THE BULGARIAN CHILD JUSTICE SYSTEM

THIRTY YEARS AFTER THE CONVENTION ON THE RIGHTS OF THE CHILD

INTERNATIONAL CONFERENCE
Sofia, November 28-29, 2019

Working Documents

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This publication has been prepared by the Bulgarian Center for Not-for-Profit Law in partnership with the National Institute for Justice, Supreme Bar Council, Institute for the State and the Law - Bulgarian Academy of Science and UNICEF Bulgaria.

The articles, materials and information in the present publication do not in any way bind or represent the official views of the partners on this initiative.

The collages on the covers have been created by the students Viktor Belev and Nicol Boyadjieva from 5th grade at the "G. S. Rakovski" Primary School – Sofia, during the "Associated" Children's Workshop for Collages, organized by the Bulgarian Center for Not-for-Profit Law and ALOS Center within the Civil Cultural Week Initiative – 2019.

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CONTENTS

INTRODUCTION AND WELCOME ADDRESS

Dear participants in the Conference
dedicated to the Bulgarian justice for children,

We welcome you, and at the very beginning of this event marking the 30th anniversary of the ratification of the Convention on the Rights of the Child, we would like to share a few messages.

There is no need to outline the context in which we are today – highly tensed clash of paradigms between conservative and liberal, European and non-European, democratic and developing. However, it is a fact that in many places around the world the ones who pay the heftiest price of the conflicts of the adults are the children. Suffering and isolated, they wait the good decisions of the older ones who don't always manage to provide them with a better chance. To what extend this context relates to Bulgaria? It is not in the scope of discussions of the Conference to determine how many of the Bulgarian children are in similar situation (such a discussion will be added value to the topics covered by the Conference). However, the topics are to what extend and how the adopted decisions (mostly as legal mechanisms) are just, working and beneficial to the child development.

We, as organizers, have set to ourselves couple of goals which we hope to be archived within this event.

Firstly, the purpose of the two-day Conference is to provide an opportunity to take stock and to reflect to what extend and how the Bulgarian jurisprudence has developed, has educated itself and is ready to develop its knowledge for ensuring safeguards for the protection and observance of the rights of the child, insofar as in the modern legal system the public relations related to the protection of the interests and rights of the child are being interpreted in a way to ensure the wellbeing of the child in the best and most effective way.

Second major point of discussion is to what extend in practice, beyond the political documents, the legislative amendments and various concrete statements advocating for change towards better systematic solutions are happening and give a positive result. To what extend the implementation of the law in Bulgaria is good for the children. Historically, the Bulgarian jurists have been involved in important advocacy actions and have had landmark propositions which have been occasions for public pride. We hope in the scope of the discussed topics to see the same.

Last but not least, in 2019, once again (for the past 10 years), a debate has arisen in the Bulgarian public space that opposes the rights and interests of children to the rights and interests of parents. In our view, a doctrine has been challenged here that must make it clear that the protection of the rights of the child cannot be opposed as an alternative to the interests of adults and society.

The event is organized in a classic conference format, using a multidisciplinary approach and bringing together different legal professionals to think and discuss together on the topics raised, believing that the best proposals will come by considering different points of view.

We would like to express our special gratitude to our partners – the National Institute for Justice, the Supreme Bar Council, the Institute for the State and the Law - Bulgarian Academy of Sciences and UNICEF Bulgaria, for accepting the topic as one with great importance and for their contribution for this discussion to happen.

We wish you a fruitful and stimulating discussion!

Екип на БЦНП

GOALS OF THE CONFERENCE

„...The question raised should be considered in the light of the necessary balance between the competing personal and public interests, by taking into account, first and foremost, the situation of the child and his or her best interest proclaimed in Article 3 of the Convention on the Rights of the Child. The ECHR has judgments in the same sense based on Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms...“

(Judicial Act of the Supreme Court of Cassation № 232/28.05.2018, ECLI:BG:SC001:2018:20180501781.001.)

The purpose of the Conference is to mark the 30th anniversary of the adoption of the Convention on the Rights of the Child (the Convention) by the UN General Assembly, which was ratified by the Republic of Bulgaria by a decision of the National Assembly on 11.04.1991 (in force since 3.07.1991). The anniversary is an occasion to assess the extent to which the Convention is understood, accepted and applied in Bulgaria in the spirit embodied in its texts by the UN Member States that have adopted it.

In recent years, we have been concerned with the topics of the rights mostly in the context of the economic and civil liberties of the grown ups, the creation and dissolution of alliances, global and regional crises, which put to the test all the instruments (legal and political) that we have accepted as a guarantor of justice, equality and humanity. Increasingly, children's rights and, above all, their protection and guarantees remain a secondary or contentious public issue. It remains doubtful to what extend we can even stand the test of humanity when it comes to children in crisis.

The Conference will provide a space for discussion on how the Convention is interpreted and applied, and in particular the applicability of the Convention's key principle – that in all actions concerning children, the best interests of the child shall be a primary consideration (Article 3 of the Convention).

The participants of the Conference are representatives of different legal professions from Bulgaria and abroad - magistrates, lawyers, scientists, human rights defenders and civil society organizations. Thirty years after the adoption of the Convention on the Rights of the Child we are looking for answers of the following questions: what is the understanding of the involved community of lawyers in Bulgaria on these topics; what are the key points of the Convention that provide guarantees of justice for the child; who are the advocates for the rights of the child in the justice system.

The aim is the Bulgarian jurisprudence on the rights of the children and their protection to receive support and incentive for development.

The event will accumulate expert knowledge and comparative information on international and national initiatives related to the topic.

PROGRAM

THURSDAY, November 28, 2019

12.00 – 13.00 – Registration

ОТКРИВАНЕ

13.00 – 14.00 – ***Moderator: Boryana Dimitrova,*** *Alpha Research*

Evgeni Stoyanov, Deputy Minister of Justice of Republic of Bulgaria

Assoc. Prof. Diana Kovatcheva, PhD., Ombudswoman of the Republic of Bulgaria

Miglena Tacheva, Director of the National Institute of Justice

Ralitsa Negentsova, Chairperson of the Supreme Bar Council

Prof. Dr. Irena Ilieva, Director of the Institute of State and Law - BAS

14.00 – 15.30 – THE NEW GENERAL COMMENT OF THE COMMITTEE ON THE RIGHTS OF THE CHILD NO. 24: CHILDREN'S RIGHTS IN CHILD JUSTICE SYSTEMS
Prof. Ann Skelton, Member of the UN Committee on the Rights of the Child

CHILDREN IN THE JUSTICE SYSTEM – STANDARDS AND PRACTICE

16.00 – 18.00 – ***Moderator: Assoc. Prof. Diana Kovatcheva,*** *PhD., Ombudswoman of the Republic of Bulgaria*

CHILD AND JUSTICE: COLLISION OR SUPPORT?
Assoc. Prof. Diana Kovatcheva

DIRECTIVE (EU) 2016/800 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON PROCEDURAL SAFEGUARDS FOR CHILDREN WHO ARE SUSPECTS OR ACCUSED PERSONS IN CRIMINAL PROCEEDINGS AND DIRECTIVE 2012/29/EU OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ESTABLISHING MINIMUM STANDARDS ON THE RIGHTS, SUPPORT AND PROTECTION OF VICTIMS OF CRIME AND THEIR TRANSPOSITION INTO BULGARIAN LEGISLATION
Georgi Spasov, Department of Interaction with the Judiciary, Ministry of Justice

CHILD'S INTERESTS IN THE PRACTICE OF THE BULGARIAN COURT
Assoc. Prof. Velina Todorova, PhD, ISL-BAS, member of CRC

THE CHILD'S PARTICIPATION IN COURT PROCEEDINGS: IN PERSON AND THROUGH A REPRESENTATIVE
Natasha Dobreva, attorney at law, Sofia Bar Association

Discussion

FRIDAY, 29 NOVEMBER, 2019

ВЪЗСТАНОВИТЕЛНО ПРАВОСЪДИЕ ЗА ДЕЦА

9.00 – 10.30 – ***Moderator: Daniela Masheva,*** Supreme Judicial Council

PRACTICAL ASPECTS IN APPLYING A HOLISTIC APPROACH IN CASES OF CHILDREN IN CONFLICT WITH THE LAW
Vladislava Tsarigradska, judge, Regional Court - Lukovit

OPPORTUNITIES FOR THE PROJECT OF A NEW LEGAL FRAMEWORK FOR RESTORATIVE JUSTICE FOR CHILDREN IN BULGARIA
Rumen Nenkov, judge at the Constitutional Court of the Republic of Bulgaria (2009-2018)

RESTORATIVE JUSTICE AND CHILDREN'S RIGHTS, STANDARDS, BEST PRACTICES AND CHALLENGES
Annemieke Wolthuis, European Forum for Restorative Justice

Discussion

CHILDREN IN THE SPIRAL OF PARENTAL CONFLICTS

11.00 – 12.30 – ***Moderator: Valya Gigova,*** *attorney at law, Sofia Bar Association, member of the Supreme Bar Council*

PARENTAL DISPUTES AND CHILDREN'S INTERESTS: CONTEMPORARY DEVELOPMENT IN FAMILY CONFLICTS RESOLUTION
Prof. Masha Antokolskaya, Free University of Amsterdam, the Netherlands

THE CARE OF THE COURT FOR THE CHILD - VICTIM OF DOMESTIC VIOLENCE
Galya Valkova, judge, Sofia Regional Court, and
Dr. Vladimir Sotirov, psychiatrist

GUARANTEEING THE BEST INTERESTS OF THE CHILD WITHIN CONFLICTS BETWEEN PARENTS IN THE EXERCISE OF PARENTAL RIGHTS - PRACTICAL ASPECTS
Marieta Dimitrova, attorney at law, Sofia Bar Association

Discussion

12.30 – Closing

Dr. Jane Muita, UNICEF Representative for Bulgaria, and
Nadia Shabani, Director of Bulgarian Center for Not-for-Profit Law

ORGANIZERS

BULGARIAN CENTER FOR NOT-FOR-PROFIT LAW (BCNL)

BCNL was established in July 2001 as a foundation in pursue of activities for the public benefit. The mission of the organization is to support the draft and the implementation of laws and policies aiming the development of the civic society, civic participation and good governance in Bulgaria. BCNL works in close cooperation and partnership with the International Center for Not-for-Profit Law (ICNL) with headquarters in Washington, the USA, and the European Center for Not-for-Profit Law (ECNL) with headquarters in the Hague, the Netherlands. The chairperson of the Board of Trustees of BCNL is Assoc. Prof. Velina Todorova, Ph.D., member of the UN Committee on the Rights of the Child.

During the past 15 years BCNL has taken part in the adoption of the Non-profit Legal Enteties Act in Bulgaria and its amendments, in the creation of tax relief rules for organizations carrying out activities in public benefit and their donors and has encouraged the reforms of the Social Assistance Act and its Implementing Rules which led to the adoption of the social contracting mechanism and providing social services by CSOs. BCNL was one of the leading organizations in the process of adoption of the United Nations Convention on the Rights of Persons with Disabilities and participated in drafting the Concept of national legislation changes regarding the implementation of the standards set by Art. 12 of the UN Convention on the Rights of Persons with Disabilities (approved by the Council of Ministers of the Republic of Bulgaria in 2012). BCNL was also one of the member of the Ministry of Justice's working group on preparation of the draft of the Natural Persons and Support Measures Act.

NATIONAL INSTITUTE FOR JUSTICE (NIJ)

The National Institute for Justice (NIJ) was established with the Judiciary System Act in 2013. The mission of NIJ is to form and develop values, knowledge, skills and professional competence by carrying out hands-on trainings based on modern methods and in accordance with the principles of judicial training adopted by the European Judicial Training Network. NIJ encourages innovative training forms related to the integration of work, study, extracurricular environment and the deployment of e-learning

The main activity of the NIJ is related to the organization and conduct of initial and introductory trainings for judges, prosecutors, investigators, jurors, as well as ongoing trainings for sustaining and advancing the qualification of judges, prosecutors, investigators, members of the Supreme Judicial Council, Chief Inspector and inspectors from the SJC Inspectorate, state bailiffs, registry judges, court assistants, prosecutorial assistants, court officials, jurors, inspectors from the Inspectorate to the Minister of Justice he and other officials from the Ministry of Justice.

SUPREME BAR COUNCIL (SBC)

The Supreme Bar Council (SBC) is legal entity with headquarters in Sofia. It consists of 15 main members and 10 members in reserv, who shall be elected with 4-year mandate by the General Assembly (GA) of the Bar Councils` representatives across the coutry. The GA elects separately the Chairperson of the Supreme Bar Council, who is included in the number of its regular members. Two Deputy Chairperson and a Secretary-General shall be elected from among them.

The Supreme Bar Council provides statements on draft regulatory acts and makes proposals for improvement of the legislation. Make proposals to the Chairperson of the Supreme Court of Cassation and to the Chairperson of the Supreme Administrative Court for issuing interpretative decisions and drafts statements on them. SBC may refer to the Constitutional Court on the constitutionality of a law that violates the rights and freedoms of citizens. SBC manages uniform registers of lawyers, junior lawyers and law firms. SBC also manages the Unified Register of Foreign Lawyers who have been recognized as having the right to appear as defense counsel before a Bulgarian court. It issues ordinances assigned by the Bar Act. SBC organizes a lawyer training center and performs other functions.

INSTITUTE FOR THE STATE AND THE LAW – BULGARIAN ACADEMY OF SCIENCES (ISL – BAS)

The Institute for the State and the Law (ISL) was established in 1947 and is the only scientific unit in the BAS system that carries out foundamental and applied researchs in the field of law. In addition, the Institute carries out active scientific and consultative activities to assist the bodies of the legislative, executive and judicial branches of government. It is structured in four sections: Public Law, Civil Law, International Law and Criminal Justice.

The ISL has a long standing tradition in the research of the legislation in force, the law enforcement and the problems related to the harmonization of the Bulgarian legislation with the European Union law. To this end, about 10 collective scientific projects with budget funding are developed annually in the ISL. The Institute publishes the Journal of “Legal Thought” and a series of collections of “Scientific Papers of the Institute of Legal Sciences”.

UNICEF BULGARIA

UNICEF is the United Nations Children’s Fund, working in 190 countries and territories, including Bulgaria, to uphold the rights of every child. For 70 years, UNICEF has been striving to improve the lives of children and their families. UNICEF cooperates with all countries and governments; builds strategic partnerships with the corporate sector and the media; collaborates with local communities, civil society organizations and independent institutions, parent organizations and last but not least – with the youth themselves. In 2018 UNICEF and the Government of the Republic of Bulgaria started a new cooperation program for the period 2018-2022 to support the national efforts to ensure that all children and adolescents in the country, including those in the most vulnerable situation are enjoying their rights and developing their full potential in an inclusive and protective society. The program includes 4 components: early childhood development and a public childcare system; inclusive pre-school and school education; violence prevention, protection of victims and access to justice for all children; partnerships to monitor, communicate and promote the rights of children in Bulgaria and around the world.

GUESTS

Assoc. Prof. Diana Kovatcheva, PhD., Ombudswoman of the Republic of Bulgaria

Assoc. Prof. Diana Kovatcheva, PhD, is a LL.M. graduate from the Law Faculty of Sofia University "St. Kliment Ohridski" and has a Master in European law (from Sofia University) and a Master in European Law and Judicial System (from the Université Nancy II, France). She is a PhD in European Law and Judicial System granted by the Université Nancy II, France. Since 2000 she is a Research Fellow at the Institute of Legal Sciences at the Bulgarian Academy of Science. For nearly 10 years (2002 – 2011) Diana Kovatcheva, PhD, has been Director of Transparency International – Bulgaria. Between 2011 and 2013 she was Minister of Justice of Bulgaria. She teaches at the Faculty of Law of UNWE in Sofia and is an author of number of research papers on international law. In 2014 Diana Kovatcheva became a Member of the Most Excellent Order of the British Empire, awarded by Her Majesty Queen Elizabeth II for her contribution in the prevention of corruption and her contribution to the transparency and effectiveness of the judicial system. In 2016 she was appointed as Deputy-Ombudswoman of the Republic of Bulgaria and since September 2019 she is the Ombudswoman of the Republic of Bulgaria.

Miglena Tacheva, Director of the National Institute for Justice

Miglena Tacheva has a law degree from the Faculty of Law of Sofia University "St. Kliment Ohridski." She began her professional career as a bailiff in the Varna Regional Court, after which she was appointed as judge and Chairperson of the Varna Regional Court. She has taught Administrative Law and Process at the Administration Center of the Council of Ministers. She also participated in drafting of the Legal Aid Act and the establishment of a Pilot Legal Aid Office in Veliko Tarnovo. Between 2001 and 2005, Ms. Tacheva was Deputy Minister of Justice, and from July 2007 to July 2009 - Minister of Justice and Keeper of the state seal. In 2007 she participated in the creation of a public council of legal NGOs under the Minister of Justice as a model for civil society involvement in judicial reform. In 2016 she was a legal advisor to the National Assembly, and a little later Mrs. Tacheva was elected Director of the National Institute of Justice.

Attorney at law Ralica Negencov, Chairperson of the Supreme Bar Council

Attorney at law Ralitsa Negentsova has a law degree from the Law Faculty of Sofia University "St. Kliment Ohridski" and is a member of the Sofia Bar Association since 1985. She practices in the field of civil law. From 1992 to 2013 she was a member and spokesperson of the Central Election Commission. She was a member of the Sofia Bar Council for two terms; two terms member of the Supreme Bar Council. Attorney at law Negentsova has chaired twice the High Disciplinary Court. In 2013 attorney at law Ralitsa Negentsova was elected chairperson of the Supreme Bar Council and was re-elected to the same position in 2017. **Prof. Dr. Irena Ilieva,**

Director of the Institute for the State and the Law – BAS

Prof. Dr. Irena Ilieva has a law degree from the Law Faculty of Sofia University „St. Kliment Ohridski". She teaches International Law and International Relations at the Sofia University and at the Law Faculty of the University of Plovdiv "Paisiy Hilendarski". She has been several times a guest lecturer at the Law Faculty of the University of Salzburg (Austria), the University of Navarre (Pamplona, Spain) and the University of Bologna (Italy) under the Erasmus and Erasmus Plus programs. In 2017 she is the first Bulgarian guest - Professor of Legal Studies at the University of Paris 2 „Pantheon Asa". She has specialized in Intercultural Management at A.O.T.S. (Nagoya, Japan). Prof. Dr. Ilieva is a member of the European Commission against Racism and Intolerance of the Council of Europe and the International Law Association, London, UK. She is also author of dozens of scientific papers, publications, articles, textbooks. Since 2018 Prof. Dr. Irena Ilieva is the Director of the Institute for the State and the Law - BAS.

Prof. Ann Skelton,
Member of the UN Committee on the Rights of the Child

Ann Skelton is a Professor of Law and holds the UNESCO Chair in Education Law at the University of Pretoria, South Africa. Her LLD thesis was on restorative justice relating to children. An internationally recognised researcher, Ann has published widely on children's rights, education law, restorative justice and strategic litigation. For the past 15 years, Ann was the Director of the Centre for Child Law. She is an Advocate, and has argued many landmark children's rights cases before South Africa's Constitutional Court. Ann has participated in several UN expert groups, chairs the Advisory Group of the UN Global Study on Children Deprived of their liberty, and chairperson of an expert group drafting Guiding Principles on Private Education. She has won several awards for her work, including the Worlds Children's Prize presented by Queen Silvia of Sweden and the Juvenile Justice without Border prize for her work on reducing the number of children in prisons in South Africa. She is currently a member of the UN Committee on the Rights of the Child, and chaired the working group that drafted General Comment no. 24 on Children's rights in child justice systems.

SPEAKERS

Georgi Spasov, Department of Interaction with the Judiciary, Ministry of Justice

Mr. Georgi Spasov is a Senior Expert in the Judicial and Other Specialized Activities Division of the Department of Interaction with the Judiciary to the Ministry of Justice. He is the secretary of the National Council for Assistance and Compensation to Crime Victims and Vice-Chairman of the Council's Expert Commission.

Assoc. Prof. Velina Todorova, PhD, ISL-BAS, member of CRC

Velina Todorova is an Associate Professor of Civil and Family Law at the Institute of the State and the Law at the Bulgarian Academy of Sciences (BAS) and at the Law Faculty of the University of Plovdiv "Paisiy Hilendarski". Since 2017, she is a member of the UN Committee on the Rights of the Child. She works actively for the implementation of legal reforms related to the rights of vulnerable groups such as children and women in the field of family law and social legislation. Assoc. Prof. Todorova is an expert with more than 20 years of experience in the field of children rights - child labor, domestic violence, rights of children with disabilities, juvenile justice and more. She is one of the leading experts in the development of the Child Protection Act and its subsequent amendments, as well as one of the authors of the Sofia Strategy on the Rights of the Child (2016-2021). Velina Todorova is a former Deputy Minister of Justice and a member of the Committee on European Family Law (CEFL) and is a member of the Academic Society for Family Law in Europe FL-EUR.

Natasha Dobreva, attorney at law, Sofia Bar Association

Attorney at law Natasha Dobreva is a member of the Sofia Bar Association (since 2007) with specialization in "International Human Rights Law" and "Law of the European Convention on Human Rights" (ECHR). She represents plaintiffs before the European Court of Human Rights in Strasbourg, where she has already won 12 court cases. Well known cases led by her are "S.Z. vs. Bulgaria", "Myumyun vs. Bulgaria", "Savinovska and others vs. Russia" and others. The subject of the latter is the right to family life of minors with their foster parent. On a local level attorney at law Dobreva works on criminal cases as a lawyer of victims of crimes against the person, including minors. In 2017 she represented Bulgaria at the World Conference on Reproductive Health and Human Rights in Dublin, organized by the Irish Council for Civil Liberties. As of June 2018, she is part of the team of "Zona ZaKrila", Sofia - a project of UNICEF-Bulgaria for providing legal assistance to children.

Vladislava Tsarigradska, judge at the Regional Court - Lukovit

Vladoslava Tsarigradska has a law degree from the Law Faculty of Sofia University „St. Kliment Ohridski". Since 2010 she has been a judge at the Regional Court - Lukovit. She is interested in securing and safeguarding the rights of persons with disabilities and vulnerable groups in lawsuits, including the implementation of restorative practices and a multidisciplinary approach - interacting with professionals from other fields.

Rumen Nenkov, former judge in the Constitutional Court of the Republic of Bulgaria

Judge Rumen Nenkov holds a law degree from the Law Faculty of Sofia University „St. Kliment Ohridski". His professional career began as a junior judge of the Sofia Regional Court, after working as a bailiff at the Sofia Regional Court, a judge of the Sofia Regional Court. During the period 1990-1991 he was Chief Secretary of the Ministry of Justice, and after that he was judge at the Sofia City Court (1991-1992), judge at the Supreme Court (1992-1996) and judge of the Supreme Court of Cassation (1996-2009). He chaired the Criminal Division of the Supreme Court of Cassation (1997-2002), after which he was elected as Vice-President of the Supreme Court of Cassation (2002-2009). Judge Nenkov specialized in the fields of criminal law, human rights and the judiciary in the United Kingdom, Austria, the United States, Germany and others. As a member of the Union of Scientists, he has publications in the fields of criminal law and human rights. He chaired the Central Election Commission. From 2009 to 2018 he was a judge at the Constitutional Court.

Dr. Annemieke Wolthuis, vice-chair of the European Forum for Restorative Justice

Dr. Annemieke Wolthuis is a children's rights consultant, researcher, trainer and mediator, partly working for Restorative Justice Nederland (RJN) and the Restorative Justice Academy. Until 2016 she worked for the Verwey-Jonker Institute in Utrecht on European and national research projects in the field of law, (restorative) justice, human rights and youth. She holds a PhD on restorative justice and children's rights and worked 10 years for Defence for Children International. She is also a member of the editorial board of the Dutch/Flemish journal on restorative justice and the vice-chair of the European Forum for Restorative Justice.

Prof. Masha Antokolskaya, Free University of Amsterdam, The Netherlands

Masha Antokolskaya is a Professor of Family Law at the Free University of Amsterdam, The Netherlands. She is the head of the Amsterdam Center for Family Law (ACFL). She is a member of the expert group of the Committee on European Family Law (CEFL) and the Executive Board of the International Family Law Society (ISFL) since 2005. In 2017 she organized and chaired the 16th World Congress of the International Society for Family Law in Amsterdam. Prof. Antokolskaya is the chairman of the Academic Society for Family Law in Europe FL-EUR (www.fl-eur.eu) and Editor-in-chief of Family and Law magazine, as well as a member of other editorial boards. Prof. Antokolskaya is the author of number of monographs and manuals and of more than 100 articles in English, Dutch and Russian. Her main interests are in the fields of: comparative and national family law, history of family law, protection of the elderly, empirical legal studies.

Galya Valkova, judge of the Sofia Regional Court

Galya Valkova is a judge at the Sofia Regional Court, Third Civil Division. She underwent mediation and negotiation trainings (Fulbright Summer Institute, Bansko 2010) and referred the first litigations in the field of parental conflicts for resolution through mediation to the Center for Agreements and Mediation (CAM) at the Sofia Regional Court and at Sofia City Court. She is actively involved in the activities of the CAM. In 2013 judge Valkova became chairperson of the Center for Agreements and Mediation. She has completed an internship at the Registry of the European Court of Human Rights, Strasbourg. Since 2014 judge Valkova has been collaborating with the Justice and Reconciliation Society (JRS). In the scope of the project implemented by the JRS, she participated in a study visit to Norway and the training in restorative justice conducted in Bulgaria. She has conducted a number of mediation referral trainings.

Dr. Vladimir Sotirov, psychiatrist

Dr. Vladimir Sotirov is a psychiatrist. He graduated with a degree in medicine from the Medical University in Sofia in 1995 and acquired a specialty in Psychiatry in 2001. From 1996 to 2002 he worked as a resident physician at the State Psychiatric Hospital “St. Ivan Rilski” - Novi Iskar (Kurilo). In 2007 he graduated from the Master’s program “Health Policies and Healthcare Management” at the New Bulgarian University (NBU). He was a teacher at the Master’s program “Clinical Social Work” at NBU (2003-2010). Dr. Sotirov was the Secretary (1998-2002) and subsequently Vice-Chairman, Chairman and Member of the Management Board (2004-2010) of the Sofia Psychiatric Society, as well as Vice-Chair of the Mental Health Advisory Council of Sofia Municipality (2009-2010). Since 2001 he has been a Manager and Psychiatrist at the “Adaptation” Mental Health Outpatient Clinic - a group practice for specialized psychiatric outpatient care. He has been participating in a number of research, applied and training projects.

Attorney at law Marieta Dimitrova, Sofia Bar Association

Attorney at law Marieta Dimitrova has been a member of the Sofia Bar Association since 1990. She has been a legal consultant at the Bulgarian Center for Not-for-Profit Law (BCNL) Foundation since its establishment with more than 15 years of experience in implementing projects related to the development of civil society, the social sphere and the problems of people with disabilities. Attorney at law Dimitrova was Legal Advisor to the Committee on Labor and Social Policy in the 41st National Assembly.

MODERATORS

Boryana Dimitrova, PhD, Alpha Research

Ms. Boryana Dimitrova is a PhD in Sociology, majoring in political and electoral sociology at CNRS, France, and new methods in social sciences in Yale, USA. Boryana Dimitrova is a practicing sociologist with many years of experience in social and political studies. She is the head of the electoral and socio-political researches of Alpha Research Agency on the effects and conclusions of the elections, as well as the role and responsibility of sociology. She is the author of numerous publications in Bulgarian and foreign outlets.

Daniela Masheva, Supreme Judicial Council

Ms. Daniela Masheva is law graduate from the Law Faculty of Sofia University "St. Kliment Ohridski". She has worked for many years as a prosecutor at the Sofia Regional Prosecutor's Office and at the City Prosecutor's Office (1992-2007), and afterwards at the Supreme Cassation Prosecutor's Office (2007-2017). During the period 2009-2011 Daniela Masheva she was Deputy Minister of Justice. From 2017 until now she is a member of the Supreme Judicial Council. Over the years, Ms. Masheva has participated in the Committee on Legal and Institutional Affairs at the SJC Plenum, in the "Disciplinary Activity and Liaison with the Inspectorate to the Supreme Judicial Council" Commission to the Prosecutorial College and has been the spokesperson for the Prosecutorial Committee of the SJC, carrying out the media relations. Since 2017 Daniela Masheva is a member of the Supreme Judicial Council.

Valya Gigova, attorney at law, member of the Supreme Bar Council

Attorney at law Valya Gigova has a law degree from the Law Faculty of Sofia University "St. Kliment Ohridski." At the beginning of her professional career, she worked as a notary public at the Sofia Regional Court. Since 1998 she has been registered as a lawyer at the Sofia Bar Association. Currently, she is a member of the Supreme Bar Council. She has specialized in real estate and notary law, commercial and banking law, commercial bankruptcy and civil proceedings. She is the author of number of publications in the field of property law. Attorney at law Gigova has participated as an expert in numerous working groups on drafting and discussing draft normative acts in the field of commercial and property law and the civil process at the Ministry of Justice, the Council of Ministers and the National Assembly.

Dr. Jane Muita, UNICEF Representative for Bulgaria

Dr. Jane Muita has a Bachelor of Medicine and Bachelor of Surgery, and a Master of Medicine in Pediatric from the University of Nairobi, and a Master's Degree in Public Health from "John Hopkins University", USA. Dr. Muita, a national of Kenya, has been serving as UNICEF Deputy Representative to Zimbabwe since November 2013. In this capacity, she has been providing overall leadership in developing, implementing, monitoring and evaluating the UNICEF country programme. Previously, Dr. Muita had served as UNICEF Deputy Representative in Malawi and Rwanda. Since June 2018 Dr. Jane Muita has been appointed as UNICEF Representative for Bulgaria.

Nadia Shabani, Director of BCNL

Ms. Nadia Shabani is a jurist with a master degree in Law from the Law Faculty of the Sofia University "St. Kliment Ohridski" with major in International Law and International Relations. She has worked in the Bulgarian Center for Not-for-Profit Law (BCNL) since its establishment in 2001 until 2009, and returns to BCNL in 2012. Since April 2016 she is the Director of BCNL. Nadia Shabani leads projects in various fields: advocacy for divers civic causes, social politics, human rights, social contracting, public-private partnerships. Ms. Shabani provides legal assistance to civic organizations, public officials on central and local level, professional groups, parental organizations and providers of social services for developing policies, strategic documents, drafting legislation changes and impact assessments in the social sphere. In 2009, Ms. Shabani became the Chairperson of the National Agency for Child Protection in Bulgaria, responsible for the enforcement of children rights and coordination of all government policies in the area. As the head of this Agency, she was in charge of the coordination of all measures and programs in the plan for the deinstitutionalization of children in Bulgaria, accepted in 2010 and funded by the EU.

UNITED
NATIONS

CRC

Convention on the
Rights of the Child

Distr.
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GENERAL COMMENT No. 12 (2009)
The right of the child to be heard

Article 12 of the Convention on the Rights of the Child provides:

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

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."

I. INTRODUCTION

1. Article 12 of the Convention on the Rights of the Child (the Convention) 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 assures, to every child capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with age and maturity. Paragraph 2 states, in particular, that the child shall be afforded the right to be heard in any judicial or administrative proceedings affecting him or her.

2. The right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention. The Committee on the Rights of the Child (the Committee) has identified article 12 as one of the four general principles of the Convention, the others being the right to non-discrimination, the right to life and development, and the primary consideration of the child's best interests, which highlights the fact that this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights.

3. Since the adoption of the Convention in 1989, considerable progress has been achieved at the local, national, regional and global levels in the development of legislation, policies and methodologies to promote the implementation of article 12. A widespread practice has emerged in recent years, which has

been broadly conceptualized as "participation", although this term itself does not appear in the text of article 12. This term has evolved and is now widely used to describe ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.

4. States parties reaffirmed their commitment to the realization of article 12 at the twenty-seventh special session of the General Assembly on children in 2002.[1] However, the Committee notes that, in most societies around the world, implementation of the child's right to express her or his view on the wide range of issues that affect her or him, and to have those views duly taken into account, continues to be impeded by many long-standing practices and attitudes, as well as political and economic barriers. While difficulties are experienced by many children, the Committee particularly recognizes that certain groups of children, including younger boys and girls, as well as children belonging to marginalized and disadvantaged groups, face particular barriers in the realization of this right. The Committee also remains concerned about the quality of many of the practices that do exist. There is a need for a better understanding of what article 12 entails and how to fully implement it for every child.

5. In 2006, the Committee held a day of general discussion on the right of the child to be heard in order to explore the meaning and significance of article 12, its linkages to other articles, and the gaps, good practices and priority issues that need to be addressed in order to further the enjoyment of this right.[2] The present general comment arises from the exchange of information which took place on that day, including with children, the accumulated experience of the Committee in reviewing States parties' reports, and the very significant expertise and experience of translating the right embodied in article 12 into practice by governments, non-governmental organizations (NGOs), community organizations, development agencies, and children themselves.

6. The present general comment will first present a legal analysis of the two paragraphs of article 12 and will then explain the requirements to fully realize this right, including in judicial and administrative proceedings in particular (sect. A). In section B, the connection of article 12 with the three other general principles of the Convention, as well as its relation to other articles, will be discussed. The requirements and the impact of the child's right to be heard in different situations and settings are outlined in section C. Section D sets out the basic requirements for the implementation of this right, and the conclusions are presented in section E.

7. The Committee recommends that States parties widely disseminate the present general comment within government and administrative structures as well as to children and civil society. This will necessitate translating it into the relevant languages, making child-friendly versions available, holding workshops and seminars to discuss its implications and how best to implement it, and incorporating it into the training of all professionals working for and with children.

II. OBJECTIVES

8. The overall objective of the general comment is to support States parties in the effective implementation of article 12. In so doing it seeks to:

- Strengthen understanding of the meaning of article 12 and its implications for governments, stakeholders, NGOs and society at large
- Elaborate the scope of legislation, policy and practice necessary to achieve full implementation of article 12
- Highlight the positive approaches in implementing article 12, benefitting from the monitoring experience of the Committee
- Propose basic requirements for appropriate ways to give due weight to children's views in all matters that affect them

[1] Resolution S-27/2 "A world fit for children", adopted by the General Assembly in 2002.

[2] See the recommendations of the day of general discussion in 2006 on the right of the child to be heard, available at: http://www2.ohchr.org/english/bodies/crc/docs/discussion/Final_Recommendations_after_DGD.doc.

III. THE RIGHT TO BE HEARD: A RIGHT OF THE INDIVIDUAL CHILD AND A RIGHT OF GROUPS OF CHILDREN

9. The general comment is structured according to the distinction made by the Committee between the right to be heard of an individual child and the right to be heard as applied to a group of children (e.g. a class of schoolchildren, the children in a neighbourhood, the children of a country, children with disabilities, or girls). This is a relevant distinction because the Convention stipulates that States parties must assure the right of the child to be heard according to the age and maturity of the child (see the following legal analysis of paragraphs 1 and 2 of article 12).

10. The conditions of age and maturity can be assessed when an individual child is heard and also when a group of children chooses to express its views. The task of assessing a child's age and maturity is facilitated when the group in question is a component of an enduring structure, such as a family, a class of schoolchildren or the residents of a particular neighbourhood, but is made more difficult when children express themselves collectively. Even when confronting difficulties in assessing age and maturity, States parties should consider children as a group to be heard, and the Committee strongly recommends that States parties exert all efforts to listen to or seek the views of those children speaking collectively.

11. States parties should encourage the child to form a free view and should provide an environment that enables the child to exercise her or his right to be heard.

12. The views expressed by children may add relevant perspectives and experience and should be considered in decision-making, policymaking and preparation of laws and/or measures as well as their evaluation.

13. These processes are usually called participation. The exercise of the child's or children's right to be heard is a crucial element of such processes. The concept of participation emphasizes that including children should not only be a momentary act, but the starting point for an intense exchange between children and adults on the development of policies, programmes and measures in all relevant contexts of children's lives.

14. In section A (Legal analysis) of the general comment, the Committee deals with the right to be heard of the individual child. In section C (The implementation of the right to be heard in different settings and situations), the Committee considers the right to be heard of both the individual child and children as a group.

A. Legal analysis

15. Article 12 of the Convention establishes the right of every child to freely express her or his views, in all matters affecting her or him, and the subsequent right for those views to be given due weight, according to the child's age and maturity. This right imposes a clear legal obligation on States parties to recognize this right and ensure its implementation by listening to the views of the child and according them due weight. This obligation requires that States parties, with respect to their particular judicial system, either directly guarantee this right, or adopt or revise laws so that this right can be fully enjoyed by the child.

16. The child, however, has the right not to exercise this right. Expressing views is a choice for the child, not an obligation. States parties have to ensure that the child receives all necessary information and advice to make a decision in favour of her or his best interests.

17. Article 12 as a general principle provides that States parties should strive to ensure that the interpretation and implementation of all other rights incorporated in the Convention are guided by it.[3]

18. Article 12 manifests that the child holds rights which have an influence on her or his life, and not only rights derived from her or his vulnerability (protection) or dependency on adults (provision).[4] The Convention recognizes the child as a subject of rights, and the nearly universal ratification of this international instrument by States parties emphasizes this status of the child, which is clearly expressed in article 12.

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[3] See the Committee's general comment No. 5 (2003) on general measures of implementation for the Convention on the Rights of the Child (CRC/GC/2003/5).

[4] The Convention is commonly referred to by the three "ps": provision, protection and participation.

1. Literal analysis of article 12

(a) Paragraph 1 of article 12

(i) "Shall assure"

19. Article 12, paragraph 1, provides that States parties "shall assure" the right of the child to freely express her or his views. "Shall assure" is a legal term of special strength, which leaves no leeway for State parties' discretion. Accordingly, States parties are under strict obligation to undertake appropriate measures to fully implement this right for all children. This obligation contains two elements in order to ensure that mechanisms are in place to solicit the views of the child in all matters affecting her or him and to give due weight to those views.

(ii) "Capable of forming his or her own views"

20. States parties shall assure the right to be heard to every child "capable of forming his or her own views". This phrase should not be seen as a limitation, but rather as an obligation for States parties to assess the capacity of the child to form an autonomous opinion to the greatest extent possible. This means that States parties cannot begin with the assumption that a child is incapable of expressing her or his own views. On the contrary, States parties should presume that a child has the capacity to form her or his own views and recognize that she or he has the right to express them; it is not up to the child to first prove her or his capacity.

