15 (2) (b) a judgment relating to the parental responsibility of the spouses given on the occasion of matrimonial proceedings shall not be recognised if it was given, except in case of urgency, without *the child having been given an opportunity to be heard,* in violation of the fundamental principles of procedure of the Member State in which the recognition is being sought.

In the Explanatory Report of Professor Borrás, it was pointed out that as in the 1996 Hague Convention[27] (Article 23(2) (b) and (c)), the grounds of non-recognition include (in points (b) and (d)) the fact that the child was not given an opportunity to be heard or that any person claiming that the judgment infringed his or her parental responsibility was not given an opportunity to be heard. The child must be heard in accordance with the rules applicable in the Member State concerned, which must include the rules in the United Nations Convention of 20th November 1989 on the Rights of the Child and in particular Article 12.[28]

### *6.2. Brussels II Regulation*

The Brussels II Convention did not enter into force because the area of judicial cooperation in civil matters became Community law, it was replaced by the Council Regulation (EC) No 1347/2000 of 29th May 2000 on jurisdiction and the recognition and enforcement of judgments in matrimonial matters and in matters of parental responsibility for children of both spouses (hereinafter: Brussels II Regulation), which essentially took over the structure and the provisions of the Brussels II Convention.[29]

This was one of the first EU regulations in the field of judicial cooperation in civil matters under the Treaty of Amsterdam. The scope of the Brussels II Regulation was the same as the scope of the Brussels II Convention. The regulation covered cases related to parental responsibility for the children of both spouses, as long as they were initiated during divorce, separation or marriage annulment proceedings, and the child's habitual residence is in this Member State.

On July 3rd 2000, France presented a proposal to amend the Brussels II Regulation, which sought to extend the scope of the regulation to all civil procedures relating to parental responsibility, with reference to ensuring the equal rights of children.

The aim of the initiative entitled "French initiative on rights of access to children" was to extend the unified jurisdiction system established by the Brussels II Regulation, as well as a common recognition and enforcement rules in cases related to parental responsibility, where a legal dispute related to parental responsibility was not related to civil proceedings concerning divorce, legal separation or marriage, but

27 The *Convention of 19 October 1996 on Jurisdiction, Applicable Law, Recognition, Enforcement and Co-operation in respect of Parental Responsibility and Measures for the Protection of Children* (HCCH 1996 Child Protection Convention) is a multilateral treaty covering a broad range of civil measures to protect children in cross-border situations. The Convention provides uniform rules that prevent conflicting decisions, enable cross-border co-operation between authorities, and secure the recognition and enforcement of measures among Contracting Parties. The "Child Protection Section" provides information about the operation of the Convention and the work of the Hague Conference in monitoring its implementation and promoting international co-operation in the area of child protection. See: https://www.hcch.net/en/instruments/conventions/specialised-sections/child-protection (Accessed: 16 January 2024).

28 Borrás, 1998.

29 See more: McEleavy, 2002, pp. 883–908; Wopera, 2012, pp. 37–45.

had arisen independently of it, or when it came to the case of parental responsibility over children born out of wedlock.

Article 15 (2) point b) of the Brussels II Regulation is completely the same as the provision of Brussels II Convention cited in point 4.1. It contains a provision for the grounds of non-recognition of judgment if the court did not provide the opportunity to hear the child.

As a result of the French initiative, the Council repealed the Brussels II Regulation and the European Union adopted Council Regulation (EC) No 2201/2003 of 27th November 2003 concerning the jurisdiction, recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, repealing Regulation (EC) No 1347/2000 (hereinafter: Brussels IIa Regulation) with a significantly expanded scope, which entered into force on 1st March 2005.

### *6.3. The Brussels IIa Regulation*

The scope of the Brussels IIa Regulation (hereinafter in this section: Regulation) in matrimonial cases is the same as the Brussels II Convention, but the scope of the regulation essentially covers the entire spectrum of matters of parental responsibility.[30] Based on the nearly 20-years practice of the CJEU, it can also be established that the CJEU extensively interprets the concept of parental responsibility.[31]

In view of the significant extension of the scope of the Regulation, the central character of parental responsibility matters, the child, also became the focus of the ruling. In the reform of the Regulation, an important goal was to take the interests of children more strongly into account, as this is referred to in several recitals of the Regulation.[32]

However, the child's right to participate has not yet been separately regulated and there was no harmonised obligation for the courts of the Member State exercising jurisdiction in parental responsibility matters to provide the child with an opportunity to express their own views. The Recital (19) highlights the importance of the child's participation. According to Recital (19) the hearing of the child plays an important role in the application of this Regulation, although this instrument is not intended to modify applicable national procedures.

The hearing of the child was regulated among the provisions of the Regulation only in child abduction cases in Article 11(2), but the Regulation did not formulate

30 According to Article 1 (2) the matters parental responsibility deal with: (a) rights of custody and rights of access; (b) guardianship, curatorship and similar institutions; (c) the designation and functions of any person or body having charge of the child's person or property, representing or assisting the child; (d) the placement of the child in a foster family or in institutional care; (e) measures for the protection of the child relating to the administration, conservation or disposal of the child's property.

31 See e.g.: Judgment of the Court, 26 April 2012 C-92/12. *PPU Health Service Executive v S.C. and A.C.*

32 See e.g.: Recitals (5), (12), (13), (19), (20).

such a requirement for other provisions related to parental responsibility. Article 11 regulates the procedural rules of the return of the child in child abduction cases.

According to Article 11(2) when applying Articles 12 and 13 of the Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction (hereinafter: the 1980 Hague Convention), it shall be ensured that the child is given the opportunity to be heard during the proceedings unless this appears inappropriate with regard to their age or degree of maturity.

An important difference to the 1980 Hague Convention is that pursuant to Article 11 (2), during the procedure, it must be ensured that the child is given the opportunity to be heard. The 1980 Hague Convention does not specifically require the participation of the child in the procedure. In several Member States, this resulted in the child either not being interviewed during the procedure or being interviewed by a psychological expert. The hearing may be waived on the basis of the child's age or graduation level, but it is not permitted to waive the hearing due to being out of line.

In the case *C-491/10 PPU Joseba Andoni Aguirre Zarraga v Simone Pelz*[33] the CJEU comprehensively interpreted the regulations related to the hearing of the child in connection with Article 24 of Charter, and with the certificate issued according to Article 42 of the Regulation. The CJEU stated that it was clear from Article 24 of Charter and from Article 42 (2) (a) of Regulation that those provisions refer not to the hearing of the child per se, but to the child having the opportunity to be heard. Firstly, it is a requirement of Article 24 (1) of the Charter that children should be able to express their views freely and that the views expressed should be taken into consideration on matters which concern the children, solely 'in accordance with their age and maturity', and of Article 24 (2) of the Charter that, in all actions relating to children, the best interests of the child be taken into account, since those interests may then justify a decision not to hear the child. Secondly, it is a requirement of Article 42 (2) (a) of the Regulation that the child be given the opportunity to be heard 'unless a hearing was considered inappropriate with regard to his or her age or degree of maturity'.

33 The main factual elements of the case from the point of view of hearing the child: Mr Aguirre Zarraga, of Spanish nationality (Father), and Ms Simone Pelz, of German nationality (Mother), were married in 1998 at Spain. In 2000 a daughter was born from the marriage, named Andrea. The family's habitual residence was in Spain. At the end of 2007, the relationship of the spouses broke down, they separated, and thereafter both parents brought divorce proceedings before the Spanish courts. Both Ms Pelz and Mr Zarraga sought *sole rights of custody*. By judgment 12 of May on 2008 of the Spanish Court the Father get sole rights of custody with provisional measure, while the Mother was granted rights of access. Following that judgment, Andrea went to her father's home. Ms Pelz had repeatedly expressed her wish to settle in Germany with her new partner and her daughter, the court considered that the award of custody to the mother would have been contrary to the conclusions of that report of the child psychologist expert. In June 2008 Ms Pelz moved to Germany and settled there. In August 2008, at the end of the summer holidays which she had spent with her mother, Andrea remained with her mother in Germany. Since then, Andrea has not returned to her father in Spain. Since the Spanish court handling the case considered that Andrea had been living with her mother in Germany in breach of its judgment of 12 May 2008, on 15 October 2008 that court handed down a fresh judgment in respect of provisional measures requested by the Father, which included prohibiting Andrea from leaving Spanish territory in the company of her mother, any member of her mother's family, and suspended until final judgment the rights of access previously granted to the Mother. In July 2009 the proceedings in relation to rights of custody were continued before the same court. The court considered that it was necessary both to obtain a fresh expert report and to hear Andrea personally and fixed dates for both in Spain. However, neither Andrea nor her mother attended on those dates. According to the referring court, the Spanish court rejected the Mother's application that she and her daughter be permitted to leave Spanish territory freely after Andrea's hearing. Nor did that court agree to Mother's request that Andrea be heard by video conference. By judgment of 16 December 2009 the Spanish court awarded sole rights of custody in respect of Andrea to her father. Ms Pelz brought before an appeal against this judgment which included the request that Andrea be heard.
Meanwhile, the procedure for the return of child was ongoing in Germany, where the second-instance court found that the Spanish Court did not obtain Andrea's current views and was therefore unable to take account of those views in its judgment of 16 December 2009 concerning rights of custody in respect of that child. According to the German Court's opinion the efforts made by the Spanish court to hear Andrea were inadequate given the importance attached to taking into account the child's views in Article 24(1) of the Charter of Fundamental Rights. The German court initiated the preliminary ruling procedure in the case.

Consequently, it is for the court which has to rule on the return of a child to assess whether such a hearing is appropriate, since the conflicts which make a judgment awarding custody of a child to one of the parents necessary, and the associated tensions, create situations in which the hearing of the child, particularly when, as may be the case, the physical presence of the child before the court is required, may prove to be inappropriate, or even harmful to the psychological health of the child, who is often exposed to such tensions and adversely affected by them. Accordingly, while remaining a right of the child, *hearing the child cannot constitute an absolute obligation, but must be assessed having regard to what is required in the best interests of the child in each individual case*, in accordance with Article 24(2) of the Charter of Fundamental Rights. It follows that, as provided for in Article 24 of the Charter and the first subparagraph of Article 42(2) of Regulation, it is not a necessary consequence of the right of the child to be heard, that a hearing before the court of the Member State of origin must take place, but that right does require that the legal procedures and conditions which enable the child to express his or her views freely are made available to that child and that those views are obtained by the court. In other words, whilst it is not a requirement of Article 24 of the Charter and Article 42(2)(a) of Regulation that the court of the Member State of origin obtain the views of the child in every case by means of a hearing, and that that court thus retains a degree of discretion, the fact remains that, where that court decides to hear the child, those provisions require the court to take all measures which are appropriate to the arrangement of such a hearing, *having regard to the child's best interests* and the *circumstances of each individual case*, in order to ensure the effectiveness of those provisions, and *to offer to the child a genuine and effective opportunity* to express his or her views.[34]

The CJEU therefore added two very important adjectives to the text of the Article 12 of the CRC: the child must be given a *genuine* and *effective* opportunity to express views.

In addition, in Article 23 (b) there is a reference to hearing the child on the grounds of non-recognition of judgments relating to parental responsibility. According to this provision a judgment relating to parental responsibility shall not be recognised if it was given, except in case of urgency, without the child having been given an opportunity to be heard, in violation of fundamental principles of procedure of the Member State, in which recognition is sought.

### *6.4. The Brussels IIb Regulation*

On 15th April 2014, the Commission adopted a report on the application of the Brussels IIa Regulation.[35] The report concluded that the Brussels IIa Regulation was a well-

34 Judgment of the Court 22 December 2010 in Case C-491/10 *PPU Joseba Andoni Aguirre Zarraga v Simone Pelz,* points (62)–(66).

35 See the commentaries of the Regulation in Hungarian and English: Wopera, 2023a; González Beilfuss et al., 2023.

functioning instrument that had brought important benefits to citizens, but that the existing rules could be improved.

Based on Article 65 of the Brussels IIa Regulation, the final report[36] on evaluation and amendment of the regulation was published in 2015. According to this report, the number of international couples has been increasing continuously since 2008, along with the number of international divorces and cross-border cases related to parental responsibility.

Based on the experiences of the judicial practice of the Brussels IIa Regulation, the proposal for the recast of the regulation was prepared for 2016, and after years of negotiations, on June 25th 2019, the Council adopted the Council Regulation (EU) 2019/1111 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction (recast) (hereinafter in this section: Regulation or Brussels IIb Regulation), which entered into force on August 1st 2022. It should be emphasised that the Brussels IIb Regulation is a recast of the Brussels IIa Regulation and not a new regulation.

There are many innovative provisions in the Brussels IIb Regulation, but if one thing were to be pointed out *as a general characteristic*, it is the strong child-centred approach of the Regulation, which is much more effective than in the Brussels IIa Regulation. The Brussels IIa regulation is characterised by the absolute priority of the enforcement of judgments. If an enforceable judgment was made, the enforcement procedure had to be carried out even if it was seriously harmful to the child, and only in exceptional cases could the enforcement be suspended or terminated.