21. The Committee emphasizes that article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard in all matters affecting her or him. In this respect, the Committee underlines the following:

- First, in its recommendations following the day of general discussion on implementing child rights in early childhood in 2004, the Committee underlined that the concept of the child as rights holder is "... anchored in the child's daily life from the earliest stage".[5] Research shows that the child is able to form views from the youngest age, even when she or he may be unable to express them verbally.[6] Consequently, full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication including play, body language, facial expressions, and drawing and painting, through which very young children demonstrate understanding, choices and preferences.
- Second, it is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views on the matter.
- Third, States parties are also under the obligation to ensure the implementation of this right for children experiencing difficulties in making their views heard. For instance, children with disabilities should be equipped with, and enabled to use, any mode of communication necessary to facilitate the expression of their views. Efforts must also be made to recognize the right to expression of views for minority, indigenous and migrant children and other children who do not speak the majority language.
- Lastly, States parties must be aware of the potential negative consequences of an inconsiderate practice of this right, particularly in cases involving very young children, or in instances where the child has been a victim of a criminal offence, sexual abuse, violence, or other forms of mistreatment. States parties must undertake all necessary measures to ensure that the right to be heard is exercised ensuring full protection of the child.

(iii) "The right to express those views freely"

22. The child has the right "to express those views freely". "Freely" means that the child can express her or his views without pressure and can choose whether or not she or he wants to exercise her or his right to be heard. "Freely" also means that the child must not be manipulated or subjected to undue influence

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[5] CRC/C/GC/7/Rev.1, para. 14.

[6] Cf. Lansdown G., "The evolving capacities of the child", Innocenti Research Centre, UNICEF/Save the Children, Florence (2005).

or pressure. “Freely” is further intrinsically related to the child’s “own” perspective: the child has the right to express her or his own views and not the views of others.

23. States parties must ensure conditions for expressing views that account for the child’s individual and social situation and an environment in which the child feels respected and secure when freely expressing her or his opinions.

24. The Committee emphasizes that a child should not be interviewed more often than necessary, in particular when harmful events are explored. The “hearing” of a child is a difficult process that can have a traumatic impact on the child.

25. The realization of the right of the child to express her or his views requires that the child be informed about the matters, options and possible decisions to be taken and their consequences by those who are responsible for hearing the child, and by the child’s parents or guardian. The child must also be informed about the conditions under which she or he will be asked to express her or his views. This right to information is essential, because it is the precondition of the child’s clarified decisions.

(iv) “In all matters affecting the child”

26. States parties must assure that the child is able to express her or his views “in all matters affecting” her or him. This represents a second qualification of this right: the child must be heard if the matter under discussion affects the child. This basic condition has to be respected and understood broadly.

27. The Open-ended Working Group established by the Commission on Human Rights, which drafted the text of the Convention, 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 refer to “all matters affecting the child”. The Committee is concerned that children are often denied the right to be heard, even though it is obvious that the matter under consideration is affecting them and they are capable of expressing their own views with regard to this matter. While the Committee supports a broad definition of “matters”, which also covers issues not explicitly mentioned in the Convention, it recognizes the clause “affecting the child”, which was added in order to clarify that no general political mandate was intended. The practice, however, including the World Summit for Children, demonstrates that a wide interpretation of matters affecting the child and children helps to include children in the social processes of their community and society. Thus, States parties should carefully listen to children’s views wherever their perspective can enhance the quality of solutions.

(v) “Being given due weight in accordance with the age and maturity of the child”

28. The views of the child must be “given due weight in accordance with the age and maturity of the child”. This clause refers to the capacity of the child, which has to be assessed in order to give due weight to her or his views, or to communicate to the child the way in which those views have influenced the outcome of the process. Article 12 stipulates that simply listening to the child is insufficient; the views of the child have to be seriously considered when the child is capable of forming her or his own views.

29. By requiring that due weight be given in accordance with age and maturity, article 12 makes it clear that age alone cannot determine the significance of a child’s views. Children’s levels of understanding are not uniformly linked to their biological age. Research has shown that information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child’s capacities to form a view. For this reason, the views of the child have to be assessed on a case-by-case examination.

30. 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. Maturity is difficult to define; in the context of article 12, it is the capacity of a child to express her or his 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.

31. Consideration needs to be given to the notion of the evolving capacities of the child, and direction and guidance from parents (see para. 84 and sect. C below).

(b) Paragraph 2 of article 12

(i) The right "to be heard in any judicial and administrative proceedings affecting the child"

32. Article 12, paragraph 2, specifies that opportunities to be heard have to be provided in particular "in any judicial and administrative proceedings affecting the child". The Committee emphasizes that this provision applies to all relevant judicial proceedings affecting the child, without limitation, including, for example, 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. Typical administrative proceedings include, for example, decisions about children's education, health, environment, living conditions, or protection. Both kinds of proceedings may involve alternative dispute mechanisms such as mediation and arbitration.

33. The right to be heard applies both to proceedings which are initiated by the child, such as complaints against ill-treatment and appeals against school exclusion, as well as to those initiated by others which affect the child, such as parental separation or adoption. States parties are encouraged to introduce legislative measures requiring decision makers in judicial or administrative proceedings to explain the extent of the consideration given to the views of the child and the consequences for the child.

34. A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms.

(ii) "Either directly, or through a representative or an appropriate body"

35. After the child has decided to be heard, he or she will have to decide how to be heard: "either directly, or through a representative or appropriate body". The Committee recommends that, wherever possible, the child must be given the opportunity to be directly heard in any proceedings.

36. The representative can be the parent(s), a lawyer, or another person (inter alia, a social worker). However, it must be stressed that in many cases (civil, penal or administrative), there are risks of a conflict of interest between the child and their most obvious representative (parent(s)). If the hearing of the child is undertaken through a representative, it is of utmost importance that the child's views are transmitted correctly to the decision maker by the representative. The method chosen should be determined by the child (or by the appropriate authority as necessary) according to her or his particular situation. Representatives must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children.

37. The representative must be aware that she or he represents exclusively the interests of the child and not the interests of other persons (parent(s)), institutions or bodies (e.g. residential home, administration or society). Codes of conduct should be developed for representatives who are appointed to represent the child's views.

(iii) "In a manner consistent with the procedural rules of national law"

38. The opportunity for representation must be "in a manner consistent with the procedural rules of national law". This clause should not be interpreted as permitting the use of procedural legislation which restricts or prevents enjoyment of this fundamental right. On the contrary, States parties are encouraged to comply with the basic rules of fair proceedings, such as the right to a defence and the right to access one's own files.

39. When rules of procedure are not adhered to, the decision of the court or the administrative authority can be challenged and may be overturned, substituted, or referred back for further juridical consideration.

2. Steps for the implementation of the child's right to be heard

40. Implementation of the two paragraphs of article 12 requires five steps to be taken in order to effectively realize the right of the child to be heard whenever a matter affects a child or when the child is invited to give her or his views in a formal proceeding as well as in other settings. These requirements have to be applied in a way which is appropriate for the given context.

(a) Preparation

41. Those responsible for hearing the child have to ensure that the child is informed about her or his right to express her or his opinion in all matters affecting the child and, in particular, in any judicial and administrative decision-making processes, and about the impact that his or her expressed views will have on the outcome. The child must, furthermore, receive information about the option of either communicating directly or through a representative. She or he must be aware of the possible consequences of this choice. The decision maker must adequately prepare the child before the hearing, providing explanations as to how, when and where the hearing will take place and who the participants will be, and has to take account of the views of the child in this regard.

(b) The hearing

42. The context in which a child exercises her or his right to be heard has to be enabling and encouraging, so that the child can be sure that the adult who is responsible for the hearing is willing to listen and seriously consider what the child has decided to communicate. The person who will hear the views of the child can be an adult involved in the matters affecting the child (e.g. a teacher, social worker or caregiver), a decision maker in an institution (e.g. a director, administrator or judge), or a specialist (e.g. a psychologist or physician).

43. Experience indicates that the situation should have the format of a talk rather than a one-sided examination. Preferably, a child should not be heard in open court, but under conditions of confidentiality.

(c) Assessment of the capacity of the child

44. The child's views must be given due weight, when a case-by-case analysis indicates that the child is capable of forming her or his own views. If the child is capable of forming her or his own views in a reasonable and independent manner, the decision maker must consider the views of the child as a significant factor in the settlement of the issue. Good practice for assessing the capacity of the child has to be developed.

(d) Information about the weight given to the views of the child (feedback)

45. Since the child enjoys the right that her or his views are given due weight, the decision maker has to inform the child of the outcome of the process and explain how her or his views were considered. The feedback is a guarantee that the views of the child are not only heard as a formality, but are taken seriously. 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 a complaint.

(e) Complaints, remedies and redress

46. Legislation is needed to provide children with complaint procedures and remedies when their right to be heard and for their views to be given due weight is disregarded and violated.[7] Children should have the possibility of addressing an ombudsman or a person of a comparable role in all children's institutions, inter alia, in schools and day-care centres, in order to voice their complaints. Children should know who these persons are and how to access them. In the case of family conflicts about consideration of children's views, a child should be able to turn to a person in the youth services of the community.

47. If the right of the child to be heard is breached with regard to judicial and administrative proceedings (art. 12, para. 2), the child must have access to appeals and complaints procedures which provide remedies for rights violations. Complaints procedures must provide reliable mechanisms to ensure that children are confident that using them will not expose them to risk of violence or punishment.

3. Obligations of States parties

(a) Core obligations of States parties

48. The child's right to be heard imposes the obligation on States parties to review or amend their legislation in order to introduce mechanisms providing children with access to appropriate information, adequate support, if necessary, feedback on the weight given to their views, and procedures for complaints, remedies or redress.

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[7] See the Committee's general comment No. 5 (2003) on general measures of implementation of the Convention on the Rights of the Child, para. 24.

49. In order to fulfil these obligations, States parties should adopt the following strategies:

- Review and withdraw restrictive declarations and reservations to article 12
- Establish independent human rights institutions, such as children's ombudsmen or commissioners with a broad children's rights mandate[8]
- Provide training on article 12, and its application in practice, for all professionals working with, and for, children, including lawyers, judges, police, social workers, community workers, psychologists, caregivers, residential and prison officers, teachers at all levels of the educational system, medical doctors, nurses and other health professionals, civil servants and public officials, asylum officers and traditional leaders
- Ensure appropriate conditions for supporting and encouraging children to express their views, and make sure that these views are given due weight, by regulations and arrangements which are firmly anchored in laws and institutional codes and are regularly evaluated with regard to their effectiveness
- Combat negative attitudes, which impede the full realization of the child's right to be heard, through public campaigns, including opinion leaders and the media, to change widespread customary conceptions of the child

(b) Specific obligations with regard to judicial and administrative proceedings

(i) The child's right to be heard in civil judicial proceedings

50. The main issues which require that the child be heard are detailed below:

Divorce and separation

51. In cases of separation and divorce, the children of the relationship are unequivocally affected by decisions of the courts. Issues of maintenance for the child as well as custody and access are determined by the judge either at trial or through court-directed mediation. Many jurisdictions have included in their laws, with respect to the dissolution of a relationship, a provision that the judge must give paramount consideration to the "best interests of the child".

52. For this reason, all legislation on separation and divorce has to include the right of the child to be heard by decision makers and in mediation processes. Some jurisdictions, either as a matter of policy or legislation, prefer to state an age at which the child is regarded as capable of expressing her or his own views. The Convention, however, anticipates that this matter be determined on a case-by-case basis, since it refers to age and maturity, and for this reason requires an individual assessment of the capacity of the child.

Separation from parents and alternative care

53. Whenever a decision is made to remove a child from her or his family because the child is a victim of abuse or neglect within his or her home, the view of the child must be taken into account in order to determine the best interests of the child. The intervention may be initiated by a complaint from a child, another family member or a member of the community alleging abuse or neglect in the family.

54. The Committee's experience is that the child's right to be heard is not always taken into account by States parties. The Committee recommends that States parties ensure, through legislation, regulation and policy directives, that the child's views are solicited and considered, including decisions regarding placement in foster care or homes, development of care plans and their review, and visits with parents and family.

Adoption and kafalah of Islamic law

55. When a child is to be placed for adoption or *kafalah* of Islamic law and finally will be adopted or placed in *kafalah*, it is vitally important that the child is heard. Such a process is also necessary when step-parents or foster families adopt a child, although the child and the adopting parents may have already been living together for some time.

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[8] See the Committee's general comment No. 2 (2002) on the role of independent human rights institutions.

56. Article 21 of the Convention states that the best interests of the child shall be the paramount consideration. In decisions on adoption, *kafalah* or other placement, the "best interests" of the child cannot be defined without consideration of the child's views. The Committee urges all States parties to inform the child, if possible, about the effects of adoption, *kafalah* or other placement, and to ensure by legislation that the views of the child are heard.

(ii) The child's right to be heard in penal judicial proceedings

57. In penal proceedings, the right of child to express her or his views freely in all matters affecting the child has to be fully respected and implemented throughout every stage of the process of juvenile justice.[9]

The child offender

58. Article 12, paragraph 2, of the Convention requires that a child alleged to have, accused of, or recognized as having, infringed the penal law, has the right to be heard. This right has to be fully observed during all stages of the judicial process, from the pre-trial stage when the child has the right to remain silent, to the right to be heard by the police, the prosecutor and the investigating judge. It also applies through the stages of adjudication and disposition, as well as implementation of the imposed measures.

59. In case of diversion, including mediation, a child must have the opportunity to give free and voluntary consent and must be given the opportunity to obtain legal and other advice and assistance in determining the appropriateness and desirability of the diversion proposed.

60. In order to effectively participate in the proceedings, every child must be informed promptly and directly about the charges against her or him in a language she or he understands, and also about the juvenile justice process and possible measures taken by the court. The proceedings should be conducted in an atmosphere enabling the child to participate and to express her/himself freely.

61. The court and other hearings of a child in conflict with the law should be conducted behind closed doors. Exceptions to this rule should be very limited, clearly outlined in national legislation and guided by the best interests of the child.

The child victim and child witness

62. The child victim and child witness of a crime must be given an opportunity to fully exercise her or his right to freely express her or his view in accordance with United Nations Economic and Social Council resolution 2005/20, "Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime".[10]

63. In particular, this means that every effort has to be 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 enabled to express freely, and in her or his own manner, views and concerns regarding her or his involvement in the judicial process.

64. The right of the child victim and witness is also linked to the right to be informed about issues such as availability of health, psychological and social services, the role of a child victim and/or witness, the ways in which "questioning" is conducted, existing support mechanisms in place for the child when submitting a complaint and participating in investigations and court proceedings, the specific places and times of hearings, the availability of protective measures, the possibilities of receiving reparation, and the provisions for appeal.

(iii) The child's right to be heard in administrative proceedings

65. All States parties should develop administrative procedures in legislation which reflect the requirements of article 12 and ensure the child's right to be heard along with other procedural rights, including the rights to disclosure of pertinent records, notice of hearing, and representation by parents or others.

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[9] See the Committee's general comment No. 10 (2007) on children's rights in juvenile justice (CRC/C/GC/10).

[10] United Nations Economic and Social Council resolution 2005/20, in particular arts. 8, 19 and 20. Available at: www.un.org/ecosoc/docs/2005/Resolution%202005-20.pdf.

66. Children are more likely to be involved with administrative proceedings than court proceedings, because administrative proceedings are less formal, more flexible and relatively easy to establish through law and regulation. The proceedings have to be child-friendly and accessible.

67. Specific examples of administrative proceedings relevant for children include mechanisms to address discipline issues in schools (e.g. suspensions and expulsions), refusals to grant school certificates and performance-related issues, disciplinary measures and refusals to grant privileges in juvenile detention centres, asylum requests from unaccompanied children, and applications for driver's licences. In these matters a child should have the right to be heard and enjoy the other rights "consistent with the procedural rules of national law".

B. The right to be heard and the links with other provisions of the Convention

68. Article 12, as a general principle, is linked to the other general principles of the Convention, such as article 2 (the right to non-discrimination), article 6 (the right to life, survival and development) and, in particular, is interdependent with article 3 (primary consideration of the best interests of the child). The article is also closely linked with the articles related to civil rights and freedoms, particularly article 13 (the right to freedom of expression) and article 17 (the right to information). Furthermore, article 12 is connected to all other articles of the Convention, which cannot be fully implemented if the child is not respected as a subject with her or his own views on the rights enshrined in the respective articles and their implementation.

69. The connection of article 12 to article 5 (evolving capacities of the child and appropriate direction and guidance from parents, see para. 84 of the present general comment) is of special relevance, since it is crucial that the guidance given by parents takes account of the evolving capacities of the child.

1. Articles 12 and 3

70. The purpose of article 3 is to ensure that in all actions undertaken concerning children, by a public or private welfare institution, courts, administrative authorities or legislative bodies, the best interests of the child are a primary consideration. It means that every action taken on behalf of the child has to respect the best interests of the child. The best interests of the child is similar to a procedural right that obliges States parties to introduce steps into the action process to ensure that the best interests of the child are taken into consideration. The Convention obliges States parties to assure that those responsible for these actions hear the child as stipulated in article 12. This step is mandatory.

71. The best interests of the child, established in consultation with the child, is not the only factor to be considered in the actions of institutions, authorities and administration. It is, however, of crucial importance, as are the views of the child.

72. Article 3 is devoted to individual cases, but, explicitly, also requires that the best interests of children as a group are considered in all actions concerning children. States parties are consequently under an obligation to consider not only the individual situation of each child when identifying their best interests, but also the interests of children as a group. Moreover, States parties must examine the actions of private and public institutions, authorities, as well as legislative bodies. The extension of the obligation to "legislative bodies" clearly indicates that every law, regulation or rule that affects children must be guided by the "best interests" criterion.

73. There is no doubt that the best interests of children as a defined group have to be established in the same way as when weighing individual interests. If the best interests of large numbers of children are at stake, heads of institutions, authorities, or governmental bodies should also provide opportunities to hear the concerned children from such undefined groups and to give their views due weight when they plan actions, including legislative decisions, which directly or indirectly affect children.

74. There is no tension between articles 3 and 12, only a complementary role of the two general principles: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children. In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.

2. Articles 12, 2 and 6

75. The right to non-discrimination is an inherent right guaranteed by all human rights instruments including the Convention on the Rights of the Child. According to article 2 of the Convention, every

child has the right not to be discriminated against in the exercise of his or her rights including those provided under article 12. The Committee stresses that States parties shall take adequate measures to assure to every child the right to freely express his or her views and to have those views duly taken into account without discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. States parties shall address discrimination, including against vulnerable or marginalized groups of children, to ensure that children are assured their right to be heard and are enabled to participate in all matters affecting them on an equal basis with all other children.

76. In particular, the Committee notes with concern that, in some societies, customary attitudes and practices undermine and place severe limitations on the enjoyment of this right. States parties shall take adequate measures to raise awareness and educate the society about the negative impact of such attitudes and practices and to encourage attitudinal changes in order to achieve full implementation of the rights of every child under the Convention.

77. The Committee urges States parties to pay special attention to the right of the girl child to be heard, to receive support, if needed, to voice her view and her view be given due weight, as gender stereotypes and patriarchal values undermine and place severe limitations on girls in the enjoyment of the right set forth in article 12.

78. The Committee welcomes the obligation of States parties in article 7 of the Convention on the Rights of Persons with Disabilities to ensure that children with disabilities are provided with the necessary assistance and equipment to enable them to freely express their views and for those views to be given due weight.

79. Article 6 of the Convention on the Rights of the Child acknowledges that every child has an inherent right to life and that States parties shall ensure, to the maximum extent possible, the survival and development of the child. The Committee notes the importance of promoting opportunities for the child's right to be heard, as child participation is a tool to stimulate the full development of the personality and the evolving capacities of the child consistent with article 6 and with the aims of education embodied in article 29.

3. Articles 12, 13 and 17

80. Article 13, on the right to freedom of expression, and article 17, on access to information, are crucial prerequisites for the effective exercise of the right to be heard. These articles establish that children are subjects of rights and, together with article 12, they assert that the child is entitled to exercise those rights on his or her own behalf, in accordance with her or his evolving capacities.

81. The right to freedom of expression embodied in article 13 is often confused with article 12. However, while both articles are strongly linked, they do elaborate different rights. Freedom of expression relates to the right to hold and express opinions, and to seek and receive information through any media. It asserts the right of the child not to be restricted by the State party in the opinions she or he holds or expresses. As such, the obligation it imposes on States parties is to refrain from interference in the expression of those views, or in access to information, while protecting the right of access to means of communication and public dialogue. Article 12, however, relates to the right of expression of views specifically about matters which affect the child, and the right to be involved in actions and decisions that impact on her or his life. Article 12 imposes an obligation on States parties to introduce the legal framework and mechanisms necessary to facilitate active involvement of the child in all actions affecting the child and in decision-making, and to fulfil the obligation to give due weight to those views once expressed. Freedom of expression in article 13 requires no such engagement or response from States parties. However, creating an environment of respect for children to express their views, consistent with article 12, also contributes towards building children's capacities to exercise their right to freedom of expression.

82. Fulfilment of the child's right to information, consistent with article 17 is, to a large degree, a prerequisite for the effective realization of the right to express views. Children need access to information in formats appropriate to their age and capacities on all issues of concern to them. This applies to information, for example, relating to their rights, any proceedings affecting them, national legislation, regulations and policies, local services, and appeals and complaints procedures. Consistent with articles 17 and 42, States parties should include children's rights in the school curricula.

83. The Committee also reminds States parties that the media are an important means both of promoting awareness of the right of children to express their views, and of providing opportunities for the public expression of such views. It urges various forms of the media to dedicate further resources to the inclusion of children in the development of programmes and the creation of opportunities for children to develop and lead media initiatives on their rights.[11]

4. Articles 12 and 5

84. Article 5 of the Convention states that States parties shall respect the responsibilities, rights and duties of parents, legal guardians, or members of the extended family or community as provided for by local custom, to give direction and guidance to the child in her or his exercise of the rights recognized in the Convention. Consequently, the child has a right to direction and guidance, which have to compensate for the lack of knowledge, experience and understanding of the child and are restricted by his or her evolving capacities, as stated in this article. The more the child himself or herself knows, has experienced and understands, the more the parent, legal guardian or other persons legally responsible for the child have to transform direction and guidance into reminders and advice and later to an exchange on an equal footing. This transformation will not take place at a fixed point in a child's development, but will steadily increase as the child is encouraged to contribute her or his views.

85. This requirement is stimulated by article 12 of the Convention, which stipulates that the child's views must be given due weight, whenever the child is capable of forming her or his own views. In other words, as children acquire capacities, so they are entitled to an increasing level of responsibility for the regulation of matters affecting them.[12]

5. Article 12 and the implementation of child rights in general

86. In addition to the articles discussed in the preceding paragraphs, most other articles of the Convention require and promote children's involvement in matters affecting them. For these manifold involvements, the concept of participation is ubiquitously used. Unquestionably, the lynchpin of these involvements is article 12, but the requirement of planning, working and developing in consultation with children is present throughout the Convention.

87. The practice of implementation deals with a broad range problems, such as health, the economy, education or the environment, which are of interest not only to the child as an individual, but to groups of children and children in general. Consequently, the Committee has always interpreted participation broadly in order to establish procedures not only for individual children and clearly defined groups of children, but also for groups of children, such as indigenous children, children with disabilities, or children in general, who are affected directly or indirectly by social, economic or cultural conditions of living in their society.

88. This broad understanding of children's participation is reflected in the outcome document adopted by the twenty-seventh special session of the General Assembly entitled "A world fit for children". States parties have promised "to develop and implement programmes to promote meaningful participation by children, including adolescents, in decision-making processes, including in families and schools and at the local and national levels" (para. 32, subpara. 1). The Committee has stated in its general comment No. 5 on general measures of implementation for the Convention on the Rights of the Child: "It is important that Governments develop a direct relationship with children, not simply one mediated through non-governmental organizations (NGOs) or human rights institutions."[13]

C. The implementation of the right to be heard in different settings and situations

89. The right of the child to be heard has to be implemented in the diverse settings and situations in which children grow up, develop and learn. In these settings and situations, different concepts of the child and her or his role exist, which may invite or restrict children's involvement in everyday matters and crucial decisions. Various ways of influencing the implementation of the child's right to be heard are available, which States parties may use to foster children's participation.

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[11] Day of general discussion on the child and the media (1996): www.unhchr.ch/html/menu2/6/crc/doc/days/media.pdf.

[12] General comment No. 5 (2003) on general measures of implementation for the Convention on the Rights of the Child.

[13] Ibid., para. 12.

1. In the family

90. A family where children can freely express views and be taken seriously from the earliest ages provides an important model, and is a preparation for the child to exercise the right to be heard in the wider society.[14] Such an approach to parenting serves to promote individual development, enhance family relations and support children's socialization and plays a preventive role against all forms of violence in the home and family.

91. The Convention recognizes the rights and responsibilities of parents, or other legal guardians, to provide appropriate direction and guidance to their children (see para. 84 above), but underlines that this is to enable the child to exercise his or her rights and requires that direction and guidance are undertaken in a manner consistent with the evolving capacities of the child.

92. States parties should encourage, through legislation and policy, parents, guardians and childminders to listen to children and give due weight to their views in matters that concern them. Parents should also be advised to support children in realizing the right to express their views freely and to have children's views duly taken into account at all levels of society.

93. In order to support the development of parenting styles respecting the child's right to be heard, the Committee recommends that States parties promote parent education programmes, which build on existing positive behaviours and attitudes and disseminate information on the rights of children and parents enshrined in the Convention.

94. Such programmes need to address:

- The relationship of mutual respect between parents and children
- The involvement of children in decision-making
- The implication of giving due weight to the views of every family member
- The understanding, promotion and respect for children's evolving capacities
- Ways of dealing with conflicting views within the family

95. These programmes have to reinforce the principle that girls and boys have equal rights to express their views.

96. The media should play a strong role in communicating to parents that their children's participation is of high value for the children themselves, their families and society.

2. In alternative care

97. Mechanisms must be introduced to ensure that children in all forms of alternative care, including in institutions, are able to express their views and that those views be given due weight in matters of their placement, the regulations of care in foster families or homes and their daily lives. These should include:

- Legislation providing the child with the right to information about any placement, care and/or treatment plan and meaningful opportunities to express her or his views and for those views to be given due weight throughout the decision-making process.
- Legislation ensuring the right of the child to be heard, and that her or his views be given due weight in the development and establishment of child-friendly care services.
- Establishment of a competent monitoring institution, such as a children's ombudsperson, commissioner or inspectorate, to monitor compliance with the rules and regulations governing the provision of care, protection or treatment of children in accordance with the obligations under article 3. The monitoring body should be mandated to have unimpeded access to residential facilities (including those for children in conflict with the law), to hear the views and concerns of the child directly, and to monitor the extent to which his or her views are listened to and given due weight by the institution itself.
- Establishment of effective mechanisms, for example, a representative council of the children, both girls and boys, in the residential care facility, with the mandate to participate in the development and implementation of the policy and any rules of the institution.

3. In health care

98. The realization of the provisions of the Convention requires respect for the child's right to express his or her views and to participate in promoting the healthy development and well-being of children. This applies to individual health-care decisions, as well as to children's involvement in the development of health policy and services.

99. The Committee identifies several distinct but linked issues that need consideration in respect of the child's involvement in practices and decisions relating to her or his own health care.

100. Children, including young children, should be included in decision-making processes, in a manner consistent with their evolving capacities. They should be provided with information about proposed treatments and their effects and outcomes, including in formats appropriate and accessible to children with disabilities.

101. States parties need to introduce legislation or regulations to ensure that children have access to confidential medical counselling and advice without parental consent, irrespective of the child's age, where this is needed for the child's safety or well-being. Children may need such access, for example, where they are experiencing violence or abuse at home, or in need of reproductive health education or services, or in case of conflicts between parents and the child over access to health services. The right to counselling and advice is distinct from the right to give medical consent and should not be subject to any age limit.

102. The Committee welcomes the introduction in some countries of a fixed age at which the right to consent transfers to the child, and encourages States parties to give consideration to the introduction of such legislation. Thus, children above that age have an entitlement to give consent without the requirement for any individual professional assessment of capacity after consultation with an independent and competent expert. However, the Committee strongly recommends that States parties ensure that, where a younger child can demonstrate capacity to express an informed view on her or his treatment, this view is given due weight.

103. Physicians and health-care facilities should provide clear and accessible information to children on their rights concerning their participation in paediatric research and clinical trials. They have to be informed about the research, so that their informed consent can be obtained in addition to other procedural safeguards.

104. States parties should also introduce measures enabling children to contribute their views and experiences to the planning and programming of services for their health and development. Their views should be sought on all aspects of health provision, including what services are needed, how and where they are best provided, discriminatory barriers to accessing services, quality and attitudes of health professionals, and how to promote children's capacities to take increasing levels of responsibility for their own health and development. This information can be obtained through, inter alia, feedback systems for children using services or involved in research and consultative processes, and can be transmitted to local or national children's councils or parliaments to develop standards and indicators of health services that respect the rights of the child.[14]

4. In education and school

105. Respect for right of the child to be heard within education is fundamental to the realization of the right to education. The Committee notes with concern continuing authoritarianism, discrimination, disrespect and violence which characterize the reality of many schools and classrooms. Such environments are not conducive to the expression of children's views and the due weight to be given these views.

106. The Committee recommends that States parties take action to build opportunities for children to express their views and for those views to be given due weight with regard to the following issues.

107. In all educational environments, including educational programmes in the early years, the active role of children in a participatory learning environment should be promoted.[15] Teaching and learning must take into account life conditions and prospects of the children. For this reason, education

[14] The Committee also draws attention to its general comment No. 3 (2003) on HIV/Aids and the rights of the child, paras. 11 and 12, and its general comment No. 4 (2003) on adolescent health, para. 6.

[15] "A human rights-based approach to Education for All: A framework for the realization of children's right to education and rights within education", UNICEF/UNESCO (2007).

authorities have to include children's and their parents' views in the planning of curricula and school programmes.

108. Human rights education can shape the motivations and behaviours of children only when human rights are practised in the institutions in which the child learns, plays and lives together with other children and adults.[16] In particular, the child's right to be heard is under critical scrutiny by children in these institutions, where children can observe, whether in fact due weight is given to their views as declared in the Convention.

109. Children's participation is indispensable for the creation of a social climate in the classroom, which stimulates cooperation and mutual support needed for child-centred interactive learning. Giving children's views weight is particularly important in the elimination of discrimination, prevention of bullying and disciplinary measures. The Committee welcomes the expansion of peer education and peer counselling.

110. Steady participation of children in decision-making processes should be achieved through, inter alia, class councils, student councils and student representation on school boards and committees, where they can freely express their views on the development and implementation of school policies and codes of behaviour. These rights need to be enshrined in legislation, rather than relying on the goodwill of authorities, schools and head teachers to implement them.

111. Beyond the school, States parties should consult children at the local and national levels on all aspects of education policy, including, inter alia, the strengthening of the child-friendly character of the educational system, informal and non-formal facilities of learning, which give children a "second chance", school curricula, teaching methods, school structures, standards, budgeting and child-protection systems.

112. The Committee encourages States parties to support the development of independent student organizations, which can assist children in competently performing their participatory roles in the education system.

113. In decisions about the transition to the next level of schools or choice of tracks or streams, the right of the child to be heard has to be assured as these decisions deeply affect the child's best interests. Such decisions must be subject to administrative or judicial review. Additionally, in disciplinary matters, the right of the child to be heard has to be fully respected.[17] In particular, in the case of exclusion of a child from instruction or school, this decision must be subject to judicial review as it contradicts the child's right to education.

114. The Committee welcomes the introduction of child-friendly school programmes in many countries, which seek to provide interactive, caring, protective and participatory environments that prepare children and adolescents for active roles in society and responsible citizenship within their communities.

5. In play, recreation, sports and cultural activities

115. Children require play, recreation, physical and cultural activities for their development and socialization. These should be designed taking into account children's preferences and capacities. Children who are able to express their views should be consulted regarding the accessibility and appropriateness of play and recreation facilities. Very young children and some children with disabilities, who are unable to participate in formal consultative processes, should be provided with particular opportunities to express their wishes.

6. In the workplace

116. Children working at younger ages than permitted by laws and International Labour Organization Conventions Nos. 138 (1973) and 182 (1999) have to be heard in child-sensitive settings in order to understand their views of the situation and their best interests. They should be included in the search for a solution, which respects the economic and socio-structural constraints as well as the cultural context

[16] Committee on the Rights of the Child, general comment No. 1 (2001) on the aims of education (art. 29, para. 1 of the Convention), (CRC/GC/2001/1).

[17] States parties should refer to the Committee's general comment No. 8 (2006) on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment, which explains participatory strategies to eliminate corporal punishment (CRC/C/GC/8).

under which these children work. Children should also be heard when policies are developed to eliminate the root causes of child labour, in particular regarding education.

117. Working children have a right to be protected by law against exploitation and should be heard when worksites and conditions of work are examined by inspectors investigating the implementation of labour laws. Children and, if existing, representatives of working children's associations should also be heard when labour laws are drafted or when the enforcement of laws is considered and evaluated.

7. In situations of violence

118. The Convention establishes the right of the child to be protected from all forms of violence and the responsibility of States parties to ensure this right for every child without any discrimination. The Committee encourages States parties to consult with children in the development and implementation of legislative, policy, educational and other measures to address all forms of violence. Particular attention needs to be paid to ensuring that marginalized 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 processes.

119. In this regard, the Committee welcomes the findings of the Secretary-General's Study on Violence against Children, and urges States Parties to implement fully its recommendations, including the recommendation to provide the space for children to freely express their views and give these views due weight in all aspects of prevention, reporting and monitoring violence against them.[18]

120. Much of the violence perpetrated against children goes unchallenged both because certain forms of abusive behaviour are understood by children as accepted practices, and due to the lack of child-friendly reporting mechanisms. For example, they have no one to whom they can report in confidence and safety about experienced maltreatment, such as corporal punishment, genital mutilation or early marriage, and no channel to communicate their general observations to those accountable for implementation of their rights. Thus, effective inclusion of children in protective measures requires that children be informed about their right to be heard and to grow up free from all forms of physical and psychological violence. States parties should oblige all children's institutions to establish easy access to individuals or organizations to which they can report in confidence and safety, including through telephone helplines, and to provide places where children can contribute their experience and views on combating violence against children.

121. The Committee also draws the attention of States parties to the recommendation in the Secretary-General's Study on Violence against Children to support and encourage children's organizations and child-led initiatives to address violence and to include these organizations in the elaboration, establishment and evaluation of anti-violence programmes and measures, so that children can play a key role in their own protection.

8. In the development of prevention strategies

122. The Committee notes that the voices of children have increasingly become a powerful force in the prevention of child rights violations. Good practice examples are available, inter alia, in the fields of violence prevention in schools, combating child exploitation through hazardous and extensive labour, providing health services and education to street children, and in the juvenile justice system. 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.

9. In immigration and asylum proceedings

123. Children who come to a country following their parents in search of work or as refugees are in a particularly vulnerable situation. For this reason it is urgent to fully implement their right to express their views on all aspects of the immigration and asylum proceedings. In the case of migration, the child has to be heard on his or her educational expectations and health conditions in order to integrate him or her into school and health services. In the case of an asylum claim, the child must additionally have the opportunity to present her or his reasons leading to the asylum claim.

124. The Committee emphasizes that these children have to be provided with all relevant information, in their own language, on their entitlements, the services available, including means of communication,

[18] Report of the independent expert for the United Nations Study on Violence against Children (A/61/299).

and the immigration and asylum process, in order to make their voice heard and to be given due weight in the proceedings. A guardian or adviser should be appointed, free of charge. Asylum-seeking children may also need effective family tracing and relevant information about the situation in their country of origin to determine their best interests. Particular assistance may be needed for children formerly involved in armed conflict to allow them to pronounce their needs. Furthermore, attention is needed to ensure that stateless children are included in decision-making processes within the territories where they reside.[19]

10. In emergency situations

125. The Committee underlines that the right embodied in article 12 does not cease in situations of crisis or in their aftermath. There is a growing body of evidence of the significant contribution that children are able to make in conflict situations, post-conflict resolution and reconstruction processes following emergencies.[20] Thus, the Committee emphasized in its recommendation after the day of general discussion in 2008 that children affected by emergencies should be encouraged and enabled to participate in analysing their situation and future prospects. Children's participation helps them to regain control over their lives, contributes to rehabilitation, develops organizational skills and strengthens a sense of identity. However, care needs to be taken to protect children from exposure to situations that are likely to be traumatic or harmful.

126. Accordingly, the Committee encourages States parties to support mechanisms which enable children, in particular adolescents, to play an active role in both post-emergency reconstruction and post-conflict resolution processes. Their views should be elicited in the assessment, design, implementation, monitoring and evaluation of programmes. For example, children in refugee camps can be encouraged to contribute to their own safety and well-being through the establishment of children's forums. Support needs to be given to enable children to establish such forums, while ensuring that their operation is consistent with children's best interests and their right to protection from harmful experiences.

11. In national and international settings

127. Much of the opportunity for children's participation takes place at the community level. The Committee welcomes the growing number of local youth parliaments, municipal children's councils and ad hoc consultations where children can voice their views in decision-making processes. However, these structures for formal representative participation in local government should be just one of many approaches to the implementation of article 12 at the local level, as they only allow for a relatively small number of children to engage in their local communities. Consulting hours of politicians and officials, open house and visits in schools and kindergartens create additional opportunities for communication.

128. Children should be supported and encouraged to form their own child-led organizations and initiatives, which will create space for meaningful participation and representation. In addition, children can contribute their perspectives, for example, on the design of schools, playgrounds, parks, leisure and cultural facilities, public libraries, health facilities and local transport systems in order to ensure more appropriate services. In community development plans that call for public consultation, children's views should be explicitly included.

129. Such participation opportunities are, meanwhile, established in many countries also on the district, regional, federal state and national levels, where youth parliaments, councils and conferences provide forums for children to present their views and make them known to relevant audiences. NGOs and civil society organizations have developed practices to support children, which safeguard the transparency of representation and counter the risks of manipulation or tokenism.

130. The Committee welcomes the significant contributions by UNICEF and NGOs in promoting awareness-raising on children's right to be heard and their participation in all domains of their lives, and encourages them to further promote child participation in all matters affecting them, including at the grass-roots, community, and national or international levels, and to facilitate exchanges of best practices. Networking among child-led organizations should be actively encouraged to increase opportunities for shared learning and platforms for collective advocacy.

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[19] Cf. the Committee's general comment No. 6 (2005) on the treatment of unaccompanied and separated children outside their country of origin (CRC/GC/2005/6).

[20] "The participation of children and young people in emergencies: a guide for relief agencies", UNICEF, Bangkok (2007).

131. At the international level, children's participation at the World Summits for Children convened by the General Assembly in 1990 and 2002, and the involvement of children in the reporting process to the Committee on the Rights of the Child have particular relevance. The Committee welcomes written reports and additional oral information submitted by child organizations and children's representatives in the monitoring process of child rights implementation by States parties, and encourages States parties and NGOs to support children to present their views to the Committee.

D. Basic requirements for the implementation of the right of the child to be heard

132. The Committee urges States parties to avoid tokenistic approaches, which limit children's expression of views, or which allow children to be heard, but fail to give their views due weight. It emphasizes that adult manipulation of children, placing children in situations where they are told what they can say, or exposing children to risk of harm through participation are not ethical practices and cannot be understood as implementing article 12.

133. If participation is to be effective and meaningful, it needs to be understood as a process, not as an individual one-off event. Experience since the Convention on the Rights of the Child was adopted in 1989 has led to a broad consensus on the basic requirements which have to be reached for effective, ethical and meaningful implementation of article 12. The Committee recommends that States parties integrate these requirements into all legislative and other measures for the implementation of article 12.

134. All processes in which a child or children are heard and participate, must be:

(a) Transparent and informative - children must be provided with full, accessible, diversity-sensitive and age-appropriate information about their right to express their views freely and their views to be given due weight, and how this participation will take place, its scope, purpose and potential impact;

(b) Voluntary - children should never be coerced into expressing views against their wishes and they should be informed that they can cease involvement at any stage;

(c) Respectful - children's views have to be treated with respect and they should be provided with opportunities to initiate ideas and activities. Adults working with children should acknowledge, respect and build on good examples of children's participation, for instance, in their contributions to the family, school, culture and the work environment. They also need an understanding of the socio-economic, environmental and cultural context of children's lives. Persons and organizations working for and with children should also respect children's views with regard to participation in public events;

(d) Relevant - the issues on which children have the right to express their views must be of real relevance to their lives and enable them to draw on their knowledge, skills and abilities. In addition, space needs to be created to enable children to highlight and address the issues they themselves identify as relevant and important;

(e) Child-friendly - environments and working methods should be adapted to children's capacities. Adequate time and resources should be made available to ensure that children are adequately prepared and have the confidence and opportunity to contribute their views. Consideration needs to be given to the fact that children will need differing levels of support and forms of involvement according to their age and evolving capacities;

(f) Inclusive - participation must be inclusive, avoid existing patterns of discrimination, and encourage opportunities for marginalized children, including both girls and boys, to be involved (see also para. 88 above). Children are not a homogenous group and participation needs to provide for equality of opportunity for all, without discrimination on any grounds. Programmes also need to ensure that they are culturally sensitive to children from all communities;

(g) Supported by training - adults need preparation, skills and support to facilitate children's participation effectively, to provide them, for example, with skills in listening, working jointly with children and engaging children effectively in accordance with their evolving capacities. Children themselves can be involved as trainers and facilitators on how to promote effective participation; they require capacity-building to strengthen their skills in, for example, effective participation awareness of their rights, and training in organizing meetings, raising funds, dealing with the media, public speaking and advocacy;

(h) Safe and sensitive to risk - in certain situations, expression of views may involve risks. Adults have a responsibility towards the children with whom they work and must take every precaution to minimize the risk to children of violence, exploitation or any other negative consequence of their participation. Action necessary to provide appropriate protection will include the development of a clear child-protection strategy which recognizes the particular risks faced by some groups of children, and the extra barriers they face in obtaining help. Children must be aware of their right to be protected from harm and know where to go for help if needed. Investment in working with families and communities is important in order to build understanding of the value and implications of participation, and to minimize the risks to which children may otherwise be exposed;

(i) Accountable - a commitment to follow-up and evaluation is essential. For example, in any research or consultative process, children must be informed as to how their views have been interpreted and used and, where necessary, provided with the opportunity to challenge and influence the analysis of the findings. Children are also entitled to be provided with clear feedback on how their participation has influenced any outcomes. Wherever appropriate, children should be given the opportunity to participate in follow-up processes or activities. Monitoring and evaluation of children's participation needs to be undertaken, where possible, with children themselves.

E. Conclusions

135. Investment in the realization of the child's right to be heard in all matters of concern to her or him and for her or his views to be given due consideration, is a clear and immediate legal obligation of States parties under the Convention. It is the right of every child without any discrimination. Achieving meaningful opportunities for the implementation of article 12 will necessitate dismantling the legal, political, economic, social and cultural barriers that currently impede children's opportunity to be heard and their access to participation in all matters affecting them. It requires a preparedness to challenge assumptions about children's capacities, and to encourage the development of environments in which children can build and demonstrate capacities. It also requires a commitment to resources and training.

134. Fulfilling these obligations will present a challenge for States parties. But it is an attainable goal if the strategies outlined in this general comment are systematically implemented and a culture of respect for children and their views is built.

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Committee on the Rights of the Children

GENERAL COMMENT No. 14 (2013) on the right of the child to have his or her best interests taken as a primary consideration

(art. 3, para. 1 - adopted by the Committee at its 62th session:14 January – 1 February 2013)

"*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.*"

Convention on the Rights of the Child (art. 3, para. 1)

I. Introduction

A. The best interests of the child: a right, a principle and a rule of procedure

1. Article 3, paragraph 1, of the Convention on the Rights of the Child gives the child the right to have his or her best interests assessed and taken into account as a primary consideration in all actions or decisions that concern him or her, both in the public and private sphere. Moreover, it expresses one of the fundamental values of the Convention. The Committee on the Rights of the Child (the Committee) has identified article 3, paragraph 1, as one of the four general principles of the Convention for interpreting and implementing all the rights of the child,[1] and applies it is a dynamic concept that requires an assessment appropriate to the specific context.

2. The concept of the "child's best interests" is not new. Indeed, it pre-dates the Convention and was already enshrined in the 1959 Declaration of the Rights of the Child (para. 2), the Convention on the Elimination of All Forms of Discrimination against Women (arts. 5 (b) and 16, para. 1 (d)), as well as in regional instruments and many national and international laws.

3. The Convention also explicitly refers to the child's best interests in other articles: article 9: separation from parents; article 10: family reunification; article 18: parental responsibilities; article 20: deprivation of family environment and alternative care; article 21: adoption; article 37(c): separation from adults in detention; article 40, paragraph 2 (b) (iii): procedural guarantees, including presence of parents at court hearings for penal matters involving children in conflict with the law. Reference is also made to the child's best interests in the Optional Protocol to the Convention on the sale of children, child

[1] The Committee's general comment No. 5 (2003) on the general measures of implementation of the Convention on the Rights of the Child, para. 12; and No. 12 (2009) on the right of the child to be heard, para. 2.

prostitution and child pornography (preamble and art. 8) and in the Optional Protocol to the Convention on a communications procedure (preamble and arts. 2 and 3).

4. The concept of the child's best interests is aimed at ensuring both the full and effective enjoyment of all the rights recognized in the Convention and the holistic development of the child.[2] The Committee has already pointed out[3] that "an adult's judgment of a child's best interests cannot override the obligation to respect all the child's rights under the Convention." It recalls that there is no hierarchy of rights in the Convention; all the rights provided for therein are in the "child's best interests" and no right could be compromised by a negative interpretation of the child's best interests.

5. The full application of the concept of the child's best interests requires the development of a rights-based approach, engaging all actors, to secure the holistic physical, psychological, moral and spiritual integrity of the child and promote his or her human dignity.

6. The Committee underlines that the child's best interests is a threefold concept:

(a) A substantive right: The right of the child to have his or her best interests assessed and taken as a primary consideration when different interests are being considered in order to reach a decision on the issue at stake, and the guarantee that this right will be implemented whenever a decision is to be made concerning a child, a group of identified or unidentified children or children in general. Article 3, paragraph 1, creates an intrinsic obligation for States, is directly applicable (self-executing) and can be invoked before a court.

(b) A fundamental, interpretative legal principle: If a legal provision is open to more than one interpretation, the interpretation which most effectively serves the child's best interests should be chosen. The rights enshrined in the Convention and its Optional Protocols provide the framework for interpretation.

(c) A rule of procedure: Whenever a decision is to be made that will affect a specific child, an identified group of children or children in general, the decision-making process must include an evaluation of the possible impact (positive or negative) of the decision on the child or children concerned. Assessing and determining the best interests of the child require procedural guarantees. Furthermore, the justification of a decision must show that the right has been explicitly taken into account. In this regard, States parties shall explain how the right has been respected in the decision, that is, what has been considered to be in the child's best interests; what criteria it is based on; and how the child's interests have been weighed against other considerations, be they broad issues of policy or individual cases.

7. In the present general comment, the expression "the child's best interests" or "the best interests of the child" covers the three dimensions developed above.

B. Structure

8. The scope of the present general comment is limited to article 3, paragraph 1, of the Convention and does not cover article 3, paragraph 2, which pertains to the well-being of the child, nor article 3, paragraph 3, which concerns the obligation of States parties to ensure that institutions, services and facilities for children comply with the established standards, and that mechanisms are in place to ensure that the standards are respected.

9. The Committee states the objectives (chapter II) of the present general comment and presents the nature and scope of the obligation of States parties (chapter III). It also provides a legal analysis of article 3, paragraph 1 (chapter IV), showing the links to other general principles of the Convention. Chapter V is dedicated to the implementation, in practice, of the principle of best interests of the child, while chapter VI provides guidelines on disseminating the general comment.

II. Objectives

10. The present general comment seeks to ensure the application of and respect for the best interests of the child by the States parties to the Convention. It defines the requirements for due consideration, especially in judicial and administrative decisions as well as in other actions concerning the child as an individual, and at all stages of the adoption of laws, policies, strategies, programmes, plans, budgets,

[2] The Committee expects States to interpret development as a "holistic concept, embracing the child´s physical, mental, spiritual, moral, psychological and social development" (general comment No. 5, para. 12).

[3] General comment No. 13 (2011) on the right to protection from all forms of violence, para. 61.

legislative and budgetary initiatives and guidelines – that is, all implementation measures – concerning children in general or as a specific group. The Committee expects that this general comment will guide decisions by all those concerned with children, including parents and caregivers.

11. The best interests of the child is a dynamic concept that encompasses various issues which are continuously evolving. The present general comment provides a framework for assessing and determining the child's best interests; it does not attempt to prescribe what is best for the child in any given situation at any point in time.

12. The main objective of this general comment is to strengthen the understanding and application of the right of children to have their best interests assessed and taken as a primary consideration or, in some cases, the paramount consideration (see paragraph 38 below). Its overall objective is to promote a real change in attitudes leading to the full respect of children as rights holders. More specifically, this has implications for:

(a) The elaboration of all implementation measures taken by governments;

(b) Individual decisions made by judicial or administrative authorities or public entities through their agents that concern one or more identified children;

(c) Decisions made by civil society entities and the private sector, including profit and non-profit organizations, which provide services concerning or impacting on children;

(d) Guidelines for actions undertaken by persons working with and for children, including parents and caregivers.

III. Nature and scope of the obligations of States parties

13. Each State party must respect and implement the right of the child to have his or her best interests assessed and taken as a primary consideration, and is under the obligation to take all necessary, deliberate and concrete measures for the full implementation of this right.

14. Article 3, paragraph 1, establishes a framework with three different types of obligations for States parties:

(a) The obligation to ensure that the child's best interests are *appropriately integrated and consistently applied* in every action taken by a public institution, especially in all implementation measures, administrative and judicial proceedings which directly or indirectly impact on children;

(b) The obligation to ensure that all judicial and administrative decisions as well as policies and legislation concerning children demonstrate that the child's best interests have been a primary consideration. This includes describing how the best interests have been examined and assessed, and what weight has been ascribed to them in the decision.

(c) The obligation to ensure that the interests of the child have been assessed and taken as a primary consideration in decisions and actions taken by the private sector, including those providing services, or any other private entity or institution making decisions that concern or impact on a child.

15. To ensure compliance, States parties should undertake a number of implementation measures in accordance with articles 4, 42 and 44, paragraph 6, of the Convention, and ensure that the best interests of the child are a primary consideration in all actions, including:

(a) Reviewing and, where necessary, amending domestic legislation and other sources of law so as to incorporate article 3, paragraph 1, and ensure that the requirement to consider the child's best interests is reflected and implemented in all national laws and regulations, provincial or territorial legislation, rules governing the operation of private or public institutions providing services or impacting on children, and judicial and administrative proceedings at any level, both as a substantive right and as a rule of procedure;

(b) Upholding the child's best interests in the coordination and implementation of policies at the national, regional and local levels;

(c) Establishing mechanisms and procedures for complaints, remedy or redress in order to fully realize the right of the child to have his or her best interests appropriately integrated and consistently applied in all implementation measures, administrative and judicial proceedings relevant to and with an impact on him or her;

(d) Upholding the child's best interests in the allocation of national resources for programmes and measures aimed at implementing children's rights, and in activities receiving international assistance or development aid;

(e) When establishing, monitoring and evaluating data collection, ensure that the child's best interests are explicitly spelled out and, where required, support research on children's rights issues;

(f) Providing information and training on article 3, paragraph 1, and its application in practice to all those making decisions that directly or indirectly impact on children, including professionals and other people working for and with children;

(g) Providing appropriate information to children in a language they can understand, and to their families and caregivers, so that they understand the scope of the right protected under article 3, paragraph 1, as well as creating the necessary conditions for children to express their point of view and ensuring that their opinions are given due weight;

(h) Combating all negative attitudes and perceptions which impede the full realization of the right of the child to have his or her best interests assessed and taken as a primary consideration, through communication programmes involving mass media and social networks as well as children, in order to have children recognized as rights holders.

16. In giving full effect to the child's best interests, the following parameters should be borne in mind:

(a) The universal, indivisible, interdependent and interrelated nature of children's rights;

(b) Recognition of children as right holders;

(c) The global nature and reach of the Convention;

(d) The obligation of States parties to respect, protect and fulfil all the rights in the Convention;

(e) Short-, medium- and long-term effects of actions related to the development of the child over time.

IV. Legal analysis and links with the general principles of the Convention

A. Legal analysis of article 3, paragraph 1

1. "In all actions concerning children"

(a) "in all actions"

17. Article 3, paragraph 1 seeks to ensure that the right is guaranteed in all decisions and actions concerning children. This means that every action relating to a child or children has to take into account their best interests as a primary consideration. The word "action" does not only include decisions, but also all acts, conduct, proposals, services, procedures and other measures.

18. Inaction or failure to take action and omissions are also "actions", for example, when social welfare authorities fail to take action to protect children from neglect or abuse.

(b) "concerning"

19. The legal duty applies to all decisions and actions that directly or indirectly affect children. Thus, the term "concerning" refers first of all, to measures and decisions directly concerning a child, children as a group or children in general, and secondly, to other measures that have an effect on an individual child, children as a group or children in general, even if they are not the direct targets of the measure. As stated in the Committee's general comment No. 7 (2005), such actions include those aimed at children (e.g. related to health, care or education), as well as actions which include children and other population groups (e.g. related to the environment, housing or transport) (para. 13 (b)). Therefore, "concerning" must be understood in a very broad sense.

20. Indeed, all actions taken by a State affect children in one way or another. This does not mean that every action taken by the State needs to incorporate a full and formal process of assessing and determining the best interests of the child. However, where a decision will have a major impact on a child or children, a greater level of protection and detailed procedures to consider their best interests is appropriate.

Thus, in relation to measures that are not directly aimed at the child or children, the term "concerning" would need to be clarified in the light of the circumstances of each case in order to be able to appreciate the impact of the action on the child or children.

(c) "children"

21. The term "children" refers to all persons under the age of 18 within the jurisdiction of a State party, without discrimination of any kind, in line with articles 1 and 2 of the Convention.

22. Article 3, paragraph 1, applies to children as individuals and places an obligation on States parties to assess and take the child's best interests as a primary consideration in individual decisions.

23. However, the term "children" implies that the right to have their best interests duly considered applies to children not only as individuals, but also in general or as a group. Accordingly, States have the obligation to assess and take as a primary consideration the best interests of children as a group or in general in all actions concerning them. This is particularly evident for all implementation measures. The Committee[4] underlines that the child's best interests is conceived both as a collective and individual right, and that the application of this right to indigenous children as a group requires consideration of how the right relates to collective cultural rights.

24. That is not to say that in a decision concerning an individual child, his or her interests must be understood as being the same as those of children in general. Rather, article 3, paragraph 1, implies that the best interests of a child must be assessed individually. Procedures for establishing the best interests of children individually and as a group can be found in chapter V below.

2. "By public or private social welfare institutions, courts of law, administrative authorities or legislative bodies"

25. The obligation of the States to duly consider the child's best interests is a comprehensive obligation encompassing all public and private social welfare institutions, courts of law, administrative authorities and legislative bodies involving or concerning children. Although parents are not explicitly mentioned in article 3, paragraph 1, the best interests of the child "will be their basic concern" (art. 18, para. 1).

(a) "public or private social welfare institutions"

26. These terms should not be narrowly construed or limited to social institutions *stricto sensu*, but should be understood to mean all institutions whose work and decisions impact on children and the realization of their rights. Such institutions include not only those related to economic, social and cultural rights (e.g. care, health, environment, education, business, leisure and play, etc.), but also institutions dealing with civil rights and freedoms (e.g. birth registration, protection against violence in all settings, etc.). Private social welfare institutions include private sector organizations – either for-profit or non-profit – which play a role in the provision of services that are critical to children's enjoyment of their rights, and which act on behalf of or alongside Government services as an alternative.

(b) "courts of law"

27. The Committee underlines that "courts" refer to all judicial proceedings, in all instances – whether staffed by professional judges or lay persons – and all relevant procedures concerning children, without restriction. This includes conciliation, mediation and arbitration processes.

28. In criminal cases, the best interests principle applies to children in conflict (i.e. alleged, accused or recognized as having infringed) or in contact (as victims or witnesses) with the law, as well as children affected by the situation of their parents in conflict with the law. The Committee[5] underlines that protecting the child's best interests means that the traditional objectives of criminal justice, such as repression or retribution, must give way to rehabilitation and restorative justice objectives, when dealing with child offenders.

29. In civil cases, the child may be defending his or her interests directly or through a representative, in the case of paternity, child abuse or neglect, family reunification, accommodation, etc. The child may be affected by the trial, for example in procedures concerning adoption or divorce, decisions regarding custody, residence, contact or other issues which have an important impact on the life and development of the child, as well as child abuse or neglect proceedings. The courts must provide for the best interests of the child to be considered in all such situations and decisions, whether of a procedural or substantive nature, and must demonstrate that they have effectively done so.

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[4] General comment No.11 (2009) on indigenous children and their rights under the Convention, para. 30.

[5] General comment No. 10 (2007*)* on children's rights in juvenile justice, para. 10.

(c) "administrative authorities"

30. The Committee emphasizes that the scope of decisions made by administrative authorities at all levels is very broad, covering decisions concerning education, care, health, the environment, living conditions, protection, asylum, immigration, access to nationality, among others. Individual decisions taken by administrative authorities in these areas must be assessed and guided by the best interests of the child, as for all implementation measures.

(d) "legislative bodies"

31. The extension of States parties' obligation to their "legislative bodies" shows clearly that article 3, paragraph 1, relates to children in general, not only to children as individuals. The adoption of any law or regulation as well as collective agreements – such as bilateral or multilateral trade or peace treaties which affect children – should be governed by the best interests of the child. The right of the child to have his or her best interests assessed and taken as a primary consideration should be explicitly included in all relevant legislation, not only in laws that specifically concern children. This obligation extends also to the approval of budgets, the preparation and development of which require the adoption of a best-interests-of-the-child perspective for it to be child-rights sensitive.

3. "The best interests of the child"

32. The concept of the child's best interests is complex and its content must be determined on a case-by-case basis. It is through the interpretation and implementation of article 3, paragraph 1, in line with the other provisions of the Convention, that the legislator, judge, administrative, social or educational authority will be able to clarify the concept and make concrete use thereof. Accordingly, the concept of the child's best interests is flexible and adaptable. It should be adjusted and defined on an individual basis, according to the specific situation of the child or children concerned, taking into consideration their personal context, situation and needs. For individual decisions, the child's best interests must be assessed and determined in light of the specific circumstances of the particular child. For collective decisions – such as by the legislator –, the best interests of children in general must be assessed and determined in light of the circumstances of the particular group and/or children in general. In both cases, assessment and determination should be carried out with full respect for the rights contained in the Convention and its Optional Protocols.

33. The child's best interests shall be applied to all matters concerning the child or children, and taken into account to resolve any possible conflicts among the rights enshrined in the Convention or other human rights treaties. Attention must be placed on identifying possible solutions which are in the child's best interests. This implies that States are under the obligation to clarify the best interests of all children, including those in vulnerable situations, when adopting implementation measures.

34. The flexibility of the concept of the child's best interests allows it to be responsive to the situation of individual children and to evolve knowledge about child development. However, it may also leave room for manipulation; the concept of the child's best interests has been abused by Governments and other State authorities to justify racist policies, for example; by parents to defend their own interests in custody disputes; by professionals who could not be bothered, and who dismiss the assessment of the child's best interests as irrelevant or unimportant.

35. With regard to implementation measures, ensuring that the best interests of the child are a primary consideration in legislation and policy development and delivery at all levels of Government demands a continuous process of child rights impact assessment (CRIA) to predict the impact of any proposed law, policy or budgetary allocation on children and the enjoyment of their rights, and child rights impact evaluation to evaluate the actual impact of implementation. [6]

4. "Shall be a primary consideration"

36. The best interests of a child shall be a primary consideration in the adoption of all measures of implementation. The words "shall be" place a strong legal obligation on States and mean that States may not exercise discretion as to whether children's best interests are to be assessed and ascribed the proper weight as a primary consideration in any action undertaken.

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[6] General comment No. 5 (2003*)* on general measures of implementation of the Convention on the Rights of the Child, para. 45.

37. The expression "primary consideration" means that the child's best interests may not be considered on the same level as all other considerations. This strong position is justified by the special situation of the child: dependency, maturity, legal status and, often, voicelessness. Children have less possibility than adults to make a strong case for their own interests and those involved in decisions affecting them must be explicitly aware of their interests. If the interests of children are not highlighted, they tend to be overlooked.

38. In respect of adoption (art. 21), the right of best interests is further strengthened; it is not simply to be "**a primary** consideration" but "**the paramount** consideration". Indeed, the best interests of the child are to be the determining factor when taking a decision on adoption, but also on other issues.

39. However, since article 3, paragraph 1, covers a wide range of situations, the Committee recognizes the need for a degree of flexibility in its application. The best interests of the child – once assessed and determined – might conflict with other interests or rights (e.g. of other children, the public, parents, etc.). Potential conflicts between the best interests of a child, considered individually, and those of a group of children or children in general have to be resolved on a case-by-case basis, carefully balancing the interests of all parties and finding a suitable compromise. The same must be done if the rights of other persons are in conflict with the child's best interests. If harmonization is not possible, authorities and decision-makers will have to analyse and weigh the rights of all those concerned, bearing in mind that the right of the child to have his or her best interests taken as a primary consideration means that the child's interests have high priority and not just one of several considerations. Therefore, a larger weight must be attached to what serves the child best.

40. Viewing the best interests of the child as "primary" requires a consciousness about the place that children's interests must occupy in all actions and a willingness to give priority to those interests in all circumstances, but especially when an action has an undeniable impact on the children concerned.

B. The best interests of the child and links with other general principles of the Convention

1. The child's best interests and the right to non-discrimination (art. 2)

41. The right to non-discrimination is not a passive obligation, prohibiting all forms of discrimination in the enjoyment of rights under the Convention, but also requires appropriate proactive measures taken by the State to ensure effective equal opportunities for all children to enjoy the rights under the Convention. This may require positive measures aimed at redressing a situation of real inequality.

2. The child's best interests and the right to life, survival and development (art. 6)

42. States must create an environment that respects human dignity and ensures the holistic development of every child. In the assessment and determination of the child's best interests, the State must ensure full respect for his or her inherent right to life, survival and development.

3. The child's best interests and the right to be heard (art. 12)

43. Assessment of a child's best interests must include respect for the child's right to express his or her views freely and due weight given to said views in all matters affecting the child. This is clearly set out in the Committee's general comment No. 12 which also highlights the inextricable links between articles 3, paragraph 1, and 12. The two articles have complementary roles: the first aims to realize the child's best interests, and the second 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 or her best interests. Article 3, paragraph 1, cannot be correctly applied if the requirements of article 12 are not met. Similarly, article 3, paragraph 1, reinforces the functionality of article 12, by facilitating the essential role of children in all decisions affecting their lives[7].

44. The evolving capacities of the child (art. 5) must be taken into consideration when the child's best interests and right to be heard are at stake. The Committee has already established that the more the child knows, has experienced and understands, the more the parent, legal guardian or other persons legally responsible for him or her have to transform direction and guidance into reminders and advice, and later to an exchange on an equal footing.[8] Similarly, as the child matures, his or her views shall have increasing weight in the assessment of his or her best interests. Babies and very young children have the same rights as all children to have their best interests assessed, even if they cannot express their views

[7] General comment No. 12, paras. 70-74.

[8] Ibid., para. 84.

or represent themselves in the same way as older children. States must ensure appropriate arrangements, including representation, when appropriate, for the assessment of their best interests; the same applies for children who are not able or willing to express a view.

45. The Committee recalls that article 12, paragraph 2, of the Convention provides for the right of the child to be heard, either directly or through a representative, in any judicial or administrative proceeding affecting him or her (see further chapter V.B below).

V. Implementation: assessing and determining the child's best interests

46. As stated earlier, the "best interests of the child" is a right, a principle and a rule of procedure based on an assessment of all elements of a child's or children's interests in a specific situation. When assessing and determining the best interests of the child in order to make a decision on a specific measure, the following steps should be followed:

(a) First, within the specific factual context of the case, find out what are the relevant elements in a best-interests assessment, give them concrete content, and assign a weight to each in relation to one another;

(b) Secondly, to do so, follow a procedure that ensures legal guarantees and proper application of the right.

47. Assessment and determination of the child's best interests are two steps to be followed when required to make a decision. The "best-interests assessment" consists in evaluating and balancing all the elements necessary to make a decision in a specific situation for a specific individual child or group of children. It is carried out by the decision-maker and his or her staff – if possible a multidisciplinary team –, and requires the participation of the child. The "best-interests determination" describes the formal process with strict procedural safeguards designed to determine the child's best interests on the basis of the best-interests assessment.

A. Best interests assessment and determination

48. Assessing the child's best interests is a unique activity that should be undertaken in each individual case, in the light of the specific circumstances of each child or group of children or children in general. These circumstances relate to the individual characteristics of the child or children concerned, such as, inter alia, age, sex, level of maturity, experience, belonging to a minority group, having a physical, sensory or intellectual disability, as well as the social and cultural context in which the child or children find themselves, such as the presence or absence of parents, whether the child lives with them, quality of the relationships between the child and his or her family or caregivers, the environment in relation to safety, the existence of quality alternative means available to the family, extended family or caregivers, etc.

49. Determining what is in the best interests of the child should start with an assessment of the specific circumstances that make the child unique. This implies that some elements will be used and others will not, and also influences how they will be weighted against each other. For children in general, assessing best interests involves the same elements.

50. The Committee considers it useful to draw up a non-exhaustive and non-hierarchical list of elements that could be included in a best-interests assessment by any decision-maker having to determine a child's best interests. The non-exhaustive nature of the elements in the list implies that it is possible to go beyond those and consider other factors relevant in the specific circumstances of the individual child or group of children. All the elements of the list must be taken into consideration and balanced in light of each situation. The list should provide concrete guidance, yet flexibility.

51. Drawing up such a list of elements would provide guidance for the State or decision-maker in regulating specific areas affecting children, such as family, adoption and juvenile justice laws, and if necessary, other elements deemed appropriate in accordance with its legal tradition may be added. The Committee would like to point out that, when adding elements to the list, the ultimate purpose of the child's best interests should be to ensure the full and effective enjoyment of the rights recognized in the Convention and the holistic development of the child. Consequently, elements that are contrary to the rights enshrined in the Convention or that would have an effect contrary to the rights under the Convention cannot be considered as valid in assessing what is best for a child or children.

1. Elements to be taken into account when assessing the child's best interests

52. Based on these preliminary considerations, the Committee considers that the elements to be taken into account when assessing and determining the child's best interests, as relevant to the situation in question, are as follows:

(a) The child's views

53. Article 12 of the Convention provides for the right of children to express their views in every decision that affects them. 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 or children to influence the determination of their best interests.

54. The fact that the child is very young or in a vulnerable situation (e.g. has a disability, belongs to a minority group, is a migrant, etc.) does not deprive him or her of the right to express his or her views, nor reduces the weight given to the child's views in determining his or her best interests. 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[9] and support, where necessary, to ensure their full participation in the assessment of their best interests.

(b) The child's identity

55. Children are not a homogeneous group and therefore diversity must be taken into account when assessing their best interests. The identity of the child includes characteristics such as sex, sexual orientation, national origin, religion and beliefs, cultural identity, personality. Although children and young people share basic universal needs, the expression of those needs depends on a wide range of personal, physical, social and cultural aspects, including their evolving capacities. The right of the child to preserve his or her identity is guaranteed by the Convention (art. 8) and must be respected and taken into consideration in the assessment of the child's best interests.

56. Regarding religious and cultural identity, for example, when considering a foster home or placement for a child, 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 (art. 20, para. 3), and the decision-maker must take into consideration this specific context when assessing and determining the child's best interests. The same applies in cases of adoption, separation from or divorce of parents. Due consideration of the child's best interests implies that children have access to the culture (and language, if possible) of their country and family of origin, and the opportunity to access information about their biological family, in accordance with the legal and professional regulations of the given country (see art. 9, para. 4).

57. Although preservation of religious and cultural values and traditions as part of the identity of the child must be taken into consideration, practices that are inconsistent or incompatible with the rights established in the Convention are not in the child's best interests. Cultural identity cannot excuse or justify the perpetuation by decision-makers and authorities of traditions and cultural values that deny the child or children the rights guaranteed by the Convention.

(c) Preservation of the family environment and maintaining relations

58. The Committee recalls that it is indispensable to carry out the assessment and determination of the child's best interests in the context of potential separation of a child from his or her parents (arts. 9, 18 and 20). It also underscores that the elements mentioned above are concrete rights and not only elements in the determination of the best interests of the child.

59. The family is the fundamental unit of society and the natural environment for the growth and well-being of its members, particularly children (preamble of the Convention). The right of the child to family life is protected under the Convention (art. 16). The term "family" must be interpreted in a broad sense to include biological, adoptive or foster parents or, where applicable, the members of the extended family or community as provided for by local custom (art. 5).

60. Preventing family separation and preserving family unity are important components of the child protection system, and are based on the right provided for in article 9, paragraph 1, which requires "that a child shall not be separated from his or her parents against their will, except when […] such separation is necessary for the best interests of the child". Furthermore, the child who is separated from one or both parents is entitled "to maintain personal relations and direct contact with both parents on a regular

[9] See Convention on the Rights of Persons with Disabilities, art. 2: "Reasonable accommodation" means necessary and appropriate modification and adjustments not imposing a disproportionate or undue burden, where needed in a particular case, to ensure […] the enjoyment or exercise on an equal basis with others of all human rights and fundamental freedoms.

basis, except if it is contrary to the child's best interests" (art. 9, para. 3). This also extends to any person holding custody rights, legal or customary primary caregivers, foster parents and persons with whom the child has a strong personal relationship.

61. Given the gravity of the impact on the child of separation from his or her parents, such separation should only occur as a last resort measure, as when the child is in danger of experiencing imminent harm or when otherwise necessary; separation should not take place if less intrusive measures could protect the child. Before resorting to separation, the State should provide support to the parents in assuming their parental responsibilities, and restore or enhance the family's capacity to take care of the child, unless separation is necessary to protect the child. Economic reasons cannot be a justification for separating a child from his or her parents.

62. The Guidelines for the Alternative Care of Children[10] aims to ensure that children are not placed in alternative care unnecessarily; and that where alternative care is provided, it is delivered under appropriate conditions responding to the rights and best interests of the child. In particular, "financial and material poverty, or conditions directly and uniquely imputable to such poverty, should never be the only justification for the removal of a child from parental care [...] but should be seen as a signal for the need to provide appropriate support to the family" (para. 15).

63. Likewise, a child may not be separated from his or her parents on the grounds of a disability of either the child or his or her parents.[11] Separation may be considered only in cases where the necessary assistance to the family to preserve the family unit is not effective enough to avoid a risk of neglect or abandonment of the child or a risk to the child's safety.

64. In case of separation, the State must guarantee that the situation of the child and his or her family has been assessed, where possible, by a multidisciplinary team of well-trained professionals with appropriate judicial involvement, in conformity with article 9 of the Convention, ensuring that no other option can fulfil the child's best interests.

65. When separation becomes necessary, the decision-makers shall ensure that the child maintains the linkages and relations with his or her parents and family (siblings, relatives and persons with whom the child has had strong personal relationships) unless this is contrary to the child's best interests. The quality of the relationships and the need to retain them must be taken into consideration in decisions on the frequency and length of visits and other contact when a child is placed outside the family.

66. When the child's relations with his or her parents are interrupted by migration (of the parents without the child, or of the child without his or her parents), preservation of the family unit should be taken into account when assessing the best interests of the child in decisions on family reunification.

67. The Committee is of the view that shared parental responsibilities are generally in the child's best interests. However, in decisions regarding parental responsibilities, the only criterion shall be what is in the best interests of the particular child. It is contrary to those interests if the law automatically gives parental responsibilities to either or both parents. In assessing the child's best interests, the judge must take into consideration the right of the child to preserve his or her relationship with both parents, together with the other elements relevant to the case.

68. The Committee encourages the ratification and implementation of the conventions of the Hague Conference on Private International Law,[12] which facilitate the application of the child's best interests and provide guarantees for its implementation in the event that the parents live in different countries.

69. In cases where the parents or other primary caregivers commit an offence, alternatives to detention should be made available and applied on a case-by-case basis, with full consideration of the likely impacts of different sentences on the best interests of the affected child or children.[13]

70. Preservation of the family environment encompasses the preservation of the ties of the child in a wider sense. These ties apply to the extended family, such as grandparents, uncles/aunts as well friends,

[10] General Assembly resolution 64/142, annex.

[11] Convention on the Rights of Persons with Disabilities, art. 23, para. 4.

[12] These include No. 28 on the Civil Aspects of International Child Abduction, 1980; No. 33 on Protection of Children and Co-operation in Respect of Intercountry Adoption, 1993; No. 23 on the Recognition and Enforcement of Decisions Relating to Maintenance Obligations, 1973; No. 24 on the Law Applicable to Maintenance Obligations, 1973.

[13] See recommendations of the Day of general discussion on children of incarcerated parents (2011).

school and the wider environment and are particularly relevant in cases where parents are separated and live in different places.

(d) Care, protection and safety of the child

71. When assessing and determining the best interests of a child or children in general, the obligation of the State to ensure the child such protection and care as is necessary for his or her well-being (art. 3, para. 2) should be taken into consideration. The terms "protection and care" must also be read in a broad sense, since their objective is not stated in limited or negative terms (such as "to protect the child from harm"), but rather in relation to the comprehensive ideal of ensuring the child's "well-being" and development. Children's well-being, in a broad sense includes their basic material, physical, educational, and emotional needs, as well as needs for affection and safety.

72. Emotional care is a basic need of children; if parents or other primary caregivers do not fulfil the child's emotional needs, action must be taken so that the child develops a secure attachment. Children need to form an attachment to a caregiver at a very early age, and such attachment, if adequate, must be sustained over time in order to provide the child with a stable environment.

73. Assessment of the child's best interests must also include consideration of the child's safety, that is, the right of the child to protection against all forms of physical or mental violence, injury or abuse (art. 19), sexual harassment, peer pressure, bullying, degrading treatment, etc.,[14] as well as protection against sexual, economic and other exploitation, drugs, labour, armed conflict, etc.(arts. 32-39).

74. Applying a best-interests approach to decision-making means assessing the safety and integrity of the child at the current time; however, the precautionary principle also requires assessing the possibility of future risk and harm and other consequences of the decision for the child's safety.

(e) Situation of vulnerability

75. An important element to consider is the child's situation of vulnerability, such as disability, belonging to a minority group, being a refugee or asylum seeker, victim of abuse, living in a street situation, etc. The purpose of determining the best interests of a child or children in a vulnerable situation should not only be in relation to the full enjoyment of all the rights provided for in the Convention, but also with regard to other human rights norms related to these specific situations, such as those covered in the Convention on the Rights of Persons with Disabilities, the Convention relating to the Status of Refugees, among others.

76. The best interests of a child in a specific situation of vulnerability will not be the same as those of all the children in the same vulnerable situation. Authorities and decision-makers need to take into account the different kinds and degrees of vulnerability of each child, as each child is unique and each situation must be assessed according to the child's uniqueness. An individualized assessment of each child's history from birth should be carried out, with regular reviews by a multidisciplinary team and recommended reasonable accommodation throughout the child's development process.

(f) The child's right to health

77. The child's right to health (art. 24) and his or her health condition are central in assessing the child's best interest. However, if there is more than one possible treatment for a health condition or if the outcome of a treatment is uncertain, the advantages of all possible treatments must be weighed against all possible risks and side effects, and the views of the child must also be given due weight based on his or her age and maturity. In this respect, children should be provided with adequate and appropriate information in order to understand the situation and all the relevant aspects in relation to their interests, and be allowed, when possible, to give their consent in an informed manner.[15]

78. For example, as regards adolescent health, the Committee[16] has stated that States parties have the obligation to ensure that all adolescents, both in and out of school, have access to adequate information that is essential for their health and development in order to make appropriate health behaviour choices. This should include information on use and abuse of tobacco, alcohol and other substances,

[14] General comment No. 13 (2011) on the right of the child to freedom from all forms of violence.

[15] General comment No. 15 (2013) on the right of the child to the enjoyment of the highest attainable standard of health (art. 24), para. 31.

[16] General comment No. 4 (2003) on adolescent health and development in the context of the Convention on the Rights of the Child.

diet, appropriate sexual and reproductive information, dangers of early pregnancy, prevention of HIV/AIDS and of sexually transmitted diseases. Adolescents with a psycho-social disorder have the right to be treated and cared for in the community in which he or she lives, to the extent possible. Where hospitalization or placement in a residential institution is necessary, the best interests of the child must be assessed prior to taking a decision and with respect for the child's views; the same considerations are valid for younger children. The health of the child and possibilities for treatment may also be part of a best-interests assessment and determination with regard to other types of significant decisions (e.g. granting a residence permit on humanitarian grounds).

(g) The child's right to education

79. It is in the best interests of the child to have access to quality education, including early childhood education, non-formal or informal education and related activities, free of charge. All decisions on measures and actions concerning a specific child or a group of children must respect the best interests of the child or children, with regard to education. In order to promote education, or better quality education, for more children, States parties need to have well-trained teachers and other professionals working in different education-related settings, as well as a child-friendly environment and appropriate teaching and learning methods, taking into consideration that education is not only an investment in the future, but also an opportunity for joyful activities, respect, participation and fulfilment of ambitions. Responding to this requirement and enhancing children's responsibilities to overcome the limitations of their vulnerability of any kind, will be in their best interests.

2. Balancing the elements in the best-interests assessment

80. It should be emphasized that the basic best-interests assessment is a general assessment of all relevant elements of the child's best interests, the weight of each element depending on the others. Not all the elements will be relevant to every case, and different elements can be used in different ways in different cases. The content of each element will necessarily vary from child to child and from case to case, depending on the type of decision and the concrete circumstances, as will the importance of each element in the overall assessment.

81. The elements in the best-interests assessment may be in conflict when considering a specific case and its circumstances. For example, preservation of the family environment may conflict with the need to protect the child from the risk of violence or abuse by parents. In such situations, the elements will have to be weighted against each other in order to find the solution that is in the best interests of the child or children.