Article 56 of the Brussels IIb Regulation already allows the suspension of enforcement proceedings and the refusal of enforcement, if in the best interests of the child. According to Article 56 (4) in exceptional cases, the authority competent for enforcement or the court may, upon application of the person against whom enforcement is sought or, where applicable under national law, of the child concerned or of any interested party acting in the best interests of the child, *suspend the enforcement proceedings if enforcement would expose the child to a grave risk of physical or psychological harm due* to temporary impediments which have arisen after the decision was given, or by virtue of any other significant change of circumstances. Where the grave risk referred to in paragraph 4 is of a lasting nature, the competent authority charged with enforcing the judgement of the court, upon application, may refuse the enforcement of the decision.

This child-centred approach is also clearly detectable in other provisions of the Brussels IIb Regulation. The best example of this is Article 21, which constitute the right of the child to express his or her views.

It is considered a big step in the field of the child's right to express their views that the Brussels IIb Regulation already establishes the child's right to express views in a separate article, and not only in child abduction cases in return proceedings, but in all matters related to parental responsibility.

36 European Commission, 2015.

We must mention that Article 26 of Chapter III of the Regulation, which defines the rules related to 'International Child Abduction', refers back to Article 21 of the Regulation.[37]

According to Article 21

> '(1) When exercising their jurisdiction, the courts of the Member States shall, in accordance with national law and procedure, provide the child who is capable of forming his or her own views with a genuine and effective opportunity to express his or her views, either directly, or through a representative or an appropriate body. (2) Where the court, in accordance with national law and procedure, gives a child an opportunity to express his or her views in accordance with this Article, the court shall give due weight to the views of the child in accordance with his or her age and maturity.'

These provisions can be examined in more detail.

#### *6.4.1. 'The Court Having Jurisdiction'*

The Regulation establishes an obligation for the court with jurisdiction regarding the child's expression of views. According to the case-law of the CJEU the term 'court' should be given a broad meaning, so as to also cover administrative authorities, or other authorities, such as notaries, who exercise jurisdiction in certain matrimonial matters or matters of parental responsibility.[38]

The question arises, when the *court orders a provisional, including protective measures* pursuant to Article 15 of the Regulation, does it have this obligation?

Above all, it should be mentioned that a significant change of attitude can be observed regarding provisional including protective measures in the Regulation. Article 15 of the Regulation states that in urgent cases the court ordering a provisional including protective measure *has jurisdiction* to do so, even if the court of another Member State has jurisdiction over the substance of the matter.[39]

In my opinion, the court ordering provisional including protective measures has an obligation to provide an opportunity to the child to express views, and it can only ignore this obligation if the exceptional urgency of the case does not allow this. This interpretation is in accordance with the provisions of Article 39, paragraph 2, point b of the Regulation. (See later in detail)

#### *6.4.2. 'The Child Who Is Capable of Forming Views'*

The court must determine whether the child is capable of forming views or not. As was mentioned earlier, and as it was presented in detail in earlier chapters of this

37 According to Article 26 'Right of the child to express his or her views in return proceedings': Article 21 of this Regulation shall also apply in return proceedings under the 1980 Hague Convention.

38 Recital (14) of the Regulation.

39 See more: Ágnes Váradi: Article 15 in Wopera, 2023a, pp. 123–127.

book, the definition of a child capable of forming views should be determined in accordance with the General Comment to Article 12 of the CRC.

The fact that a child is very young or in a vulnerable situation (e.g. has a disability, belongs to a minority group etc.) does not deprive him or her of the right to express his or her views. The views of young children may be expressed by non-verbal forms of communication including play, body language, facial expressions, drawing and painting. Age and maturity are relevant when the court has to consider the weight of the views of the child in the decision-making process. The assessment of the capability of the child does not depend either on his or her request to be heard or on the request of the parents.[40]

If the court establishes that the child is capable of forming a view, it must provide this child with the opportunity to express his or her views freely. The court must record this assessment in the certificate attached to its judgment.

### *6.4.3. 'In Accordance With National Law'*

The court having jurisdiction must act in accordance with its national law, including national substantive law and procedural law. According to the Practice Guide, the Regulation does not modify the applicable national law and procedures on the question of how to establish the capability of the child to form his or her own views. Courts in the Member States develop their own techniques and strategies. Some courts do so directly; others commission special experts, such as psychologists, who then report back to the court. Whichever technique is deployed, it is a matter for the court itself to decide whether or not the child is capable of forming his or her own views.[41]

The requirement "in accordance with national law" means the procedural law regulation of the Member State. According to their own procedural rules, the member states determine how and when the child is guaranteed the right to express views. In the comparative law chapter of this book, the individual national reports show which procedural regulations apply in some Central-European countries.

The Regulation should, however leave the question of *who will hear the child* and *how the child is heard* to be determined by national law and procedures of the Member States. Consequently, it should not be the purpose of this Regulation to set out whether the child should be heard by the judge in person or by a specially trained expert reporting to the court afterwards, or whether the child should be heard in the courtroom or in another place or through another means.[42] National law is also applicable to the provision of information to the child. In general, listening to the child needs to be carried out in a manner which takes account of the child's age and maturity. Assessing the views of all children should be done with expertise and care and in a manner compatible with the age and maturity of the child.[43]

40 European Commission: Directorate-General for Justice and Consumers and Musseva, 2023 (hereinafter: Practice Guide), p. 159.
41 Ibid.
42 Recital (39) of the Regulation.
43 Practice Guide, pp. 162–163.

*6.4.4. 'Genuine and Effective Opportunity to Express Views'*

The court must provide the child has a genuine and effective opportunity to express views; it cannot be formal. With this, the requirement imposed by the CJEU in the previously cited Zarraga case[44] was also included in the normative text of the Article 21 of the Regulation. In this regard, we emphasise that neither during or since the Zarraga case has the CJEU explained what can be considered a genuine and effective opportunity. This must be considered by the court in each case.

In the light of the earlier described facts of the Zarraga case, we can conclude what the CJEU meant by genuine and effective opportunity. The Spanish court of first instance ordered the hearing of the child living in Germany, but even before the hearing, it decided that the child could not leave the territory of Spain, unless for some important reason, e.g. she returns for her hearing. The Spanish court rejected the mother's application that she and her daughter be permitted to leave Spanish territory freely after the child's hearing, or that the child be heard via video conference, which was rejected by the Spanish court. So, it can be concluded that the *child was not given a genuine and effective opportunity to express her views,* because by appearing in court she would have risked not being able to leave the territory of Spain after her hearing.

The Practice Guide points out, that *all appropriate legal tools* must be made available for the child to express his or her views freely. Thus, the court of the Member State concerned is required to take all measures which are appropriate for the arrangement of the hearing, regarding the best interests of the child and the circumstances of each individual case. The court should, in so far as possible, and always taking into consideration the best interests of the child, use all means available to it under national law as well as the specific instruments of international judicial cooperation, including when appropriate, those provided for by the Taking of Evidence Regulation.[45] The reference to the Taking of Evidence Regulation in Recital 39 is intended to clarify that the hearing of the child falls within its scope for the purposes of this Regulation, irrespective of the national classification of the hearing as evidence, or another procedural institute. In addition, where it is not possible to hear a child in person, and where the technical means are available, the court might consider holding a hearing via videoconference or by means of any other communication technology[46] unless, on account of the particular circumstances of the case, the use of such technology would not be appropriate for the fair conduct of the proceedings.[47]

44 Judgment of the Court 22 December 2010 in Case C-491/10 *PPU Joseba Andoni Aguirre Zarraga v Simone Pelz,* points (62)–(66).
45 European Parliament and European Council, 2020.
46 See more: European Commission, 2021b.
47 See: Recital 53; Practice Guide, pp. 160–161.

*6.4.5. 'Right and Not an Obligation'*

Article 21 does not require the hearing of the child, but the provision of the opportunity to express views: the child is free to decide whether or not to exercise his or her right to express their views.

According to the Recital (39) of the Regulation while remaining a right of the child, hearing the child *cannot constitute an absolute obligation,* but must be assessed, taking into account the best interests of the child, for example in cases involving agreements between the parties.

If, according to the court, the child must be provided with the opportunity to express his opinion, his opinion must also be taken into account.

*6.4.6. 'Giving Due Weight to the Child's Views'*

If the child makes use of the opportunity to freely express his or her views directly or through a representative or an appropriate body, the court of the Member State shall give due weight to these views in accordance to his or her age and maturity. The consideration of the views of the child is of particular importance when assessing his or her best interests (see Recital 39). Any decision that does not take into account the child's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child to influence the determination of their best interests.

The obligation to give due weight means that it is not sufficient to merely listen to the child; and in addition, the views of the child must be taken into consideration. The reasoning of the court in this regard should be part of the decision, in particular when the decision does not follow the child's views. The court must evaluate the views of the child with regard to the particular circumstances of each case and of each individual child, as the level of different children of the same age's development may differ.

In any case, the obligation of the court to give due weight to the child's views does not mean that the court is bound by the wishes of the child when deciding on the subject matter, as decisions need to be taken according to the best interests of the child.[48]

*6.4.7. The Consequences of Violating the Child's Right to Express Views*

The provisions of refusal of recognition and enforcement of decisions show that there are serious consequences for violating the rules of the rights of the child to express views.

Article 39 (2) of the Regulation establishes the possibility to refuse recognition, in case the child's right to express views is ignored. According to this provision the recognition of a decision in matters of parental responsibility *may be refused* if they were given without the child who is capable of forming his or her own views having being given an opportunity to express his or her views in accordance with Article 21, except where: the proceedings only concerned the property of the child and provided

48 Practice Guide, pp. 161–162.

that giving such an opportunity was not required in light of the subject matter of the proceedings; or there were serious grounds to take into account, in particular, the urgency of the case.

As was mentioned earlier, the grounds for refusal related to the child's right to express views can be found in Article 23(b) of the Brussels IIa Regulation. In order to make the grounds for refusal more prominent in the Regulation, they were made independent grounds for refusal named in paragraph 2 of Article 39, if the court did not provide an opportunity for the child, who is capable of forming his or her own views during the procedure.

It should be emphasised that, contrary to the mandatory grounds for refusal in Article 39 (1), a refusal of recognition is not mandatory in the case of a violation of the child's right to express views.

The court must consider whether the absence of the opportunity to express views affected the substance of the decision to such an extent that the refusal to recognise was justified.

Two exceptions to the duty to hear the child where the absence of hearing may not be a reason for the refusal of recognition and enforcement stem from Article 39(2). The first exception concerns proceedings related only to *the property of the child*, provided that giving an opportunity to the child to express his or her own views is not required in light of the subject matter of the proceedings. The second exception refers to the existence of serious grounds, to be established taking into account, in particular, the *urgency of the situation*, (for example when ordering provisional, including protective, measures).[49] Such serious grounds could be given, for instance, where there is imminent danger to the child's physical and psychological integrity or life, and any further delay might increase the risk that this danger materialises.[50]

All exceptions to the duty to hear the child *should be interpreted very restrictively*. In particular it should be borne in mind that the rights of the child are significant in relation to proceedings affecting the child, and that generally decisions about the future of a child and his or her relationship with parents and others are crucial in ensuring the best interests of the child.[51]

### *6.5. Proposal in Matters of Parenthood*

It should briefly be mentioned that the Proposal for a Council Regulation on jurisdiction, applicable law, recognition of decisions and acceptance of authentic instruments in matters of parenthood and on the creation of a European Certificate of Parenthood (hereinafter: Proposal) is being prepared in the field of judicial cooperation in civil matters.

49 Practice Guide, p. 164.
50 Recital (57).
51 Practice Guide, p. 165.

The Proposal concerns the recognition in a Member State of the parenthood[52] of a child as established in another Member State. It aims to protect the fundamental rights and other rights of children in matters concerning their parenthood in cross-border situations, including their right to an identity, to non-discrimination and to a private and family life, taking the best interests of the child as a primary consideration. This Proposal also aims to provide legal certainty and predictability and to reduce litigation costs and burden for families, as well as national courts and other competent authorities in connection with proceedings for the recognition of parenthood in another Member State. To attain these aims, this Proposal should require Member States to recognise for all purposes the parenthood of a child as established in another Member State. The Proposal shall apply to civil matters of parenthood in cross-border situations.

Article 15 of the Proposal, like the Brussels IIb Regulation, provides in title 'Right of children to express their views' about the child's right to express views. According to this Article, 1 when exercising their jurisdiction under this Regulation, the courts of the Member States shall, in accordance with national law and procedure, provide children below the age of 18 years whose parenthood is to be established and who are capable of forming their own views, with a genuine and effective opportunity to express their views, either directly or through a representative or an appropriate body. 2.Where the court, in accordance with national law and procedure, gives children below the age of 18 years an opportunity to express their views in accordance with this Article, the court shall give due weight to the views of the children in accordance with their age and maturity."

If adopted, this Proposal will be the second instrument in which the provision of the child's right to express views appears specifically in the field of judicial cooperation in civil matters.

## 7. Closing Remarks

The development is clearly visible in the field of the child's right to participate, as the EU creates more precise provisions in the EU legal sources adopted and about to be adopted in the field of judicial cooperation in civil matters, which clearly strengthen the child's right to express an opinion. Combining the provisions on the child's right to express views with the rules on refusal of recognition and enforcement in the Brussels IIb Regulation is an effective tool for the implementation of these provisions. However, in order for these provisions to be implemented in the practice of the courts of the member states, a change of attitude is necessary, which requires balancing the best interests of the child and the purpose of the civil procedure; which is precisely what child-friendly justice means.

52 Parenthood means the parent-child relationship established in law. It includes the legal status of being the child of a particular parent or parents.

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# Part III
# Comparative Findings and Conclusions

| Chapter 14 |

# Comparative Summary of Child-Friendly Justice – Bringing Together the Threads

Kata Zsófia Prém

## 1. Setting the Scene

The examination of children's rights is of paramount importance, as children require increased protection due to their vulnerability. However, it is equally important to recognise that children are also participants in social and legal processes as legal entities. In recent decades, there have been significant developments in international law, particularly with regard to the UN Convention on the Rights of the Child, which has been widely ratified. These developments have had a considerable impact on national legal systems. The objective of this chapter is to provide a synopsis of the examination of the legal frameworks of the countries included in the book. The study pays particular attention to the extent to which children's participation rights are reflected in the text of constitutions and details children's participation in civil, administrative, and criminal court proceedings. This is of particular importance, as it is an essential means for children to express their opinions and participate in order to ensure that their interests are effectively taken into account in judicial and administrative proceedings.

## 2. Brief International Overview

International and European Union conventions and treaties represent a significant component of the legal framework of the countries examined in the book. The UN Convention on the Rights of the Child (CRC) represents the most widely ratified

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human rights convention in the world, encompassing the rights of children, with particular regard to their situation and vulnerability. Article 12 of the Convention constitutes the foundation for child-friendly justice, thereby establishing the basis for the participation and rights of children in civil, criminal, and administrative proceedings. The present article provides a comprehensive overview of the legal and social status of children. It is important to note that, while these individuals do not possess the same level of autonomy as adults, they are nevertheless recognised as legal entities. Article 12 is notable for its introduction of a new right into international human rights law. This right is to express one's own views, a right that is guaranteed to every child capable of forming their own views. Furthermore, the right stipulates that these views must be given due weight in accordance with their age and maturity. Article 12 stipulates that States Parties must guarantee that children, who possess the capacity to formulate independent opinions, are granted the opportunity to articulate these perspectives in all matters that concern them. Furthermore, it is imperative that these views are accorded appropriate weight, commensurate with their age and maturity. The rejection of age limits necessitates the acknowledgement of varied modes of communication, as conventional forms of verbal communication may not wholly represent the perspectives of younger children or children with severe disabilities. It is insufficient to merely listen to the child; their views must be given serious consideration.[1] Article 12(2) stipulates the right of the child to be heard in any judicial and administrative proceedings affecting them. This provision finds application in a variety of contexts, including but not limited to decisions pertaining to parental separation, guardianship, care, adoption, and so forth. The right to be heard can only be exercised in an environment that is safe and appropriate for the child's age. It is imperative that procedures are accessible and child-friendly, with particular attention paid to the provision of child-friendly information, support, appropriately trained staff, the design of courtrooms, and so forth.[2] It is important to acknowledge that Article 3 of the CRC is designed to ensure the optimal welfare of the child. Furthermore, Article 12 outlines the procedure for soliciting the opinions of children and ensuring their involvement in all matters that affect them, including the determination of their best interests. The principle of non-discrimination is also closely linked to Article 12, as every child must be guaranteed the right to express their views and be heard, regardless of their age, religion, skin colour, gender, race, etc.[3] Article 13 of the CRC is a fundamental component of the international legal framework that guarantees the freedom of expression of children. It is important to note that articles 12 and 13 are often confused with each other. Article 13 stipulates that the state is required to adopt a passive approach, that is to say, the state is prohibited from interfering with the expression of children's opinions. Conversely, Article 12 stipulates that States Parties must adopt an active approach and establish a legal

1 Benyusz, 2025, pp. 205–209.
2 Ibid., pp. 209–210.
3 Ibid., p. 212.

framework and appropriate mechanisms to facilitate the involvement of children in all measures and decisions affecting their lives. Moreover, the right to information, as outlined in Article 17, is a prerequisite for the effective exercise of the right to express an opinion.[4]

Alongside the primary source of law, the CRC, general human rights treaties, such as the European Convention on Human Rights, play a significant role in Europe. Article 19 of the European Convention on Human Rights (ECHR) established the European Court of Human Rights (ECtHR), which plays a significant role in the protection and promotion of children's rights. The Court has an increasing impact on the development of children's rights in Europe. The ECtHR has interpreted the ECHR as applying to children, despite the fact that it contains few specific references to children's rights.[5]

All Member States of the European Union and all member states of the Council of Europe are parties to the CRC. The guiding principles of the CRC, such as the principle of the best interests of the child, non-discrimination, the right to survival, and the right of the child to be heard, are therefore applicable. The Council of Europe considers the protection of children's rights and the promotion of child-friendly justice to be a priority. In alignment with the principles of the CRC, the organisation has incorporated these rights into its various conventions, action plans, guidelines, and manuals. The Committee of Ministers has assigned responsibility to four Council of Europe bodies for the development of guidelines on child-friendly justice. The guidelines were developed in close cooperation with the 'Building a Europe for and with children' programme. The Council of Europe initiated this project in 2008, and it was subsequently endorsed by the European Committee on Legal Cooperation. Following this, it was presented to the Committee of Ministers for adoption in 2010. At the policy level, the Council of Europe has been implementing the 'Building a Europe for and with children' programme since 2006. This is a comprehensive action plan involving national governments, civil society, the European Union, and other international organisations and stakeholders. The Council of Europe's intergovernmental work in the field of children's rights is guided by successive strategies on children's rights. Furthermore, in order to consolidate the rights of children within all justice systems, the Council of Europe has published a handbook entitled European law relating to the rights of the child, which provides an overview of the fundamental rights of children in the European Union and the member states of the Council of Europe.[6]

As a result of high mobility and population movements, citizens of individual countries have many opportunities to work in other countries, integrate into new environments, and start families. Consequently, it is imperative to ensure legal certainty for children from international families. Such situations are addressed by the 1996 Hague Convention, which deals with a range of issues including jurisdiction,

4 Ibid., p. 216.
5 Tóth, 2025, pp. 231–233.
6 Ibid., pp. 233–236.

applicable law, recognition and enforcement, and cooperation in relation to parental responsibility. The 1980 Hague Convention on the Civil Aspects of International Child Abduction is also applicable in this context.[7]

In addition to the aforementioned, it is also important to mention the Charter of Fundamental Rights of the European Union as primary EU legislation. In accordance with Article 24, which pertains to the rights of children, it is asserted that children are entitled to the requisite protection and care that is indispensable for their well-being. It is crucial to acknowledge the right of children to articulate their perspectives on issues that impact their lives. Their views must be given due consideration, taking into account their age and maturity levels. It is important to note the EU Strategy on the Rights of the Child, which was adopted in 2021. It is imperative to acknowledge that policies pertaining to children ought not to be formulated without duly considering the perspectives of children. This principle is further reinforced by the Strategy on the Rights of the Child, which sought to incorporate the voices of over 10,000 children through various means of consultation, including online questionnaires. The fourth thematic area of the EU strategy is child-friendly justice, which describes how children can participate directly in court proceedings as defendants, victims, or witnesses. This will be explained in more detail later with regard to individual countries.[8] In 2024, the Council of Europe and the European Commission initiated a project on child-friendly justice. The objective of this project is to develop child-friendly frameworks with the aim of raising awareness among children involved in legal proceedings and their parents about children's rights before, during, and after court proceedings. It is important to note that the Brussels IIa Regulation, which contains a number of innovative provisions, merits particular attention. The Regulation adopts a markedly child-centred approach, which is significantly more effective than that of the Brussels IIa Regulation.[9]

## 3. The Constitutional Protection of Children's Rights

As the constitutions of individual countries provide the legal framework for all national legislation, it is imperative to examine whether the constitutions of the countries under review guarantee children's participation rights at the constitutional level. The constitution is regarded as the supreme norm within the legal system of a given state, serving not only as a guideline for values and legal policy, but also establishing the fundamental principles to which all other legislation is required to conform. The constitutional recognition, or lack thereof, of children's participation rights is therefore not merely of declarative significance, but also defines the framework for child-friendly justice. In the following review, the constitution of each state

7 Tomczewska, 2025, p. 270.
8 Wopera, 2025, pp. 306–308.
9 Wopera, 2025, p. 309.

will be examined, country by country, to ascertain how and to what extent children's participation rights are guaranteed.

The Hungarian Fundamental Law does not provide for children's rights in general, but rather for their right to protection, stating that every child has the right to the protection and care necessary for their physical, mental, and moral development. The Fundamental Law provides specific protection for designated groups, including families, children, women, and individuals with disabilities.[10] A distinctive feature of the Hungarian Fundamental Law is that it specifically names children as one of the groups in need of protection and guarantees them the right to the care and protection necessary for their physical, mental, and moral development. This regulatory framework imposes a significant obligation on the state, yet it exhibits a lesser emphasis on children's autonomy and participatory rights when compared to the Slovenian model, and it adopts a less comprehensive approach to fundamental rights in contrast to the Czech system.

A perusal of the Constitution of the Slovak Republic reveals the absence of any explicit reference to the right of minor children to judicial protection or to express their opinion or be informed in court proceedings. The sole reference to minors stipulates that special protection for children and young people is guaranteed, yet the detailed rules must be established by law.[11] In essence, Slovak constitutional law enumerates children among the groups that are entitled to special protection. However, it does not establish any independent participation or procedural rights for them. Consequently, the practical enforcement of children's rights is primarily delegated to lower-level legislation.

The Constitution of the Republic of Croatia, in a manner analogous to the Hungarian constitution, makes reference to children's rights in generic terms. However, in a manner similar to the Slovak constitution, it remains silent on the question of children's rights to participate in court proceedings.[12] Consequently, it can be deduced that Croatian constitutional law embodies a median stance, as it expressly acknowledges children's rights as a distinct constitutional realm, yet derives the particulars of participation rights exclusively from general human rights guarantees and international conventions.

As with the Croatian Constitution, the Serbian Constitution does not contain explicit provisions on children's participation rights. However, it does stipulate that children enjoy human rights in accordance with their age and maturity.[13]

The right of children to be heard is enshrined in the Polish Constitution as an independent constitutional value, which derives from the right to human dignity that is inherent to all people. The concept of dignity serves as the foundational principle underpinning all forms of freedom and rights, including the right to freedom of

10 Nagy, 2025, pp. 83–85.
11 Koromház, 2025, pp. 157–158.
12 Kunda and Smojver, 2025, pp. 23–24.
13 Knežević, 2025, p. 141.

expression. The right of children to express their views in matters affecting them is therefore guaranteed by the Polish Constitution, which universally guarantees freedom of expression to all people. The Constitution expressly stipulates that when determining the rights of the child, the authorities and persons responsible for the child have a duty to listen to the child and take their views into account as far as possible.[14]

Romania explicitly recognises at the constitutional level the right of children to special protection and participation, which is elaborated in detail in child protection laws.[15]

By contrast, Czech constitutional regulations are much more restrained in the area of protecting children's rights than the solutions adopted by the other countries examined. Despite the fact that the Czech Republic is a signatory to numerous international treaties and human rights conventions that stipulate or reinforce the protection of children's rights, and these form part of the domestic legal system, the text of the constitution does not contain any explicit provisions on children's participation rights. The general provisions of the Czech Constitution, which include the right to a fair trial and equality before the law, apply to all individuals, including children. Moreover, the practice of the Czech Constitutional Court substantiates the notion that these guarantees are applicable to children in full.[16]

The French Constitution does not contain any explicit provisions pertaining to the participation of children in individual proceedings. However, it is important to note that the constitutional principles of the French legal system, such as the presumption of innocence and the principle of adversarial proceedings, apply universally to all persons, regardless of age. Consequently, children are entitled to the same fundamental legal guarantees as adults. The constitutional recognition of children's rights has been confirmed in judicial practice, thereby establishing the specific nature of the criminal justice system for minors.[17] Consequently, constitutional protection of children in France is implicitly implemented through general principles and the interpretative practice of the Constitutional Council. In terms of participatory rights, it offers weaker guarantees than those enshrined in Czech legislation.

In contrast to the above, the Constitution of the Republic of Slovenia provides particularly robust and intricate constitutional protection of children's rights, which extends beyond the framework of the general catalogue of fundamental rights. It is evident that a number of provisions within the Constitution are explicitly designed to safeguard the well-being of children and young people. These provisions impose active obligations on the state, compelling it to protect its most vulnerable citizens and to establish the necessary conditions to ensure their protection. The Slovenian Constitution stipulates that children are to be accorded specific protection and care,

14 Lis, 2025, pp. 105–107.
15 Fegyveresi, 2025, p. 125.
16 Kissová, 2025, pp. 43–44.
17 Nord-Wagner, 2025, p. 65.

and that their human rights and fundamental freedoms are to be determined by their age and maturity. It is imperative that children are accorded special protection against the economic, social, physical and mental exploitation and abuse to which they are vulnerable. It is particularly noteworthy that the state provides special protection to children who are deprived of parental or family care.[18] The Slovenian Constitution provides stronger guarantees than the constitutions of many other Central European countries, as it treats children's rights not merely as an adjunct to parental rights, but as a separate and priority area of protection.