82. In weighing the various elements, one needs to bear in mind that the purpose of assessing and determining the best interests of the child is to ensure the full and effective enjoyment of the rights recognized in the Convention and its Optional Protocols, and the holistic development of the child.

83. There might be situations where "protection" factors affecting a child (e.g. which may imply limitation or restriction of rights) need to be assessed in relation to measures of "empowerment" (which implies full exercise of rights without restriction). In such situations, the age and maturity of the child should guide the balancing of the elements. The physical, emotional, cognitive and social development of the child should be taken into account to assess the level of maturity of the child.

84. In the best-interests assessment, one has to consider that the capacities of the child will evolve. Decision-makers should therefore consider measures that can be revised or adjusted accordingly, instead of making definitive and irreversible decisions. To do this, they should not only assess the physical, emotional, educational and other needs at the specific moment of the decision, but should also consider the possible scenarios of the child's development, and analyse them in the short and long term. In this context, decisions should assess continuity and stability of the child's present and future situation.

B. Procedural safeguards to guarantee the implementation of the child's best interests

85. To ensure the correct implementation of the child's right to have his or her best interests taken as a primary consideration, some child-friendly procedural safeguards must be put in place and followed. As such, the concept of the child's best interests is a rule of procedure (see para. 6 (b) above).

86. While public authorities and organizations making decisions that concern children must act in conformity with the obligation to assess and determine the child's best interests, people who make decisions concerning children on a daily basis (e.g. parents, guardians, teachers, etc.) are not expected

to follow strictly this two-step procedure, even though decisions made in everyday life must also respect and reflect the child's best interests.

87. States must put in place formal processes, with strict procedural safeguards, designed to assess and determine the child's best interests for decisions affecting the child, including mechanisms for evaluating the results. States must develop transparent and objective processes for all decisions made by legislators, judges or administrative authorities, especially in areas which directly affect the child or children.

88. The Committee invites States and all persons who are in a position to assess and determine the child's best interests to pay special attention to the following safeguards and guarantees:

(a) Right of the child to express his or her own views

89. A vital element of the process is communicating with children to facilitate meaningful child participation and identify their best interests. Such communication should include informing children about the process and possible sustainable solutions and services, as well as collecting information from children and seeking their views.

90. Where the child wishes to express his or her views and where this right is fulfilled through a representative, the latter's obligation is to communicate accurately the views of the child. In situations where the child's views are in conflict with those of his or her representative, a procedure should be established to allow the child to approach an authority to establish a separate representation for the child (e.g. a guardian ad litem), if necessary.

91. The procedure for assessing and determining the best interests of children as a group is, to some extent, different from that regarding an individual child. When the interests of a large number of children are at stake, Government institutions must find ways to hear the views of a representative sample of children and give due consideration to their opinions when planning measures or making legislative decisions which directly or indirectly concern the group, in order to ensure that all categories of children are covered. There are many examples of how to do this, including children's hearings, children's parliaments, children-led organizations, children's unions or other representative bodies, discussions at school, social networking websites, etc.

(b) Establishment of facts

92. Facts and information relevant to a particular case must be obtained by well-trained professionals in order to draw up all the elements necessary for the best-interests assessment. This could involve interviewing persons close to the child, other people who are in contact with the child on a daily basis, witnesses to certain incidents, among others. Information and data gathered must be verified and analysed prior to being used in the child's or children's best-interests assessment.

(c) Time perception

93. The passing of time is not perceived in the same way by children and adults. Delays in or prolonged decision-making have particularly adverse effects on children as they evolve. It is therefore advisable that procedures or processes regarding or impacting children be prioritized and completed in the shortest time possible. The timing of the decision should, as far as possible, correspond to the child's perception of how it can benefit him or her, and the decisions taken should be reviewed at reasonable intervals as the child develops and his or her capacity to express his or her views evolves. All decisions on care, treatment, placement and other measures concerning the child must be reviewed periodically in terms of his or her perception of time, and his or her evolving capacities and development (art. 25).

(d) Qualified professionals

94. Children are a diverse group, with each having his or her own characteristics and needs that can only be adequately assessed by professionals who have expertise in matters related to child and adolescent development. This is why the formal assessment process should be carried out in a friendly and safe atmosphere by professionals trained in, inter alia, child psychology, child development and other relevant human and social development fields, who have experience working with children and who will consider the information received in an objective manner. As far as possible, a multidisciplinary team of professionals should be involved in assessing the child's best interests.

95. The assessment of the consequences of alternative solutions must be based on general knowledge (i.e. in the areas of law, sociology, education, social work, psychology, health, etc.) of the likely

consequences of each possible solution for the child, given his or her individual characteristics and past experience.

(e) Legal representation

96. The child will need appropriate legal representation when his or her best interests are to be formally assessed and determined by courts and equivalent bodies.. In particular, in cases where a child is referred to an administrative or judicial procedure involving the determination of his or her best interests, he or she should be provided with a legal representative, in addition to a guardian or representative of his or her views, when there is a potential conflict between the parties in the decision.

(f) Legal reasoning

97. In order to demonstrate that the right of the child to have his or her best interests assessed and taken as a primary consideration has been respected, any decision concerning the child or children must be motivated, justified and explained. The motivation should state explicitly all the factual circumstances regarding the child, what elements have been found relevant in the best-interests assessment, the content of the elements in the individual case, and how they have been weighted to determine the child's best interests. If the decision differs from the views of the child, the reason for that should be clearly stated. If, exceptionally, the solution chosen is not in the best interests of the child, the grounds for this must be set out in order to show that the child's best interests were a primary consideration despite the result. It is not sufficient to state in general terms that other considerations override the best interests of the child; all considerations must be explicitly specified in relation to the case at hand, and the reason why they carry greater weight in the particular case must be explained. The reasoning must also demonstrate, in a credible way, why the best interests of the child were not strong enough to be outweigh the other considerations. Account must be taken of those circumstances in which the best interests of the child must be the paramount consideration (see paragraph 38 above).

(g) Mechanisms to review or revise decisions

98. States should establish mechanisms within their legal systems to appeal or revise decisions concerning children when a decision seems not to be in accordance with the appropriate procedure of assessing and determining the child's or children's best interests. There should always be the possibility to request a review or to appeal such a decision at the national level. Mechanisms should be made known to the child and be accessible by him or her directly or by his or her legal representative, if it is considered that the procedural safeguards had not been respected, the facts are wrong, the best-interests assessment had not been adequately carried out or that competing considerations had been given too much weight. The reviewing body must look into all these aspects.

(h) Child-rights impact assessment (CRIA)

99. As mentioned above, the adoption of all measures of implementation should also follow a procedure that ensures that the child's best interests are a primary consideration. The child-rights impact assessment (CRIA) can predict the impact of any proposed policy, legislation, regulation, budget or other administrative decision which affect children and the enjoyment of their rights and should complement ongoing monitoring and evaluation of the impact of measures on children's rights.[17] CRIA needs to be built into Government processes at all levels and as early as possible in the development of policy and other general measures in order to ensure good governance for children's rights. Different methodologies and practices may be developed when undertaking CRIA. At a minimum, they must use the Convention and its Optional Protocols as a framework, in particular ensuring that the assessments are underpinned by the general principles and have special regard for the differentiated impact of the measure(s) under consideration on children. The impact assessment itself could be based on input from children, civil society and experts, as well as from relevant Government departments, academic research and experiences documented in the country or elsewhere. The analysis should result in recommendations for amendments, alternatives and improvements and be made publicly available.[18]

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[17] General comment No. 16 (2013) on State obligations regarding the impact of the business sector on children's rights, paras. 78-81.

[18] States may draw guidance from the Report of the Special Rapporteur on the right to food on Guiding principles on human rights impact assessments of trade and investment agreements (A/HRC/19/59/Add.5).

VI. Dissemination

100. The Committee recommends that States widely disseminate the present general comment to parliaments, governments and the judiciary, nationally and locally. It should also be made known to children – including those in situations of exclusion –, all professionals working for and with children (including judges, lawyers, teachers, guardians, social workers, staff of public or private welfare institutions, health staff, teachers, etc.) and civil society at large. To do this, the general comment should be translated into relevant languages, child-friendly/appropriate versions should be made available, conferences, seminars, workshops and other events should be held to share best practices on how best to implement it. It should also be incorporated into the formal pre- and in-service training of all concerned professionals and technical staff.

101. States should include information in their periodic reporting to the Committee on the challenges they face and the measures they have taken to apply and respect the child's best interests in all judicial and administrative decisions and other actions concerning the child as an individual, as well as at all stages of the adoption of implementation measures concerning children in general or as a specific group.

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General comment No. 24 (2019) on children's rights in the child justice system

I. Introduction

1. The present general comment replaces general comment No. 10 (2007) on children's rights in juvenile justice. It reflects the developments that have occurred since 2007 as a result of the promulgation of international and regional standards, the Committee's jurisprudence, new knowledge about child and adolescent development, and evidence of effective practices, including those relating to restorative justice. It also reflects concerns such as the trends relating to the minimum age of criminal responsibility and the persistent use of deprivation of liberty. The general comment covers specific issues, such as issues relating to children recruited and used by non-State armed groups, including those designated as terrorist groups, and children in customary, indigenous or other non-State justice systems.

2. Children differ from adults in their physical and psychological development. Such differences constitute the basis for the recognition of lesser culpability, and for a separate system with a differentiated, individualized approach. Exposure to the criminal justice system has been demonstrated to cause harm to children, limiting their chances of becoming responsible adults.

3. The Committee acknowledges that preservation of public safety is a legitimate aim of the justice system, including the child justice system. However, States parties should serve this aim subject to their obligations to respect and implement the principles of child justice as enshrined in the Convention on the Rights of the Child. As the Convention clearly states in article 40, every child alleged as, accused of or recognized as having infringed criminal law should always be treated in a manner consistent with the promotion of the child's sense of dignity and worth. Evidence shows that the prevalence of crime committed by children tends to decrease after the adoption of systems in line with these principles.

4. The Committee welcomes the many efforts made to establish child justice systems in compliance with the Convention. Those States having provisions that are more conducive to the rights of children than those contained in the Convention and the present general comment are commended, and reminded that, in accordance with article 41 of the Convention, they should not take any retrogressive steps. State party reports indicate that many States parties still require significant investment to achieve full compliance with the Convention, particularly regarding prevention, early intervention, the development and implementation of diversion measures, a multidisciplinary approach, the minimum age of criminal responsibility and the reduction of deprivation of liberty. The Committee draws States' attention to the report of the Independent Expert leading the United Nations global study on children deprived of their liberty (A/74/136), submitted pursuant to General Assembly resolution 69/157, which had been initiated by the Committee.

5. In the past decade, several declarations and guidelines that promote access to justice and child-friendly justice have been adopted by international and regional bodies. These frameworks cover children in all aspects of the justice systems, including child victims and witnesses of crime, children in welfare proceedings and children before administrative tribunals. These developments, valuable though they are, fall outside of the scope of the present general comment, which is focused on children alleged as, accused of or recognized as having infringed criminal law.

II. Objectives and scope

6. The objectives and scope of the present general comment are:

(a) To provide a contemporary consideration of the relevant articles and principles in the Convention on the Rights of the Child, and to guide States towards a holistic implementation of child justice systems that promote and protect children's rights;

(b) To reiterate the importance of prevention and early intervention, and of protecting children's rights at all stages of the system;

(c) To promote key strategies for reducing the especially harmful effects of contact with the criminal justice system, in line with increased knowledge about children's development, in particular:

(i) Setting an appropriate minimum age of criminal responsibility and ensuring the appropriate treatment of children on either side of that age;

(ii) Scaling up the diversion of children away from formal justice processes and to effective programmes;

(iii) Expanding the use of non-custodial measures to ensure that detention of children is a measure of last resort;

(iv) Ending the use of corporal punishment, capital punishment and life sentences;

(v) For the few situations where deprivation of liberty is justified as a last resort, ensuring that its application is for older children only, is strictly time limited and is subject to regular review;

(d) To promote the strengthening of systems through improved organization, capacity-building, data collection, evaluation and research;

(e) To provide guidance on new developments in the field, in particular the recruitment and use of children by non-State armed groups, including those designated as terrorist groups, and children coming into contact with customary, indigenous and non-State justice systems.

III. Terminology

7. The Committee encourages the use of non-stigmatizing language relating to children alleged as, accused of or recognized as having infringed criminal law.

8. Important terms used in the present general comment are listed below:

• Appropriate adult: in situations where the parent or legal guardian is not available to assist the child, States parties should allow for an appropriate adult to assist the child. An appropriate adult may be a person who is nominated by the child and/or by the competent authority.

• Child justice system:[1] the legislation, norms and standards, procedures, mechanisms and provisions specifically applicable to, and institutions and bodies set up to deal with, children considered as offenders.

• Deprivation of liberty: any form of detention or imprisonment or the placement of a person in a public or private custodial setting, from which this person is not permitted to leave at will, by order of any judicial, administrative or other public authority.[2]

• Diversion: measures for referring children away from the judicial system, at any time prior to or during the relevant proceedings.

• Minimum age of criminal responsibility: the minimum age below which the law determines that children do not have the capacity to infringe the criminal law.

[1] In the English version of the present general comment, the term "child justice system" is used in place of "juvenile justice".

[2] United Nations Rules for the Protection of Juveniles Deprived of their Liberty (Havana Rules), art. 11 (b).

• Pretrial detention: detention from the moment of the arrest to the stage of the disposition or sentence, including detention throughout the trial.

• Restorative justice: any process in which the victim, the offender and/or any other individual or community member affected by a crime actively participates together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party. Examples of restorative process include mediation, conferencing, conciliation and sentencing circles.[3]

IV. Core elements of a comprehensive child justice policy

A. Prevention of child offending, including early intervention directed at children below the minimum age of criminal responsibility

9. States parties should consult the United Nations Model Strategies and Practical Measures on the Elimination of Violence against Children in the Field of Crime Prevention and Criminal Justice and comparative national and international research on root causes of children's involvement in the child justice system and undertake their own research to inform the development of a prevention strategy. Research has demonstrated that intensive family- and community-based treatment programmes designed to make positive changes in aspects of the various social systems (home, school, community, peer relations) that contribute to the serious behavioural difficulties of children reduce the risk of children coming into child justice systems. Prevention and early intervention programmes should be focused on support for families, in particular those in vulnerable situations or where violence occurs. Support should be provided to children at risk, particularly children who stop attending school, are excluded or otherwise do not complete their education. Peer group support and a strong involvement of parents are recommended. States parties should also develop community-based services and programmes that respond to the specific needs, problems, concerns and interests of children, and that provide appropriate counselling and guidance to their families.

10. Articles 18 and 27 of the Convention confirm the importance of the responsibility of parents for the upbringing of their children, but at the same time the Convention requires States parties to provide the assistance to parents (or other caregivers) necessary to carry out their child-rearing responsibilities. Investment in early childhood care and education correlates with lower rates of future violence and crime. This can commence when the child is very young, for example with home visitation programmes to enhance parenting capacity. Measures of assistance should draw on the wealth of information on community and family-based prevention programmes, such as programmes to improve parent-child interaction, partnerships with schools, positive peer association and cultural and leisure activities.

11. Early intervention for children who are below the minimum age of criminal responsibility requires child-friendly and multidisciplinary responses to the first signs of behaviour that would, if the child were above the minimum age of criminal responsibility, be considered an offence. Evidence-based intervention programmes should be developed that reflect not only the multiple psychosocial causes of such behaviour, but also the protective factors that may strengthen resilience. Interventions must be preceded by a comprehensive and interdisciplinary assessment of the child's needs. As an absolute priority, children should be supported within their families and communities. In the exceptional cases that require an out-of-home placement, such alternative care should preferably be in a family setting, although placement in residential care may be appropriate in some instances, to provide the necessary array of professional services. It is to be used only as a measure of last resort and for the shortest appropriate period of time and should be subject to judicial review.

12. A systemic approach to prevention also includes closing pathways into the child justice system through the decriminalization of minor offences such as school absence, running away, begging or trespassing, which often are the result of poverty, homelessness or family violence. Child victims of sexual exploitation and adolescents who engage with one another in consensual sexual acts are also sometimes criminalized. These acts, also known as status offences, are not considered crimes if committed by adults. The Committee urges States parties to remove status offences from their statutes.

B. Interventions for children above the minimum age of criminal responsibility[4]

13. Under article 40 (3) (b) of the Convention, States parties are required to promote the establishment of measures for dealing with children without resorting to judicial proceedings, whenever appropriate.

[3] Basic principles on the use of restorative justice programmes in criminal matters, para. 2.

[4] See also section IV.E below.

In practice, the measures generally fall into two categories:

(a) Measures referring children away from the judicial system, any time prior to or during the relevant proceedings (diversion);

(b) Measures in the context of judicial proceedings.

14. The Committee reminds States parties that, in applying measures under both categories of intervention, utmost care should be taken to ensure that the child's human rights and legal safeguards are fully respected and protected.

Interventions that avoid resorting to judicial proceedings

15. Measures dealing with children that avoid resorting to judicial proceedings have been introduced into many systems around the world, and are generally referred to as diversion. Diversion involves the referral of matters away from the formal criminal justice system, usually to programmes or activities. In addition to avoiding stigmatization and criminal records, this approach yields good results for children, is congruent with public safety and has proved to be cost-effective.

16. Diversion should be the preferred manner of dealing with children in the majority of cases. States parties should continually extend the range of offences for which diversion is possible, including serious offences where appropriate. Opportunities for diversion should be available from as early as possible after contact with the system, and at various stages throughout the process. Diversion should be an integral part of the child justice system, and, in accordance with art. 40 (3) (b) of the Convention, children's human rights and legal safeguards are to be fully respected and protected in all diversion processes and programmes

17. It is left to the discretion of States parties to decide on the exact nature and content of measures of diversion, and to take the necessary legislative and other measures for their implementation. The Committee takes note that a variety of community-based programmes have been developed, such as community service, supervision and guidance by designated officials, family conferencing and other restorative justice options, including reparation to victims.

18. The Committee emphasizes the following:

(a) Diversion should be used only when there is compelling evidence that the child committed the alleged offence, that he or she freely and voluntarily admits responsibility, without intimidation or pressure, and that the admission will not be used against the child in any subsequent legal proceeding;

(b) The child's free and voluntary consent to diversion should be based on adequate and specific information on the nature, content and duration of the measure, and on an understanding of the consequences of a failure to cooperate or complete the measure;

(c) The law should indicate the cases in which diversion is possible, and the relevant decisions of the police, prosecutors and/or other agencies should be regulated and reviewable. All State officials and actors participating in the diversion process should receive the necessary training and support;

(d) The child is to be given the opportunity to seek legal or other appropriate assistance relating to the diversion offered by the competent authorities, and the possibility of review of the measure;

(e) Diversion measures should not include the deprivation of liberty;

(f) The completion of the diversion should result in a definite and final closure of the case. Although confidential records of diversion can be kept for administrative, review, investigative and research purposes, they should not be viewed as criminal convictions or result in criminal records.

Interventions in the context of judicial proceedings (disposition)

19. When judicial proceedings are initiated by the competent authority, the principles of a fair and just trial are applicable (see section D below). The child justice system should provide ample opportunities to apply social and educational measures, and to strictly limit the use of deprivation of liberty, from the moment of arrest, throughout the proceedings and in sentencing. States parties should have in place a probation service or similar agency with well-trained staff to ensure the maximum and effective use of measures such as guidance and supervision orders, probation, community monitoring or day reporting centres, and the possibility of early release from detention.

C. Age and child justice systems

Minimum age of criminal responsibility

20. Children who are below the minimum age of criminal responsibility at the time of the commission of an offence cannot be held responsible in criminal law proceedings. Children at or above the minimum age at the time of the commission of an offence but younger than 18 years can be formally charged and subjected to child justice procedures, in full compliance with the Convention. The Committee reminds States parties that the relevant age is the age at the time of the commission of the offence.

21. Under article 40 (3) of the Convention, States parties are required to establish a minimum age of criminal responsibility, but the article does not specify the age. Over 50 States parties have raised the minimum age following ratification of the Convention, and the most common minimum age of criminal responsibility internationally is 14. Nevertheless, reports submitted by States parties indicate that some States retain an unacceptably low minimum age of criminal responsibility.

22. Documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact of their actions or to comprehend criminal proceedings. They are also affected by their entry into adolescence. As the Committee notes in its general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, adolescence is a unique defining stage of human development characterized by rapid brain development, and this affects risk-taking, certain kinds of decision-making and the ability to control impulses. States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age. Moreover, the developmental and neuroscience evidence indicates that adolescent brains continue to mature even beyond the teenage years, affecting certain kinds of decision-making. Therefore, the Committee commends States parties that have a higher minimum age, for instance 15 or 16 years of age, and urges States parties not to reduce the minimum age of criminal responsibility under any circumstances, in accordance with article 41 of the Convention.

23. The Committee recognizes that although the setting of a minimum age of criminal responsibility at a reasonably high level is important, an effective approach also depends on how each State deals with children above and below that age. The Committee will continue to scrutinize this in reviews of State party reports. Children below the minimum age of criminal responsibility are to be provided with assistance and services according to their needs, by the appropriate authorities, and should not be viewed as children who have committed criminal offences.

24. If there is no proof of age and it cannot be established that the child is below or above the minimum age of criminal responsibility, the child is to be given the benefit of the doubt and is not to be held criminally responsible.

Systems with exceptions to the minimum age

25. The Committee is concerned about practices that permit exceptions to the use of a lower minimum age of criminal responsibility in cases where, for example, the child is accused of committing a serious offence. Such practices are usually created to respond to public pressure and are not based on a rational understanding of children's development. The Committee strongly recommends that States parties abolish such approaches and set one standardized age below which children cannot be held responsible in criminal law, without exception.

Systems with two minimum ages

26. Several States parties apply two minimum ages of criminal responsibility (for example, 7 and 14 years), with a presumption that a child who is at or above the lower age but below the higher age lacks criminal responsibility unless sufficient maturity is demonstrated. Initially devised as a protective system, it has not proved so in practice. Although there is some support for the idea of individualized assessment of criminal responsibility, the Committee has observed that this leaves much to the discretion of the court and results in discriminatory practices.

27. States are urged to set one appropriate minimum age and to ensure that such legal reform does not result in a retrogressive position regarding the minimum age of criminal responsibility.

Children lacking criminal responsibility for reasons related to developmental delays or neurodevelopmental disorders or disabilities

28. Children with developmental delays or neurodevelopmental disorders or disabilities (for example, autism spectrum disorders, fetal alcohol spectrum disorders or acquired brain injuries) should not be in the child justice system at all, even if they have reached the minimum age of criminal responsibility. If not automatically excluded, such children should be individually assessed.

Application of the child justice system

29. The child justice system should apply to all children above the minimum age of criminal responsibility but below the age of 18 years at the time of the commission of the offence.

30. The Committee recommends that those States parties that limit the applicability of their child justice system to children under the age of 16 years (or lower), or that allow by way of exception that certain children are treated as adult offenders (for example, because of the offence category), change their laws to ensure a non-discriminatory full application of their child justice system to all persons below the age of 18 years at the time of the offence (see also general comment No. 20, para. 88).

31. Child justice systems should also extend protection to children who were below the age of 18 at the time of the commission of the offence but who turn 18 during the trial or sentencing process.

32. The Committee commends States parties that allow the application of the child justice system to persons aged 18 and older whether as a general rule or by way of exception. This approach is in keeping with the developmental and neuroscience evidence that shows that brain development continues into the early twenties.

Birth certificates and age determination

33. A child who does not have a birth certificate should be provided with one promptly and free of charge by the State, whenever it is required to prove age. If there is no proof of age by birth certificate, the authority should accept all documentation that can prove age, such as notification of birth, extracts from birth registries, baptismal or equivalent documents or school reports. Documents should be considered genuine unless there is proof to the contrary. Authorities should allow for interviews with or testimony by parents regarding age, or for permitting affirmations to be filed by teachers or religious or community leaders who know the age of the child.

34. Only if these measures prove unsuccessful may there be an assessment of the child's physical and psychological development, conducted by specialist pediatricians or other professionals skilled in evaluating different aspects of development. Such assessments should be carried out in a prompt, child- and gender-sensitive and culturally appropriate manner, including interviews of children and parents or caregivers in a language the child understands. States should refrain from using only medical methods based on, inter alia, bone and dental analysis, which is often inaccurate, due to wide margins of error, and can also be traumatic. The least invasive method of assessment should be applied. In the case of inconclusive evidence, the child or young person is to have the benefit of the doubt.

Continuation of child justice measures

35. The Committee recommends that children who turn 18 before completing a diversion programme or non-custodial or custodial measure be permitted to complete the programme, measure or sentence, and not be sent to centres for adults.

Offences committed before and after 18 years and offences committed with adults

36. In cases where a young person commits several offences, some occurring before and some after the age of 18 years, States parties should consider providing for procedural rules that allow the child justice system to be applied in respect of all the offences when there are reasonable grounds to do so.

37. In cases where a child commits an offence together with one or more adults, the rules of the child justice system applies to the child, whether they are tried jointly or separately.

D. Guarantees for a fair trial

38. Article 40 (2) of the Convention contains an important list of rights and guarantees aimed at ensuring that every child receives fair treatment and trial (see also article 14 of the International Covenant on Civil and Political Rights). It should be noted that these are minimum standards. States parties can and should try to establish and observe higher standards.

39. The Committee emphasizes that continuous and systematic training of professionals in the child justice system is crucial to uphold those guarantees. Such professionals should be able to work in interdisciplinary teams, and should be well informed about the physical, psychological, mental and social development of children and adolescents, as well as about the special needs of the most marginalized children.

40. Safeguards against discrimination are needed from the earliest contact with the criminal justice system and throughout the trial, and discrimination against any group of children requires active redress. In particular, gender-sensitive attention should be paid to girls and to children who are discriminated against on the basis of sexual orientation or gender identity. Accommodation should be made for children with disabilities, which may include physical access to court and other buildings, support for children with psychosocial disabilities, assistance with communication and the reading of documents, and procedural adjustments for testimony.

41. States parties should enact legislation and ensure practices that safeguard children's rights from the moment of contact with the system, including at the stopping, warning or arrest stage, while in custody of police or other law enforcement agencies, during transfers to and from police stations, places of detention and courts, and during questioning, searches and the taking of evidentiary samples. Records should be kept on the location and condition of the child in all phases and processes.

No retroactive application of child justice (art. 40 (2) (a))

42. No child shall be held guilty of any criminal offence that did not constitute a criminal offence, under national or international law, at the time it was committed. States parties that expand their criminal law provisions to prevent and combat terrorism should ensure that those changes do not result in the retroactive or unintended punishment of children. No child should be punished with a heavier penalty than the one applicable at the time of the offence, but if a change of law after the offence provides for a lighter penalty, the child should benefit.

Presumption of innocence (art. 40 (2) (b) (i))

43. The presumption of innocence requires that the burden of proof of the charge is on the prosecution, regardless of the nature of the offence. The child has the benefit of the doubt and is guilty only if the charges have been proved beyond reasonable doubt. Suspicious behaviour on the part of the child should not lead to assumptions of guilt, as it may be due to a lack of understanding of the process, immaturity, fear or other reasons.

Right to be heard (art. 12)

44. In paragraphs 57 to 64 of general comment No. 12 (2009) on the right of the child to be heard, the Committee explained the fundamental right of the child to be heard in the context of child justice.

45. Children have the right to be heard directly, and not only through a representative, at all stages of the process, starting from the moment of contact. The child has the right to remain silent and no adverse inference should be drawn when children elect not to make statements.

Effective participation in the proceedings (art. 40 (2) (b) (iv))

46. A child who is above the minimum age of criminal responsibility should be considered competent to participate throughout the child justice process. To effectively participate, a child needs to be supported by all practitioners to comprehend the charges and possible consequences and options in order to direct the legal representative, challenge witnesses, provide an account of events and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed. Proceedings should be conducted in a language the child fully understands or an interpreter is to be provided free of charge. Proceedings should be conducted in an atmosphere of understanding to allow children to fully participate. Developments in child-friendly justice provide an impetus towards child-friendly language at all stages, child-friendly layouts of interviewing spaces and courts, support by appropriate adults, removal of intimidating legal attire and adaptation of proceedings, including accommodation for children with disabilities.

Prompt and direct information of the charge(s) (art. 40 (2) (b) (ii))

47. Every child has the right to be informed promptly and directly (or where appropriate through his or her parent or guardian) of the charges brought against him or her. Promptly means as soon as possible after the first contact of the child with the justice system. Notification of parents should not be neglected

on the grounds of convenience or resources. Children who are diverted at the charge stage need to understand their legal options, and legal safeguards should be fully respected.

48. Authorities should ensure that the child understands the charges, options and processes. Providing the child with an official document is insufficient and an oral explanation is necessary. Although children should be assisted in understanding any document by a parent or appropriate adult, authorities should not leave the explanation of the charges to such persons.

Legal or other appropriate assistance (art. 40 (2) (b) (ii))

49. States should ensure that the child is guaranteed legal or other appropriate assistance from the outset of the proceedings, in the preparation and presentation of the defence, and until all appeals and/or reviews are exhausted. The Committee requests States parties to withdraw any reservation made in respect of article 40 (2) (b) (ii).

50. The Committee remains concerned that many children face criminal charges before judicial, administrative or other public authorities, and are deprived of liberty, without having the benefit of legal representation. The Committee notes that in article 14 (3) (d) of the International Covenant on Civil and Political Rights, the right to legal representation is a minimum guarantee in the criminal justice system for all persons, and this should equally apply to children. While the article allows the person to defend himself or herself in person, in any case where the interests of justice so require the person is to be assigned legal assistance.

51. In the light of the above, the Committee is concerned that children are provided less protection than international law guarantees for adults. The Committee recommends that States provide effective legal representation, free of charge, for all children who are facing criminal charges before judicial, administrative or other public authorities Child justice systems should not permit children to waive legal representation unless the decision to waive is made voluntarily and under impartial judicial supervision.

52. If children are diverted to programmes or are in a system that does not result in convictions, criminal records or deprivation of liberty, "other appropriate assistance" by well-trained officers may be an acceptable form of assistance, although States that can provide legal representation for children during all processes should do so, in accordance with article 41. Where other appropriate assistance is permissible, the person providing the assistance is required to have sufficient knowledge of the legal aspects of the child justice process and receive appropriate training.

53. As required under article 14 (3) (b) of the International Covenant on Civil and Political Rights, there is to be adequate time and facilities for the preparation of the defence. Under the Convention on the Rights of the Child, the confidentiality of communications between the child and his or her legal representative or other assistant is to be guaranteed (art. 40 (2) (b) (vii)), and the child's right of protection against interference with his or her privacy and correspondence is to be respected (art. 16).

Decisions without delay and with the involvement of parents or guardians (art. 40 (2) (b) (iii))

54. The Committee reiterates that the time between the commission of the offence and the conclusion of proceedings should be as short as possible. The longer this period, the more likely it is that the response loses its desired outcome.

55. The Committee recommends that States parties set and implement time limits for the period between the commission of the offence and the completion of the police investigation, the decision of the prosecutor (or other competent body) to institute charges, and the final decision by the court or other judicial body. These time limits should be much shorter than those set for adults, but should still allow legal safeguards to be fully respected. Similar speedy time limits should apply to diversion measures.

56. Parents or legal guardians should be present throughout the proceedings. However, the judge or competent authority may decide to limit, restrict or exclude their presence in the proceedings, at the request of the child or of his or her legal or other appropriate assistant or because it is not in the child's best interests.

57. The Committee recommends that States parties explicitly legislate for the maximum possible involvement of parents or legal guardians in the proceedings because they can provide general psychological and emotional assistance to the child and contribute to effective outcomes. The Committee also recognizes that many children are informally living with relatives who are neither parents nor legal

guardians, and that laws should be adapted to allow genuine caregivers to assist children in proceedings, if parents are unavailable.

Freedom from compulsory self-incrimination (art. 40 (2) (b) (iv))

58. States parties must ensure that a child is not compelled to give testimony or to confess or acknowledge guilt. The commission of acts of torture or cruel, inhuman or degrading treatment in order to extract an admission or confession constitutes a grave violation of the child's rights (Convention on the Rights of the Child, art. 37 (a)). Any such admission or confession is inadmissible as evidence (Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, art. 15).

59. Coercion leading a child to a confession or self-incriminatory testimony is impermissible. The term "compelled" should be interpreted broadly and not be limited to physical force. The risk of false confession is increased by the child's age and development, lack of understanding, and fear of unknown consequences, including a suggested possibility of imprisonment, as well as by the length and circumstances of the questioning.

60. The child must have access to legal or other appropriate assistance, and should be supported by a parent, legal guardian or other appropriate adult during questioning. The court or other judicial body, when considering the voluntariness and reliability of an admission or confession by a child, should take all factors into account, including the child's age and maturity, the length of questioning or custody and the presence of legal or other independent assistance and of the parent(s), guardian or appropriate adult. Police officers and other investigating authorities should be well trained to avoid questioning techniques and practices that result in coerced or unreliable confessions or testimonies, and audiovisual techniques should be used where possible.

Presence and examination of witnesses (art. 40 (2) (b) (iv))

61. Children have the right to examine witnesses who testify against them and to involve witnesses to support their defence, and child justice processes should favour the child's participation, under conditions of equality, with legal assistance.

Right of review or appeal (art. 40 (2) (b) (v))

62. The child has the right to have any finding of guilt or the measures imposed reviewed by a higher competent, independent and impartial authority or judicial body. This right of review is not limited to the most serious offences. States parties should consider introducing automatic measures of review, particularly in cases that result in criminal records or deprivation of liberty. Furthermore, access to justice requires a broader interpretation, allowing reviews or appeals on any procedural or substantive misdirection, and ensuring that effective remedies are available.[5]

63. The Committee recommends that States parties withdraw any reservation made in respect of article 40 (2) (b) (v).

Free assistance of an interpreter (art. 40 (2) (b) (vi))

64. A child who cannot understand or speak the language used in the child justice system has the right to the free assistance of an interpreter at all stages of the process. Such interpreters should be trained to work with children.

65. States parties should provide adequate and effective assistance by well-trained professionals to children who experience communication barriers.

Full respect of privacy (arts. 16 and 40 (2) (b) (vii))

66. The right of a child to have his or her privacy fully respected during all stages of the proceedings, set out in article 40 (2) (b) (vii), should be read with articles 16 and 40 (1).

67. States parties should respect the rule that child justice hearings are to be conducted behind closed doors. Exceptions should be very limited and clearly stated in the law. If the verdict and/or sentence is pronounced in public at a court session, the identity of the child should not be revealed. Furthermore, the right to privacy also means that the court files and records of children s should be kept strictly confidential and closed to third parties except for those directly involved in the investigation and adjudication of, and the ruling on, the case.

[5] Human Rights Council resolution 25/6.

68. Case-law reports relating to children should be anonymous, and such reports placed online should adhere to this rule.

69. The Committee recommends that States refrain from listing the details of any child, or person who was a child at the time of the commission of the offence, in any public register of offenders. The inclusion of such details in other registers that are not public but impede access to opportunities for reintegration should be avoided.

70. In the Committee's view, there should be lifelong protection from publication regarding crimes committed by children. The rationale for the non-publication rule, and for its continuation after the child reaches the age of 18, is that publication causes ongoing stigmatization, which is likely to have a negative impact on access to education, work, housing or safety. This impedes the child's reintegration and assumption of a constructive role in society. States parties should thus ensure that the general rule is lifelong privacy protection pertaining to all types of media, including social media.

71. Furthermore, the Committee recommends that States parties introduce rules permitting the removal of children's criminal records when they reach the age of 18, automatically or, in exceptional cases, following independent review.

E. Measures[6]

Diversion throughout the proceedings

72. The decision to bring a child into the justice system does not mean the child must go through a formal court process. In line with the observations made above in section IV.B, the Committee emphasizes that the competent authorities – in most States the public prosecutor – should continuously explore the possibilities of avoiding a court process or conviction, through diversion and other measures. In other words, diversion options should be offered from the earliest point of contact, before a trial commences, and be available throughout the proceedings. In the process of offering diversion, the child's human rights and legal safeguards should be fully respected, bearing in mind that the nature and duration of diversion measures may be demanding, and that legal or other appropriate assistance is therefore necessary. Diversion should be presented to the child as a way to suspend the formal court process, which will be terminated if the diversion programme is carried out in a satisfactory manner.

Dispositions by the child justice court

73. After proceedings in full compliance with article 40 of Convention are conducted (see section IV.D above), a decision on dispositions is made. The laws should contain a wide variety of non-custodial measures and should expressly prioritize the use of such measures to ensure that deprivation of liberty is used only as a measure of last resort and for the shortest appropriate period of time.

74. A wide range of experience with the use and implementation of non-custodial measures, including restorative justice measures, exists. States parties should benefit from this experience, and develop and implement such measures by adjusting them to their own culture and tradition. Measures amounting to forced labour or to torture or inhuman and degrading treatment are to be explicitly prohibited and penalized.

75. The Committee reiterates that corporal punishment as a sanction is a violation of article 37 (a) of the Convention, which prohibits all forms of cruel, inhuman and degrading treatment or punishment (see also the Committee's general comment No. 8 (2006) on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment).

76. The Committee emphasizes that the reaction to an offence should always be proportionate not only to the circumstances and the gravity of the offence, but also to the personal circumstances (age, lesser culpability, circumstances and needs, including, if appropriate, the mental health needs of the child), as well as to the various and particularly long-term needs of the society. A strictly punitive approach is not in accordance with the principles of child justice spelled out in article 40 (1) of the Convention. Where serious offences are committed by children, measures proportionate to the circumstances of the offender and to the gravity of the offence may be considered, including considerations of the need for public safety and sanctions. Weight should be given to the child's best interests as a primary consideration as well as to the need to promote the child's reintegration into society.

[6] See also section IV.B above.

77. Recognizing the harm caused to children and adolescents by deprivation of liberty, and its negative effects on their prospects for successful reintegration, the Committee recommends that States parties set a maximum penalty for children accused of crimes that reflects the principle of the "shortest appropriate period of time" (Convention on the Rights of the Child, art. 37 (b)).

78. Mandatory minimum sentences are incompatible with the child justice principle of proportionality and with the requirement that detention is to be a measure of last resort and for the shortest appropriate period of time. Courts sentencing children should start with a clean slate; even discretionary minimum sentence regimes impede proper application of international standards.

Prohibition of the death penalty

79. Article 37 (a) of the Convention reflects the customary international law prohibition of the imposition of the death penalty for a crime committed by a person who is under 18 years of age. A few States parties assume that the rule prohibits only the execution of persons who are below the age of 18 years at the time of execution. Other States defer the execution until the age of 18. The Committee reiterates that the explicit and decisive criterion is the age at the time of the commission of the offence. If there is no reliable and conclusive proof that the person was below the age of 18 at the time the crime was committed, he or she should have the benefit of the doubt and the death penalty cannot be imposed.

80. The Committee calls upon the few States parties that have not yet abolished the imposition of the death penalty for all offences committed by persons below the age of 18 years to do so urgently and without exceptions. Any death penalty imposed on a person who was below the age of 18 at the time of the commission of the offence should be commuted to a sanction that is in full conformity with Convention.

No life imprisonment without parole

81. No child who was below the age of 18 at the time he or she committed an offence should be sentenced to life imprisonment without the possibility of release or parole. The period to be served before consideration of parole should be substantially shorter than that for adults and should be realistic, and the possibility of parole should be regularly reconsidered. The Committee reminds States parties that sentence children to life imprisonment with the possibility of release or parole that in applying this sanction they should strive for the realization of the aims of article 40 (1) of the Convention. This means, inter alia, that a child sentenced to life imprisonment should receive education, treatment and care aiming at his or her release, reintegration and ability to assume a constructive role in society. This also requires a regular review of the child's development and progress in order to decide on his or her possible release. Life imprisonment makes it very difficult, if not impossible, to achieve the aims of reintegration. The Committee notes the 2015 report in which the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment finds that life imprisonment and lengthy sentences, such as consecutive sentencing, are grossly disproportionate and therefore cruel, inhuman or degrading when imposed on a child (A/HRC/28/68, para. 74). The Committee strongly recommends that States parties abolish all forms of life imprisonment, including indeterminate sentences, for all offences committed by persons who were below the age of 18 at the time of commission of the offence.

F. Deprivation of liberty, including pretrial detention and post-trial incarceration

82. Article 37 of the Convention contains important principles for the use of deprivation of liberty, the procedural rights of every child deprived of liberty and provisions concerning the treatment of and conditions for children deprived of their liberty. The Committee draws the attention of States parties to the 2018 report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, in which the Special Rapporteur noted that the scale and magnitude of children's suffering in detention and confinement called for a global commitment to the abolition of child prisons and large care institutions, alongside scaled-up investment in community-based services (A/HRC/38/36, para. 53).

83. States parties should immediately embark on a process to reduce reliance on detention to a minimum.

84. Nothing in the present general comment should be construed as promoting or supporting the use of deprivation of liberty, but rather as providing correct procedures and conditions in the minority of cases where deprivation of liberty is deemed necessary.

Leading principles

85. The leading principles for the use of deprivation of liberty are: (a) the arrest, detention or imprisonment of a child is to be used only in conformity with the law, only as a measure of last resort and for the shortest appropriate period of time; and (b) no child is to be deprived of his or her liberty unlawfully or arbitrarily. Arrest is often the starting point of pretrial detention, and States should ensure that the law places clear obligations on law enforcement officers to apply article 37 in the context of arrest. States should further ensure that children are not held in transportation or in police cells, except as a measure of last resort and for the shortest period of time, and that they are not held with adults, except where that is in their best interests. Mechanisms for swift release to parents or appropriate adults should be prioritized.

86. The Committee notes with concern that, in many countries, children languish in pretrial detention for months or even years, which constitutes a grave violation of article 37 (b) of the Convention. Pretrial detention should not be used except in the most serious cases, and even then only after community placement has been carefully considered. Diversion at the pretrial stage reduces the use of detention, but even where the child is to be tried in the child justice system, non-custodial measures should be carefully targeted to restrict the use of pretrial detention.

87. The law should clearly state the criteria for the use of pretrial detention, which should be primarily for ensuring appearance at the court proceedings and if the child poses an immediate danger to others. If the child is considered a danger (to himself or herself or others) child protection measures should be applied. Pretrial detention should be subject to regular review and its duration limited by law. All actors in the child justice system should prioritize cases of children in pretrial detention.

88. In application of the principle that deprivation of liberty should be imposed for the shortest appropriate period of time, States parties should provide regular opportunities to permit early release from custody, including police custody, into the care of parents or other appropriate adults. There should be discretion to release with or without conditions, such as reporting to an authorized person or place. The payment of monetary bail should not be a requirement, as most children cannot pay and because it discriminates against poor and marginalized families. Furthermore, where bail is set it means that there is a recognition in principle by the court that the child should be released, and other mechanisms can be used to secure attendance.

Procedural rights (art. 37 (d))

89. Every child deprived of his or her liberty has the right to prompt access to legal and other appropriate assistance, as well as the right to challenge the legality of the deprivation of his or her liberty before a court or other competent, independent and impartial authority, and to a prompt decision on any such action. The Committee recommends that no child be deprived of liberty, unless there are genuine public safety or public health concerns, and encourages State parties to fix an age limit below which children may not legally be deprived of their liberty, such as 16 years of age.

90. Every child arrested and deprived of his or her liberty should be brought before a competent authority within 24 hours to examine the legality of the deprivation of liberty or its continuation. The Committee also recommends that States parties ensure that pretrial detention is reviewed regularly with a view to ending it. In cases where conditional release of the child at or before the first appearance (within 24 hours) is not possible, the child should be formally charged with the alleged offences and be brought before a court or other competent, independent and impartial authority or judicial body for the case to be dealt with as soon as possible but not later than 30 days after pretrial detention takes effect. The Committee, conscious of the practice of adjourning court hearings many times and/or for long periods, urges States parties to adopt maximum limits for the number and length of postponements and introduce legal or administrative provisions to ensure that the court or other competent body makes a final decision on the charges not later than six months from the initial date of detention, failing which the child should be released.

91. The right to challenge the legality of the deprivation of liberty includes not only the right to appeal court decisions, but also the right of access to a court for review of an administrative decision (taken by, for example, the police, the prosecutor and other competent authorities). States parties should set short time limits for the finalization of appeals and reviews to ensure prompt decisions, as required by the Convention.

Treatment and conditions (art. 37 (c))

92. Every child deprived of liberty is to be separated from adults, including in police cells. A child deprived of liberty is not to be placed in a centre or prison for adults, as there is abundant evidence that this compromises their health and basic safety and their future ability to remain free of crime and to reintegrate. The permitted exception to the separation of children from adults stated in article 37 (c) of the Convention – "unless it is considered in the child's best interests not to do so" – should be interpreted narrowly and the convenience of the States parties should not override best interests. States parties should establish separate facilities for children deprived of their liberty that are staffed by appropriately trained personnel and that operate according to child-friendly policies and practices.

93. The above rule does not mean that a child placed in a facility for children should be moved to a facility for adults immediately after he or she reaches the age of 18. The continuation of his or her stay in the facility for children should be possible if that is in his or her best interests and not contrary to the best interests of the children in the facility.

94. Every child deprived of liberty has the right to maintain contact with his or her family through correspondence and visits. To facilitate visits, the child should be placed in a facility as close as possible to his or her family's place of residence. Exceptional circumstances that may limit this contact should be clearly described in law and not be left to the discretion of the authorities.

95. The Committee emphasizes that, inter alia, the following principles and rules need to be observed in all cases of deprivation of liberty:

(a) Incommunicado detention is not permitted for persons below the age of 18;

(b) Children should be provided with a physical environment and accommodation conducive to the reintegrative aims of residential placement. Due regard should be given to their needs for privacy, for sensory stimuli and for opportunities to associate with their peers and to participate in sports, physical exercise, arts and leisure-time activities;

(c) Every child has the right to education suited to his or her needs and abilities, including with regard to undertaking exams, and designed to prepare him or her for return to society; in addition, every child should, when appropriate, receive vocational training in occupations likely to prepare him or her for future employment;

(d) Every child has the right to be examined by a physician or a health practitioner upon admission to the detention or correctional facility and is to receive adequate physical and mental health care throughout his or her stay in the facility, which should be provided, where possible, by the health facilities and services of the community;

(e) The staff of the facility should promote and facilitate frequent contact by the child with the wider community, including communications with his or her family, friends and other persons, including representatives of reputable outside organizations, and the opportunity to visit his or her home and family. There is to be no restriction on the child's ability to communicate confidentially and at any time with his or her lawyer or other assistant;

(f) Restraint or force can be used only when the child poses an imminent threat of injury to himself or herself or others, and only when all other means of control have been exhausted. Restraint should not be used to secure compliance and should never involve deliberate infliction of pain. It is never to be used as a means of punishment. The use of restraint or force, including physical, mechanical and medical or pharmacological restraints, should be under close, direct and continuous control of a medical and/or psychological professional. Staff of the facility should receive training on the applicable standards and members of the staff who use restraint or force in violation of the rules and standards should be punished appropriately. States should record, monitor and evaluate all incidents of restraint or use of force and ensure that it is reduced to a minimum;

(g) Any disciplinary measure is to be consistent with upholding the inherent dignity of the child and the fundamental objectives of institutional care. Disciplinary measures in violation of article 37 of the Convention must be strictly forbidden, including corporal punishment, placement in a dark cell, solitary confinement or any other punishment that may compromise the physical or mental health or well-being of the child concerned, and disciplinary measures should not deprive children of their basic rights, such as visits by legal representative, family contact, food, water, clothing, bedding, education, exercise or meaningful daily contact with others;

(h) Solitary confinement should not be used for a child. Any separation of the child from others should be for the shortest possible time and used only as a measure of last resort for the protection of the child or others. Where it is deemed necessary to hold a child separately, this should be done in the presence or under the close supervision of a suitably trained staff member, and the reasons and duration should be recorded;

(i) Every child should have the right to make requests or complaints, without censorship as to the substance, to the central administration, the judicial authority or any other proper independent authority, and to be informed of the response without delay. Children need to know their rights and to know about and have easy access to request and complaints mechanisms;

(j) Independent and qualified inspectors should be empowered to conduct inspections on a regular basis and to undertake unannounced inspections on their own initiative; they should place special emphasis on holding conversations with children in the facilities, in a confidential setting;

(k) States parties should ensure that there are no incentives to deprive children of their liberty and no opportunities for corruption regarding placement, or regarding the provision of goods and services or contact with family.

G. Specific issues

Military courts and State security courts

96. There is an emerging view that trials of civilians by military tribunals and State security courts contravene the non-derogable right to a fair trial by a competent, independent and impartial court. This is an even more concerning breach of rights for children, who should always be dealt with in specialized child justice systems. The Committee has raised concerns about this in several concluding observations.

Children recruited and used by non-State armed groups, including those designated as terrorist groups, and children charged in counter-terrorism contexts

97. The United Nations has verified numerous cases of recruitment and exploitation of children by non-State armed groups, including those designated as terrorist groups, not only in conflict areas but also in non-conflict areas, including children's countries of origin and countries of transit or return.

98. When under the control of such groups, children may become victims of multiple forms of violations, such as conscription; military training; being used in hostilities and/or terrorist acts, including suicide attacks; being forced to carry out executions; being used as human shields; abduction; sale; trafficking; sexual exploitation; child marriage; being used for the transport or sale of drugs; or being exploited to carry out dangerous tasks, such as spying, conducting surveillance, guarding checkpoints, conducting patrols or transporting military equipment. It has been reported that non-State armed groups and those designated as terrorist groups also force children to commit acts of violence against their own families or within their own communities to demonstrate loyalty and to discourage future defection.

99. The authorities of States parties face a number of challenges when dealing with these children. Some States parties have adopted a punitive approach with no or limited consideration of children's rights, resulting in lasting consequences for the development of the child and having a negative impact on the opportunities for social reintegration, which in turn may have serious consequences for the broader society. Often, these children are arrested, detained, prosecuted and put on trial for their actions in conflict areas and, to a lesser extent, also in their countries of origin or return.

100. The Committee draws the attention of States parties to Security Council resolution 2427 (2018). In the resolution, the Council stressed the need to establish standard operating procedures for the rapid handover of children associated or allegedly associated with all non-State armed groups, including those who committed acts of terrorism, to relevant civilian child protection actors. The Council emphasized that children who had been recruited in violation of applicable international law by armed forces and armed groups and were accused of having committed crimes during armed conflicts should be treated primarily as victims of violations of international law. The Council also urged Member States to consider non-judicial measures as alternatives to prosecution and detention that were focused on reintegration, and called on them to apply due process for all children detained for association with armed forces and armed groups.

101. States parties should ensure that all children charged with offences, regardless of the gravity or the context, are dealt with in terms of articles 37 and 40 of the Convention, and should refrain from charging

and prosecuting them for expressions of opinion or for mere association with a non-State armed group, including those designated as terrorist groups. In line with paragraph 88 of its general comment No. 20, the Committee further recommends that States parties adopt preventive interventions to tackle social factors and root causes, as well as social reintegration measures, including when implementing Security Council resolutions related to counter-terrorism, such as resolutions 1373 (2001), 2178 (2014), 2396 (2017) and 2427 (2018), and General Assembly resolution 72/284, in particular the recommendations contained in paragraph 18.

Customary, indigenous and non-State forms of justice

102. Many children come into contact with plural justice systems that operate parallel to or on the margins of the formal justice system. These may include customary, tribal, indigenous or other justice systems. They may be more accessible than the formal mechanisms and have the advantage of quickly and relatively inexpensively proposing responses tailored to cultural specificities. Such systems can serve as an alternative to official proceedings against children, and are likely to contribute favourably to the change of cultural attitudes concerning children and justice.

103. There is an emerging consensus that reforms of justice sector programmes should be attentive to such systems. Considering the potential tension between State and non-State justice, in addition to concerns about procedural rights and risks of discrimination or marginalization, reforms should proceed in stages, with a methodology that involves a full understanding of the comparative systems concerned and that is acceptable to all stakeholders. Customary justice processes and outcomes should be aligned with constitutional law and with legal and procedural guarantees. It is important that unfair discrimination does not occur, if children committing similar crimes are being dealt with differently in parallel systems or forums.

104. The principles of the Convention should be infused into all justice mechanisms dealing with children, and States parties should ensure that the Convention is known and implemented. Restorative justice responses are often achievable through customary, indigenous or other non-State justice systems, and may provide opportunities for learning for the formal child justice system. Furthermore, recognition of such justice systems can contribute to increased respect for the traditions of indigenous societies, which could have benefits for indigenous children. Interventions, strategies and reforms should be designed for specific contexts and the process should be driven by national actors.

V. Organization of the child justice system

105. In order to ensure the full implementation of the principles and rights elaborated in the previous paragraphs, it is necessary to establish an effective organization for the administration of child justice.

106. A comprehensive child justice system requires the establishment of specialized units within the police, the judiciary, the court system and the prosecutor's office, as well as specialized defenders or other representatives who provide legal or other appropriate assistance to the child.

107. The Committee recommends that States parties establish child justice courts either as separate units or as part of existing courts. Where that is not feasible for practical reasons, States parties should ensure the appointment of specialized judges for dealing with cases concerning child justice.

108. Specialized services such as probation, counselling or supervision should be established together with specialized facilities, for example day treatment centres and, where necessary, small-scale facilities for residential care and treatment of children referred by the child justice system. Effective inter-agency coordination of the activities of all these specialized units, services and facilities should be continuously promoted.

109. In addition, individual assessments of children and a multidisciplinary approach are encouraged. Particular attention should be paid to specialized community-based services for children who are below the age of criminal responsibility, but who are assessed to be in need of support.

110. Non-governmental organizations can and do play an important role in child justice. The Committee therefore recommends that States parties seek the active involvement of such organizations in the development and implementation of their comprehensive child justice policy and, where appropriate, provide them with the necessary resources for this involvement.

VI. Awareness-raising and training

111. Children who commit offences are often subjected to negative publicity in the media, which contributes to a discriminatory and negative stereotyping of those children. This negative presentation or criminalization of children is often based on a misrepresentation and/or misunderstanding of the causes of crime, and regularly results in calls for tougher approaches (zero-tolerance and "three strikes" approaches, mandatory sentences, trial in adult courts and other primarily punitive measures). States parties should seek the active and positive involvement of Members of Parliament, non-governmental organizations and the media to promote and support education and other campaigns to ensure that all aspects of the Convention are upheld for children who are in the child justice system. It is crucial for children, in particular those who have experience with the child justice system, to be involved in these awareness-raising efforts.

112. It is essential for the quality of the administration of child justice that all the professionals involved receive appropriate multidisciplinary training on the content and meaning of the Convention. The training should be systematic and continuous and should not be limited to information on the relevant national and international legal provisions. It should include established and emerging information from a variety of fields on, inter alia, the social and other causes of crime, the social and psychological development of children, including current neuroscience findings, disparities that may amount to discrimination against certain marginalized groups such as children belonging to minorities or indigenous peoples, the culture and the trends in the world of young people, the dynamics of group activities and the available diversion measures and non-custodial sentences, in particular measures that avoid resorting to judicial proceedings. Consideration should also be given to the possible use of new technologies such as video "court appearances", while noting the risks of others, such as DNA profiling. There should be a constant reappraisal of what works.

VII. Data collection, evaluation and research

113. The Committee urges States parties to systematically collect disaggregated data, including on the number and nature of offences committed by children, the use and the average duration of pretrial detention, the number of children dealt with by resorting to measures other than judicial proceedings (diversion), the number of convicted children, the nature of the sanctions imposed on them and the number of children deprived of their liberty.

114. The Committee recommends that States parties ensure regular evaluations of their child justice systems, in particular of the effectiveness of the measures taken, and in relation to matters such as discrimination, reintegration and patterns of offending, preferably carried out by independent academic institutions.

115. It is important that children are involved in this evaluation and research, in particular those who are or who have previously had contact with the system, and that the evaluation and research are undertaken in line with existing international guidelines on the involvement of children in research.

THE RIGHTS OF CHILDREN IN CHILD JUSTICE SYSTEMS: AN OVERVIEW OF THE CRC COMMITTEE'S GENERAL COMMENT 24

Paper prepared and presented by **Professor Ann Skelton**[1]

The CRC vision and a current overview of the shift in thinking

The Convention on the Rights of the Child (CRC) requires States to ensure that children alleged as, charged with or recognized as having infringed criminal law are treated in a manner that upholds their dignity and worth, protects their rights, and encourages them to respect other people's rights. Since the adoption of the Convention 30 years ago, a significant number of States have moved away from a punitive approach towards children in conflict with the law. States have introduced specialised child justice systems, introduced diversion of children to programmes - including restorative justice measures, reduced the number of children detained, and put an end to prohibited forms of sentencing such as corporal punishment.

The benefits of a rights-compliant child justice system are felt by the entire society: The prevalence of crime committed by children tends to decline after the adoption of systems in line with the CRC principles. In fact, there is evidence that in developed countries, the number of children coming into contact with the criminal justice system has rapidly declined over the

In the Netherlands, researchers have been investigating the decline in the number of children coming into contact with the criminal justice system around the world.[2] Data shows a dramatic drop in the number young people under the age of 18 years coming into contact with the police.[3] A study of trends in Germany show a decline in the number of children entering the criminal justice system. The number of children who were arrested, aged 12 to 17 years, dropped by 40% since 2016.[4] The pattern in other European countries is similar: According to Dutch researchers Berghuis and De Waard, 25 European Union countries have seen a decline in the number of young people who are detained, some of which are developing economies and others, which have previously been viewed as a developed economy, have been through periods that saw them downgraded to emerging market economies.[5] There has been a drop of 41.9% between 2008 and 2014. Data shows that crime rates have decreased between the years 2001 and 2016 with the detention rate of 14 to 17 year olds falling by almost 50%.[6]Property related crimes and the most serious violent crime have declined but domestic violence and theft have increased.[7] Predictably, online crimes have increased, with illegal downloading rising; it was reported

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[2] Berghuis and De Waard "Declining juvenile crime – explanations for the international downturn" (2017) 43:1 *Justitiële Verkenningen*

[3] Berghuis and De Waard (2017) at 2.

[4] Berghuis and De Waard (2017) at 4.

[5] As above.

[6] As above.

[7] Fernándes-Molina and Gutiérrez "Juvenile crime drop: What is happening with youth in Spain and

to be at 65.7% in 2004 and at 79% in 2015.[8] One of the big influences on the decline have been public policies, particularly what the authors call the social welfare model which provides support to children and families could account for the overall reduction in crime.[9] Commonwealth countries, such as England and Wales, Scotland, United States, Canada, New Zealand and, Australia - also saw a decline in numbers after 2006/2007.[10] A study of the United States (U.S) for example shows a decline in the 'youth confinement rate', down by 48%, across all states.[11] Furthermore, research notes that the "decline has not led to a surge in juvenile crime. On the contrary, crime has fallen even as juvenile justice systems have locked up fewer child offenders[12] The main reasons given for the declining numbers are shifts in thinking about the best ways to deal with young people who break the law and fiscal pressures on states which has caused a search for less expensive measures.[13]

Overall, the studies demonstrate the decline in the number of children entering the criminal justice system and the various contextual reasons for this. Reasons given include: changing police interaction with child offenders; change in public policy; a tightened national fiscal belt; increased online presence of children and many more.

Evidence of similar downward trends in developing economies is more difficult to demonstrate, due to lack of consistent record keeping and analysis, and the fact that such information is not often found in the public domain. However, one interesting example is Malaysia, which is a middle income country and which also showed a decline in the number of children committing crimes. Data from the Department of Statistics shows that "[t]he number of juvenile offenders declined 10.3 per cent from 5,096 cases (2014) to 4,569 cases (2015).[14] South Africa, too, has seen a dramatic decrease in the number of children coming into the justice system. The number of children charged has dropped from 75435 in 2010/2011, down to 39797 in 2016/17 – which is 49.7% reduction, very similar to the trends in commonwealth countries. The decline in numbers coincides with the introduction of the Child Justice Act (2008) - based on the CRC principles and restorative justice concepts.

The Report to the United Nations Global Study on Children Deprived of their Liberty, presented to the UN General Assembly in October 2019 confirmed the impact of the CRC and other human rights standards and their contribution to a drop in the number of children deprived of their liberty:

A comprehensive set of international human rights standards is testimony to astrong legal and political commitment by the international community to prevent deprivation of liberty of children in the administration of justice. **That legal framework has already contributed to the establishment of specialized child justice systems, the adoption of non-custodial solutions and a decrease in the number of children deprived of liberty**. Nevertheless, there are still at least 410,000 children held in detention every year in remand centres and prisons. This does not include an estimated 1 million children held every year in police custody. On the basis of the State responses to the questionnaire, it is not possible to provide an evidence -based figure for the number of children held in police custody on any given day. Nevertheless, research for the study proves that detention remains the sad reality of an estimated 160,000–250,000 children in remand centres and prisons worldwide on any given day.

The evidence set out above supports the claim that rights compliant child justice systems have the positive effect of actually reducing crime, over time.

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why?" (2018) *European Journal of Criminology* at 21.

[8] Fernándes-Molina and Gutiérrez (2018) at 9-10.

[9] Fernándes-Molina and Gutiérrez (2018) at 22. This is until the most recent economic crisis.

[10] Berghuis and De Waard (2017) at 4.

[11] Annie E. Casey Foundation (2013) at 2.

[12] Annie E. Casey Foundation (2013) at 1.

[13] Paulson "Why juvenile incarceration reached its lowest rate in 38 years" (2013) The Christian Monitor Science. https://www.csmonitor.com/USA/Justice/2013/0227/Why-juvenile-incarceration-reached-its-lowest-rate-in-38-years.

See also Gass (2015) "Juvenile incarceration rate has dropped in half. Is the trend sustainable?". https://www.csmonitor.com/USA/Justice/2015/1110/Juvenile-incarceration-rate-has-dropped-in-half.-Is-trend-sustainable.

[14] Department of Statistics, Malaysia "Children Statistics, Malaysia 2016" https://www.dosm.gov.my/v1/index.php?r=column/ctheme&menu_id=U3VPMldoYUxzVzFaYmNkWXZteGduZz09&bul_id=NVYwaEtwM21Mz09.

Aims of the new General Comment

The Committee has always shown a strong interest in the Articles 37 and 40, and has provided guidance to states on a range of measures in all its concluding observations. The Committee recommitted to this important subject matter, by deciding to review its earlier General Comment 10 (hereafter GC 10) on children's rights in juvenile justice (2007). One reason, certainly, was to clarify certain misunderstandings about the minimum age of responsibility, which I will return to later in this paper, and to reinforce the need to reduce deprivation of liberty. But there were other developments during the past decade that really required a fresh look at the subject matter. Initially, the project was referred to as a 'revision' of the early General Comment, but as the work progressed, and a large number of comments were received, it became clear that this was not just a minor revision, but a substantial re-write, and that the a new General Comment should be issued – no 24, and that it would completely replace GC 10. The introduction explains that the new General Comment reflects developments that have occurred since 2007, as a result of the promulgation of international and regional standards, the Committee's jurisprudence, new knowledge about child and adolescent development, and evidence of effective practice, including those relating to restorative justice. The general comment also covers specific issues that were not dealt with in GC 10, such as issues relating to children recruited and used by non-State armed groups, including those designated as terrorist groups, and children in customary, indigenous or other non-State justice systems.

Terminology shift

Immediately noticeable to English speakers is the change in the name of title. This came about as a result of wide spread calls to shift away from the term 'juvenile justice'. The reason for this is that it seems, in English, to have a pejoritive meaning – a silent 'delinquent' seems to follow the word 'juvenile'. GC 24 states the Committee's preference for non-stigmatizing language. Some states called for a shift to youth justice, and most NGOs that made submissions favoured child justice. This is in line with the Convention itself, which does not use the word juvenile. The term juvenile justice came into the vocabulary of the CRC's work through UN guidelines such as the UN Standard Minimum Rules for the Administration of Juvenile Justice (the Beijing Rules), the UN Guidelines for the Prevention of Juvenile Delinquency (Riyadh Guidelines) and the UN Rules for the Protection of Children Deprived of their Liberty (Havana Rules), and through the reporting guidelines and subsequent jurisprudence. GG 24 defines 'a child justice system' as referring to laws and procedures specifically applicable to children considered as offenders, as well as to the specialized personnel who work with them and the services and support offered to them.

Core elements of a comprehensive child justice policy

The General Comment lists a number of core elements for an effective and rights compliant child justice system. These are set out in chronological order, and some of the main features are set out below, with a focus on what is new.

Prevention of child offending, including early intervention directed at children below the minimum age of criminal responsibility

States are encouraged to consider comparative and international research, and undertake their own research, to inform their own prevention strategies. States should capitalize on intensive family and community based services and programs that respond to the needs of children and their families. Investment in early childhood care and education correlates with lower rates of future crime. There is more detail on early intervention for children below the minimum age of criminal responsibility who are getting into trouble:

Evidence-based intervention programmes should be developed that reflect not only the multiple psychosocial causes of such behaviour, but also the protective factors that may strengthen resilience child's needs. As an absolute priority, children should be supported within their families and communities. In the exceptional cases that require an out-of-home placement, such alternative care should preferably be in a family setting, although placement in residential care may be appropriate in some instances, to provide the necessary array of professional services. It is to be used only as a measure of last resort and for the shortest appropriate period of time and should be subject to judicial review.[15]

[15] GC 24 para 11.

The mention of any form of residential care for children who are legally considered incapable of committing crimes. However, the Committee considered this guidance to be necessary given the fact that an increasing number of states have rather high minimum ages of criminal responsibility, and a range of appropriate measures are necessary. The cautious language and the requirement for judicial review is aimed to ensure that this is not used to sweep children below the minimum age into residential systems.

The prevention section also deals with what are known as 'status offences', calling on states to rescind laws that criminalise poor children for actions such as begging or trespassing. However, this has a modern twist, and includes child victims of sexual exploitation and adolescents who engage in consensual sex with one another – the committee urges States to remove these kinds of laws from their statutes.[16]

Interventions

Article 40(3)(b) of the Convention requires States parties to establish measures without resorting to judicial proceedings. GC 24 divides these into two categories

(a) Measures referring children away from the judicial system at any time prior to or during the relevant proceedings;

(b) Measures in the context of judicial proceedings.

The measures referring children away from the system are known as diversion measures. GC 24 states that that diversion should be the preferred manner of dealing with children in the majority of cases. It is non stigmatizing, can avoid criminal record, is congruent with public safety and is cost-effective. Although leaving some space for imaginative interventions at the national level, the Committee notes that a variety of community-based programmes have been developed, such as community service, supervision and guidance, family conferencing and other restorative justice options. GC 24 stresses the importance of safeguarding children's rights during diversion processes.

Age and child justice systems

The Committee GC 10 was, in fact, fairly clear on the minimum age of criminal responsibility. Due to the fact that the Convention itself merely asked states to set a MACR that was not too low, the Committee decided to take the plunge, and suggest an absolute minimum. In GC 10 the Committee observed that, from its own recommendations to state parties

[I]t can be concluded that a minimum age of criminal responsibility below the age of 12 years is considered by the Committee not to be internationally acceptable. States parties are encouraged to increase their lower MACR to the age of 12 years as the absolute minimum age and to continue to increase it to a higher age level.

The jury is still out on whether this was a good idea. On the one hand, many states have raised their MACR since 2007 and continue to raise it. South Africa was a case in point. Starting from the colonially inherited minimum age of 7 years, GC 10 was used by advocates to argue for raising the age. The advocates wanted 12 or even 14, Parliament would not go so far, so fast. In 2008, just a year after GC 10 was adopted, the South African Parliament passed the Child Justice Act which raised the MACR from 7 to 10, <u>but</u> also contained a clause that said that within 5 years of the law coming into operation, the MACR would be reconsidered by Parliament, with a view to raising it. This clause was inspired by GC 10. Indeed in 2018 a Bill was passed by Parliament, raising the age to 12, and again containing a clause that this will be reconsidered in 5 years time. There are other positive stories like this – Scotland has finally just done the same. However, there were some negative stories too. A number of states decided to consider lowering the age of MACR, apparently because they thought that would be permissible under GC 10 – Although the committee's intention was in fact clear. Denmark, Georgia, Hungary (or serious cases) and Panama are all states that lowered the minimum age. The Committee criticised these states when they subsequently came up for review. Denmark changed their minimum age back to 15, but the others. Currently, both the Philippines and Indonesia are threatening to lower the minimum age.

So, in General Comment 24, the Committee wanted to be absolutely clear. GC 24 states that over 50 states parties have raised the minimum age following ratification of the Convention, and that the most common minimum age of criminal responsibility internationally is 14. It goes on provide a basis for this:

Documented evidence in the fields of child development and neuroscience indicates that maturity and the capacity for abstract reasoning is still evolving in children aged 12 to 13 years due to the fact that their frontal cortex is still developing. Therefore, they are unlikely to understand the impact

[16] GC 24 para 12.

of their actions or to comprehend criminal proceedings. They are also affected by their entry into adolescence. As the Committee notes in its general comment No. 20 (2016) on the implementation of the rights of the child during adolescence, adolescence is a unique defining stage of human development characterized by rapid brain development, and this affects risk-taking, certain kinds of decision-making and the ability to control impulses. States parties are encouraged to take note of recent scientific findings, and to increase their minimum age accordingly, to at least 14 years of age. Moreover, the developmental and neuroscience evidence indicates that adolescent brains continue to mature even beyond the teenage years, affecting certain kinds of decision-making. Therefore, the Committee commends States parties that have a higher minimum age, for instance 15 or 16 years of age, and urges States parties not to reduce the minimum age of criminal responsibility under any circumstances, in accordance with article 41 of the Convention.[17]

The Committee also recognizes that although the setting of a MACR at a reasonably high level is important, an effective approach also depends on how each State deals with children above and below that age. The Committee says that it will scrutinize this in future reviews of State parties. The Committee also indicates that where there is doubt about age, the child is to be given the benefit of the doubt and is not to be held criminally responsible. Another new feature of the MACR provisions relates to children lacking criminal responsibility for reasons related to developmental delays or neurodevelopmental disorders or disabilities, fore example, children with autism spectrum disorders, fetal alcohol spectrum disorders or acquired brain injuries. These categories of children were not expressly mentioned in GC 10 – but submissions to the Committee indicated that cases involving such children are in fact coming before national courts. GC 24 states that these children should not be in the criminal justice system at all, even if they have reached the minimum age. If not automatically excluded, they must be individually assessed.

While still on the issue of age, GC 24 also considers the upper age limit of 18, encourages all states to ensure that the child justice system is extended up to this age for all cases, regardless of the offence, and underscores that the relevant age is the age at the time of the alleged commission of the offence. Guidance is also provided on the continuation of child justice measures if the child turns 18 during the trial, crimes committed together with adults.

Guarantees for a fair trial

General Comment 10 provided detailed guidance on guarantees for a fair trial, which is repeated in GC 24. However, there are some important additions. For example, non discrimination is stressed, in particular 'gender-sensitive attention should be paid to girls and to children who are discriminated against on the basis of sexual orientation or gender identity'.[18] Also, GC 24 calls for 'accommodation to be made for children with disabilities, which may include physical access to courts, support for children, assistance with communication and procedural adjustments for testimony'.[19]

More is said in GC 24 about children's right from the moment of contact with the system, including the stopping, warning and arrest stage, while in custody of police or other law enforcement agencies, during transfers to and from police stations, places of detention and courts, and during question searches and the taking of evidentiary samples. Proper record keeping and tracking is also required to ensure children's safety.

On the issue of legal representation, GC 24 does raise some new ideas. The Committee expresses concern that many children face criminal charges and are even deprived of their liberty without having legal representation. The Committee notes that art 14(3)(d) of the International Covenant on Civil and Political Rights (ICCPR) confers the right to legal representation as a minimum guarantee for all persons, and that this should apply equally to children.

In the light of the above, the Committee is concerned that children are provided less protection than international law guarantees for adults. The Committee recommends that States provide effective legal representation, free of charge, for all children who are facing criminal charges before judicial, administrative or other public authorities Child justice systems should not permit children to waive legal representation unless the decision to waive is made voluntarily and under impartial judicial supervision.[20]

GC 24 also stresses the importance of privacy, in particular the non-publication of the identity of child offenders. What is new here is that Committee expresses itself regarding child offenders who turn 18 during the criminal proceedings. The Committee's view is that there should be lifelong protection from

[17] GC 24 para 22.

[18] GC 24 para 40.

[19] As above.

[20] GC 24 para 51.

publication. The rationale for this is that publication causes ongoing stigmatization which is likely to impede the child's reintegration and assumption of a constructive roles in society. The Committee also recommends that States parties introduce rules permitting the removal of children's criminal records when they reach 18, automatically or, in exceptional cases, following independent review.

Non-custodial measures

Non-custodial measures should be expanded to ensure detention of children is only used as a measure of last resort. Non-custodial measures should be the default position for dealing with children at arrest, prior to and during trial, as well as at the sentencing stage. The Committee has, in its concluding observations to State parties made a shift in language since 2017. It no longer refers to 'alternative sentencing measures' but rather speaks of 'non-custodial measures, to indicate that this should be the generally applied type of measure, deprivation of liberty should be a last resort, it should be exceptional. GC 24 also uses this type of language.

Custodial measures

The Committee decided to call on States to set a minimum length for custodial sentences. The Committee deliberated as to whether to propose a maximum sentence. States that had commented on the first draft cautioned against setting maximum sentences, and in the end, the Committee decided to leave it up to the states. However this advice is coupled with a statement recognising 'the harm caused to children and adolescents by deprivation of liberty, and its negative effects on their prospects for successful integration'.[21] Although the Committee does acknowledge that, where serious offences are committed by children, measures proportionate to the circumstances of the offender and the gravity of the offence may be considered, including the need for public safety and sanctions. However, even in such situations, 'weight should be given to the child's best interests as a primary consideration as well as the need to promote the child's reintegration into society'.[22] GC 24 is also absolutely clear that mandatory minimum sentences are incompatible with the principle of proportionality and detention as a measure of last resort and for the shortest appropriate period of time. The Committee states that Courts sentencing children should start with a clean slate; even discretionary minimum sentence regimes impede proper application of international standards.[23]

Other impermissible sanctions

The use of corporal punishment, capital punishment and life imprisonment without parole is not allowed under the child rights Convention. GC 24 strongly urges States to abolish all forms of life imprisonment, including indeterminate sentences, for all offences committed by persons under the age of 18 at the time of the offence. The Committee notes the 2015 report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment, which finds that life imprisonment and lengthy sentences are grossly disproportionate and therefore cruel, inhuman or degrading when imposed on a child.[24]

With regard to the death penalty – the Committee calls on the few states that have not yet abolished the imposition of the death penalty for all offences committed by persons who were below 18 at the time of the commission of the offence to do so urgently and without exceptions. Any existed death sentences should be commuted.[25]

Deprivation of liberty, including pretrial detention and post-trial incarceration

GC 24 takes a strong stand against deprivation of liberty. The Committee draws attention to the 2018 report of the Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, which noted that

the scale and magnitude of children's suffering in detention and confinement called for a global commitment to the abolition of child prisons and large care institutions, alongside scaled-up investment in community-based services.[26]

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[21] GC 24 para 77.

[22] GC 24 para 76.

[23] GC 24 para 78.

[24] A/HRC/28/68, para 74.

[25] The Committee regularly writes letters to such states about individuals, urging states not to carry out planned executions.

[26] GC 24 para 82.

The Committee calls on States parties to immediately embark on a process to reduce reliance on detention as a minimum. States are called out on allowing children 'to languish in pretrial detention for months or even years'.[27]

The GC hones in on arrest as the starting point of pre-trial detention, and points out that States should place clear obligations on law enforcement officials to ensure that article 37 is applied in the context of arrest, and that mechanisms for swift release to parents or appropriate adults should be prioritized:

In application of the principle that deprivation of liberty should be imposed for the shortest appropriate period of time, States parties should provide regular opportunities to permit early release from custody, including police custody, into the care of parents or other appropriate adults. There should be discretion to release with or without conditions, such as reporting to an authorized person or place. The payment of monetary bail should not be a requirement, as most children cannot pay and because it discriminates against poor and marginalized families. Furthermore, where bail is set it means that there is a recognition in principle by the court that the child should be released, and other mechanisms can be used to secure attendance.[28]

Ensuring that, where deprivation of liberty is unavoidable, children's rights are protected, they receive appropriate education and health care, and contact with family and community is retained. Early release must be frequently considered, and investment in effective reintegration pays dividends for the child and the broader community.

The Committee takes a fairly bold approach in GC 24 to the setting of a minimum age below which children should not be detained. States that provided submissions were mostly against the setting of such an age. There was considerable debate in the Committee, and eventually the wording that was adopted was aligned with a submission by Canada.

The Committee recommends that no child be deprived of liberty, unless there are genuine public safety or public health concerns, and encourages State parties to fix an age limit below which children may not legally be deprived of their liberty, such as 16 years of age.

The length of pretrial detention is also set out in GC 24. The recommendations are set out in paragraph 90 of the General Comment:

- Every child arrested and deprived of his or her liberty should be brought before a competent authority within 24 hours to examine the legality of the deprivation of liberty or its continuation
- In cases where child is not released at or before the first appearance, the child should be formally charged and brought before court to be dealt with as soon as possible but not later than 30 days after pre trial detention takes effect
- Postponements to be kept to a minimum in number and short in length and the law should ensure that the court or other competent body makes a final decision on the charges not later than than six months from the initial date of detention, failing which the child should be released.

With regard to conditions within detention, a new addition in GC 24 is the inclusion of a rule that 'incommunicado detention is not permitted for persons below the age of 18'.[29] Situations that permit the use of restraint or force is also more narrowly prescribed, only when the child poses an imminent threat of injury to himself or others, and only when all other means of control have been exhausted. Restraints include medical or pharmacological restraints, which should be used under close, directand continuous control of medical and/or psychological staff. Solitary confinement should not be used for any child. Any separation of the child from others should be used only for the shortest time possible and only as a last resort and in the presence or under close supervision of a suitably trained staff member, and the reasons and duration are to be recorded.