It can be concluded that the depth of regulation and the scope of guarantees provided by constitutions vary from country to country. While certain states ensure children's rights through detailed and explicit provisions, others rely more on general human rights frameworks and ratified international conventions. In summary, it can be stated that the constitutions of the countries examined – with the exception of the Constitution of the Republic of Slovenia – rarely contain explicit and detailed provisions concerning minors. Rather, specific rules concerning minors are defined within the framework of general human rights guarantees or other legislation, such as family law, civil procedure law, criminal procedure law, or child protection laws. However, despite the absence of explicit mention in constitutions, the right of children to participate in court proceedings is widely considered to be constitutionally guaranteed. This is due to the fact that the rights of children are widely regarded as a subset of human rights, the legal protection of which is enshrined in the constitutions of nations.

## 4. The Participation of Children in Legal Proceedings

As demonstrated above, while constitutions universally establish a human rights framework, the rights of children to participate are seldom articulated in a consistent and explicit manner at this tier. Instead, the regulations demonstrate a particular national diversity, with children's rights not being regulated by a single, comprehensive codified law, but rather included in various laws. It is evident that provisions for the safeguarding and involvement of children are dispersed across a range of legal domains, including family law, civil law, civil procedure law, criminal procedure law, education, health, and social legislation.

The realities of life demonstrate that children, like adults, can come into contact with the justice system in various ways. Children may be involved in a variety of legal proceedings, including civil (e.g., divorce of parents and the settlement of maintenance and contact rights, adoption), administrative (e.g., settlement of citizenship) and criminal proceedings. However, it is important to note that during such proceedings, children frequently lack the capacity to comprehensively grasp the legal processes that pertain to them or their own role in these processes. This underscores

18 Burkelc Juras, 2025, pp. 179–182.

the imperative for the justice system to adapt its operations to address the particular requirements of juveniles. Such adaptations play a fundamental role in ensuring that legal proceedings are conducted in the best interests of the child.

### *4.1. Participation of Children in Civil Court Proceedings – With Particular Regard to the Expression and Hearing of Children's Opinions*

Within the legal framework of Hungary, the fundamental principles of private law that pertain to minors are enshrined within the provisions of the Civil Code, specifically within the sections entitled 'legal entity' and 'family law'. The law stipulates that, within the context of family relationships, the interests and rights of children are to be accorded heightened protection. According to the Hungarian legal system, a minor is defined as any individual under the age of 18, unless they have attained the age of majority by entering into marriage after attaining the age of 16. It is an irrefutable legal fact that individuals under the age of 14 years are not legally capable, and that, upon reaching the age of 14, their legal capability is, to a significant extent, circumscribed. It is an incontrovertible fact that individuals below the age of 18 are under the supervision or guardianship of their parents. Parental supervision encompasses the legal responsibility to act as legal guardian for the child, as parents are entitled to represent their child in personal and financial matters by law. This signifies that the parent or guardian is entitled to instigate legal proceedings on behalf of the minor, and to act as their legal representative in court. Exceptions to this rule are cases where the interests of the parent and the child conflict. However, it should be noted that these regulations do not apply to the hearing of children in court. This is because the hearing represents an expression of the child's personal rights and is conducted by the child themselves in a court of law. It is imperative to acknowledge that a parent may not act as legal representative for their child in cases where the parent, their spouse, partner, close relative, or any other individual whom the parent legally represents, has interests that are in opposition to those of the child. In such cases, an ad hoc guardian is appointed for the child. The Hungarian Civil Code guarantees children's rights in several ways, one of the most significant of which is the involvement of children in decision-making, which is closely linked to their right to express their opinion. Parents have a legal obligation to inform their children of any decisions that may impact them. They must also ensure that children who are capable of forming their own opinions are given the opportunity to express these views prior to the decision being made. Parents are then required to take these opinions into consideration when making the decision, ensuring that it aligns with the child's age and level of maturity. Furthermore, the court is obliged to inform the child that they may express their opinion during the proceedings. In judicial proceedings, a range of notifications are employed, each tailored to the specific age group concerned. In the notice disseminated to children, the court informs them that they are at liberty to express their opinion in various ways (in accordance with Croatian regulations, this can be done in writing, by electronic message, video message, or even by drawing). It is possible for these to be dispatched to the court electronically, either with the assistance of parents

or independently, thus obviating the need for appearance in court. Hungarian civil law does not provide a definition for the concept of a 'child with sufficient intellectual capacity'. However, according to court practice, in all cases where the child's age is not a determining factor, the court is obliged to examine whether the child has sufficient intellectual capacity. In accordance with the pertinent legislation, a minor may be deemed to have sufficient intellectual capacity if, in accordance with their age and intellectual and emotional development, they are capable of comprehending the fundamental content of the facts and decisions relevant to their case, and can predict the probable consequences of these decisions. It is important to note that this is a subjective category, the existence of which must be decided by the court.[19] The Hungarian Code of Civil Procedure is the governing legislation that regulates the provisions relating to civil proceedings. In accordance with the provisions of this legislation, any individual who is capable of acquiring rights and obligations under the provisions of civil law is permitted to act as a party in court proceedings. In accordance with the stipulated regulation, the capacity for a minor to act as either plaintiff or defendant in civil proceedings is unrestricted, extending from birth until death. It is an essential prerequisite for a person to possess full legal capacity in order to participate as a party in legal proceedings, as stipulated by the rules of the Civil Code. In the field of civil procedural law, the concept of limited legal capacity is not recognised. Consequently, individuals under the age of 18 do not possess legal capacity, regardless of whether they have attained the age of 14. In such instances, the party concerned acts through their legal representative during the proceedings. In the absence of legal representation for the child, the court is obliged to appoint a notary public to act on behalf of the party. In legal proceedings pertaining to personal status, specific regulations are applicable to children over the age of 14, as they possess full legal capacity in such matters. The law does not stipulate an age limit for the provision of testimony, which signifies that minors under the age of 14 may also be heard in civil proceedings, provided that the evidence anticipated to be provided by their testimony cannot be obtained by alternative means. The presence of the legal representative is permissible during the hearing. It is imperative that warnings and information provided during the hearing are formulated in a manner appropriate to the age and maturity of the minor, ensuring that the content is suitable for children. It is not necessary for minors under the age of 14 to be informed of the legal consequences of providing false testimony; however, they must be instructed to tell the truth. In the event of a conflict of interest between the minor witness and their legal representative, the court shall request the appointment of a guardian to exercise the rights of the legal representative by the guardianship authority. Should the court deem it appropriate to hear the child as an interested party, it shall, where justified, appoint a notary public for the minor ex officio. It is vital to ensure that the minor is provided with a hearing in an appropriate atmosphere, taking into account their age and maturity, and that this is conducted in a child-friendly manner. At the commencement of the hearing, the

19 Nagy, 2025, pp. 91–93.

minor is to be requested to state their name, place and date of birth, mother's name, and address. It is imperative that these individuals are made aware of their right to refuse to testify or answer certain questions, and that they are reminded of their right to do so. The minor is heard by the judge; prior to the hearing, the parties may submit questions, the admissibility of which is decided by the judge. Following the conclusion of the hearing, the statement documented in the written minutes is to be read out or the audio recording is to be played in the presence of the minor. Thereafter, the minor is permitted to amend their statement or augment the information they have provided. It is important to note that Hungarian courts have child interview rooms where minors are interviewed by the court in a child-friendly environment. It has been observed that children under the age of 8 and 10 are typically interviewed in these rooms, while older children are interviewed in the courtroom.[20] It is imperative that the direct hearing of the child is conducted with consideration for the child's age and level of maturity. It is evident that the communication methods employed for young children differ from those utilised for teenagers. Furthermore, the court may elect to hear the minor in conjunction with an expert, in which case a judicial expert is appointed and the court must pose questions to which the expert must respond.[21]

In Slovenia, the position of children in civil and non-contentious proceedings is contingent on the provisions of three sources of law: the Civil Procedure Act, the Non-Contentious Civil Procedure Act, and the Family Law Act.[22] Children attain full legal competence at the age of 18, or earlier in exceptional cases, for example, if – as in Hungarian, Slovak, and Croatian legislation – the child marries or is granted full legal competence by the court because they have become a parent (the latter is analogous to Croatian legislation).[23] It is important to note that children who have reached the age of 15 have limited legal capacity. In accordance with Hungarian legislation, the legal representation of children is provided by their parents or guardians until such time as they attain full legal capacity. In civil litigation and non-contentious proceedings, children have the right to a special representative (conflict guardian), especially in cases where the interests of the parents exercising parental authority and those of the child conflict. Furthermore, the child is entitled to express their opinion with the assistance of a confidant or legal advocate during specific judicial proceedings. The court is obliged to give due consideration to the child's opinion when determining matters pertaining to the child's protection, upbringing and maintenance, contact, the exercise of parental authority and the provision of parental care. In proceedings aimed at protecting the interests of the child, the court shall require the social services centre to inform the child, if he or she is capable of understanding the meaning of the proceedings and the consequences of the decision, about the proceedings and his or her right to express an opinion. The child is afforded the opportunity to

20 Nagy, 2025, pp. 87–90.
21 Ibid., p. 94.
22 Burkelc Juras, 2025, p. 185.
23 Ibid., p. 181.

articulate their perspective at the social services centre, during a dialogue with the children's rights representative, or in an informal conversation with the judge, even in the absence of parental figures. The presence of an individual in whom the child has confidence and who is selected by the child, or the child's advocate, is also permissible. It is imperative to note that minutes of the hearing are taken, and these may also be recorded on audio or video. In the interests of the child, the court may exercise its discretion to withhold the minutes from the parents. It is acknowledged that children have the right to express themselves and articulate their opinions, and this statement may potentially be of significance in determining their rights. Nevertheless, the right to express an opinion is not absolute, as public authorities or courts are not required to hear the child in person in all cases. The necessity for the child's perspective to be considered is contingent upon the specific circumstances of each individual case, as well as the age and maturity of the child.[24]

In accordance with the provisions of the Slovak Civil Code, a child is deemed a minor until the attainment of full legal capacity, which coincides with the age of majority, that is to say, the age of 18 years. In a manner analogous to the regulations governing the attainment of majority status in the Hungarian, Slovenian and Croatian legal systems, the Slovak Civil Code stipulates that an individual may attain the age of majority by entering into marriage, on the condition that they have attained a minimum age of 16 years and have obtained the approval of the court. The provisions of Slovak family law further specify the principle enshrined in their constitution that the opinion of the child must always be taken into account when deciding on matters relating to minor children. This is due to the fact that minors are entitled to express their opinion independently and freely on all matters affecting them. However, the opinion of a minor child must be assessed in accordance with their age and mental maturity. This general provision applies to all countries on the basis that the mental maturity of a minor child increases with age, which suggests that as they grow older, they will be increasingly able to judge what is in their best interests. The Family Law Act contains two specific provisions that explicitly mention the need for the consent of a minor child (similar to Slovenian legislation) in the case of foster care and adoption. It is also pertinent to mention the legal regulation of healthcare, which, akin to Czech regulations, pertains to the right of minor children to information and to express their own opinion on matters that directly affect them. As was the case in the preceding countries, Slovakia also has a provision that has been previously discussed. In circumstances where the interests of a minor child and their legal representative are in conflict in certain proceedings, the court is required to appoint a guardian whose duty it is to resolve the conflict. In accordance with the provisions stipulated within the Civil Procedure Code, any individual is at liberty to appear before the court in their own right, to the extent that they are legally entitled to do so. Full legal capacity, including the capacity to act in legal proceedings, commences upon attaining majority. Consequently, minor children, devoid of legal capacity, are unable to act in

24 Ibid., pp. 185–187.

legal proceedings and thus cannot act independently before the court. However, this does not constitute a direct impediment to the progression of legal proceedings, as it is a procedural deficiency that can be rectified by the court appointing a guardian to represent the concerned party or by the court summoning the legal representative to act on their behalf. In accordance with Slovak civil procedural law, a minor child may be a witness in civil proceedings. However, the law does not provide for a separate procedure for such cases. The court generally hears evidence during the hearing itself. However, according to the law, this is also possible outside the hearing. In theory, it is possible to hear a minor witness outside the hearing, and even outside the court building itself.[25] The Slovak Civil Non-Contentious Proceedings Act imposes a special obligation on the court. If a minor is involved in the proceedings, the court is obliged to inform him or her about the course of the proceedings and all relevant issues related to the subject matter of the case. The court is also obliged to explain the consequences of the court's decision to the minor. It is important to note that in civil non-contentious proceedings, the law regulates the issue of legal capacity in a different manner. In such cases, if circumstances so require, the court may decide that a person who does not have full legal capacity should be represented in the proceedings by their legal representative or guardian ad litem, even if they could act independently in the case.[26] The Civil Non-Contentious Proceedings Act also expressly regulates the evidentiary procedure in proceedings involving minor children. In such cases, the court is required to take into account the opinion of the minor child as a participant in the proceedings, if the child is capable of expressing an independent opinion. It can be concluded from the provisions of the Civil Non-Contentious Proceedings Act and the Family Law Act that the hearing of a minor child must be conducted in an appropriate and suitable manner so as not to cause undue stress to the minor child. Slovak legislation does not preclude the indirect determination of the opinion of a minor child, i.e. without a hearing by the judge.[27]

In the Czech Republic, provisions concerning children's right to participate can be found in both civil substantive law and civil procedural law. The right of children to participate is regulated by the Czech Civil Code, which stipulates that prior to the court's decision-making process regarding the interests of a child, the court is obliged to provide the child with the information necessary to form and express their own opinion. In the event that the court determines that the child lacks the capacity to comprehend the information, or to formulate an opinion or communicate it, the court is obliged to inform and hear the individual who is best placed to safeguard the child's interests. The Czech Civil Code establishes a presumption that children over the age of 12 are capable of receiving information, forming their own opinions and communicating them. However, the court is also obliged to communicate with children under the age of 12. The judge is obliged to determine whether it is necessary to ascertain the

25 Koromház, 2025, pp. 159–164.
26 Ibid., pp. 169–170.
27 Ibid., pp. 172–173.

child's opinion and how this can be achieved, bearing in mind that even a conversation with a child under the age of 12 can provide important information for the court's decision. The law also stipulates that the court must accord due weight to the child's opinion.[28] The Civil Procedure Act stipulates that the court must proceed in such a way as to ascertain the child's opinion on the matter. The law accords primacy to the procurement of the child's direct opinion. In certain cases, however, the question of whether the court should hear the child directly may depend on what procedural measures the court can take to ensure that the child does not suffer trauma or undue stress during the direct hearing before the court.[29] Moreover, the Act on Special Civil Procedures, which contains rules on non-contentious proceedings, stipulates that the court must act in such a way that the minor is provided with the necessary information about the court proceedings and is informed of the possible consequences of taking their opinion into account and of the consequences of court decisions. In a manner analogous to the regulations of Slovakia and Slovenia, specific provisions are also applicable to adoption proceedings. In accordance with the regulations of the Czech Republic, children are guaranteed specific rights of participation in decisions concerning their health, similar to the provisions in effect in the Slovak Republic.[30] In civil proceedings, children are represented by their legal representatives. In instances where the child lacks the capacity to act independently and is not represented by a legal guardian, the judge will appoint a guardian *ad litem*.[31]

In accordance with the precedent set in previous cases, minors under the age of 18 in Croatia do not possess legal capacity; this capacity is acquired upon reaching the age of majority. There is, however, one exception to the general rule on legal capacity, namely situations where a minor marries before reaching the age of 18. In a manner analogous to the regulations of Hungary, Slovenia and Slovakia, the Croatian judicial system may, in exceptional circumstances, permit individuals over the age of 16 to enter into matrimony. It is noteworthy that under the prevailing family law, an additional exception to the prevailing rule on legal capacity was in effect. This exception pertained to mentally mature minors who became parents prior to attaining the age of 18. In such cases, if a 16- or 17-year-old minor had a child, the court decided on the acquisition of legal capacity. The current Croatian family law no longer contains such a provision; however, this exception still exists in Slovenia. It is an established legal principle that legal capacity is inextricably linked to the capacity to sue. Consequently, in the majority of cases, children under the age of 18 will not be deemed to have legal capacity to sue. Their participation in court proceedings will therefore be through representation (by a parent or guardian). As previously stated, in instances where the interests of the parents are in opposition to those of the child, a special guardian will be appointed to represent the child. However, the child's legal incapacity does not

28 Kissová, 2025, p. 45.
29 Ibid., p. 55.
30 Ibid., pp. 45–46.
31 Ibid., pp. 56–58.

negate their right to be heard. That is to say, the child must be given the opportunity to express their opinion and testify in court, depending on their age and maturity.[32] The Croatian Civil Procedure Act stipulates that legal representatives are generally heard on behalf of parties who do not have legal capacity. However, the court may, at its discretion, decide to hear the child instead of or in addition to the legal representative. As in Slovakia, there are no specific provisions on the hearing of child witnesses, other than that minors are not required to take an oath when giving evidence. However, the Family Law Act contains detailed provisions for cases where the child's opinion is considered particularly important in family law matters. Accordingly, the law stipulates that in any legal proceedings in which the rights of the child are involved or in which the child has a vested interest, the child is entitled to be duly informed of the salient aspects of the case, to be provided with counsel, to articulate their perspective, and to be apprised of the implications of the proceedings. The child's opinion is to be given due consideration, with this being assessed in accordance with the age and level of maturity of the child in question. It is acknowledged that the child may be reluctant to articulate their perspective, a sentiment that the court is obliged to acknowledge and respect. A separate regulation governs the manner in which the child's opinion is to be sought. The regulation stipulates that the child must express their opinion in the absence of parents, guardians, or other persons caring for the child. Determining the child's opinion is a multifaceted process that entails not only the act of listening to the child, but also encompasses a series of preparatory measures, the communication of pertinent rights and the procedural framework, and the evaluation of the child's aptitudes and developmental maturity. This is followed by the expression of opinion, which does not consist of questioning, but rather a kind of conversation in a stimulating and encouraging atmosphere in which the child feels safe and respected and where their opinion is listened to seriously and taken into account. In a manner analogous to Hungarian practice, the child may also express their opinion through non-verbal forms of communication, such as play, body language, facial expressions, drawing, and so forth. The methodology employed in soliciting the child's perspective is subject to variation depending on their age. The latter group is permitted to articulate their perspectives autonomously in a designated forum. The necessity for an expert to be present is contingent upon the court's determination. Conversely, children under the age of 14 typically articulate their perspectives through a guardian or other specialist, such as a psychologist. It is acknowledged that children may express their opinions in an appropriate location that is adapted and equipped for working with children (this may be, for example, a separate room in the court, a home, or other premises).[33]

In Serbia, every natural person has party capacity, which means that every child, regardless of age, maturity or other characteristics, has party capacity, i.e. they can participate in proceedings as a plaintiff or defendant. In contrast, under Serbian law,

32 Kunda and Smojver, 2025, pp. 26–27.
33 Ibid., pp. 30–33.

litigation capacity signifies the ability of an individual to act independently. In the event that an individual lacks litigation capacity, they are required to be represented by a legal representative. The capacity to engage in legal proceedings is contingent upon the possession of full legal capacity, which is ordinarily acquired at the age of 18. In certain cases, minor children may acquire full legal capacity earlier. For instance, in accordance with Hungarian, Slovenian, Slovak and Croatian legislation, if a minor who has reached the age of 16 enters into marriage, they acquire full legal capacity upon entering into marriage. Furthermore, in accordance with Slovenian legislation, the court has the discretion to confer full legal capacity on a minor aged 16 who has become a parent. A party lacking legal capacity is permitted to participate in proceedings solely through the medium of a legal representative or guardian. In the event of a conflict of interest between the child and their legal guardian, the Serbian Civil Procedure Code, as in previous cases, allows for the appointment of a temporary representative (typically a lawyer) for such cases.[34] When it comes to hearing children in civil proceedings, two different cases must be examined. In the first instance, the child is heard for the purpose of expressing their opinion.[35] The most salient aspects of the child's right to express their opinion are set out in the Serbian Family Law Act. The right to express an opinion is granted to every child capable of forming an opinion, and it would appear that Serbian law does not recognise an age limit in this regard. However, the law stipulates in a subsequent article that children over the age of 10 are permitted to express their opinions directly and freely in all court proceedings. Whilst these two provisions may appear contradictory, it can be argued that the relationship between them is complementary, and that children over the age of 10 are presumed to be capable of forming opinions. It is insufficient for the child merely to articulate their perspective; the court is also obligated to give it due consideration. However, the determination of congruence between the court's decision and the child's opinion is contingent upon the evaluation of whether it is in the child's best interests. In accordance with the principles of family law, the court is obligated to furnish the child with fundamental information, to heed their concerns, and to grant them the opportunity to articulate their perspective, provided that they are deemed a party to the legal proceedings. Conversely, the court appears to have no such obligation if the child is not a party to the court proceedings, even in cases affecting the child's interests. Nevertheless, both case law and academic literature concur that the court is obligated to ensure the effective participation of the child, even in cases where the child is not a party to the proceedings. In accordance with the prevailing jurisprudence, the wishes and feelings of the child, in accordance with their age and maturity, are deemed to be a pertinent factor in determining the best interests of the child. It is imperative to note that this assessment cannot be conducted without first hearing the child's opinion. The court generally lacks the expertise to evaluate a child's capacity to form a judgment; consequently, the assessment is conducted by

34 Knežević, 2025, pp. 146–147.
35 Ibid., p. 152.

professionals, such as psychologists or social workers. It is imperative to note that this evaluation must be conducted prior to the scheduled hearing, and the latter can only proceed if the expert issues a favourable opinion. The court is obliged to refrain from hearing the child if it is clearly contrary to the child's best interests.[36] In the second case, the child is heard as a witness. In a manner analogous to the Slovak and Croatian civil procedure codes, the Serbian civil procedure code does not contain specific provisions on children called to testify. In accordance with the prevailing provision, any individual capable of providing information pertaining to the pertinent facts is eligible to serve as a witness, thereby indicating that the requirement for the individual to have reached the age of majority is not a prerequisite. However, it is advisable to adopt an innovative approach when engaging with children. For instance, the judge is required to first elucidate the procedural framework to the child, and the judge is duty-bound to conduct the hearing in a manner commensurate with the child's age and maturity, employing language that is accessible and comprehensible to them.[37]

The Romanian Civil Code stipulates that only persons of full age have full capacity of exercise. A person becomes of full age upon reaching the age of 18. Minors who have reached the age of 14 have limited capacity of exercise. Similar to the Hungarian, Slovak, Croatian, Slovenian, and Serbian rules described above, minors who have reached the age of 16 and are married have full capacity of exercise in Romania. It is important to note that inors under the age of 14 do not have legal capacity. The Romanian Code of Civil Procedure stipulates that children under the age of 14 may be heard as witnesses without taking an oath, similar to the Croatian rules, but the court is obliged to call on them to tell the truth. Minors are heard as witnesses in the council chamber, and the court decides whether parents, guardians, or other persons may be present at the hearing.[38] In Romania, the law on the protection and promotion of children's rights expressly allows children to express their opinions from a certain age. The law also stipulates that children have the right to freedom of expression, i.e. to seek, receive, and impart information in any form and by any means of their choice. The right of children to participate includes the right to be heard in proceedings, as children who are capable of forming their own opinions have the right to express their views freely on matters affecting them. Under the Romanian Civil Code, as in Serbia, children aged 10 and above must be heard and their opinions taken into account in accordance with their age and maturity. It is important to note that children under the age of 10 may also be heard if the competent court considers it necessary for the resolution of the case. In addition, every child has the right to request a hearing. Similar to Slovak, Slovenian, and Czech regulations, stricter rules apply to adoption, as Romanian regulations require the consent of adopted children over the age of 10 for adoption.[39] Hearings with children are to be conducted in a free, pressure-free,

36 Ibid., pp. 143–146.
37 Ibid., p. 152.
38 Fegyveresi, 2025, pp. 127–128.
39 Ibid., pp. 125–126.

stress-free environment and in a language that the child can understand. Furthermore, the law on the protection and promotion of children's rights provides for a special form of hearing for abused, neglected, and exploited children when special protective measures are established. According to this article, the hearing shall take place exclusively in the courtroom, in the presence of a psychologist, and only after the child has been prepared in advance. The child's statement may be recorded using audiovisual equipment.[40]

French law employs the concept of discernment to determine whether a minor's wishes can be taken into account, whether in decision-making, in expressing opinions on matters affecting them, or in assuming responsibility. This is a subjective concept that depends on the personality and individual development of each child. It is not defined by law, but is determined by the judge on the basis of the minor's age, physical abilities, and intelligence. French law has several age limits that can be combined with the minor's discernment. In the field of civil law, for instance, the age of 16 is the age at which minors can be emancipated. In accordance with the provisions stipulated within the French Civil Code, minors with discernment are heard by the judge in all proceedings concerning them. In addition, minors have the right to be heard if they so request. The hearing may take place individually, in the presence of a lawyer or a person chosen by the minor, unless the judge finds that the chosen person is not in the minor's best interests. As in previous cases, under French law, minors are represented by their parents or tutor. For example, similar to Hungarian regulations, if the interests of a minor conflict with those of their legal representative during proceedings, the presiding judge will appoint an ad hoc administrator to represent them. In court proceedings, they are generally represented by their legal representative.[41] A certain degree of professionalization has taken place among lawyers dealing with minors. The National Charter for Children's Lawyers sets out best practices and the specificities of providing assistance to minors. In particular, it stipulates that children should, as far as possible, be assisted by a lawyer who specializes in dealing with minors.[42] In certain cases, minors may act on their own behalf without representation, for example in cases of educational assistance, i.e. if the minor's health, safety or morals are at risk, or if the conditions for the minor's upbringing and physical, emotional, intellectual and social development are seriously endangered. Minors in such danger may apply directly to the juvenile court judge. Even if the minor does not have the necessary discernment, he or she may still be represented in the educational assistance proceedings by an ad hoc administrator.[43] Pursuant to the French Civil Code, minors may request that the judge hear them in all proceedings concerning them. If the minor has sufficient discernment, the judge is obliged to hear the minor if they so request. The hearing may also be initiated by the child's parents. The French