Organization of the child justice system

To ensure full implementation, it is important to establish and maintain an effective organization of the child justice system should be introduced and improved through making sure that capacity of personnel is strengthened. GC 24 also highlights the importance of partnerships with NGOs, which can and do play an important role in the running of effective child justice systems.

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[27] GC 24 para 86.

[28] GC 24 para 88.

[29] GC 24 para 95(a).

Specialized units are important, but it is essential that all professionals receive appropriate multi disciplinary training, which should be systematic and continuous. Awareness raising among the public is also important to counter negative stereotyping of child offenders, often driven by the media. Data about the system must be collected – such as how many children are arrested, how many are charged, how many are diverted, and how many are deprived of their liberty. This data must be regularly analysed and the system must be evaluated, so that it can be constantly improved.

Current issues

GC 24 includes two new specific issues on which guidance is offered.

Non-state armed groups and counter-terrorism contexts

The United Nations has verified numerous cases of children who have been recruited and used by non-State armed groups, and children who have been used by terrorist groups and charged in counter-terrorism contexts. A Security Council Resolution issued in 2018 requires States to establish procedures for the rapid handover of these children to relevant civilian child protection actors, and treat them mainly as victims of violations of international law. For these children, non-judicial measures and social reintegration should be considered rather than prosecution and detention. If children are charged with offences in those contexts, they should be dealt with under the provision of article 37 the child rights Convention that prohibits torture and sets strict conditions for depriving children of liberty; and article 40 that describes the procedures for dealing with children alleged as, charged with or recognized as having infringed criminal law.

Customary, indigenous and non-State forms of justice

Many children come into contact with plural justice systems that operate parallel to or on the margins of the formal justice system, such as customary, tribal or indigenous. There is an emerging consensus that reform of justice sector programs should be attentive to these systems, which can be more accessible and provide responses that are tailored to cultural specificities. Restorative justice responses are often achievable through such non-State justice systems, and may provide opportunities for learning for the formal child justice system. The processes and outcomes must be aligned with a children's rights-based approach.

Conclusion

The reasons for the review of GC 10 are apparent, because much new knowledge has been incorporated into the body of GC 24, which now completely replaced GC 10. While the Committee acknowledged in the introduction to GC 24 that much progress has been made – and the introduction to this paper provides further support for that contention – it is clear that in most States parties improvements can be made, and is some States parties, effective systems still need to be built. This paper has aimed to provide the rationale for the drafting of GC 24, it has revealed how the process of drafting was an open and consultative one, and that submissions made by States and civil society influenced the drafting. The focus in this paper has been on the new ideas and wording of the GC, and has endeavoured to explain why they were included. While the long term commitment to the implementation of articles 37 and 40 already led to the drafting of a General Comment on juvenile justice, further developments in the field and in the Committee's own jurisprudence provided scope for a new look at this important topic. GC 24 is a tool that can be used for advocacy, law reform, litigation, research and training. Children themselves can work on taking the ideas forward. As the GC's last clause reminds us, it is important that children are involved in evaluation and research of child justice systems, particularly those who are o have previously had contact with the system.

YOUNG ADULT OFFENDERS' RIGHTS AND RESTORATIVE JUSTICE

by **Annemieke Wolthuis** and **Maartje Berger**

Introduction

Criminological research shows that young adults are the age group with the highest risk of offending. The nature of that behavior is often temporary. Recent neurobiological research demonstrates that the brain of young adults continuously grows until the age of 25 and even beyond. This results in more attention for the group of young adults, often seen as the group between 16 and 25 years of age. Despite these developments the way young adult offenders are treated in policy and legislation does not seem very coherent yet. The UN Convention on the Rights of the Child is applicable for children and young people up to 18, resulting in many juvenile justice arrangements and systems based on a pedagogical approach limited to the age of 18. That leads to the question of what then is arranged especially for the group of young adults? And what can be learned from rules and regulations for minors?

Reactions on criminal behavior for young people include more and more restorative measures. What entails this trend and what are the core values of restorative justice for young adult offenders and victims? What practices and rules are in place and can be used for this particular group?

In this article we will explore and explain about the needs and possibilities of the use of restorative justice for young adult offenders. We will first go through relevant international and European standards on juvenile justice and restorative justice. What do they say about how states should deal with criminal behavior of youngsters and the rights of young people in conflict with the law? After that we will explore current research into brain development of young people that is relevant for their behavior. We illustrate practice with Dutch developments including the law for young adult delinquents and mention briefly developments in other jurisdictions. Then we continue explaining the main restorative justice principles and facts followed by a conclusion concerning the implementation of a restorative justice approach for young adults.

International standards for young people

Young adults, and here we mainly focus on the group aged between 18 and 25 (Crone, 2008; Steinberg, 2009), who come in conflict with the law are not often mentioned in international human rights instruments. We thus have to look elsewhere to see what is relevant for them. What is laid down in the rules and regulations for children for example? The UN Convention on the Rights of the Child (CRC, 1989) is the most ratified binding international human rights convention. The general objectives are that the best interests should prevail in all decisions concerning children, that they should be listened to and that they should not be discriminated. In articles 37, 39 and 40, the CRC sets detailed standards for juvenile justice systems stating that ''member states shall seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law''.

The CRC describes in detail the standards and legal safeguards for juvenile justice. Article 3, the ''umbrella'' article, states that the best interest of the child is a primary consideration in every decision related to the child. This article is often applied in combination with other standards such as those for juvenile justice. Furthermore the CRC states that everyone working with children in the penal system has to take pedagogical objectives, children's development and evolving capacities of children into account. As children are continuously growing, improving their abilities and skills and further developing themselves, they need to be able to learn from their mistakes. (Liefaard, 2008; Blaak et all, 2012).

The Convention on the Rights of the Child asks member states to implement special juvenile justice systems including special laws, procedures, authorities and institutions, as was also already the main goal of the Beijing Rules of 1985.[1] According to article 37 and 40 CRC children have a right to a fair

[1] UN General Assembly (1985) United Nations Standard Minimum Rules for the Administration of Juvenile Justice (The Beijing Rules), A/RES/40/33.

trial and detention can only be applied as a measure of last resort and for the shortest appropriate period of time. Article 40 emphasizes that states should first aim to keep children out of the justice system, promote diversion and invest in alternative procedures and measures. Research results also show that diversion, including restorative or educational measures, are a meaningful and effective answer to juvenile first and second offenders. Juvenile court dispositions should be preserved for persistent or more serious offenders (Junger-Tas & Dunkel, 2009; Wolthuis, 2012; UNICEF, 2013; Pruin & Dünkel, 2015). According to article 39 victim protection is a state responsibility by taking all measures "to promote physical and psychological recovery and social reintegration of a child victim of: any form of neglect, exploitation, or abuse; torture or any other form of cruel, inhuman or degrading treatment or punishment; or armed conflicts''. It also states that such recovery and reintegration shall take place in an environment which fosters the health, self-respect and dignity of the child.

The Committee on the Rights of the Child gives a deeper understanding of the meaning of legal safeguards for children and adolescents until 18 year of age in its General Comment No. 10 Children's Rights in Juvenile Justice (2007). The Committee is currently concerned with the rights of adolescents and recently launched a draft of General Comment No. 20 on the implementation of the rights of the child during adolescence, meaning young people between the age 16-18. In the document the Committee acknowledges the challenging environment of this century for these young people. The Committee asks states for an investment aiming to strengthen the capacities of adolescents enabling them to overcome a range of risks, such as the challenges of a digital world, migration, trafficking, recruitment by armed groups, addiction to drugs, poverty, and living in a multi ethnic society. However, the definition of a child is ''every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier''. The Committee sets no specific rules for young adults 18+ and does not go beyond the scope of its own age group.

But, although the CRC and the General Comments of the Committee only refer to young adults aged 16-18, the UN Beijing Rules[2] (1985) and several European rules, that are non-binding, but form a clear set of recommendations, do make a specific reference to the use of the standards of juvenile justice in cases of young adult offenders aged 18+.[3] Rule 3.3. of the Beijing Rules states for example that: *''efforts shall be made to extend the principles embodied in the Rules to young adult offenders"*. And at European level the Council of Europe's recommendation nr 20 (2003) on ''new ways of dealing with juvenile delinquency and the role of juvenile justice'' states in *Rule 11: reflecting the extended transition to adulthood, it should be possible for young adults under the age of 21 to be treated in a way comparable to juveniles and be subject to the same interventions, when the judge is of the opinion that they are not as mature and responsible for their actions as adults".*

In recommendation 11 (2008) of the ''European Rules for Juvenile Offenders subject to Sanctions or Measures'' *Rule 17 states: young adult offenders may, where appropriate, be regarded as juveniles and dealt with accordingly.*

In several European countries the criminal justice approach to responding to young adult offending implies the use of juvenile law in cases of adolescents aged 18-23. In Germany for example all young adults, aged 18-21, have been integrated into the juvenile justice system since 1953 and are transferred to the jurisdiction of the juvenile court. Other countries with special rules for young adult offenders are Austria (18-21, Croatia (18-21), England and Wales, the Scandinavian approach as seen in Finland and Sweden (18-21) and the Netherlands (18-23) (Pruin & Dünkel, 2015).

[2] UN General Assembly (1985) United Nations Standard Minimum Rules for the Administration of Juvenile Justice, A/RES/40/33, (Beijing Rules)

[3] Beijing Rules: rule 3.3. *''efforts shall be made to extend the principles embodied in the Rules to young adult offenders"*. 2003 Rec 20 on ''new ways of dealing with juvenile delinquency and the role of JJ''. *Rule 11: reflecting the extended transition to adulthood (…). young adults under 21 should be treated in a way comparable to juveniles and be subject to the same interventions(…).* 2008 Rec 11 ''European Rules for Juvenile Offenders subject to Sanctions or Measures''. *Rule 17: young adult offenders may, where appropriate, be regarded as juveniles and dealt with accordingly.*

Brain development research and Dutch law and policy

Like in other countries, in the Netherlands several scientists undertook longitudinal research concerning the brain of young adults. Crone's[4] neurobiological research shows that the brain is only fully developed from 23-25 years of age (Crone, 2008). When young adults grow older their decisions are less impulsive and they become more empathic with other people. Doreleijers[5] states that the brain of young people above 18 is still fully developing. He wonders why the latest insights about the brain are not better used in the care and penal system. According to Doreleijers, young people should not be held in youth custodial institutions away from their own environment. Recidivism appears to be less when young offenders are treated in a daily program nearby such as forensic day care. Over 80% of the adolescents in prison also have behavioral disturbances such as autism or ADHD. Police and justice officers are not fully aware of this (NRC news paper items, 2007 & 2009).[6]

Prior and colleagues state by looking at international research that "young adults, like juveniles, must be considered less culpable than older adults due to their psychosocial immaturity" (Prior et al, 2011). Pruin and Dünkel conclude in their recent research on European responses to young adult offending: "the sum of interdisciplinary research strongly suggests that young adulthood is a crucial and sensitive period in the life-course that is characterized by wide-ranging changes and transitions, the (non) accomplishment of which appears to have a significant impact on life trajectories and criminal careers. Against this back drop, adapting the way in which the state responds to young adult offending would be a justifiable solution." They thus plea for specific state attention for this age group.

Such research results and insights led to a political discussion in the Netherlands on new rules for adolescents and young adult offenders. The new ''Adolescent law'' was adopted on 1 April 2014. It applies to adolescent and young adult offenders between16 and 23 years of age. According to the new law, juvenile justice can be applied in cases of young adults until the age of 23. However, due to a reservation of the Netherlands to article 37 CRC adolescents aged 16 to 18 can be transferred to the penal system and tried according to adult law. In 2013 a total of 56 minors (age 16-17) were convicted under adult law. (Jaarbericht Kinderrechten 2016, Defence for Children - Unicef Nederland, p. 22) Data for 2014-2016 on cases from adolescents and young adult offenders are not yet available for The Netherlands. An evaluation study of the new law is currently carried out by the Dutch research institute of the Ministry of Security and Justice WODC.[7]

Furthermore, the Dutch Ministry of Security and Justice is starting pilot projects named ''small-scale provisions'' beside the youth justice institutions.[8] Due to the low number of adolescents staying here - a maximum of eight young offenders - a more individual approach can be used. These regional small-scale institutions are more open, which means that adolescents can attend school or work and continue most of their daily life while they serve their sentence in the facility. This is in line with the recommendations Doreleijers made.

Restorative Justice developments for children and young adults

Although comprehensive rules at international and national level are not specifically developed for young adults aged 16 to 25, restorative justice is becoming more and more an important part in a human rights based approach in penal cases of this age group.

There is not one clear definition of restorative justice, it is a broad 'umbrella' concept. However, the general notion is that it focuses on the harm caused by conflicts or criminal offences. In the words of Nils Christie, it is about giving back the conflict to its owners: an offender and the victim, and often also the community as a third party in stead of the state and criminal justice system having that task or ownership (Christie, 1977). Responsibility and participation are other important notions. The

[4] Prof. dr. E.A.M Crone is professor developmental cognitive neuroscience at the Institute for Psychology Leiden University.

[5] Professor of child and adolescent psychiatry at the VUmc University in Amsterdam.

[6] https://www.nrc.nl/nieuws/2007/03/09/angsten-en-wanen-in-een-kale-gevangeniscel-11288272-a493539. https://www.nrc.nl/nieuws/2009/04/01/zijn-wij-in-nederland-allemaal-gek-geworden-11706291-a150549

[7] WODC, Onderzoeksafdeling Criminaliteit, Rechtshandhaving en Sancties (CRS), Monitoring and Evaluation Adolescent penal law. A research program (2014-2019). https://www.wodc.nl/onderzoek/onderzoeksprogramma/adolescentenstrafrecht/

[8] https://www.rijksoverheid.nl/actueel/nieuws/2016/11/02/groningen-en-nijmegen-openen-kleinschalige-voorzieningen-voor-justitiele-jeugd

main principles of restorative justice are voluntariness (to participate), neutrality and confidentiality. Initiatives in this field often started with juvenile offenders. This is considered an easier group to relate to for governments as well as for victims because of the notion that they should be allowed to learn from their mistakes (Walgrave, 2000; Vanfraechem 2007; Wolthuis, 2012).

The most common forms of restorative justice are victim-offender mediation and forms of conferences with more affected people present, such as family group conferences which is lead by an independent and specially educated mediator. Most of the times it is intended to create an actual meeting with the parties involved in the conflict, but sometimes indirect forms are used, for example sending a letter or that messages are communicated by the mediator. The history of such initiatives goes far back. Often referral is made to forms of justice used by indigenous peoples, for example the Maori in New-Zealand and the Inuit in Canada. Also concepts like ubuntu in S-Africa are forms of local ways to deal with conflicts by talking publicly about them, often led by an elder person of the community. (Johnstone & Van Ness, 2007) Until the middle ages such participatory forms of finding solutions for conflicts were used also in Europe. They were lost afterwards and the government took over the role of conflict-solver. Recently, since the nineties, we can see a rise in interest in such concepts, through alternative sanctions, development of children's rights, alternative dispute settlement and emancipation of victims. (Wolthuis, 2012).

Developments with restorative justice programmes for children and adolescents are found in many parts of the world. It is for example at the heart of the juvenile justice system in New-Zealand: Family Group Conferences have since 1989 been the first option in the law (Morris & Maxwell, 2001). It is explicitly developed on the basis of Maori tradition, and it is now a national system and all partners in the penal chain know it. Also in Europe we see many initiatives such as in Northern Ireland, Austria, Belgium, Hungary - just to mention a few. By now almost all European countries have restorative justice projects, although the implementation and the practical way of working can differ a lot. (Vanfraechem et al, 2010) These days restorative justice can be called an international movement with active organisations, such as the EFRJ: European Forum for Restorative Justice (www.euforumrj.org) and the IIRP: the International Institute for Restorative Practices (http://www.iirp.edu).

'Does restorative justice work?', is a question that is often asked. Meta-studies from different continents do indeed show high satisfaction rates among victims, offenders and professionals. The feeling of justice increases, participants feel that they are being taken serious, the aspect of taking responsibility is appreciated. It also shows that most of the times less recidivism is measured and there is no study that shows higher rates afterwards (see for example: Sherman & Strang, 2007; Shapland et all, 2008 and Claessen et all, 2015). Even though such a meeting is a one day event, for many people it is a moment of change, a new beginning. On the other hand, there are also many who are not interested in taking part, while good information and a solid preparation make more victims and offenders interested. (Vanfraechem et al. 2010; Laxminiaram, 2014)

There are a number of international (human rights) standards drafted on the theme, for example the 1999 Council of Europe Recommendation No. R (99) 19 on mediation in penal matters, the 2001 EU Council Framework Decision on the standing of victims in criminal proceedings and its successor, the 2012 Victim Directive[9] that entails rights on restorative justice for victims, including the necessary protection. Also the 2002 UN Basic Principles on the use of restorative practices provide countries worldwide with tools for a broader development of those practises. They promote the use of restorative justice in all kind of cases, from so-called less serious offences cases till even murder. The Convention in the Rights of the Child with its launch in 1989, had not yet used the term restorative justice, but all Juvenile Justice instruments that have been launched since 1996 make reference to the term and it is seen as a priority in reaction on crime, as was also confirmed by the Committee on the Rights of the Child in its General Comment no. 10.[10]

Restorative justice can be applied in all stages of or before or after a criminal procedure, thus including: (1) the prevention phase; (2) the arrest & investigation stage – police; (3) the prosecution stage; (4) during a court session; (5) while serving a sentence and finally (6) after serving a sentence. It differs per state and region what is used most. (Wolthuis, 2012)

[9] The Directive 2012/29/EU establishing minimum standards on the rights, support and protection of victims of crime ensures that persons who have fallen victim of crime are recognised, treated with respect and receive proper protection, support and access to justice.

[10] UN Committee on the Rights of the Child, General Comment 10 (2007), Children's rights in juvenile justice, CRC/C/GC/10, par 10 en 27.

Developments in the Netherlands

In the Netherlands initiatives started in the nineties with victim-offender mediation (VOM), conferencing and several pilots with juveniles (evaluated in 2006: Steketee et all, 2006). After an experimental stage the main focus became victim offender conversations outside of the criminal justice system, even though outcomes can be send to the public prosecutor. An organisation was established called Victim in Focus, which now does more than 2000 such conversations per year.[11] In the last few years pilots at court level, police level and probation have been carried out and positively evaluated. (Dierx & Van Hoek, 2012; Cleven at al, 2015) It was hoped that the court pilots will be changed into a permanent way of working, but the minister of Security and Justice has concluded differently in October 2016 and there is no more funding allocated to the mediation bureaus at the courts. Lobby to change this is initiated by mediators, scientists and others active in the field. At the same time restorative justice in juvenile detention centres and youth protection is developing. There is, in general, more attention for victims, initiatives in neighbourhoods and by citizens themselves influenced by politics but also active organisations like: Restorative Justice Nederland (RJN), Eigen Kracht, associations for mediators, and sometimes schools, play a role. There is an article in criminal procedure law on victims and mediation (mentioned above) and the full criminal procedural law is currently being re-drafted that also may include more restorative justice rules.

Conclusions

Criminological and brain research show that there is an evidence base for applying juvenile law in the period of young adulthood. International human rights standards point out that states cannot avoid taking into consideration the specific needs of this age group who goes through a very important stage of transition during these years.

At the same time there is a base in the international standards for the use of restorative justice in cases of adolescents and young adult offenders. The use in general is an obligation under EU law (Victim Directive), with strong moral support by the Council of Europe and the United Nations. Diversion and restoration are key principles of comprehensive juvenile justice systems. In many countries modern restorative justice practices started with pilots and projects for children and adolescents in conflict with the law. As they make use of a pedagogical approach and the evolving capacities of children, using restorative practices is an important step towards the development of child-friendly policies and a further implementation of the principles of the Convention on the Rights of the Child. This is embedded in international and European instruments dealing with juvenile justice and restorative justice.

We believe that young adults in conflict with the law should, just like children and adolescents under 18, have the right to a specific approach taking into account their age and stage of development. Where the principles of a children's rights based approach should be applied to young adults, they should be able to receive the merits of juvenile justice systems, guaranteeing easy access to restorative justice practices as well.

Experience shows that young adults are still often a forgotten group, and it appears that a specific approach in cases of adolescents and young adults is needed. It is a need and challenge to develop and implement restorative justice practices further for the age group between 16 and 25 in the coming period. This should include lobby for specific UN rules for young adults offenders, more research on good practices and involving young adults them selves.

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[11] Jaarverslag 2015, Slachtoffer in Beeld.

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CHILD'S ACCESS TO JUSTICE AND HEALTH CARE IN BULGARIA

In person or through representative

by Natasha Dobreva

CHILD'S ACCESS TO JUSTICE

Children whose legal representatives actively defend their interests usually do not have reasons to contact the judicial system. The reverse is true – often children who are required to participate in court proceedings as claimants, witnesses, offenders, private prosecutors etc. are exactly the ones with deficiencies in their legal representation. The reasons for the failure of the legal representation of children are different, for example, a conflict between the interests of the children and the interests of their parents; low parental capacity; lack of information on children's rights, etc. This paper focuses on the children with legal representation deficiencies and will present two alternatives for children`s access to court without their parents' consent. These are the alternate figures of the attorney and the prosecutor.

Attorney

According to Bulgarian law, the power of attorney with respect to a child may, as a rule, arise after authorization by the parent when the child is below 14 or by the child (14-18y) with the consent of the parent (Articles 3 to 4 of The Persons and Families Act). Ex officio attorney may be appointed to the child when a conflict between his/her and the parent's interests is at stake (Art. 129, para. 2 of the Family Code; Art. 101 of the Criminal Proceedings Code; Articles 28, 29, para 4 and 32 the Civil Proceedings Code). The question is whether a minor (14-18y) can authorize alone a lawyer to represent him/her in court - without the signature of the parent/guardian on the power of attorney. This is how the case law addresses this question.

Teenage girl R.S. from Sofia reports at school that her brother, with whom she lives together with their parents, had sexual contacts with her. In such scenario, a power of representation arises in favor of the Director of the Social Assistance Directorate to protect her interests. He files a request to court for the girl's removal from the family apartment, but only 3 months later orders her accommodation back home, with immediate effect. The order was issued in the morning and the girl was taken to her home, where the crime was committed, at noon. I appealed against the immediate effect of the order and, simultaneously, I asked the court to appoint me as an ex officio representative of the child and to consider the appeal admissible. The Sofia-City Administrative Court held that I had a valid power of attorney arising directly from the court decision, and the Supreme Administrative Court added that should the child is over 14 she/he must sign the appeal as well:

Decision No. 4269 of 06.07.2018 of the Sofia-City Administrative Court in case No. 7083/18:

"*The court, taking into consideration that the appeal is submitted by the addressee of the disputed order, which repeal is requested, finds that R.S. has a legal stance to seek suspension of the immediate effect of the administrative act. Her age presupposes that she, by herself with the consent of a parent, and in case that it is impossible, through ex officio attorney in accordance with Art. 15, para. 8 of the Child Protection Act, to protect her own rights and legitimate interests. The request is admissible.*"

In the case law of the Sofia-City Administrative Court, the failure to provide legal consultation and/or representation to a child in accordance with Art. 15, para. 8 of the Child Protection Act is a major procedural violation, leading to the repeal of the appealed order. This is the case, for example, of the unaccompanied refugee A.Z., who is 17 years and 23 days old when the proceedings regarding his status were initiated in Bulgaria. Although a representative was provided to him - a social worker from

the respective Social Assistance Directorate - this employee was not an attorney and could not provide the legal aid guaranteed to the children by force of Art. 15, para. 8 of the Child Protection Act. For that reason, the court held that the State Refugees Agency had issued an unlawful order due to a violation of A.Z.'s right to access to legal aid:

„[In] the case of A.Z. as an unaccompanied minor, a representative has been appointed pursuant to Art. 15, para. 7 of the Child Protection Act – T.P. who is a social worker, who was present during his interview, but A.Z.'s file does not contain data and evidence that his right to legal assistance and appeal in all proceedings affecting his rights and interests is protected and guaranteed. In the instant case, by the evidence contained in the file, there is no data that the right to legal aid and the procedure to receive it have been explained to the minor foreigner. The instructions given to him on the legal terms and procedure for examining the application for a refugee status did not include any specific clarification on this matter. A list of organizations working with refugees and foreigners who have applied for status has not been handed out to the applicant, and, besides, the service of such a list alone is not sufficient to ensure the fulfilment of the obligation under Art. 15, para. 8 of the Child Protection Act."

The father of the conceived but unborn K.B. is a trafficker who forced her mother to prostitute throughout her entire pregnancy, until K.B. was born prematurely. At present, the father is a defendant in criminal proceedings, where K.B. is suing him for moral damages, represented by me, with the consent of her mother. The court accepted the compensation claim of the 2-year old child against her father as admissible:

Ruling from the 13 May 2019 hearing of the Vratsa District Court in criminal case no. 281/19:

„*Joins the victims M.O. and K.B., through her mother, as parties to the criminal proceedings in their capacity of civil claimants. Pursuant to Art. 76 of the Criminal Proceedings Code, joins M.O. and K.B., through her mother, as victims in their capacity of private prosecutors in the criminal proceedings, both represented in the case by lawyer N.D. from the Sofia Bar Association."*

Apart from domestic case law, I would like to give an example from the procedure before the European Court of Human Rights.

Two young boys from Yekaterinburg were raised in a state home for children deprived of parental care - their fathers are unknown and their mothers - drug addicts and AIDS patients - are deprived of parental rights by court order. Yu.S. becomes their foster parent who begins a transgender transition. Finding out about the transgender condition of the foster parent, the Child Protection Department ends the foster care contract and returns the children to a state institution. Yu.S. never sees them again. Following the exhaustion of the remedies in Russia, I filed an application to the European Court of Human Rights on behalf of Yu. S., but also on behalf of the children. I argued that a conflict between the interests of the minor applicants to file the complaint and the interests of their legal representative - the State, exists:

„*Statement relevant to Rule 36 § 1 - Representation of applicants*

"*The applicants ask the Court to admit attorney N. Dobreva as representative of all 3 of them, on the basis of the authority form signed by the fist applicant. They point to the existing conflict between the interest of the second and third applicants to support this application against the Russian State and the interest of their legal representative, which is the Russian State. Due to this conflict of interests, it is not possible to obtain the signature of the respective employee at the Welfare Office on the authority section in the application form, as it concerns the second and third applicants. The applicants also point out that the removal of the first applicant as a guardian of the second and third applicants is in substance the complaint before the Court. Since they have an arguable claim that this removal was unlawful and disproportionate, the first applicant submits that he can act on behalf of the second and third applicants, that the question of the representation before the Court is closely linked to the merits of the complaints and they should be considered jointly. This was exactly the approach taken by the Court in A.H. and others v. Russia, judgment of 17 January 2017, § 357."*

The ECtHR found the application on behalf of all three applicants admissible, registered their application by No. 16206/19 and opened the case *Savinovskikh and Others v. Russia*. Thus, at this initial stage of the proceedings before the ECtHR, my power of attorney is recognized.

The ECtHR formulated a very clear *locus standi* test as early as in 1996 in the decision on the admissibility of application No. 23715/94 by *S.P., D.P., and A.T. against the United Kingdom*. The applicants, 3

minor boys, complained of the delay in the care proceedings which concerned their placement with their long-term foster parents. The application was introduced on behalf of the children by Mr. Clements, the solicitor who represented them in the child care proceedings, supported by a letter of authority by the guardian ad litem appointed by the domestic court to safeguard the interests of the children in the domestic proceedings. The ECtHR held that representation before it is not solely governed by considerations of domestic procedural standing. Whether or not Mr. Clements may validly represent the applicant children before the Court will depend on examination of a number of relevant factors. The Court emphasized that the position of children qualifies for careful consideration: children must generally rely on other persons to present their claims and represent their interests and may not be of an age or capacity to authorize steps to be taken on their behalf in any real sense. Therefore, a restrictive or technical approach in this area is to be avoided. The relevant factors in considering the admissibility of this application were: 1) whether other or more appropriate representation exists or is available; 2) the nature of the links between Mr. Clements and the children; 3) the object and scope of the application introduced on their behalf and 4) whether there are any conflicts of interest. As regards the first element, the Court found that the children should be represented in any application either by their biological mother or by the local authority, both of whom share parental responsibility. On a practical level however, it accepted that these options are not open to the applicants. The mother was disinterested and the local authority was the subject of criticism in the application. There was therefore no alternative source of representation in the present case which would render Mr. Clements's assumption of the role inappropriate or unnecessary. Satisfied with the other 3 factors as well, the Court concluded that the application was admissible.

Turning back to Bulgaria, the statistics show a very limited number of applications submitted on behalf of children before the ECtHR in general, let alone such raising representation issues. In 2017, the applications of 3 children were communicated to the Bulgarian Government - *Pavlov and others against Bulgaria*, application no. 72059/16 (contact rights) and *Dermanski et autres contre la Bulgarie,* application No. 61322/10 (degrading treatment). In 2018, another 2 children were admitted as applicants before the ECtHR – *X. and Y. against Bulgaria*, application No. 23763/18 (custody proceedings) and *Z. against Bulgaria*, application No. 39257/17 (rape). In 2019, 3 further complaints on behalf of children were communicated - *D.K. c. Bulgarie*, application No. 76336/16 (unlawful detention) and *Y. and Others against Bulgaria*, application No. 1666/19 (custody proceedings). In 2019, the Court also communicated to the Bulgarian Government one group application regarding eviction of Roma families from their homes, including 19 children –*Paketova et autres contre la Bulgarie*, application No. 17808/19.

Most of these children are represented by non-governmental, human rights organizations. Their small number does not indicate that children's rights are not violated in Bulgaria, just the contrary; it means that the main right – to access to legal aid and to access to court – is being violated systematically, regardless of the diversity of substantive rights guaranteed to children under domestic legislation.

Prosecutor

The parents of the minor M.D. met with me after they were summoned for a first hearing in a sexual assault case where she was the victim. During the meeting, I informed them about their rights and they agreed with the roles of private prosecutors and civil claimants in the trial. On the next day, upon entering the courtroom, they saw the perpetrator and changed their mind, telling the judge that they do not want anything from the defendant. There are two reasons for their behavior: first, they were intimidated by the confrontation with the offender's relatives with whom they live in one community and, second, they believed, despite my legal consultations, that the court's decision whether or not to credit their testimonies depends on their refusal to claim compensation. The court started the trial without adding the child as a party in the proceedings. In this situation, the prosecutor could have intervened and submitted a compensation claim on behalf of the child victim:

Criminal Proceedings Code, Prosecutor's right to submit a civil claim

Art. 51. Where the victim, due to under age or physical or psychological difficulties, is not able to defend his/her rights and legitimate interests, the prosecutor may file a civil claim in his/her favour.

In some cases of public interest, the Prosecution's Office has exercised this power. For example, in a case of 14 minor student girls sexually assaulted by the school paramedic, the Vratsa District Prosecution's Office, on its own initiative submitted a request to the court to secure the future civil claims, in the interest of the children. It was declared admissible and well-founded (Decision No 272 of 29.8.2013 in criminal case No. 378/2013 of the Vratsa District Court).

The prosecution office has the authority to represent the interests of minors, acting on their behalf, not only in criminal proceedings. During some trials, information is disclosed for harmful influence of parents over their children. In such cases, the prosecutor may initiate, on his/her own initiative, a civil case for restriction or deprivation of parental rights:

Article 133. (1) of the Family Code - „*Proceedings to restrict or deprive parental rights shall be opened upon request of … the State prosecutor … before the district court at the current place of residence of the child."*

There are examples in the case law, where the prosecutor, on his own initiative, has brought a civil case to court for deprivation of parental rights for reason of violence against children. For example, the reason of depriving a father of parental rights was the severe bodily injury of a minor confirmed with a final conviction of this man. In this case, the child's father is the abuser and the mother has a mental disease. As the father and the child are in conflict of interest and the mother is not legally supported or informed, the prosecutor brought the request for deprivation of the father's parental rights.

GIRLS 'ACCESS TO HEALTH

Children's access to justice and children's access to healthcare both require a mediator to stand in between. The second part of the paper discusses State's obligations with regard to access of minor girls to reproductive health care - in person or through representative.

In 2017, over 3200 underage girls in Bulgaria carried a pregnancy till term. For many of them, the (continued) pregnancy is a consequence of a crime - violent sexual intercourse, forced marriage, restriction of their freedom of movement, including access to medical services, etc. Many of these girls were not aware of their right to have an abortion or had no practical opportunity to exercise it as they needed the consent of a parent.

In Bulgaria, persons from the age of 14 until the age of 18 perform legal actions with the consent of their parents. A 16-year-old pregnant teenager is partly emancipated - she has the right to consult a gynecologist herself and make the necessary examinations, but cannot consent to abortion herself. According to the Health Act (Art. 87, Para. 3), the consent of the parent is not necessary for health consultations, preventive examinations of persons over 16 years of age. However, it is necessary for hospitalization and surgery. Clinical Pathway No. 4 „Premature Termination of Pregnancy" to the National Framework Agreement requires the signature of the parent under informed consent for the hospital stay, surgery, discharge and issuing of the abortion report. The Regulation on artificial termination of pregnancy provides the same: „*Abortion of minor women is performed with the consent of their legal representatives or guardians" (Article 4).*

At the same time, the Regulation provides that the small age of the girl - between 14 and 16 years - is a contraindication to carry the pregnancy to term. The abortion of such a small girl is always covered by the Health Insurance Fund, it is by definition a therapeutic one, just because of the girl's age (see „ List of medical conditions for abortion", Annex to the Regulation on artificial termination of pregnancy). For a pregnant minor, giving birth is a health threat by definition - it presupposes physical, psychological and emotional harm. Although the law defends the minor girls' interests so strongly, there remains a mandatory formality to apply them in practice - consent from the parent, which is not always achievable.

In theory, the consent of the parent can be replaced by a court decision: „*In case of disagreement between a parent and a child, he or she may personally contact the Social Assistance Directorate for help. If the child is fourteen years old and the disagreement is on substantive issues, she may file a request to the district court to settle the dispute." (Article 124, paragraph 3 of the Family Code).*

However, is it realistic to expect that the girl will submit to the gynecologist a true copy of the judgment, entered into force, within the maximum time limit allowed for an abortion? Obviously, this remedy is not effective or practical in case of pregnancy, as the UN Committee on the Elimination of Discrimination against Women held in their views regarding Complaint No. 22/2009, case *T.P.F. v. Peru*:

"8.17 The Committee considers that, since the State party has legalized therapeutic abortion, it must establish an appropriate legal framework that allows women to exercise their right to it under conditions

that guarantee the necessary legal security, both for those who have recourse to abortion and for the health professionals who must perform it. It is essential for this legal framework to include a mechanism for rapid decision-making, with a view to limiting to the extent possible risks to the health of the pregnant mother, that her opinion be taken into account, that the decision be well-founded and that there be a right to appeal. In the present case the Committee considers that L.C. could not benefit from a procedure for requesting a therapeutic abortion that met these criteria. In the light of the information contained in the file, the Committee believes, in particular, that the delay by the hospital authorities in deciding on the request had detrimental effects on her physical and mental health. Consequently, the Committee considers that an effective remedy was not available to L.C."

The same principle is embraced by the European Court of Human Rights, for example, in the case P. and S. v. Poland, Appl. No. 57375/08, §§ 96 and 99:

"While the Court has held that Article 8 cannot be interpreted as conferring a right to abortion, it has found that the prohibition of abortion when sought for reasons of health and/or wellbeing falls within the scope of the right to respect for one's private life and accordingly of Article 8 … [T]he State is under a positive obligation to create a procedural framework enabling a pregnant woman to effectively exercise her right of access to lawful abortion".

The violation of the European Convention for the Protection of Human Rights and Fundamental Freedoms in this case stems not only from obstructing access to the medical service, by requiring the approval of a third party (Article 8), but also from inhuman and degrading treatment of the pregnant girl (Article 3). The applicant was only 14 years old when she became pregnant and was forcibly admitted to a hospital without her mother's consent, advised by a gynecologist to carry the pregnancy to term, forced to meet a priest, although she did not want such a meeting, and forced to sign a declaration of informed consent that an abortion could cause her death. In addition, the hospital released a press release about the case, which resulted in the girl receiving additional pressure from strangers not to interrupt her pregnancy. She was also refused a police escort to protect her from anti-abortion activists upon leaving the hospital. For the European Court of Human Rights, all these factors combined are sufficient to establish that the minimum threshold of inhuman and degrading treatment under Article 3 has been reached.

Pressuring a pregnant woman's free will is violence. But for her, experiencing the unwanted pregnancy is also a painful experience. Under international human rights law, forced pregnancy is a type of torture. For example, in the case of V.D.A. v. Argentina, Complaint No. 1608/2007, the UN Human Rights Committee ruled:

"9.2 … The Committee considers that the State party's omission, in failing to guarantee L.M.R.'s right to a termination of pregnancy, as provided under article 86.2 of the Criminal Code, when her family so requested, caused L.M.R. physical and mental suffering … especially serious by the victim's status as a young girl with a disability. In this connection the Committee recalls its general comment No. 20 in which it states that [the prohibition of torture and cruel, inhuman or degrading treatment] relates not only to acts that cause physical pain but also to acts that cause mental suffering".

The most recent, General Recommendation No. 35 of the UN Committee on the Elimination of Discrimination against Women, dated 14.07.2017, has the same meaning, but even more comprehensive:

"18. Violations of women's sexual and reproductive health and rights, such as forced sterilization, forced abortion, forced pregnancy, criminalization of abortion, denial or delay of safe abortion and/or post-abortion care, forced continuation of pregnancy, and abuse and mistreatment of women and girls seeking sexual and reproductive health information, goods and services, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment."

In Bulgaria, the implementation of this recommendation by the Government and the protection of girls' reproductive rights is achievable, among other things, through legislative measures and amendments to the Criminal Code. For example, the crime „rape" under Art. 152 of the CC could be complemented with the aggravating circumstance - „if the victim became pregnant". The same aggravating circumstance could be applied to the crime „illegal relationship with a minor outside marriage" under Art. 191 of the Criminal Code:

„Article 191 (1) A person of full age who, outside marriage, lives together in a relationship with a person of female gender, who has not completed 16 years of age, shall be punished .... (2) An adult who

persuades or facilitates a minor boy and girl who have not completed 16 years of age, to living together in a relationship, outside marriage, shall be punished .... (3) If the act under the preceding paragraphs has been committed with a person who has not completed 14 years of age, the punishment shall be 2 to 5 years imprisonment."

In the draft Criminal Code of 21.12.2013, pregnancy is not included as an aggravating circumstance in these two gender-based offenses. Generally, the aggravating circumstances not only increase the size of the punishment and prolong the statute of limitations for prosecuting and punishing the perpetrator, but also reflect the legislator's sensitivity and recognition of the damages from the crime at stake. Unwanted pregnancy is a damage and this needs to be reminded more often, especially in the context of "best interests of the girl child".