40 Ibid., pp. 130–131.
41 Nord-Wagner, 2025, pp. 68–71.
42 Ibid., p. 74.
43 Ibid., pp. 68–71.

Code of Civil Procedure allows the judge to refuse to hear the minor if he or she does not consider it necessary for the resolution of the dispute or if it appears to be contrary to the minor's interests. The child is heard by the judge or a person appointed by the judge. In certain cases, it may be justified to use judges who are specially trained in hearing children. The person appointed by the judge to hear the child must have no connection with either the minor or the parties to the proceedings and must work in the social, psychological, or medical-psychological field. The hearing of the minor must take place as soon as possible so as not to delay the proceedings.[44]

In the Polish legal system, the institution of hearing children is regulated by the Code of Civil Procedure. The Act stipulates that in matters relating to the person or property of a minor, the court shall hear the child if his or her mental development, state of health and maturity so permit, taking into account, as far as possible, his or her reasonable wishes. It is important to note that merely hearing the child's opinion does not inherently necessitate its consideration in decision-making processes concerning the child. An important criterion is that the child must consent to being heard. Refusal to consent is grounds for not hearing the child. Hearing the child is a procedural act and is not part of the evidentiary process. The hearing is not a means of evidence and does not constitute evidence. Its function is similar to that of witness testimony, as its purpose is to ascertain the child's position in matters directly affecting the child. Hearing the child is particularly important, for example, in matters concerning contact, guardianship, foster parents or, as already mentioned in the Slovak, Slovenian, Czech and Romanian regulations, adoption. The court is obliged to examine each case individually and decide on a case-by-case basis whether the direct involvement of the child is necessary for the court proceedings, taking into account the impact of the hearing on the child's well-being and emotions. If the judges decide to hear the child, they do so when the child is over 13 years of age, as the child has limited legal capacity from that age onwards. As the legislator has not set an age limit for the possibility of hearing a child, it is also possible to hear younger children. The hearing must be conducted at the ideal stage of the proceedings, as contacting the child too early means that the judge does not know which issues need to be clarified and does not have sufficient knowledge to plan and conduct the hearing. On the other hand, a hearing held at the final stage of the proceedings may lead to the child being held responsible for the outcome. Only an expert psychologist may participate in the hearing of the child alongside the judge. Under no circumstances may other persons participate in the hearing, including the child's parents or persons representing the parents. The child may only be heard once during the proceedings, unless this is in the child's best interests or the child requests a new hearing. It is important that the child is properly prepared for the hearing, but this must not influence the content of the child's testimony. However, it is necessary to sensitise the child to tell the truth and describe what actually happened. The child's hearing shall take place in a closed session, which shall be held in a suitably equipped room at the court's premises or

44 Ibid., p. 74.

outside the court's premises. The venue for the hearing must be child-friendly, provide a sense of security, an intimate and discreet atmosphere, and facilitate concentration and free expression of opinion. The room used for hearing the child must meet the conditions of a friendly interview room, i.e. the blue room, and should resemble a living room rather than a staff room. It should be equipped with seating designed for children and accessories that lend it a friendly character, depending on the child's age. The interviewer's attire should be informal; for example, the judge should not wear a robe. The judge should communicate with the child in a language appropriate to the child's age and mental development. Unlike the rules in the countries described above, in Poland, the hearing of a child may not be recorded on audio or video. The activity documented in the official minutes is an appropriate solution, as the purpose of the hearing is not to gather evidence but to ascertain the child's position. In Polish practice, however, minors are most often interviewed in court offices. The institution of the interview ensures procedural subjectivity for the child, but does not confer procedural capacity. As in the previous countries, under Polish law, procedural capacity is reserved for persons with full legal capacity. Persons without procedural capacity may only perform procedural acts through their legal representative.[45]

In summary, it can be concluded that the legal systems of the countries examined all strive to ensure children's rights to participate in court and other proceedings. Individual national laws – typically civil codes and civil procedure codes – define in detail the legal capacity of children and the circumstances and manner of their hearing. A common starting point in this regard is that in most countries, children only become fully capable of acting upon reaching the age of majority, but they are entitled to varying degrees and forms of procedural participation even before that. The countries examined all have rules stating that it is essential to hear the views of children in matters affecting them, which is in line with Article 12 of the CRC. As mentioned in the introduction, the Convention states that children have the right to express their views freely in all matters affecting them, and that those views should be given due weight in accordance with the age and maturity of the child. In all of the countries examined, emphasis is placed on directly ascertaining the views of the child, either through personal interviews or other forms of communication. In Serbia and Romania, hearing children is mandatory even from a lower age, which shows an expansive interpretation of the requirements of the Convention. Although the procedural forms and age limits vary, the common principle is that the expression of children's opinions is not a mere formality, but a legitimate element of judicial and administrative decision-making, which states must ensure. Overall, it can be concluded that the regulations of the countries examined strive to comply with international standards, especially the requirements set out in the CRC.

45 Lis, 2025, pp. 110–120.

### *4.2. Participation of Children in Administrative Court Proceedings*

In the Hungarian legal system, the law on child protection and guardianship, along with the related government decree, places a clear obligation on relevant authorities to prioritise the fundamental interests of the child in their application. Furthermore, the law stipulates that children have the right to express their opinions and to be informed about their rights. This obligation to provide information rests primarily with the family and with organizations and individuals involved in the upbringing, care, or other matters concerning the child. It is important to note that children have the right to initiate proceedings before the courts and other bodies specified by law in the event of a violation of their fundamental rights. The law recognises that children between the ages of 14 and 18 with limited legal capacity to initiate proceedings in certain matters on their own initiative. The law provides for extensive consultation with those concerned in guardianship proceedings. Children with sufficient intellectual capacity but who are legally incompetent or have limited legal capacity must also be heard and informed of the possibility of making a statement. In the event that such a child requests a hearing, it cannot be refused, and in general, the hearing cannot be waived in matters concerning the personal and property affairs of such a child. Such hearings should primarily be conducted at the premises of the child welfare authority in the presence of the legal representative. However, the guardianship authority may also hear the child in the absence of the legal representative, which is justified if the interests of the child and the legal representative conflict. In many cases, the office is not the appropriate environment for building trust, and the situation of the person concerned may also make it difficult for them to appear before the authority. Consequently, the law permits the conduct of hearings outside the office premises.[46]

In the Republic of Slovenia, the Social Work Center is entrusted with the responsibility of safeguarding the rights of children and ensuring their well-being, operating under the auspices of a public mandate. It is noteworthy that until 2019, guardianship, foster care and adoption were governed by administrative law. However, with the introduction of the new family law, these matters were transferred to the jurisdiction of the district courts. Consequently, social work centers now cooperate with the courts in these proceedings. These social centers continue to operate in the field of international protection and asylum-seeking children. The ability to be a party is a procedural prerequisite and a condition for conducting administrative proceedings. During the proceedings, the authorities must always examine ex officio whether the person acting as a party in the proceedings can actually participate in the proceedings as a party. Slovenian administrative procedure law does not contain any specific provisions on the representation of minors. In administrative proceedings, all children have procedural legitimacy. In these proceedings, the child acts as a subject of the administrative procedure. In administrative disputes, the provisions

46 Nagy, 2025, pp. 85–87.

of the Civil Procedure Act shall apply, unless the Administrative Dispute Act provides otherwise.[47]

In the Slovak Republic, the Administrative Procedure Act does not exclude minors from participating in administrative proceedings. However, if a minor participating in the proceedings is unable to act independently due to limited legal capacity, the Act requires that they be represented by a legal representative or that a guardian be appointed for them. Furthermore, Slovakia has administrative courts, which deal with cases that have already been or should have been dealt with by administrative authorities. In the context of administrative court proceedings involving minors, the provisions of the Code of Civil Procedure are the governing principles.[48]

Within the legal framework of the Czech Republic, children's right to participate in administrative proceedings is guaranteed by the Administrative Procedure Act. The legal capacity of the subjects corresponds to their capacity to act. Irrespective of their procedural capacity, everyone has the right to be heard during the proceedings, so children must be given the opportunity to express their opinion directly or through their representative or the social and legal protection authority.[49] In addition, the Act on Socio-Legal Protection of Children regulates procedural and substantive legal issues relating to the social and legal protection of children. In accordance with the provisions stipulated within the Act, children who are capable of forming their own opinions have the right to express their opinions freely in all matters affecting them for the purposes of social protection. The social welfare authority takes into account the wishes and feelings of the child in its measures, bearing in mind the child's age and development, so as not to endanger or impair their emotional and psychological development.[50] In accordance with the Czech Civil Code, the Act on Socio-Legal Protection of Children establishes a rebuttable presumption that children over the age of 12 have the capacity to form opinions.[51]

In a manner analogous to that of Slovakia, Croatia also has administrative courts within which children are guaranteed access to proceedings without any specific age limit. However, the participation of children in administrative proceedings is not regulated in detail by the applicable legislation. Consequently, the general rules of participation explained above apply to both representation and hearings.[52]

France also has administrative courts, but these deal with minors less frequently than civil or criminal courts. The fundamental principles of the Civil Code are applicable to administrative court proceedings.[53]

In Serbia, one of the most important features of administrative disputes is the minimal regulation of proceedings. Accordingly, there are no specific regulations

47 Burkelc Juras, 2025, pp. 190–192.
48 Koromház, 2025, pp. 167–168.
49 Kissová, 2025, pp. 55–56.
50 Ibid., pp. 49–50.
51 Ibid., pp. 53–54.
52 Kunda and Smojver, 2025, pp. 38–39.
53 Nord-Wagner, 2025, p. 71.

on the hearing of children in administrative court proceedings.[54] In the absence of specific regulation, issues must be resolved through the application of civil procedure rules by analogy.[55]

Overall, it can be concluded that in the countries examined, the regulation of children's participation in administrative proceedings is typically based primarily on the norms of civil procedural law. There is no uniform codification specifically regulating the participation of minors in administrative or administrative court proceedings that would clearly apply to all situations. Nevertheless, the right of children to be heard and to have their opinions taken into account, in accordance with their age and maturity, is guaranteed in all countries, albeit in different forms and with different levels of guarantees.

### *4.3. Participation of Children in Criminal Court Proceedings*

In criminal proceedings, children are typically implicated in three distinct roles: as victims, witnesses, or perpetrators of the crime. In this particular context, the primary objective is to protect the interests of children, with particular regard to ensuring that they do not become secondary victims during the proceedings and to reducing the psychological and social harm resulting from the legal process. The cornerstone for the protection of children is provided by national criminal codes and specific child protection provisions, while specific procedural safeguards are laid down in criminal procedure laws and other related legislation. The participation of children in criminal proceedings poses particular challenges, as traditional criminal proceedings are often tailored to the needs and language of adults. As a result, the proceedings can often be frightening for children and may be risky in terms of their understanding and emotional processing. For this reason, modern legal systems place particular emphasis on the development of child-friendly justice, which includes information tailored to the age and maturity of children, special hearing techniques, and the involvement of trained legal and psychological professionals.

#### *4.3.1. The Child as Witness or Victim of Crime*

The Hungarian Criminal Code uniformly regulates provisions relating to vulnerable groups requiring special protection and provides special treatment for those who are impeded in their understanding, exercise of their rights, fulfillment of their obligations, or effective participation in criminal proceedings. It is important to note that special treatment generally applies only to victims and witnesses. In instances where an individual is involved in legal proceedings and has not yet reached the age of 18, the law requires the authorities to classify them as vulnerable. In such cases, the aim is to ensure that the procedural act can be carried out without delay, that it does not have to be repeated if possible, and that there is no need to meet unnecessarily with the person involved in the criminal proceedings. Furthermore, the authorities may

54 Knežević, 2025, p. 152.
55 Ibid., p. 149.

also exclude the public from the proceedings. In proceedings against persons under the age of 18, video and audio recordings should be made where possible. In addition, the presence of a forensic psychologist may be required during the proceedings. The testimony of a person under the age of 18 may not be verified by a polygraph, and confrontation may only be ordered with their consent. Even stricter rules apply to proceedings against persons under the age of 14. They may only be questioned if their testimony cannot be replaced by other means. The questioning must be conducted in a room designed or suitable for this purpose, if possible by the same person each time. In the case of persons under the age of 14, the law prohibits confrontation. The law applies even stricter rules in cases where a crime against sexual freedom or sexual morality has been committed against a person under the age of 18. In such cases, more restrictive rules apply to the location of the proceedings, the presence of the defendant and the defence attorney is prohibited in all cases, and if the proceedings are conducted by telecommunication, the person concerned may only see the judge, the prosecutor, and the member of the investigating authority, and those present may only ask questions by way of a motion. The Barnahus house is used for interviewing children. The interview does not take place in an official room, but in a place that meets the needs of children, where a psychologist or counselor talks to the children. The conversation is recorded on video or audio, which allows members of the authorities to follow the interview from an observation room and ask questions. Such interviews may only be conducted in the case of victims and exclusively in cases of crimes against sexual freedom or sexual morality.[56]

In contrast to the Hungarian system, the Slovenian Criminal Code regulates different interrogation procedures for different categories of victims and minor witnesses. When questioning minor witnesses, special care must be taken to avoid any harmful effects on their mental state. This is facilitated, for example, by the fact that, if necessary, the questioning of minors must be carried out with the assistance of a teacher or other expert. The Slovenian Criminal Code also contains stricter provisions for cases where, for example, a crime against sexual integrity has been committed, as in such cases the minor victim must have a defence attorney throughout the criminal proceedings. Minors who do not have a lawyer will be assigned one by the court ex officio. It is important to note that Slovenian legislation focuses primarily on the protection of minors as victims and does not pay particular attention to child witnesses, even though they too find themselves in a particularly difficult situation, especially if their role in the proceedings may affect their family relationships outside the proceedings.[57]

The Slovak Criminal Code does not explicitly address the age limit for the legal capacity of witnesses and does not restrict the circle of witnesses, so even minors can be questioned during criminal proceedings. Similar to Hungarian rules, witness questioning must be conducted in such a way that it does not need to be repeated later,

56 Nagy, 2025, pp. 96–100.
57 Burkelc Juras, 2025, pp. 194–196.

so for this purpose, the questioning may be recorded and played back. The presence of a psychologist is mandatory during the questioning of a minor witness, and it is also possible for the judge to conduct the questioning of the witness himself.[58]

As in the previous cases, Czech legislation also emphasizes that the questioning of minor witnesses or victims must be conducted with particular care by a person experienced in dealing with minors. This is to ensure that the interview does not have to be repeated at a later date.[59] Similar to the Slovak system, if criminal proceedings concern a child who is a victim or witness of another person's crime, there is no age limit for interviewing minors.[60] Furthermore, the authorities are obliged to collaborate with entities that provide social and legal protection for children, organizations representing the interests of citizens, and persons implementing advocacy programs. As a further guarantee, the protection of the personal data and privacy of persons under the age of 18 is expressly regulated in the Criminal Code. Accordingly, no one may disclose information that could identify a victim under the age of 18. This rule also applies to the publication of images, visual and audio recordings, and other information related to the proceedings.[61]

Croatian legislation is also in accordance with the aforementioned principle, which stipulates that children must be treated with special care in order to avoid any harmful consequences affecting their upbringing and development. In addition to the rights generally enjoyed by victims in criminal proceedings, child victims also have special rights. These rights may include, among others, the right to legal representation at public expense, the confidentiality of personal data, and the exclusion of the public from the proceedings, as mentioned above. Similar to Hungarian and Slovenian regulations, Croatian regulations are even stricter in cases involving crimes against sexual freedom or crimes related to human trafficking. In these cases, the child is entitled to additional rights, such as the right to a counselor before the examination, the right to be interviewed by a person of the same sex, the right to refuse to answer questions that strictly relate to the victim's private life, and the right to be examined using audio-video equipment, similar to Hungarian regulations. The questioning of witnesses differs slightly depending on whether the child is under or over the age of 14. If not, the witness is interviewed by the investigating judge without the parties being present, using audio-video equipment. As in the Hungarian, Slovenian, and Slovak systems described above, a psychologist, teacher, or other expert assists in the examination. A common principle in the countries examined is that children should be interviewed only once during criminal proceedings, thus avoiding the risk of secondary victimization resulting from multiple interviews. the legislation of the Republic of Croatia permits the re-interviewing of children only in exceptional cases. In the case of children over the age of 14, the witness is also interviewed by the

58 Koromház, 2025, pp. 173–174.
59 Kissová, 2025, pp. 48–49.
60 Ibid., p. 54.
61 Ibid., p. 56.

investigating judge. If deemed necessary, the rules applicable to children under the age of 14 may also be applied to them, but if this is not deemed necessary, the interview is conducted in accordance with the general rules, i.e., children over the age of 14 are interviewed as adult witnesses. The child is also protected during identification, as the persons to be identified cannot see or hear him or her. The same applies to any evidence where the child's identity is visible or identifiable. In such cases, the recording will be reproduced with the child's face and voice distorted. However, if the interests of the proceedings as a whole require that the child's identity be visible, the original recording may be presented.[62] This solution is similar to Czech regulations, according to which the personal data of minors may only be disclosed if this is necessary to locate other persons, to conduct criminal proceedings, or if it is in the public interest.[63]

Within the jurisdiction of Serbia, criminal proceedings involving minors and the special protection of children who are victims of various crimes are regulated by the Law on Juveniles. Under this law, minor victims must have a lawyer from the first hearing of the accused. If the minor does not have a lawyer, the court will appoint one ex officio. Serbian literature emphasizes that the presence of such a lawyer is essential for the minor victim to understand the criminal proceedings, the individual procedural steps, and their rights and obligations. Serbian law also reflects the generally accepted principle that minors should be treated according to their maturity, personality, and living conditions during questioning. In addition, questioning methods should be designed to create a child-friendly atmosphere. All persons involved in the proceedings must take care of the minor during the interrogation, which includes taking into account the minor's maturity and individual characteristics and protecting their privacy in order to avoid any negative impact on their development. If necessary, psychologists or educators may also participate in the interview, as is the case under Slovak, Hungarian, and Slovenian rules. In addition to them, the presence of the prosecutor and defence attorney is mandatory, and the parent or guardian is usually also present. Compared to the countries examined in the book, Serbian law is 'less' strict, as according to the regulations, a minor victim may be questioned no more than twice. The court may also conduct the questioning via video call, or it may even take place at the minor's home or in a social care center. In cases where a child has been summoned as a witness, there are generally no specific provisions. The court must assess whether the child is capable of giving testimony.[64]

In Romania, the main procedural rights and safeguards relating to the hearing of victims are set out in the Romanian Code of Criminal Procedure, which stipulates that the hearing of victims under the age of 14 must take place in the presence of one of their parents, guardian or a representative of the person or institution responsible for the minor's upbringing and education, as well as a psychologist appointed by the

62 Kunda and Smojver, 2025, pp. 33–35.
63 Kissová, 2025, p. 56.
64 Knežević, 2025, pp. 151–153.

court. At the time of the hearing, minors under the age of 14 may not be told that they must tell the truth, nor may they be made aware that false testimony is punishable, but they are warned that they must tell the truth, although they are not required to take an oath. While Hungarian criminal procedure law expressly prohibits confrontation in the case of minors under the age of 14, Romanian rules contain a restriction that the prosecutor's office must summon the parents or guardian, as well as the Directorate General for Social Assistance and Child Protection, to the confrontation of the minor. In addition to the Code of Criminal Procedure, two guidelines also provide for the methodology of interviewing minors. One is the 'Methodological Guide for Interviewing Minor Victims', which encourages the use of open-ended questions that can elicit specific, detailed answers in the form of verbal accounts. The other is the 'Guidelines for the Hearing of Children in Court Proceedings', which includes complex interdisciplinary psychological concepts and practices, as well as the practical application of national and international legal rules, all of which aim to strengthen and respect the rights of children. Two special rooms were set up in two large Romanian cities, Cluj-Napoca and Craiova, for the hearing of minors, and in 2016, a room for the hearing of minors was opened at the Bucharest Public Prosecutor's Office.[65]

It will subsequently be demonstrated that French criminal law applies stricter measures to juvenile offenders than the Central European countries examined in this book, but at the same time it applies largely similar procedural guarantees for the protection of juvenile witnesses and victims. Minors can be heard as witnesses from the age of 16, at which point they must take an oath to tell the truth. However, below this age – as in Romanian law – minors may also be heard by the court, but they do not take an oath and are therefore not regarded as witnesses in the strict legal sense. Similar to the Slovak model, in addition to criminal sanctions, judges also have educational measures at their disposal, which they often prefer in cases of less serious crimes. It is worth noting that judicial personnel and the competent courts are also specialized, which means that criminal proceedings are conducted by specialized prosecutors and only specialized judges can pass judgment on minors. French law also stipulates that minors must be represented by a lawyer in all courts, which is a generally accepted guarantee in most of the countries examined.[66] In accordance with Romanian legislation, French law also stipulates that the hearing or confrontation of a minor may take place in the presence of a psychologist or doctor specializing in children, a family member of the minor, a guardian ad litem, or any other person. The interview must always be recorded on audio-visual media. Audio recordings may only be made if this is in the minor's interest. The aim of this is to avoid secondary victimization by ensuring that the minor does not have to repeat their statement at different stages of the proceedings.[67] It is important to note that special procedures have been introduced for investigators interviewing child victims. Many police stations have a

65 Fegyveresi, 2025, pp. 134–135.
66 Nord-Wagner, 2025, pp. 72–73.
67 Ibid., pp. 74–75.

Mélanie room, which is used for interviewing minors. This room is like a children's room or a playroom with lots of toys, which not only makes the child feel safe, but also gives them the opportunity to show what happened to them, for example with the help of dolls.[68] This approach draws parallels to the Barnahus model in Hungary and the blue room initiative in Poland.

In Poland, Article 28 of the Act of 9 June 2022 on the Support and Rehabilitation of Minors regulates the interrogation of minor victims. According to the provisions of this Act, in cases involving the most serious criminal acts committed by a juvenile offender, a victim under the age of 15 at the time of questioning may only be heard as a witness if their testimony is deemed to be of significant importance to the resolution of the case. This hearing may only take place once, unless new circumstances arise that necessitate further examination, or if a request for evidence from a minor who did not have legal representation during the initial interrogation is granted. The hearing is conducted by the family court and involves an expert psychologist. The expert psychologist taking part in the hearing should be of the same gender as the victim, unless this would make the proceedings more difficult. The prosecutor, defence counsel, and the victim's attorney have the right to attend the hearing. The victim's legal representative, the person with whom the victim resides permanently, or an adult nominated by the victim may also be present at the hearing, provided it does not restrict the person being questioned from expressing themselves freely. If the juvenile offender, who has been notified of this activity, does not have a defence lawyer of their choice, the family court will appoint a defence lawyer ex officio. The interrogation is recorded using a video and audio recording device. The written record may be limited to a summary of the most relevant statements made during the hearing. The image and sound recording is attached to the protocol.[69] Conversely, Article 185a of the Code of Criminal Procedure establishes a specific process for the interrogation of juvenile victims in cases involving violence, unlawful threats, sexual offences and crimes against family members or caregivers. Minors under the age of 15 are questioned only once, after a special court session involving a psychologist. The hearing is recorded and this recording is played at the hearing. This approach is intended to protect the child's well-being by reducing stress and the risk of re-traumatisation. The following regulations must be observed when questioning a minor victim (i.e. an individual under the age of 15). A child is usually questioned only once, unless new relevant facts come to light or the defendant requests it, provided they did not have a lawyer during the first hearing. The hearing takes place during a court session and involves a psychologist. The activity record and image and sound recordings are played back at the hearing. The significance of testimony: questioning is only admissible if the child's testimony could significantly impact the resolution of the case. Minors aged 15 to 17 may also be questioned in this manner if there is a well-founded fear that

68 Ibid., pp. 77–78.
69 Article 28 of the Act of 9 June 2022 on the Support and Rehabilitation of Minors.

interrogation under normal conditions could negatively impact their mental state.[70] Article 185c of the Criminal Code regulates the questioning of victims over the age of 15. A victim of a sexual offence who has reached the age of 15 at the time of questioning may only be questioned as a witness if their testimony is deemed significant for resolving the case. This questioning may only occur once, unless new circumstances arise that require further clarification or if the defendant, who did not have legal representation at the time of the victim's initial hearing, requests additional evidence. The court shall conduct the victim's hearing with the participation of an expert psychologist immediately, no later than 14 days from receipt of the application. The prosecutor, defence counsel and the victim's attorney have the right to attend the hearing.[71] A person listed in Article 51 § 2 (i.e. a legal representative or a person under whose permanent care the victim remains) or an adult indicated by the victim also has the right to be present at the hearing if it does not restrict the victim's freedom of expression.[72] At the main hearing, the video and audio recording of the hearing is played and the hearing report is read.

#### *4.3.2. The Child as Perpetrator of a Crime*

In the Czech legal system, the substantive and procedural characteristics of criminal proceedings against minors are governed by the Act on Criminal Proceedings against Minors. Under Czech criminal procedure law, a minor is a person who, at the time of committing the offense, was at least 15 years of age but not yet 18 years of age. Similar to Romanian legislation, children under the age of 15 cannot be punished, so the rules of civil law apply to the actions of younger minors. It should be noted that persons involved in proceedings concerning minors must undergo special training on the treatment of minors. Criminal cases involving juveniles are heard before juvenile courts, which are not separate judicial bodies, but rather specialized judges working in general courts who cooperate with authorities dealing with the social and legal protection of children and with specialized law enforcement agencies. Minors have the right to professional representation and to choose a defence attorney during the proceedings.[73] As in the countries described below, minors must have a lawyer, even if they expressly refuse representation. If the minor does not exercise their right to choose a defence attorney and neither their legal representative nor guardian chooses an attorney, then the closest relative or other interested person may choose a defence attorney.[74] An interesting feature of Czech law is that the legal representatives of minors have the right to represent the minor in the proceedings and to act on their behalf. It should be noted that, in the best interests of the child, they may exercise these rights on behalf of the minor even against the minor's will.[75]

70 Art. 185a of the Polish Criminal Code.
71 Ibid., Art. 185c.
72 Ibid., Art 51 § 2.
73 Kissová, 2025, pp. 43–44.
74 Ibid., pp. 58–59.
75 Ibid.