CONSTITUTIONAL COURT OF SOUTH AFRICA

Case CCT 320/17

Summary: minor – assault with intent to do grievous bodily harm – common law defence of reasonable and moderate chastisement – best interests of the child – defence inconsistent with sections 10 and 12(1)(c) of the Constitution – amicus curiae leave to intervene – application for leave to appeal

In the matter between:

FREEDOM OF RELIGION SOUTH AFRICA	Applicant
and	
MINISTER OF JUSTICE AND CONSTITUTIONAL DEVELOPMENT	First Respondent
MINISTER OF SOCIAL DEVELOPMENT	Second Respondent
NATIONAL DIRECTOR OF PUBLIC PROSECUTIONS	Third Respondent
YG	Fourth Respondent
CHILDREN'S INSTITUTE	Fifth Respondent
QUAKER PEACE CENTRE	Sixth Respondent
SONKE GENDER JUSTICE	Seventh Respondent
and	
GLOBAL INITIATIVE TO END ALL CORPORAL PUNISHMENT OF CHILDREN	First Amicus Curiae
DULLAH OMAR INSTITUTE FOR CONSTITUTIONAL LAW, GOVERNANCE AND HUMAN RIGHTS	Second Amicus Curiae
PARENT CENTRE	Third Amicus Curiae

Neutral citation: Freedom of Religion South Africa v Minister of Justice and Constitutional Development and Others [2019] ZACC 34

Coram: Mogoeng CJ, Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J

Judgment: Mogoeng CJ (unanimous)

Heard on: 29 November 2018

Decided on: 18 September 2019

ORDER

On appeal from the High Court of South Africa, Gauteng Local Division, Johannesburg (in an application for direct access):

1. The application for direct access is granted.

2. Freedom of Religion South Africa is granted leave to intervene.

3. The application for leave to appeal is dismissed.

4. It is declared that the common law defence of reasonable and moderate parental chastisement is inconsistent with the provisions of sections 10 and 12(1)(c) of the Constitution.

5. There will be no order as to costs.

JUDGMENT

MOGOENG CJ (Basson AJ, Cameron J, Dlodlo AJ, Froneman J, Goliath AJ, Khampepe J, Mhlantla J, Petse AJ and Theron J concurring):

Introduction

[1] The adage “spare the rod, spoil the child” stares us in the face here. It challenges our foresight and capacity to bring Solomonic wisdom to bear on a sensitive, complex and controversial matter of national importance – child discipline.

[2] Many parents contend that they bear the primary duty to lovingly raise their children in terms of their religious, cultural and other “non-harmful” beliefs, which entail the administration of moderate and reasonable chastisement, without being exposed to the risk of criminal charges or a criminal record.

[3] The entitlement of parents to administer that chastisement without attracting adverse legal consequences was declared unconstitutional by the High of South Africa, Gauteng Local Division, Johannesburg. This declaration was based on the infringement of several constitutional rights that a child enjoys.

[4] This then is an application for leave to challenge the declaration of constitutional invalidity of a parent’s right to administer reasonable and moderate chastisement to her child. It remains a valid defence against a charge of common assault throughout South Africa, except for Gauteng.

Background

[5] This matter began as a trial of assault with intent to do grievous bodily harm in the Johannesburg Magistrates’ Court. The father abused his 13 year old son for watching pornographic material. The violence meted out to the son also took the form of vicious kicking and punching. The father could not, therefore, have justifiably raised the defence of reasonable and moderate chastisement or relied on any religious or cultural ground to justify that unmistakably immoderate and unreasonable application of force. Unsurprisingly, he was convicted of common assault. I deliberately refrain from saying any more about the assault on the wife, except that it also led to a similar conviction. I do so because it bears no relevance to the defence of reasonable and moderate chastisement of a child.

[6] Aggrieved by the outcome, the father lodged an appeal to the High Court. Although the State did not challenge the constitutional validity of the common law right of parents to chastise their children moderately and reasonably, the Court of its own accord decided the issue. It declared the defence to be constitutionally invalid and, therefore, prospectively unavailable to parents charged with the offence of assault (common or with the intent to do grievous bodily harm) upon their children.

[7] The history and nature of parents’ legal authority to inflict reasonable and moderate corporal punishment upon their children deserves some attention. And I will borrow quite generously from Burchell and Milton, who did a brilliant job in capturing the essence of this subject.

[8] The use of physical force upon a child as a means of corrective educational discipline is a long-established part of civilisation. In line with the social importance attributed to the family unit in all societies, the law has traditionally conceded to parents a uniquely independent authority in raising their children. For this reason, the State did not interfere in the exercise of the rights, duties and responsibilities of parents in the upbringing of their children.

[9] Some parents reportedly abused their children under the guise of religion. They viewed childish misbehaviour or misconduct as a sign of demonic possession that required the use of more force or physical pain to deliver their children from evil spirits. This then resulted in many children being regularly subjected to savage and brutal chastisement without any legal protection whatsoever from that cruel or excessive punishment. Societal outcry against this abuse dates as far back as the late nineteenth century, which led to the adoption of legal measures to curb child abuse and afford greater legal protection to children.

[10] In this spirit, Cockburn CJ said:

"A parent . . . may for the purpose of correcting what is evil in the child inflict moderate and reasonable corporal punishment always however with this condition that it is moderate and reasonable. If it be administered for the gratification of passion or of rage, or if it be immoderate and excessive in its nature or degree, or if it be protracted beyond the child's power of endurance or with an instrument unfitted for the purpose and calculated to produce danger to life and limb, in all such cases the punishment is excessive and the violence is unlawful."

[11] Burchell and Milton correctly observe that disciplinary chastisement has been considered excusable provided it serves a corrective and admonitory purpose. This legal entitlement of parents to discipline their own children exists only within the confines of moderation and reasonableness. Ill-treatment or abuse of children exceeds those bounds and is in law punishable by reason of its unlawfulness.

[12] Eleven years before we became a constitutional democracy, South Africa already saw the need to pass legislation that limited parental authority and provided that parental ill-treatment of a child constituted a punishable offence. Much progress has since been made in that the Children's Act provides for a wide range of protective measures for children.

Standing

[13] Returning to the declaration of constitutional invalidity, none of those who were parties before the High Court want, or are able to challenge that decision. Freedom of Religion South Africa,**[13]** which was amicus curiae (friend of the court) in the court of first instance, seeks to assume that responsibility. But there is uncertainty about its standing.

[14] The difficulty is whether a friend of the court has standing to bring an application for leave to appeal in circumstances where parties in the lower court are not willing or able to do so. And Freedom of Religion says that it does, under those circumstances, have standing since it is acting in the public interest.

[15] In *Ferreira*, O'Regan J stated that the factors relevant to determining whether a person is genuinely acting in the public interest include considerations such as —

"whether there is another reasonable and effective manner in which the challenge can be brought; the nature of the relief sought, and the extent to which it is of general and prospective application; and the range of persons or groups who may be directly or indirectly affected by any order made by the Court and the opportunity that those persons or groups have had to present evidence and argument to the Court."

And in *Lawyers for Human Rights*, Yacoob J stated:

"The list of relevant factors is not closed. I would add that the degree of vulnerability of the people affected, the nature of the right said to be infringed, as well as the consequences of the infringement of the right are also important considerations in the analysis."

[16] As indicated, none of the parties before the High Court were willing or able to challenge the declaration of unconstitutionality. The only way put to the Court to challenge that declaration is to grant Freedom of Religion standing. Almost all parents and children in South Africa would be affected by this Court's decision on this matter. This group of people were not directly involved in the High Court and neither did they seek to be involved in the further prosecution of this matter. The parents' constitutional right to freedom of religion is also implicated. And it is a matter that involves the best interests of children, who are a vulnerable group. This, coupled with a child's right to be protected from all forms of violence, supports Freedom of Religion's contention that it has standing and should thus be allowed to intervene as a party.

[17] A jump or translation from being a friend of the court in a lower court to becoming a party at an appeal stage is at times permissible on considerations of justice. And the case of Freedom of Religion finds itself in that exact same situation. Not only does it seek to become a party in the public interest, but the issues raised also bear out the need for intervention as a party on behalf of the general body of parents and children in our country.

[18] What also makes a noteworthy difference is that Freedom of Religion is not seeking to be involved in this matter for the first time. It took part in the proceedings in the High Court, albeit in a different capacity. It is familiar with the issues that it seeks to raise on behalf of the broader public for the attainment of a final and authoritative pronouncement by this Court. This does not necessarily extend to or address the position of a person who seeks to intervene at an appeal stage, but did not participate in the same proceedings in the court of first instance.

[19] Technicalities and senseless constraints that come with rigidity should never be allowed to stand in the way of a legitimate and demonstrably desirable pursuit and attainment of justice. True, only parties to litigation should ordinarily be allowed, by reason of their direct and active participation borne of their material interest in the case, to challenge the decision of the court which decided against them. Courts must, after all, protect scarce judicial resources by not easily allowing litigious busybodies to clog the roll in circumstances where those directly and materially affected by the outcome see no need to challenge an adverse outcome. But there are exceptions to that guiding principle and those exceptions are grounded on the interests of the public.

[20] Legal principles exist to facilitate rather than to frustrate the attainment of a just, equitable, and definitive outcome. The issue of discipline, its positive and negative aspects, and the need for certainty on the disciplinary options available to parents cry out for the attention of this Court. A pronouncement by the apex court on whether the common law defence of reasonable and moderate chastisement is constitutionally invalid would clearly serve the interests of the public. That is the extent of its general and prospective application. And that thus clothes Freedom of Religion with the standing to intervene and bring an application for leave to appeal.

Leave to appeal

[21] Standing or leave to intervene as a party is, however, not dispositive of the application for leave to appeal. The question in relation to leave is whether it is in the interests of justice to grant it or whether the application raises an arguable point of law of general public importance that this Court ought to consider.

[22] Not only does this application implicate several constitutional rights, but it also most certainly raises an arguable point of law of general public importance which ought to be dealt with by this Court.

[23] Since the decision of one Division of the High Court of South Africa does not bind all other Divisions, the need for uniformity and finality demands the intervention of this Court. The constitutional sustainability of moderate and reasonable chastisement is an arguable point of law of general public importance because it concerns those parents who subscribe to different religious beliefs or cultural practices and even those who do not espouse any faith or culture. It is thus safe to conclude that this application affects the overwhelming majority of parents and children in our country.

[24] At the heart of this application lie issues relating to what is in the best interests of children. And children are a vulnerable group whose interests are of paramount importance. An integral part of those interests is how to raise them well as responsible and disciplined citizens of our country. The issues or points of law raised are of great interest and importance to almost all parents and children, most of whom are not able to champion the cause of ventilating these rights themselves and would thus be well served by the intervention of Freedom of Religion as a litigating party. If moderate and reasonable chastisement is unconstitutional, it is best to settle the issue once and for all to avoid the possible violation of children's rights in other parts of the country. The issues have been extensively ventilated in the High Court and in this Court.

[25] Freedom of Religion does have reasonable prospects of success, particularly because some comparable democracies retain the common law defence of reasonable and moderate chastisement. The interests of justice thus point to the granting of leave to appeal. It follows that this Court has jurisdiction in this matter.

[26] This being an application for direct appeal in terms of section 167(6)(b) of the Constitution, it is necessary to explain why we do not insist on the Supreme Court of Appeal being approached before

this Court. For, ordinarily litigants must not be allowed to bypass the Supreme Court of Appeal in matters involving the application or interpretation of the common law. This being a matter concerning the validity of a common law defence, it is inescapable that an explanation for the deviation be furnished.

[27] In *Zondi*, we reflected as follows on the application for direct access, and by extension direct appeal, provisions:

"Under these provisions, this Court has discretion whether to grant direct access but an application will only be granted if it is in the interests of justice to grant it. And the question whether it is in the interests of justice to grant direct access must be decided in the light of the facts of each case. In this regard this Court will consider a range of factors. These include the importance of the constitutional issue raised and the desirability of obtaining an urgent ruling of this Court on that issue, whether any dispute of fact may arise in the case, the possibility of obtaining relief in another court, and the time and costs that may be saved by coming directly to this Court."

By extension, similar considerations apply to direct appeals.

[28] The administration of reasonable and moderate punishment by parents on their children has been declared unconstitutional by the High Court. That declaration, though not relating to legislation, is just too close and similar in character to declarations of unconstitutionality relating to legislation, to render the bypassing of the Supreme Court of Appeal excusable. Although not all declarations of unconstitutionality of all common law principles would justify a departure from normal practice, the nature or importance of the constitutional issues raised, the seriousness and far-reaching implications of the unconstitutionality in this matter justify a departure from the normal appeal route, via the Supreme Court of Appeal. Certainty and finality is needed urgently. A delay that would be caused by that appeal process trajectory would not be in the public interest or in the interests of justice.**[24]** This is so because parents discipline their children daily. The sooner they know what is legally permissible, the better.

Issues

[29] The constitutional validity of a parent's defence to carry out reasonable and moderate chastisement has been attacked on several fronts.

[30] But, I hasten to state that there is merit in the approach that recognises that prolixity must be avoided where that can be achieved without watering down the quality of reasoning or the soundness of a judgment. Where one or more key constitutional rights or principles could help to properly dispose of an issue, very little purpose is hardly ever served by the long-windedness that takes the form of trolling down all the rights, principles or issues implicated or raised in order to arrive at the same conclusion. That is not to make light of the educational value of, where appropriate or necessary, dealing with every right, principle or issue raised. But readability, due regard to the scarcity of judicial resources and time, and the need for precision or tight reasoning often call for a sharper focus and brevity.

[31] For these reasons, the constitutionality of moderate and reasonable chastisement will primarily be resolved on the provision of section 12(1)(c) of the Constitution. The right to dignity will also receive attention in the discussion.

Is chastisement unconstitutional?

[32] Freedom of Religion rightly seeks to distinguish reasonable and moderate parental chastisement from the kind of assault and abuse of children that every campaign or challenge to end this common law defence is actually intended to curb. But, the difficulty they have is the attempt to locate this chastisement outside the boundaries of assault.

[33] They quite interestingly make the point that not every parent, who out of religious or cultural considerations chastises their children as a way of instilling or enforcing discipline or consequence management, intends to harm or does actually harm and abuse their children. Freedom of Religion displays an implicit appreciation of the reality that just as a verbal reprimand could have an even more traumatising or brutalising effect and an enduring negative impact on the well-being of a child, so can chastisement that is unreasonable and immoderate, often triggered by anger or an unbridled attitude or disposition of a tough disciplinarian. They only seek to protect and preserve a parental entitlement to lovingly discipline their children just or almost as positively as alternative methods reportedly do.

[34] The approach of Freedom of Religion is not purely biblical. There is, however, an allusion to the appropriateness of scriptural injunctions on the use of a rod and to parents' entitlement to administer reasonable and moderate chastisement on their children as an integral part of the exercise of the right to freedom of religion. But, it fundamentally seeks to protect the pre-existing common law defence of chastisement available to all parents irrespective of their religious persuasions, cultural practices or non-belief in a deity. It bears repetition that one of Freedom of Religion's major concerns is the apparent conflation of reasonable and moderate chastisement with blatant child abuse and brutal assault by holding them out as being inherently or fundamentally the same.

[35] The application of force to the body of another may, subject to the *de minimis non curat lex* (the law does not concern itself with trifles) principle, take the form of the slightest touch, holding a person's arm or bumping against them. But the assault may be justified or rendered lawful on the basis of authority or the right of chastisement. Had it not been for this defence, this application of force could have led to a parent being convicted of assault.

All forms of violence

[36] As indicated already, there are several constitutional rights that could be relied on to determine the validity of reasonable and moderate chastisement. But the issue can be adequately resolved on the basis of, among others, section 12(1)(c) of the Constitution, which provides:

"(1) Everyone has the right to freedom and security of the person, which includes the right—

. . .

(c) to be free from all forms of violence from either public or private sources."

[37] A proper determination of the constitutionality of chastisement requires that it be located within a criminal law setting, which is its natural habitat. Moderate and reasonable chastisement hitherto constituted an effective defence for parents who had administered it to their children and could be or were charged with assault. And properly so because assault is correctly defined by Burchell and Milton as the unlawful and intentional application of force to the person of another or inspiring a belief in that person that force is immediately to be applied as threatened. This accords with the definition our courts have given to assault, like the intentional application of unlawful force to the person of a human being.

[38] The dictionary meaning of violence is "behaviour involving physical force intended to hurt, damage or kill someone or something". And this is the ordinary grammatical meaning that ought to be ascribed to the word "violence" within the context of section 12(1)(c) of the Constitution. More importantly, even when contextually and purposively interpreted, as it should, the definition of assault by Snyman, Burchell and Milton converges on the same meaning. Violence is not so much about the manner and extent of the application of the force as it is about the mere exertion of some force or the threat thereof.

[39] Turning to the language of section 12, the operative words are "free from all forms of violence". The first question is whether we ascribe a highly technical meaning to the word "violence" or give it its ordinary grammatical meaning which connotes any application of force, however minimal. Chastisement does by its very nature entail the use of force or a measure of violence. To appreciate the connection, alluded to by the respondents and the amici, between reasonable and moderate chastisement and violence, we must ask why it is necessary to resort to chastisement in the first place. Is it not the actual or potential pain or hurt that flows from it that is believed to be more likely to have a greater effect than any other reasonably available method of discipline? Otherwise, why resort to it?

[40] It is the bite of the force applied or threatened that is hoped to be remembered to restrain a child from misbehaviour whenever the urge or temptation to do wrong comes. How then can reasonable and moderate chastisement not fall within the meaning or category of violence envisaged in section 12(1)(c)? After all, reasonable and moderate chastisement includes corporal punishment with the instrumentality of a rod or a whip. That accords with the biblical injunction referred to above namely, "He who spares his rod, hates his son, but he who loves him disciplines him promptly." The reference to violence does, therefore, extend to all forms of chastisement, moderate or extreme – a smack or a rod.

[41] The objective is always to cause displeasure, discomfort, fear or hurt. The actionable difference all along lay in the extent to which that outcome is intended to be or is actually achieved. Since

punishment by the application of force to the body of a child by a parent is always intended to hurt to some degree, moderate and reasonable chastisement indubitably amounts to legally excusable assault. And there cannot be assault, as defined, without meeting the requirements of "all forms of violence" envisaged in section 12(1)(c) of the Constitution.

[42] The mischief sought to be addressed through section 12(1)(c) is not only certain or some forms of violence, but "all forms". We have a painful and shameful history of widespread and institutionalised violence. And section 12 exists to help reduce and ultimately eradicate that widespread challenge. "All forms" is so all-encompassing that its reach or purpose seems to leave no form of violence or application of force to the body of another person out of the equation. To drive the point home quite conclusively, the Constitution extends the prohibition to violence from "either public or private sources".

[43] It is necessary to emphasise that in terms of our law, the application of force, including a touch depending on its location and deductible meaning, or a threat thereof constitutes assault. And parental authority or entitlement to chastise children moderately and reasonably has been an escape route from prosecution or conviction. This means that the violence proscribed by section 12(1)(c) could still be committed with justification if that parental right is retained. But, if it is accepted that what would ordinarily be criminally punishable, but for the common law defence of moderate and reasonable chastisement, is indeed what section 12(1)(c) seeks to prevent, then children would be protected by that section like everyone else. One would be hard-pressed to suggest that assault, which chastisement however moderate or reasonable is, does not fall within the catchment area of section 12(1)(c). "All forms of violence" means moderate, reasonable and extreme forms of violence. Besides – "a culture of authority which legitimates the use of violence is inconsistent with the values for which the Constitution stands."

[44] This proscription does put an end to any argument, however sound, that might be raised on any ground in support of the retention of the defence of reasonable and moderate parental chastisement. For there are indeed sound and wisdom-laden, faith-based and cultural considerations behind the application of the rod. That said, parental chastisement of a child, however moderate or reasonable does, in my view, meet the threshold requirement of violence proscribed by this constitutional provision and, therefore, limits the right in section 12(1)(c). The conclusion that it cannot escape the reach of section 12(1)(c) is inevitable.

The right to human dignity

[45] There is a history and context to the right to human dignity in our country. As a result, this right occupies a special place in the architectural design of our Constitution, and for good reason. As Cameron J, correctly points out, the role and stressed importance of dignity in our Constitution aims "to repair indignity, to renounce humiliation and degradation, and to vest full moral citizenship to those who were denied it in the past." Unsurprisingly because not only is dignity one of the foundational values of our democratic State, but it is also one of the entrenched fundamental rights. And section 10 of the Constitution provides: "Everyone has inherent dignity and the right to have their dignity respected and protected."

[46] Children are constitutionally recognised independent human beings, inherently entitled to the enjoyment of human rights, regardless of whether they are orphans or have parents. The word "everyone" in this section also applies to them. In *S v M* this Court gave appropriate recognition to the child's rights to dignity in these terms:

"Every child has his or her own dignity. If a child is to be constitutionally imagined as an individual with a distinctive personality, and not merely as a miniature adult waiting to reach full size, he or she cannot be treated as a mere extension of his or her parents, umbilically destined to sink or swim with them. . . . Individually and collectively all children have a right to express themselves as independent social beings, to have their own laughter as well as sorrow, to play, imagine and explore in their own way, to themselves get to understand their bodies, minds and emotions, and above all to learn as they grow how they should conduct themselves and make choices in the wide social and moral world of adulthood. And foundational to the enjoyment of the right to childhood is the promotion of the right as far as possible to live in a secure and nurturing environment free from violence, fear, want and avoidable trauma."

The right to dignity and freedom from violence are some of those highlighted for special attention and most fitting recognition.

[47] There is a sense of shame, a sense that something has been subtracted from one's human whole, and a feeling of being less dignified than before, that comes with the administration of chastisement to whatever degree. I say this alive to the reality that being held accountable for actual wrongdoing generally has the same effect. Being found guilty of misconduct or crime and the consequential sanction like imprisonment, however well-deserved, has a direct impact on one's dignity. It is all a matter of degree.

[48] That said, moderate and reasonable chastisement does impair the dignity of a child and thus limits her section 10 constitutional right. As with section 12(1)(c), the question that remains is whether the limitation is justifiable.

Justification analysis

[49] Sections 10 and 12 provide for the protection of human dignity and the freedom and security of the person respectively in the Bill of Rights. And section 36 of the Constitution provides for their possible limitation in these terms:

"(1) The rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(a) the nature of the right;

(b) the importance of the purpose of the limitation;

(c) the nature and extent of the limitation;

(d) the relation between the limitation and its purpose; and

(e) less restrictive means to achieve the purpose."

[50] It must immediately be said that the common law defence of reasonable and moderate chastisement is a law of general application and may, therefore, potentially limit the rights in the Bill of Rights. This defence is available to all parents, regardless of their religious, cultural or other persuasions, when charged with assault of their children. And it limits a child's constitutional rights to dignity and to be protected from all forms of violence. What remains to be determined is whether that limitation is reasonable and justifiable, regard being had to some of the factors listed in section 36.

The nature, purpose and importance of the limitation

[51] The reality is that parental chastisement is significantly different from the institutionalised administration of corporal punishment that has since been abolished. The one is intimate and administered by a loving parent whereas the other is somewhat cold, detached and implemented by a stranger of sorts. Parents have the inherent obligation to raise their child to become a responsible member of society whose delinquency they stand to be blamed for, whereas strangers like teachers only had an official and possibly less-caring duty to punish. The primary responsibility to mould or discipline a child into a future responsible citizen is that of parents. For example Christian parents have a "general right and capacity to bring up their children according to Christian beliefs". The abolition of the defence forces them —

"to make an absolute and strenuous choice between obeying a law of the land or following their conscience . . . to fulfil what they regard as their conscientious and biblically-ordained responsibilities for the guidance of their children."

[52] The invalidation of the defence of moderate and reasonable chastisement in Gauteng thus means that the chastisement aspect of their religiously or culturally ordained way of raising, guiding and disciplining their children is no longer available to them. To discipline them in terms of the prescripts of their faith or culture would expose them to criminal prosecution, possible conviction and possible imprisonment. And the only safety valve available to them is the abovementioned *de minimis* rule. Although this rule has acute shortcomings in terms of its inability to prevent the abolition of the defence from possibly imposing a strain on the family structure by allowing parents to be prosecuted for even the minutest of well-intentioned infractions, it is at least of some benefit in that it could save parents from being needlessly imprisoned. It does, barring diversion, not necessarily exclude the unlawfulness of the chastisement and a criminal conviction of assault, but only allows the assault to go unpunished on account of its triviality.

[53] Arguments for the retention of the defence of reasonable and moderate chastisement are understandable. Barring anger, frustration, abuse of intoxicating substances or sheer irresponsibility, parents who truly chastise their children on the love-driven religious or cultural bases do not always intend to abuse or traumatise their children. For they presumably love them and want only the best for them. It is also debatable whether the use of that method of discipline invariably produces negative consequences.

[54] It would thus be an over-generalisation to brand the very possibility of retaining reasonable and moderate chastisement on religious or cultural grounds as an inescapable recipe for widespread excessive application of violence or child abuse. Properly managed reasonable and moderate chastisement could arguably yield positive results and accommodate the love-inspired consequence management contended for by Freedom of Religion. And that would explain why so many other civilisations and comparable democracies have kept this defence alive and relatively few have abolished it.

The nature of the affected interests and rights

[55] Section 28(2) of the Constitution provides that "[a] child's best interests are of paramount importance in every matter concerning the child." Children are, after all, most vulnerable. Some of them are so young that they are incapable of lodging a complaint about abusive or potentially injurious treatment or punishment, however well-intentioned it might have been. Even those who are of school-going age might often be ignorant of what they could do to alert the law enforcement authorities to actual or potentially harmful parental conduct that they are made to endure. This alludes to an interesting speculation, not completely irrelevant though, whether the child in this matter would have reported the assault case had the mother not been a victim of the assault too.

[56] The State is obliged to respect, protect, promote and fulfil a child's section 28 protections and the Judiciary is thus bound by the provisions of section 28. That means that in our approach to a parent's entitlement to chastise a child reasonably and moderately, of paramount importance should be the best interests of the child in respect of protection from potential abuse and the need to limit the right because of the good a child and society stand to derive from its retention as a disciplinary tool.

[57] More telling is that the drafters of section 28(2) chose not to say that the "interests" of a child are of "importance" in "some matters" concerning a child. The Constitution provides that "in *every* matter" concerning a child, her "*best* interests" are of "*paramount* importance". That, however, does not mean that the best interests of a child are superior to all other fundamental rights. This much was made clear by this Court in several matters. This Court in *S v M* held that—

"the fact that the best interests of the child are paramount does not mean that they are absolute. Like all rights in the Bill of Rights their operation has to take account of their relationship to other rights, which might require that their ambit be limited."

[58] The paramountcy of the best interests of a child was further explained in these terms:

"Does the fact that section 28(2) demands that the best interests of children be accorded paramount importance mean that children's rights trump all other rights? Certainly not. All that the Constitution requires is that, unlike pre-1994, and in line with our solemn undertaking as a nation to create a new and caring society, children should be treated as children – with care, compassion, empathy and understanding of their vulnerability and inherent frailties. Even when they are in conflict with the law, we should not permit the hand of the law to fall hard on them like a sledgehammer lest we destroy them. The Constitution demands that our criminal-justice system should be child-sensitive."

[59] In *Christian Education South Africa*, we highlighted the paramount importance of the children's best interests in these terms:

"Courts throughout the world have shown special solicitude for protecting children from what they have regarded as the potentially injurious consequences of their parents' religious practices. It is now widely accepted that in every matter concerning the child, the child's best interests must be of paramount importance. This Court has recently reaffirmed the significance of this right which every child has. The principle is not excluded in cases where the religious rights of the parent are involved."

[60] It follows that these observations on the utmost necessity of child protection and the paramountcy of the importance of the best interests of a child find application regardless of the belief behind the practice that has potentially injurious consequences on the child. It could be religious, cultural

practices or any other basis on the strength of which parents believe that their children ought to be treated in a particular way that happens to be harmful to their well-being.

[61] Section 28(2) wisely anticipates possibilities of conduct that are actually or potentially prejudicial to the best interests of a child. Unsurprisingly, it is crafted in terms so broad as to leave no doubt about the choice it makes between the best interests of the child and the parent's perceived entitlement to resort to unreasonable and immoderate chastisement meant to procure a child's obedience to a parent's legitimate directive and orders. However, what remains to be determined is whether chastisement that is moderate and reasonable, is constitutionally justifiable in our kind of democracy, regard being had to the paramountcy of the best interests of a child.

The extent of the limitation and its relation to purpose

[62] Parents have over the years enjoyed the right to discipline their children in a variety of ways. One of the instruments for instilling discipline in their children is the administration of moderate and reasonable chastisement. As indicated, its foundation is both religious and cultural in character. It is thus regarded partly as an incidence of the enjoyment of one's constitutional right of freedom of religion or culture.

[63] The disadvantage though is that, unlike the constitutional protections available to the child, the right to freedom of religion does not expressly provide for parental entitlement to administer moderate and reasonable chastisement to the child nor does any provision of the Constitution acknowledge the existence of a cultural right to the same effect. Freedom of Religion's reliance on "the right to parenting" grounded on South Africa's international obligations under several conventions that deal with the right to family in particular must suffer the same fate. Not only does international law not recognise the right to discipline, but our Constitution does not make express provision for it, unlike the rights sought to be vindicated here.

[64] And this is compounded by the paucity of clear or satisfactory empirical evidence that supports chastisement as a beneficial means of instilling discipline. Though not conclusive, there are, however, some pointers to the potentially harmful effect of chastisement. Some of that research is open to criticism in that very little effort seems to have been made to distinguish between moderate and excessive or abusive application of force to the body of a child. In many of those studies, there has been a strong leaning on the effects of plain abuse and excessive application of force on the well-being of a child and very little on truly moderate and reasonable chastisement. That said, positive parenting reduces the need to enforce discipline by resorting to potentially violent methods. It could replace occasionally harsh and inconsistent parenting with non-violent and consistent strategies for discipline like positive commands, tangible rewards and problem-solving, obviously depending on age.

[65] What militates more against the retention of the defence of moderate and reasonable chastisement is the best interests of the child, which are of paramount importance in all matters involving a child. To retain this kind of chastisement, it would have to be demonstrated that apart from the fact that it ordinarily falls within the category of assault, there is something about it that advances the best interests of the child. In other words, there must be something about this excusable crime of assault that evidently redounds to the good of the child. It bears repetition that not much was said to help us appreciate that the benefits of that chastisement indeed outweigh its disadvantages, and thus justify the limitation.

[66] To properly locate the best interests of the child, it is necessary to come to grips with the nature of those interests in relation to chastisement. Chastisement is meant to discipline and help a child appreciate consequence management. In other words, the purpose of moderate and reasonable chastisement is to mould a child into a responsible member of society. What then is in her contextual best interests? It is, in my view, to achieve the same laudable objective without causing harm or unduly undermining the fundamental rights of the child. In other words, if there exists a disciplinary mechanism or measure that is more consistent with love, care, the more balanced protection of the rights and advancement of the well-being of a child and another that is less so, the former must be preferred for it gives expression to what is in the best interests of the child. It recognises, in a practical way, the paramount importance of a child's best interests.

[67] The application of force or a resort to violence, which could be harmful or abused, cannot in circumstances where there is an effective non-violent option available be said to be consonant with the best interests of a child. For indeed the best interests of a child is about what is best for her

in the circumstances – what benefits her most with no or minimum harm. But the absence of any form of discipline can never be in the best interests of a child. That said, moderate and reasonable chastisement as a tool for discipline, cannot be retained at the expense of a child's fundamental right to dignity. And the limitation of that right has not been properly explained.

Less restrictive means to achieve purpose

[68] What undermines the justification for retaining chastisement, more revealingly, is the availability of less restrictive means to achieve discipline. Chastisement is, after all, traditionally supposed to be the option of last resort, employed only when all else fails. Besides, the experience-borne traditional approach generally adopted by South African parents over the years has been to teach, guide and admonish their children, resorting to chastisement only as a measure of last resort. No research is required to verify this reality. It is as obvious as the side of the road on which South Africans drive their vehicles. The unreasonable and immoderate chastisement which constitutes assault proper, maltreatment or child abuse has always been a criminal offence which all sound-minded parents agree must be punishable. It is an aberration that has inexplicably been left to permeate society with consequences that somehow militate against or undermine the retention of moderate and reasonable chastisement.

[69] The positive parenting approach relied on by the friends of the court is fundamentally about educating a child about good behaviour and the do's and don'ts of life. It also entails a more effective parent-child communication to help a child realise the adverse consequences of unacceptable conduct and to generally guide her on how best to behave in life. This is the most basic or commonsensical approach. And it is indeed a fairly well-known means of discipline that has coexisted with reasonable and moderate chastisement for many years. More importantly, it is a less restrictive means of discipline that could potentially be effective in the attainment of the same purpose that moderate and reasonable chastisement is intended for. Of concern to many others could be the apparent less regard for more effective consequence management in the approach to positive parenting that the friends of the court seem to be advocating for. Meaningful consequences must arguably follow repeat or serious wrongdoing. For it is that appropriate admonition that should never be played down.

[70] All of the above considered, I am satisfied that important though the purpose of the possible limitation of these rights is, the paucity of proof that the chastisement is beneficial and the availability of less restrictive means to instil discipline militate against the reasonableness and justification of the limitation. Children are indeed vulnerable and delicate. They are not always able to protect themselves and may not always know what to do in the event of the law being broken to the prejudice of their best interests. This conclusion is arrived at without branding parents, who prefer moderate and reasonable chastisement, as unloving, irresponsible and inclined to harm or abuse their children.

[71] The right to be free from all forms of violence or to be treated with dignity, coupled with what chastisement does in reality entail, as well as the availability of less restrictive means, speak quite forcefully against the preservation of the common law defence of reasonable and moderate parental chastisement. There is, on the material before us, therefore, no justification for its continued existence, for it does not only limit the rights in sections 10 and 12 of the Constitution, but it also violates them unjustifiably.

Conclusion

[72] It suffices to say that any form of violence, including reasonable and moderate chastisement, has always constituted a criminal act known as assault. The effect of relying on this common law defence was to exempt parents from prosecution or conviction. Identical conduct by a person other than a parent on the same child would otherwise constitute indefensible assault.

[73] The High Court was correct in its conclusion that the common law defence of reasonable and moderate chastisement is constitutionally invalid and that this declaration be prospective in its operation.

[74] A proliferation of assault cases against parents is a reasonably foreseeable possibility. Parliament would, hopefully, allow itself to be guided by extensive consultations, research and debates before it pronounces finally on an appropriate regulatory framework. That approach would enable it to benefit not just from lobby groups, but also from parents and possibly children themselves whose interests are at stake.

[75] How law enforcement agencies would deal with reported cases of child abuse flowing from this declaration of unconstitutionality is a matter best left to be dealt with on a case-by-case basis.

Order

[76] In the result, the following order is made:

1. The application for direct access is granted.

2. Freedom of Religion South Africa is granted leave to intervene.

3. The application for leave to appeal is dismissed.

4. It is declared that the common law defence of reasonable and moderate parental chastisement is inconsistent with the provisions of sections 10 and 12(1)(c) of the Constitution.

5. There will be no order as to costs.

UNICEF ECARO

GUIDELINES ON CHILD-FRIENDLY LEGAL AID

JUNE 2018

Terminology

Access to justice: "Access to justice can be defined as the ability to obtain a just and timely remedy for violations of rights as put forth in national and international norms and standards (including the CRC). Lack of access to justice is a defining attribute of poverty and an impediment to poverty eradication and gender equality….Proper access to justice requires legal empowerment of all children: all should be enabled to claim their rights, through legal and other services such as child rights education or advice and support from knowledgeable adults."

Source: *UN Common Approach to Justice for Children (2008)*

Child: any person below the age of eighteen years.

Source: *UN Convention on the Rights of the Child (1989), Article 1*

Child-friendly justice: "refers to justice systems which guarantee the respect and the effective implementation of all children's rights at the highest attainable level…. It is, in particular, 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.*"*

Source: *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (2010), II c*

Child in conflict with the law: "a child alleged to have, or accused of, or recognized as having infringed the criminal law after attaining the age of criminal responsibility and before the age of 18."

Source: *Justice in Matters Involving Children in Conflict with the Law: Model Law on Juvenile Justice and Related Commentary, UNODC (2013)*

Diversion: "the conditional channelling of children in conflict with the law away from judicial proceedings through the development and implementation of procedures, structures and programmes that enable many - possibly most - to be dealt with by non-judicial bodies, thereby avoiding the negative effects of formal judicial proceedings and a criminal record."

Source: *Toolkit on Diversion and Alternatives to Detention, UNICEF (2010)*

Legal professional/ practitioner: For the purposes of these Guidelines, the term means any person qualified and entitled in national law to provide legal advice, assistance and representation.

Legal aid: For the purposes of these Guidelines, the term covers legal advice, assistance and representation for children.

Parent: "refers to the person(s) with parental responsibility, according to national law. In case the parent(s) is/are absent or no longer holding parental responsibility, this can be a guardian or an appointed legal representative."

Source: *Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (2010), II b*

Restorative justice/ process: "any process in which the victim, the offender and/or any other individuals or community members affected by a crime actively participate together in the resolution of matters arising from the crime, often with the help of a fair and impartial third party. Examples of restorative process include mediation, conferencing and sentencing circles."

Source: *UN Basic Principles on the use of restorative justice programmes in criminal matters (2000)*

Secondary victimisation: “victimization that occurs not as a direct result of a criminal act but through the response of institutions and individuals to the victim.”

Source: *Justice in Matters involving Child Victims and Witnesses of Crime Model Law and Related Commentary, UNODC (2009)*

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Introduction

Children come in to contact with the law for various reasons – as defendants or witnesses in criminal proceedings; as parties in family proceedings; as victims of physical or psychological violence, sexual abuse or other crimes or rights violations; and as parties in civil or administrative matters including health care, social security, disability, asylum and refugee claims. The outcomes of such cases can be hugely significant for children’s lives in the long and short term. They can determine if a child goes in to detention or not, whom they will live with, what contact they can have with their parents and siblings, which country they will live in and where they will go to school.

Most children who are in contact with the law find the actual experience of legal proceedings confusing at best and a source of fear, distress and secondary victimisation at worst. It is not unusual for them to find it difficult to communicate with the adults involved, to mistrust police and judges, to lack basic information and understanding about processes and procedures and to face discrimination because of their age, gender or other characteristics such as living and working on the street or seeking asylum. For child victims and witnesses, recalling painful events can be very stressful and if the legal procedure is not child-sensitive then it may have long-term and harmful consequences for their recovery. Yet many legal systems do nothing - or very little - to support children to participate in proceedings in a safe, meaningful and dignified manner.

One important building block for a child-friendly justice system is for children to have access to expert, specialised and trusted legal practitioners. They can make an enormous difference to a child’s experience of the justice system and to the outcome of their case.

UNICEF ECARO conducted research on children’s access to justice in 2015 (*Children’s Equitable Access to Justice, Central and Eastern Europe and Central Asia*, UNICEF, Geneva, 2015). One of the findings was that there was a lack of guidance for legal practitioners in the region when providing children with support and assistance in accessing justice. In response to this, these Guidelines were developed to be a practical tool to support both experienced and newly qualified legal practitioners in their daily work on the frontline of children’s rights.