It is interesting to note that in Slovenia, children under the age of 14 cannot be held criminally responsible, as the Slovenian Criminal Code states that although they may commit unlawful acts, they cannot be perpetrators of crimes. At the age of 14, individuals become younger juveniles (aged 14-16) and then older juveniles (aged 16-18). However, the Slovenian Criminal Code treats them in a special way after they reach the age of 18 and until they reach the age of 21 (young adults). Such young adults may receive penalties applicable to juveniles due to their personal development.[76] In contrast, in Hungary, the minimum age of criminal responsibility for certain crimes (e.g., homicide) is 12 years.[77] The Slovenian Criminal Code stipulates that all parties involved in proceedings against minors must acquire additional knowledge in the field of juvenile crime, and to this end, the competent authorities organize basic and regular training for them. The commitment of Slovenian legislation to child protection is also illustrated by the fact that the initiation of criminal proceedings against minors is, in all cases, subject to the exclusive motion of the public prosecutor. In addition, special provisions apply to situations where a minor is deprived of his or her liberty, as in such cases, similar to Slovak rules, the minor must be kept separate from adults.[78]

The criminal policy of the Slovak Republic reflects the need for special protection of minors. Similar to the Hungarian Criminal Code, the Slovak Criminal Code contains special provisions on the criminal prosecution of juvenile offenders. All provisions of the Criminal Code apply to juvenile offenders, except for those regulated in the separate section of the law on criminal proceedings against juveniles. The provisions on proceedings against juveniles apply if the offense was committed by a juvenile before reaching the age of 18, provided that the indictment is brought before the juvenile reaches the age of 19. The law stipulates that, as in the Slovenian system, persons under the age of 14 cannot be held criminally responsible. In addition, similar to the Czech model, the law expressly regulates the criminal liability of persons under the age of 15, as if such a person did not have the mental and moral maturity necessary to recognize the illegality of the act at the time of its commission, they cannot be held criminally liable. and moral maturity necessary to recognize the illegality of the act at the time of its commission, they cannot be held criminally responsible. Similar to Hungarian criminal policy, the Slovak Criminal Code expressly regulates the imposition of sanctions and educational measures, giving preference to educational measures over imprisonment. This solution supports the idea that juvenile offenders should be given a real chance to reintegrate into society after serving their sentences. If a prison sentence must be imposed, it must be served in a penal institution specifically reserved for juveniles. The court may even decide that the prison sentence must be served in such a special institution even if the convicted person

76 Burkelc Juras, 2025, pp. 192–193.
77 Art. 16 of the Act C of 2012 on the Criminal Code.
78 Burkelc Juras, 2025, pp. 198–199.

has already reached the age of 18.[79] Although such convicts are no longer formally considered minors, the regulation is similar in this respect to the Slovenian practice, where the category of minors remains in force until the age of 21. A further guarantee is that the social and legal protection authorities and the guardianship authority must be involved in proceedings against minors. Similar to Slovenian regulations, minors must always have a defense attorney in criminal proceedings; if they do not choose one, the court must appoint one from among the lawyers. Similar to the Hungarian and Slovenian systems described above, the Slovak Criminal Procedure Code also stipulates that, in order to protect the interests of minors, the court may, if necessary, order the exclusion of the public from the proceedings.[80]

In light of the particularly sensitive nature of criminal law, Croatia, in a manner similar to Slovenia and the Czech Republic, has legislation that specifically regulates criminal proceedings involving minors. The general rules for proceedings against juveniles are contained in the Criminal Procedure Act as lex generalis, while the Act on Juvenile Courts must be applied as lex specialis. As has been highlighted in several countries, in Croatia it is also mandatory to provide a defence lawyer for juvenile defendants and to notify the social services, which promotes the comprehensive protection of the child's interests. As has already become apparent, the age of criminal responsibility varies slightly between countries. In Croatia, it has been set at 14 years of age, so children who have not yet reached the age of 14 cannot be held responsible for criminal offenses. This age limit is strictly regulated by Croatian law, as the law does not allow for the prosecution of children under the age of 14, even if it is established that they were capable of assessing and understanding the consequences of their actions. In contrast, Hungarian law is different, as it holds children as young as 12 years of age criminally responsible for certain crimes. The law on juvenile courts distinguishes between minors and juveniles (in this respect, it is similar to Hungarian law). Young adults are children who have reached the age of 14 but are not yet 18. Similar to Slovenian, Slovak, and Romanian regulations, Croatian law also includes a third category, young adults, who are persons between the ages of 18 and 21.[81] Compared to the countries examined in this book, a unique solution is that criminal cases against children and young adults are tried by juvenile courts. The beginnings of this have already appeared in the Czech Republic, but separate judicial bodies have not yet been established there; instead, specialized judges working in general courts hear cases involving minors. Croatian juvenile courts, on the other hand, are established as separate divisions of county courts and municipal courts at the seat of the county courts. Juvenile judges must be appointed on the basis of their expressed affinity for the education, needs, and development of young people. They

79 Koromház, 2025, pp. 173–175.
80 Ibid., pp. 175–176.
81 Kunda and Smojver, 2025, p. 37.

must have a basic knowledge of criminology, social pedagogy, youth psychology, and youth social work.[82]

In line with Slovak, Slovenian, and Croatian regulations, Serbian law on juveniles stipulates that a child can only be charged with a criminal offense if the defendant was at least 14 years old at the time of the offense, as the age of criminal responsibility in Serbian law is 14. As in the countries described above, defence is mandatory in Serbia from the first hearing onwards. Whether a juvenile has a defence attorney is not up to them. Juveniles have the right to appoint their own defence attorney, but, as in Czech regulations, their legal guardian or relative may also do so. If no defence counsel is appointed, the court will appoint one ex officio, similar to the Slovenian model. The minor's defence counsel must be a lawyer with expertise in children's rights and juvenile crime.[83] Although there are no specific juvenile courts in Serbia, the law requires judges to specialize in certain areas of law. For example, in criminal cases involving juvenile offenders, judges must have expertise in children's rights and the criminal law protection of minors. Judges must complete training organized by the Judicial Academy, which has evolved from basic training into a more comprehensive curriculum aimed at effective continuous professional development.[84]

In Romania, with regard to the criminal responsibility of minors, the Criminal Code stipulates that minors under the age of 14 cannot be punished, minors between the ages of 14 and 16 may only be punished if it can be proven that they committed the act at an age when they were capable of acting, and minors over the age of 16 may be punished. Accordingly, Romanian criminal law establishes an absolute presumption of lack of discernment in the case of minors under the age of 14, while in the case of minors between the ages of 14 and 16, it establishes a relative presumption of discernment. In order to establish criminal responsibility, a forensic psychiatric opinion confirming the existence of the ability to discern is required. The Romanian Code of Criminal Procedure regulates proceedings involving minors in a separate chapter. Similar to Slovenian, Slovak, and Croatian regulations, the procedural rules relating to minors apply to persons who have reached the age of 18 but have not yet reached the age of 21, if they were minors when they became suspects and if the judicial authority deems it necessary. Under Romanian rules, a minor defendant may only be questioned once, and further questioning may only be authorized by the judge in duly justified cases. Cases involving juvenile defendants must be heard urgently and in closed session. The law on the organization of courts stipulates that divisions or specialized bodies dealing with juvenile and family law matters must be established to hear both crimes committed by minors and crimes committed against minors. The law in question does not make it mandatory to establish special courts in every county

82 Ibid.
83 Knežević, 2025, pp. 149–151.
84 Ibid., pp. 152–153.

to hear cases involving minors, so there is only one special court and prosecutor's office in Romania dealing with crimes against minors and families.[85]

Of the countries examined, French law shows the most striking difference in terms of the minimum age for criminal responsibility. In France, minors can be held criminally responsible from the age of 13. However, this is a rebuttable presumption, as if the minor can prove a lack of discernment, criminal responsibility cannot be established. French law also takes a stricter approach, as minors over the age of 13 may be subject to imprisonment and fines, which represents a significant increase in criminal liability. Under French criminal laws, minors between the ages of 13 and 18 normally benefit from a reduction by half of the maximum statutory penalty applicable to adults for the offence in question. However, from the age of 16, judges may, through a reasoned decision, set this reduction aside. In such cases, minors can be sentenced to the same penalties as adults.[86] Minors suspected of an offence may, depending on their age and the seriousness of the allegations, either be interviewed freely (in which case they may leave at any time) or be subjected to coercive measures such as police custody (from the age of 13) or a special retention procedure (for those under 13).

Based on an examination of the involvement of children in criminal proceedings, it can be concluded that legislative and law enforcement solutions have a dual purpose: on the one hand, to protect the fundamental rights and interests of children, and on the other hand, to maintain the effective functioning of the criminal justice system. However, the implementation of this dual objective may vary in terms of the regulatory techniques used by individual states and the procedural guarantees they provide. Among the Central European countries examined, Slovenia stands out with a unique solution, as it has adopted a separate law on the protection of children in criminal proceedings and comprehensive treatment in children's homes.[87] The procedural solutions proposed in this law aim to ensure the uniform and comprehensive treatment of children in court, whether as witnesses or victims.[88] In addition to Slovenia, the Czech Republic also applies such a solution, where the law on criminal proceedings against juveniles provides a separate framework for the enforcement of the specific features of proceedings against juvenile offenders. The purpose of separate regulations on proceedings involving minors is to apply measures that effectively contribute to preventing minors from committing unlawful acts, finding appropriate social acceptance, and contributing to the restoration of the damage caused by their unlawful acts. [89] Croatia also has a similar independent regulatory solution, where the Juvenile Court Act establishes special procedural guarantees in criminal proceedings against minors.[90] The central objective of the Act, similar to the Slovak legislation,

85 Fegyveresi, 2025, pp. 131–134.
86 Nord-Wagner, 2025, pp. 68–69.
87 Burkelc Juras, 2025, p. 193.
88 Ibid., pp. 195–196.
89 Kissová, 2025, p. 47.
90 Kunda and Smojver, 2025, pp. 33–34.

is the rehabilitation and reintegration of juvenile offenders into society. [91] In Serbia, criminal proceedings involving minors and the special protection of children who are victims of various crimes are regulated by the Juvenile Act.[92] In Romania, in addition to the Code of Criminal Procedure, two guidelines also provide for the methodology of hearing minors. Although these are not legal provisions, they are important in that they serve as practical guidelines that effectively reinforce respect for children's rights and a child-friendly approach in proceedings. [93] However, in other countries in the region, guarantees relating to children are typically scattered throughout the Criminal Code or the Code of Criminal Procedure, while Slovenia has developed a comprehensive, separate regulatory framework. This solution indicates that Slovenian legislation attaches particular importance to the interests of children and strives to consistently apply a child-friendly approach in their participation in criminal justice, which is most clearly reflected in sanctions tailored to minors.

Based on the comparison, it is clear that the Slovenian and Croatian models stand out among the countries examined, as both regulate criminal proceedings involving juveniles in separate legal frameworks and ensure the protection of children's interests through complex institutional solutions, such as child-friendly interrogation rooms, special courts, and specialized judges—to protect the interests of children. The Czech solution is partly similar, but instead of separate court institutions, it relies on judges assigned to deal with juveniles within the framework of general courts. There are differences between the countries examined in terms of the age of criminal responsibility, which is typically set at 14 or 15 years. French law shows the most striking difference in terms of the lower age limit for criminal responsibility. In France, minors can be held criminally responsible from the age of 13, which differs significantly from the regulatory practice in Central European countries, where the age of criminal responsibility is typically set higher. At the same time, the common features of the regulations in the countries examined cannot be ignored. It can be concluded that the requirement to avoid secondary victimization plays a central role in the legal systems of almost all countries, which is guaranteed by special hearing methods, the involvement of psychologists and educators, the use of audiovisual tools, and the possibility of excluding the public. Overall, it can be concluded that the principle of child-friendly justice is more or less consistently applied in the regulations of the countries examined.

91 Ibid., p. 37.
92 Knežević, 2025, pp. 149–150.
93 Fegyveresi, 2025, pp. p. 134.

## 5. Concluding Remarks

It has been emphasized several times in this chapter that children do not have the right to self-determination, but they do have the right to participate in the decision-making process, especially in matters that affect them. This is a consequence of the dignity inherent in all human beings, which gives rise to the requirement that they must be treated subjectively, regardless of all factors, including age. The subjectivity of children means that they are not objects in the hands of their parents or state authorities, but independent subjects within their families and other social groups.[94]

The enforcement of children's rights is much more a process than a completed stage of legal development. Although international standards, above all the UN Convention on the Rights of the Child, provide a solid foundation, actual enforcement depends on the constitutional system, legislation, and institutional practices of the state in question. The examples of the countries examined also show that the creation of a child-friendly justice system cannot be achieved solely through the creation of legal norms, but that institutional sensitivity, appropriate training of professionals, and the provision of tools to facilitate communication and information sharing with children are also essential.

The central message of the book is that children's participatory rights are not just legal categories, but also a measure of how well a society respects the human dignity of its youngest generation. If children are truly heard and their opinions are meaningfully incorporated into decision-making, not only are their own rights upheld, but the rule of law, social justice, and democratic values as a whole are also strengthened.

The goal, therefore, is to use international standards as a starting point to develop national legislation and deepen child-centered institutional practices in order to create justice systems that are truly child-friendly and ensure the participation and protection of children not only in a legal sense but also in a social sense.

94 Lis, 2025, p. 103.

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