They are aimed at government funded and private lawyers, paralegals and other legal practitioners who provide legal aid to children in civil, criminal, administrative and restorative justice proceedings, as well as when representing children in national, regional and international human rights monitoring bodies. They are aimed primarily at practitioners representing children directly rather than lawyers who are representing a child as an independent guardian or ‘friend’ of the court.

The Guidelines focus on the attitudes, knowledge and skills that are needed so a child client receives the best possible legal representation and support. They take in to account that practitioners are often working within imperfect justice systems and are grappling with low pay, inadequate legislation, lengthy delays in proceedings and lack of access to child-friendly services for their clients.

They were developed by UNICEF (Europe and Central Asia Regional Office) in close collaboration with a network of over 20 legal practitioners in 12 different countries in the Eastern and Central Asia Region. It is hoped that they are also relevant for practitioners in other regions. The legal practitioners involved completed a detailed questionnaire on the content of the Guidelines, piloted them in their day to day work and contributed substantially to their development and their practical application. Quotations from some of these lawyers are included in the Guidelines.

Lawyers in almost all jurisdictions are bound by professional codes of conduct and ethics. The most commonplace principles worldwide are that they must act with honesty and integrity, act in their

client's best interests, have an obligation to the court to uphold the rule of law, cannot act where is a conflict of interests and must maintain their client's confidentiality. These Guidelines are designed to complement professional codes and to consider how they can be applied when dealing with children.

The Guidelines are rooted in international and regional standards regarding children's access to justice (please see the Resources section below for a list of relevant instruments and guidelines). They start by examining the four general principles of the UN Convention on the Rights of the Child and how these should inform the work of legal practitioners: the right to non-discrimination, the right to life, survival and development, the right to be heard and the principle that the child's best interests is a primary consideration in decision-making that affects them.

They are then structured around key themes and challenges that arise in providing child-friendly legal aid to children, including: ensuring competency to act, acting in a child's best interests, communicating in a child-friendly way, facilitating a child's participation in legal proceedings, countering and preventing discrimination, keeping children safe and working with others. Although the Guidelines cannot describe every situation or circumstance confronting legal practitioners who provide legal aid to children, it is hoped that they provide a strong and practical framework for action that promotes and supports children's access to justice.

Cross-cutting Principles

The Guidelines are based upon the four cross-cutting principles that underpin the UN Convention on the Rights of the Child and the protection of children's rights in justice systems. These principles must be taken in to account in all actions by legal professionals where children are affected. They are discussed again in further depth in the Guidelines themselves but the following is a short introduction.

- **Non-discrimination**

"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 or 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.

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".

UN Convention on the Rights of the Child, Article 2 (1) and (2)

At every stage of a child's contact with the justice system, a legal professional should ensure that children are offered appropriate services without discrimination. Each client must be handled with sensitivity and an understanding of the issues that a child, or group of children, may face due to their sex, age, race, disability etc. Many children in contact with the law may also be victims of discrimination and every effort must be made to prevent and remedy this.

The right to non-discrimination is of particular relevance for legal practitioners when dealing with vulnerable groups of children in contact with the law, where special measures may need to be taken to ensure that they have their rights equally upheld and respected. For example, children who speak a minority language may need the use of an interpreter during legal proceedings.

- **Best interests**

"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."

UN Convention on Rights of the Child, Article 3

Legal practitioners have an important role in guaranteeing the right of children to have their best interests as a primary consideration where they are directly, or indirectly, involved or affected by the justice system. The Committee on the Rights of the Child provides non-exhaustive guidance on factors to take into consideration when assessing the best interests of a child in its General Comment No. 14 (2013) including: the child's views, child's identity, preservation of the family environment, care, protection and safety of the child, child's health, vulnerability and their right to education. When assessing a child's best interests, legal professionals should also take into account that the other

general principles - survival and development, the right to be heard and non-discrimination - are all relevant.

The principle of the best interests of an individual child is a dynamic concept that is continually evolving as they grow and as circumstances shift and change. Every child has the right to have his or her best interests given primary consideration but this may have to be balanced against conflicting best interests of other children, groups of children, or adults such as defendants in criminal proceedings or siblings in contact disputes.

"The protection of the best interests of the child means, for instance, that the traditional objectives of criminal justice, such as repression/retribution, must give way to rehabilitation and restorative justice objectives in dealing with child offenders."

UN Committee on the Rights of the Child, General Comment No. 10, para 10

- **Survival and development**

States Parties shall ensure to the maximum extent possible the survival and development of the child.

UN Convention on the Rights of the Child, Article 6 (2)

The principle of protecting a child's right to survival and development is closely connected with that of their best interests. Putting this right in to practice means protecting children from harm that could arise during legal proceedings; for example, keeping child witnesses safe from retribution by perpetrators and/or by ensuring children in contact with the law clearly understand every stage of their case. All forms of deprivation of liberty (including arrest, detention and imprisonment) can have negative consequences for a child's survival and development. Legal professionals should ensure, to the best of their abilities, that a child is deprived of their liberty only as a measure of last resort and for the shortest appropriate time.

- **Right to be heard**

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

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

UN Convention on the Rights of the Child, Article 12 (1) and (2)

Children must be able to express their views, opinions, and concerns and to actively participate throughout the justice process, provided it is in their best interests to do so. To put this in to practice, justice proceedings must be specifically adapted for children and a child must receive adequate information about the process, the choices they have and the possible consequences of these choices. Equally important is the right of the child to remain silent and not to participate.

Legal professionals need to assess a child's age and maturity and the relative weight that should be given to their views, opinions, concerns, and testimony. The Committee on the Rights of the Child General Comment No.12 (2009) explains that age alone can't determine the significance of a child's view and that information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child's capacities to form a view.

> **"**Children should be considered and treated as full bearers of rights and should be entitled to exercise all their rights in a manner that takes into account their capacity to form their own views and the circumstances of the case."
>
> ***Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (2010)***

GUIDELINES ON CHILD-FRIENDLY LEGAL AID

Guideline 1: Competence when providing legal aid to children

Legal professionals who provide children with legal aid should have knowledge of relevant domestic law and procedures, children's rights, children's developmental stages and how to communicate with children. They should keep up to date and refresh their skills with regular professional development training.

Providing competent and effective legal aid to children involves more than just an understanding of the relevant domestic law and procedures - it also involves a high level of motivation, commitment, skill, training and knowledge. Legal professionals should:

- know about children's rights and how they can be applied in practice, including at a minimum the provisions of the UN Convention on the Rights of the Child and the Council of Europe Child Friendly Justice Guidelines;
- have a good understanding of the civil, criminal and administrative legal procedures for children including the different measures that can be taken such as diversion or restorative justice processes;
- know when and how to seek specialised advice and support from appropriate professionals such as psychologists and social workers;
- have a working knowledge of different stages of children's physical, cognitive, emotional and social development;
- be aware of how children communicate, how this can change over the course of their childhood;
- be able to communicate effectively with children;
- have awareness and sensitivity when dealing with child victims and witnesses to avoid secondary victimisation;
- have undertaken any required vetting such as disclosure of criminal convictions; and
- take responsibility to attend trainings on an ongoing basis and keep updated as to developments in law and practice relating to children.

There are currently only a few jurisdictions in the Europe and Central Asia region, or indeed globally, that have a mandatory requirement for practitioners who provide legal assistance to children to be specialised and trained. Furthermore, there are not many jurisdictions where the work of legal professionals is systematically monitored and quality assured and that have a specific code of conduct when working with children. Legal professionals should encourage the development of such codes or regulations and access to training and specialisation by working closely with Bar Associations or other appropriate bodies.

Guideline 2: Acting in a child's best interests

The best interests of the child should be a primary consideration in all actions taken when children are in contact with the law. Legal professionals must be aware of this obligation and comply with it by evaluating and acting in the best interests of their child clients.

The principle of the best interests of the child should inform all aspects of dealings with a child client. Although it is often a prominent principle in family and civil proceedings, it is also important that it should be a primary consideration in criminal proceedings as well. It should inform:

- how a legal professional builds a relationship with a child; for example, he or she should commit time and resources to building a trusting relationship with a child to understand what is in his or her best interests;
- how a legal professional develops and adapts a case strategy to achieve the optimal legal outcome; for example, he or she might decide it is in a child's best interests to enter in to a plea bargain, to remain silent during a police interview or to advocate for diversion or restorative justice proceedings as an alternative to prosecution;
- how to interact with other key actors, such as the police or judges, to ensure that a child's best interests is a primary consideration at different stages of the process; for example, a legal professional might decide it is a child's best interests to advocate strongly for delays in a case to be kept to a minimum; for a child-friendly environment in a court-room; or to reduce the need for

repeated interviews by disclosing information to other professionals (with the child's consent); and

- how to advocate for a child's best interests to be interpreted by the court or tribunal. In many jurisdictions, a court will have the responsibility for acting in a child's best interests for instance in family proceedings regarding residence orders. There may be a clear legal framework to follow defining relevant criteria to consider when defining a child's best interests. Legal professionals can provide the court or tribunal with cogent arguments regarding a child's best interests.

When evaluating the best interests of the child at different stages of proceedings, legal practitioners will need to take into account a child's views and give them due weight so they can have a significant role in determining what is in their best interests. It is very important that a child's legal representative does not silence the child's voice if they disagree with the view they are expressing since their role is to obtain a child's informed consent on the best strategy to use.

There is no definitive 'list' of factors to take in to account when evaluating the best interests of a child. Such a list would be impossible to produce since the individual circumstances of a child will always be different case by case. Assessing a child's best interests is an ongoing task that will need constant revision and tweaking as circumstances change or the views of the child evolve. However, criteria to consider when assessing how to act in a child's best interests include: a child's general well-being; their physical, mental, spiritual, moral, psychological and social status; and their need for an education and a healthy and safe environment. The following are some different approaches to consider when evaluating the best interests of the child:

- take a holistic view of the child's development and well-being based upon having a good relationship with the child and knowing about their life and circumstances beyond the strict legal issues of their case. often legal professionals have had a very different sort of upbringing and come from a different background to their child clients. they should be aware of this and make an effort to understand the context in which the child is growing up;
- consult with others such as social workers, parents, teachers, doctors, psychologists to build up a picture of a child's needs;
- have a broad, general understanding of common issues that can affect children such as the impact of witnessing or experiencing violence, mental illness, drug and alcohol dependency and family breakdown to help provide context for individual cases;
- consider both long and short term considerations for the child's future – what is in their immediate best interests should be balanced with their best interests in five or ten or more years; and
- balance the risks of a course of action that you consider to be in a child's best interests with protective factors in a child's life that can help mitigate the risks.

> **How courts evaluate a child's best interest in England and Wales**
>
> "Evaluating a child's best interests involves a welfare appraisal in the widest sense, taking into account, where appropriate, a wide range of ethical, social, moral, religious, cultural, emotional and welfare considerations. Everything that conduces to a child's welfare and happiness or relates to the child's development and present and future life as a human being, including the child's familial, educational and social environment, and the child's social, cultural, ethnic and religious community is potentially relevant and has, where appropriate, to be taken into account. The judge must adopt a holistic approach."
>
> Lord Justice Munby, Re G (Children) [2012] EWCA Civ 1233

Guideline 3: Effective participation

Legal practitioners must ensure that a child's views and voice are heard and given due weight throughout the legal process.

Article 12 of the Convention on the Rights of the Child is clear that children who are capable of forming their own views have the right to participate and express those views freely in all judicial or administrative proceedings that affect them. Their views must be given due weight in accordance with their age and maturity. This is a vitally important right in the context of legal proceedings where it is far too commonplace for authorities to make decisions that have significant and long-lasting impacts on children's lives, without first listening to a child's own views.

The active participation of children in their cases can be very beneficial for them and for the legal process. For child victims and witnesses, having their opinions heard and taken into account can help them to recover, to build their self-confidence and to better understand their skills and potential. For child offenders, the right to participate can help them to develop a sense of responsibility and can aid their rehabilitation and reintegration back in to their community. The exchange of views between a legal professional and a child client can increase understanding of the child's best interests and provide the basis for innovative and creative solution to legal problems. Participation must be voluntary at all times and children also have a right not to participate if they choose.

> All processes in which a child or children are heard and participate, must be: Transparent and Informative, Voluntary, Respectful, Relevant, Child-friendly, Inclusive, Supported by training, Safe and sensitive to risk and Accountable.
>
> *UN Committee on the Rights of the Child, General Comment No.12*

Legal professionals play a crucial role in enabling children's right to participate in justice systems. The following are some recommendations for putting this right in to practice:

- never underestimate children's capacity to make reasoned decisions about their own lives;
- support children's ability to participate by building a relationship of trust with the child and communicating with them in a child-sensitive manner (see Guidelines 4 and 5);
- provide a child with all necessary information to enable them to participate meaningfully (see Guideline 6);
- give clear explanations of the long and short-term consequences of children's decisions to enable them to make informed decisions (see Guideline 6);
- adequately prepare the child before any hearing, providing explanations as to how, when and where the hearing will take place, who the participants will be, and how the child's views will be taken into account;
- ensure that children's interests, views and feelings are communicated as clearly as possible to relevant bodies such as courts and social services (see Guideline 12);
- take positive action to ensure that all children can participate, including children who have disabilities or challenge with communication (see Guideline 10);
- ensure that when a child is being heard during formal proceedings, they are able to express themselves freely and that proceedings are conducted in a child-friendly manner. For example, during a police interview, a legal professional should intervene if the questioning is inappropriate or hostile (see Guideline 7) and they may also need to educate other legal professionals regarding a child's right to participate; and
- inform the child of how the court or tribunal took into account their views in reaching a decision. This feedback is often overlooked but is an important part of the process and emphasises that the views of the child are not only heard as a tick-box exercise, but are in fact taken seriously.

Guideline 4: Building a relationship

A legal professional should build a relationship of trust and support with a child client.

Establishing and maintaining a relationship with a child is the foundation of good quality representation and assistance. As far as possible, the same legal practitioner should communicate with a child during a case from start to finish and if a child expresses a wish for a legal practitioner of a specific gender this should be accommodated.

From the outset, a legal professional should explain that their role is different to that of other adults in the legal system, such as judges or prosecutors, and that their task is to provide the child with the best possible representation and assistance. To build trust, expectations should be carefully managed throughout the process so that a legal practitioner does not promise to deliver something that may not be possible. Depending on the circumstances of the case, building trust may also involve working closely with the child's family and other supportive adults (see Guideline 8).

It is preferable to meet with a child in person. This allows the practitioner to explain to the child what is happening, what options are available to them, what will happen next and to answer any questions the child may have. Problems in communication can be far more easily overcome during an in-person meeting. It also allows the practitioner to get a sense of the child and to assess their circumstances. Often this will lead to a greater understanding of the case and to creative solutions in the child's interest. Even where funding is limited, practitioners should make every effort to meet with the child in-person as often as is necessary to fully prepare him or her bearing in mind that a child may have school and family commitments to manage in addition.

As well as meeting in-person, other means of communication can be used to maintain the relationship with a child client. Regular updates can be given by post, telephone, text, social media or email. It is important to check that these forms of communication are safe, accessible, confidential and reliable for the child to use. You should also explain that some forms of communication may be more confidential than others – for example, the police may be able to analyse texts if a telephone is seized during an investigation.

The first meeting with a child is particularly important in creating a positive impression and making a child feel safe and supported. As with meeting an adult client, the first meeting should be prepared for diligently by reading all relevant materials and knowing the relevant applicable law and the child's background. Ideally the meeting(s) should take place in a comfortable and child-friendly environment which offers the best possible opportunity for a child to feel safe and able to talk freely – sometimes the ideal location will be their home. If the first meeting takes place in an office, it does not take many resources to make this child-friendly - ensure that the receptionist staff are trained to welcome children and that there is a selection of toys and books suitable for different ages available in the waiting area. Do not keep children waiting for long periods of time and arrange the meeting room in an un-confrontational way so that the legal practitioner is not sitting behind a desk.

If a first meeting takes place in a police station, court-cell or detention or immigration centre, be mindful of how stressful this experience is and of the child's vulnerability. Legal professionals are often very familiar with working in these environments and can forget how alienating and frightening they really are. In these circumstance, be on time as long waits may erode confidence in your commitment, meet privately ideally in a separate room with no police or detention officers present and use appropriate communication.

Wherever the meeting takes place, before launching in to discussion of legal issues, break the ice and start to build the child's trust by asking how the child is and informal questions not related to the case. Let the child know that you are there to help them and are on their side. Allow for breaks and accept that a child may be distressed or have difficulty concentrating over long periods of time.

Logistics are important too in establishing a relationship and making the process run smoothly and it is important to find out how a child will travel to court or to the next meeting, how they will pay for the transport and the best method of communication if there are last minute changes.

Finally, if the relationship with the child becomes dysfunctional and he or she requests to change lawyers, then respect a child's right to choose a lawyer whilst also explaining any difficulties that may then arise.

> "*Working with children is more than being a professional lawyer because sometimes we need to be a psychologist to understand the voice of children*."
>
> **Lawyer in Albania**

Guideline 5: Child-sensitive communication

Children cannot participate meaningfully in proceedings unless legal practitioners communicate with them in a child sensitive manner.

Communication is the basis of good quality legal aid. To communicate effectively with a child, practitioners will need to adopt a different approach than that used with adults. They will need to take into account the child's age, gender, religion, physical and/or mental disability, level of confidence and developmental stage, emotional state, education and culture. They should also take into account that children's development is dynamic and profoundly affected by their experiences and relationships with

those that are significant in their lives and by their perceptions of and reactions to those experiences and relationships.

It is important not to make assumptions about a child's capacity to understand because of their chronological age but to integrate knowledge of child development with the information you have about the child in front of you to arrive at an assessment of their capacity. It is essential that the way in which a practitioner communicates with a child does not reinforce any aspects of discriminatory or abusive experiences for the child.

Good communication has different component parts including: giving a client the information they need; listening actively and talking through different options in a non-judgemental manner so the child can retain control of decision-making; giving the child the opportunity to have a support person with them during consultations (for example, a parent/guardian, a trusted professional, a sibling or a friend); being patient and understanding and speaking clearly, precisely, and in terms the child can understand:

- use simple vocabulary that is appropriate for the child's age and background;
- use short and frequently used words;
- use short sentences;
- ask clear and unambiguous questions; and
- avoid professional language and legal jargon.

> *"Each child is going through major social and physical changes; practice putting yourself in their place when you find yourself disagreeing or growing impatient."*
>
> **Lawyer in Bosnia**

Children do not use and understand language in the same way as adults and there can be a wide range of ability in communicating amongst children of the same age. Younger children can have problems in understanding abstract and ambiguous language and may have difficulty with concepts of time, space and measurements and in shaping clear narratives. Furthermore, pre-school children can have difficulties in perceiving other people's perspectives so may assume that other people must think and feel in the same way as them. Older children may also have these developmental characteristics and also be more sensitive to being patronised or 'talked down to'.

The position of the Committee on the Rights of the Child as stated in the General Comment on the Right to be Heard is "that the child is able to form views from the youngest age, even when she or he may be unable to express them verbally." Legal professionals should respond to different ways in which young children express themselves including play, demeanour, interaction with care-givers and body language.

Child-sensitive communications – some questions to consider

- Am I seeing the legal issues in the case, as much as I can, from my child client's point of view, rather than from an adult's point of view?
- Does the child understand as much as possible about the case/situation or is there more that could be explained, or does it need to be explained in a better way?
- If I am treating my client differently to how I would treat an adult, is this in his or her best interests?

Am I being overly-influenced by the opinions of adults involved in this case?

Children can have short attention spans and limited vocabulary and ability to relate events in a chronological order. They may be fearful of the repercussions for them or their families of disclosing certain information and be experiencing overwhelming feelings of shame, distress or guilt. Many children wish to please adults in authority, including legal professionals, by saying things which they feel are expected of them or have been brought up to listen to adults but not to speak to them. They may simply not understand the complexity of the legal issues and be puzzled by terminology.

It is good practice to carefully structure a meeting with a child client. During the initial part a legal professional should introduce themselves and put the child at ease by explaining the purpose of the interview, who will be present, how long it will take, and what will happen afterwards. They should

also explain how the interview will be recorded and how the information they give will be used. It is important to understand that it can take some time before a child is relaxed enough to be comfortable talking, especially when they are recalling events that are traumatic or involve intimate details.

Children are likely to express themselves best if given freedom to do so in their own way, in their own time. It is important to be patient, to respect silences and not to rush children or put words in to their mouth. A child should be told that it is acceptable to say, 'I don't know' when they do not know the answer to a question or can't remember and that they can ask if they do not understand the nature of a question. It should be emphasised that although there is no 'right' or 'wrong' answer to the questions being asked, it is important to give truthful information and to be as accurate as possible. They should also be reassured that it is acceptable to use 'rude' words where needed.

Summarise what the child says. This is a key skill in bringing structure to the interview. The lawyer can use this tool to confirm understanding of the case, bring together different aspects raised by the child and then either explore further what the child has already introduced or move the interview on to a new topic. When checking the child understands the information given, it is better to ask specific questions such as 'what date is your next hearing?' rather than asking 'do you understand'. If one way of explaining doesn't work, try another way. If communication is very challenging then it may be necessary to work with social workers or other professionals to facilitate communication

When it is necessary to ask questions to clarify events or request further information they should be as open ended as possible. Questions beginning with the phrase 'Tell me' or the word 'Describe' are useful examples of this type of question, e.g. 'You said you were in the metro this morning when something happened, tell me everything that you can remember.' Leading or suggestive questions that push a child towards a certain answer should never be used. The use of repeated questions should be avoided as it can signal to a child that the previous answer they gave was unacceptable or 'wrong'.

Closing a meeting properly is vital. The child should be asked if they have anything else they would like to mention, wish to tell you, or any questions they would like to ask. It is also important to reiterate how the information will be used and manage the child's expectations for what may happen in the future. The child should be thanked and be made aware of any support services available to them.

Legal professionals should bear in mind that a child may not understand legal terminology and that the legal issues at play may be complex. Terminology that is used every day by a practitioner such as social worker, courts, hearing, appeal and so on, may all be unfamiliar to a child who has never experienced the justice process before; for example, even if a child's parents have separated they may not know what the term 'divorce' actually means. Complex terminology such as 'presumption of innocence' can be even more problematic. It can be helpful to develop a child friendly glossary of key terms that children and their families can take away with them. Visual aids can also be helpful in conveying information such as diagrams, flowcharts and pictures.

"We have to show children our interest not only for their legal status but also for their psychosocial wellbeing."

Lawyer in Greece

Think too about non-verbal communication. Try to be as natural as possible and take your cues from your child client. If he or she is uncomfortable making eye contact then don't force it. Sometimes reluctance to give instructions comes from nerves or fear or an overwhelming sense of distress at disclosing painful memories. In such situations, the practitioner should be proactive in making the child feel comfortable and safe and where needed adopt a different approach to taking instructions. If necessary, practitioners should consider seeking the assistance of others to help define the wishes and instructions of children.

Checklist for communication

- Use concrete terms and simple sentences.
- Ask open-ended questions, introduce as little information into the conversation as possible, to ensure that the child's account remains authentic ("Tell me about what happened…").
- Check whether the child has correctly understood what has been said to him/her.
- Encourage the child to admit when he/she does not understand something.

- If the child shows emotions during the conversation (bursts into tears, is highly agitated, etc.) then acknowledge and accept those emotions ("I can see that it makes you sad.") and reassure them that it is all right to feel that way and to show feelings. You can change the focus of the conversation to something less distressing until they are ready to return to it; this may be on the same day or another time altogether depending on the intensity of the emotions.
- Ask concrete questions beginning with who/what/where.
- Do not assume that a word holds the same meaning for the child as for adults.
- Be clear when formulating questions, and repeat them as little as possible.
- Ask the child about one event at a time.
- React positively to the child's answers; encouragement and praise can encourage openness.
- Sit at the same level with the child.
- For older children, refer to them as young people rather than children and emphasise the value and importance of their participation (provided this is in their best interests).
- Encourage the child to ask you any question he or she may have before terminating the conversation.
- At the end of the conversation, thank the child for his/her participation in the proceedings.

Guideline 6: Providing reliable and relevant information

Legal professionals must provide children with reliable and relevant information so they can participate meaningfully in decision-making.

A child cannot participate meaningfully in legal processes unless they have a clear understanding of the facts and are aware of the possible future consequences of decisions they take. Reliable and relevant information should be provided directly to children in simple and accessible language so they can make informed decisions, even if they are not always the main decision-maker.

> *"It is important not to underestimate the child's ability to understand the situation and your explanations and advice."*
>
> ***Lawyer in Serbia***

The information provided will need to cover the details of their specific case and might also include:

- The role of the legal professional and what they can (and can't) do for them.
- What they can expect in terms of regularity of communication from their legal team.
- How the principle of confidentiality works, how it will apply in their case in relation to other adults such as parents, psychologists, the courts, the police, teachers and so on and the circumstances in which it can be breached.
- The nature of the legal issues and proceedings and why the child is involved.
- The role of different actors in the case for example police, social workers and judges.
- Specific rights of the child at every stage of the procedure: for example, the right to remain silent, the right to express an opinion, the right to be protected and the right to reparation.
- Decisions that the court or tribunal will make and what information they consider when making these decisions including how and when the child's views are taken into account.
- From the outset, the practitioner should manage expectations and prepare the child for the possibility that the court may make a decision that the child does not like; for example, if they are given a sentence of imprisonment or a family member is denied contact with them.
- Any upcoming hearings including what they are about, how long they will last and whether the child is required to attend.
- Whether or not a child may give evidence in formal proceedings and the advantages and disadvantages of this (see Guideline 7 below).
- What it means to swear an oath before a court.
- The way in which they may be questioned during formal proceedings and by whom.
- An estimation of how long the whole process could take.
- Available support mechanisms and how to access them (medical, psychological, victim support units and so on).
- Information about available safety and protection measures such as safe houses or protection orders.

- The meaning and implications of any court orders made.
- Avenues of appeal or complaint following a tribunal's decision.
- Avenues for seeking reparation including financial compensation.

The information should be put in to context so that the child can understand any choices available to them and weigh up the advantages and disadvantages of different options. Sometimes it will be necessary to repeat the same information several times to ensure the child has correctly understood. Whilst it is likely that parents will also need to receive information on their children's legal case, communication with them should not be a substitute for informing a child as well. The right of children with disabilities to information should be accommodated; for example, they might need information to be repeated more frequently or in a different format such as braille.

It can be helpful to have leaflets available that set out basic information about the justice system and the role of the legal professional in clear language. These leaflets should be adapted for use by different ages and in different contexts (criminal, civil etc.). The legal professional should consider advocating for these materials to be produced by the Bar Association or relevant Ministry where they do not already exist.

Guideline 7: Effective participation in formal proceedings

Legal professionals must ensure that children participate in formal legal proceedings in a meaningful and safe way with adequate support and procedural safeguards in place.

It may not always be in a child's best interests to participate directly in formal legal proceedings such as trials or custody hearings. For a child victim or witness, it can involve re-living traumatic events and exposure to people who have harmed them. For a child caught up in family proceedings, it can expose them to inappropriate and harmful information about their family circumstances. A legal professional will have to weigh up the advantages and disadvantages in each case when deciding the best course of action. The following factors are useful to consider:

- how essential the child's oral evidence is to further their case;
- the quality of alternative evidence (for example if videotaped earlier);
- the age, maturity, vulnerability and understanding, capacity and competence of the child;
- the length of time that has passed since the relevant events occurred;
- the support (or lack of it) that the child has from family or other sources;
- the child's own wishes; and
- the views of the parent or legal guardian

> "it would be going too far to say that domestic courts are always required to hear a child in court on the issue of access to a parent not having custody, but this issue depends on the specific circumstances of each case, having due regard to the age and maturity of the child concerned."
>
> European Court of Human Rights (Grand Chamber), judgment of 8 July 2003, *Sahin v. Germany*, No. 30943/96, paragraph 73.

There are steps that a legal professional can take to support a child who is giving oral evidence in formal proceedings so they feel more at ease and comfortable and can give the best evidence possible. For example, they can familiarise a child in advance with the lay-out of the waiting room and court-room, any equipment that may be used such as CCTV, the different roles of people in the court-room and where they will be standing. In some countries, such familiarisation programmes can be organised by the court itself but in others it may be up to the legal professional to do this. If a visit to the courtroom is not possible then it can be helpful to provide a drawing of the court-room explaining the role of different people within it.

A practitioner can also seek adaptations to proceedings to help a child feel safe and comfortable, such as:

- having frequent breaks;
- ensuring hearings are held in private;
- having separate waiting rooms for child victims and witnesses;
- requesting the removal of the formalities of court clothing (robes etc.);

- requesting that a child give evidence via CCTV where available;
- agreeing restrictions on the nature and manner of questions put to the child, for example, agreeing to use short, simple questions, not to use aggressive questioning techniques, setting some time limits and using visual aids such as maps;
- seeking permission to allow a child to sit next to or close to a supportive adult and to have all parties seated at the same level as the child;
- having short hearings that accommodate a child's capacity for concentration and attention;
- limiting unwarranted interruptions or distractions in proceedings such as people coming in and out of the court room;
- restricting those present in the room to those directly involved in the proceedings;
- ensuring that a child is accompanied by a person they trust;
- checking with the child if it is appropriate or not to have family members present during proceedings;
- being vigilant with judges, prosecutors and other lawyers to ensure they interact with the child in a respectful and sensitive manner; and
- ensuring the presence of an interpreter where needed.

It is important to remember that information given to a child may need to be repeated if there are long periods of time between court hearings and a final trial and that there is an ongoing responsibility to ensure that a child is fully informed and therefore able to participate.

"34. A child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age. Proceedings must be both accessible and child-appropriate. Particular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, clothing of judges and lawyers, sight screens, and separate waiting rooms."

General Comment No. 12, The Right to be Heard (1 July 2009) CRC/C/GC/12

Guideline 8: Working with family members and other supportive adults

A legal professional must act on a child's instructions and in his or her best interests and not those of family members.

> *"When working with family members, create a welcoming atmosphere that encourages family involvement and building trust…and implement effective communication skills, such as active listening."*
>
> **Lawyer in Bosnia**

In most cases a legal practitioner will develop a cooperative and supportive relationship with a child client's family (or with other supportive adults). However, it is important to be clear from the outset that a practitioner will be instructed by the child and not the adult. This means that the legal professional will not take instruction from the family member if they conflict with the child's instructions. Furthermore, it should be made clear that professional confidentiality does not apply to their conversations with the family members. Where needed, parents can be recommended to seek their own legal representation or referred to other service providers.

Even with younger children, communication should be directed at the child although supplemented by communicating with the adults supporting them as appropriate. Sometimes it may be necessary to ask supporting adults to wait outside so that a child can speak more freely (and vice versa).

Practitioners need to be aware of the power dynamics in adult and child relationships and be alert to the possibility that a child is being manipulated or intimidated. It is important that the interests of others, such as parents or siblings, who may be more articulate and vocal, do not conflict with or take priority over the interests of a child client. This is particularly important in situations where it is a parent who is paying the legal professional's fees and who may therefore assume that their interests trump those of the child client.

In cases where a legal professional represents both a child and an adult and there are conflicting interests, an independent representative should be appointed to represent the views and interests of the child.

It can be very challenging if a child reaches a decision about their case that a legal professional does not consider to be in their best interests, for example, choosing to return home to an abusive parent. In such situations, a legal professional should try to convince the child, as they would do with any other adult client, by drawing on the pre-existing relationship of trust and clearly identifying alternative choices to the child. They may also need to collaborate with other professionals to gain a full understanding of the child's needs and wishes and the risks associated with such a decision.

Guideline 9: Privacy and confidentiality

Legal professionals should uphold a child's right to privacy during legal proceedings and ensure that all communication with the client is kept confidential in accordance with professional codes of conduct.

The right to privacy is vitally important - child victims and witnesses can be put directly in danger and experience severe emotional harm if their identity is disclosed and child defendants can experience discrimination and stigmatisation if their offending is widely publicised. The level of risk arising from breaching the right to privacy may not always be clearly apparent to other justice professionals involved in a case such as judges or prosecutors. Legal professionals play an important role in protecting this right and should do their utmost to ensure that:

- court hearings involving children are held in private unless there are clear reasons why it is in a child's best interests for them to be public;
- judgments are given in such a way that the identity of the child is not revealed;
- criminal records of children are not disclosed after they reach the age of majority;
- if sharing details of a case for legal education purposes or to the media because of a public interest angle, a child gives consent to this disclosure and the details provided do not reveal a child's identity; and
- the media does not disclose information that could lead to a breach of a child's privacy. Litigation or complaints should be brought against media organisations who breach a child's privacy.

In most countries, the relationship between a client and lawyer is subject to strict rules about confidentiality and this applies as much to children as to adults. These rules apply to meetings, correspondence, telephone conversations and other forms of communication such as social media. This is a vital part of building a relationship of trust with a child client and ensuring they can speak to their lawyer freely and openly. In practice this means that a legal professional must:

- inform the child client that their exchanges will be confidential;
- explain that exchanges between a legal professional and family members are not protected by the same rules of confidentiality;
- be vigilant about securing the confidentiality of all forms of communication; for example, if meeting with a client in a police station or the hallway of a court-room, ensure that they cannot be over-heard. Similarly, if speaking with a child client who is in detention on the telephone, check with them if they can be over-heard; and
- ensure that a child's personal data (for example case files) are protected in accordance with national law and are kept securely and cannot be accessed by third parties unless in accordance with the best interests of the child and data protection legislation. This implies that no information or personal data is made available or published, particularly in the media, which could reveal (directly or indirectly) the child's identity. This includes: images, detailed descriptions of the child or his family, names or addresses, audio and video records, etc.

There may be exceptional circumstances, permitted in national standards, where a legal professional should reveal confidential information about their client to an appropriate authority - in many jurisdictions, the strict rules of lawyer-client confidentiality can be waived if there is a risk that non-disclosure may lead to death or personal injury of a person or relates to a criminal activity. Such a situation might include where the child reveals information which indicates continuing sexual or other physical abuse but refuses to allow disclosure of such information to third parties. Similarly, there may be situations where an adult discloses abuse committed either by himself or herself or by another adult against a child but refuses to allow any disclosure.

This can be a very challenging situation since the principle of confidentiality lies at the heart of building a trusting relationship with a child client. There are no clear-cut answers but in such

circumstances, a practitioner must weigh up the position in national law regarding when it is acceptable to breach confidentiality. In many jurisdictions, support with these difficult ethical considerations can be given by the Bar Association's ethics committee who can help discuss the national provisions and whether it is in a child's best interests to breach the strict rule of confidentiality because of the threat to the child's life or health, both mental and physical.

Guideline 10: Protecting children from discrimination

Legal professionals should ensure that children are treated fairly and are not discriminated against because of their age, gender, ethnicity, disability or other status.

Every child has the right to be treated fairly and equally, regardless of her/his or the parent's or legal guardian's race, ethnicity, colour, gender, language, religion, political or other opinion, national, ethnic or social origin, property, disability and birth or other status. In practice, this means that legal professionals should never let personal views that are discriminatory affect their decisions or the quality of the service they provide to children. As far as possible they should ensure that colleagues also do not behave in a discriminatory manner when working with children, for example, by having anti-discrimination policies in place and promoting training in the workplace.

Proactive and positive action might need to be taken to ensure that a child can engage with the legal process. Legal professionals should have a heightened awareness of issues that could affect children's ability to participate including mental illness and disability. In these circumstances, they will need to take special steps to ensure that their child clients can participate equally; for example, they may demand that a foreign national child has access to an interpreter during a police interview or that a child with a mental illness has access to a psychologist to support her whilst preparing her case. Legal professionals can play a key role in giving additional support and confidence to girls to voice their views and opinions and for these to be given due weight in decision-making. Children who have been victims of sexual assault may be at risk of discrimination and should be entitled to professional assistance to help their recovery and prevent secondary victimisation.

Children with disabilities are at an increased risk of having their rights violated compared with children without disabilities – they face significant obstacles in accessing health and education, they are more likely to experience abuse, violence and discriminatory employment practices and children with mental disabilities have a heightened risk of coming in to conflict with the law. At the same time, there are many barriers in place preventing their full participation in legal processes often owing to negative assumptions about their capacities.

Because of this, legal professionals often need to take additional steps to enable their participation such as: developing a positive and non-discriminatory attitude and encouraging other professionals to do the same; working hard at building trust and rapport; and advocating for hearings to be child-friendly and accessible. Legal professionals should ensure that children with physical disabilities, such as blindness or deafness have access to the communication aids they need to give instructions, give evidence and participate fully in proceedings.

Possible effects of discrimination for children with disabilities

- Lack of autonomy, experience of being patronised by able-bodied people;
- Feelings of being perceived as 'voiceless object';
- Difficulty in establishing positive self-identity as a disabled child;
- Experience of being isolated (geographically, physically, socially);
- Dependency;
- Feelings of being perceived as 'asexual'; and

Increased vulnerability to abuse.

Many children in contact with the law may also be victims of discrimination and every effort must be made by legal professionals to remedy this by for example sending communications to ombudspersons or national human rights institutions or by entering into litigation to protect children's rights to non-discrimination.

Guideline 11: Keeping children safe

Legal professionals should keep children safe and enable children to participate in the legal process without risk of secondary victimisation.

All children may be at risk of harm as a result of their involvement with the justice system. Child victims and witnesses of crime may be at risk of intimidation, reprisals, secondary victimisation or at worst their lives may be threatened. The risk can be heightened in case of sexual abuse, where a young child is involved, where a child has been trafficked or has disabilities or where the alleged perpetrator is close to the child. Legal professionals should be alert to these risks and should coordinate closely to discuss needed protective measures with social workers, prosecutors and judges.

Legal professionals have an important role to play in keeping children safe. To prevent stigmatisation of child defendants, they can request that the identity of children is kept private and that hearings are heard in closed session. To protect victims and witnesses from intimidation and reprisals, they can request that the court order measures that ensure the safety of the child such as giving evidence via audio, video or TV link, providing testimony prior to trial, putting in place screens in the court-room to avoid contact with the perpetrator and requesting that the perpetrator leave the court-room whilst evidence is being given. Lawyers can also advocate for restraining orders against perpetrators and that they be held in pre-trial detention. Prior to giving evidence, lawyers can demand that a child has access to a separate waiting room.

It can be challenging if a child refuses to cooperate with the procedural mechanisms on offer for their protection. In such situations, a legal professional should respect their views and opinions but also draw on their trusted relationship to influence the child as to their best interests. Where needed, legal professionals should refer child clients to sources of support such as asylum advice, counselling or healthcare advice. They should have access to an up to date and comprehensive list of local or national organisations which can offer relevant help.

Guideline 12: Working with others

A legal professional should work collaboratively with other organisations, provided this is in a child's best interests.

Legal professionals need to collaborate with other professionals to guarantee a child's rights are upheld. Other professionals might include police, prosecutors, judges, interpreters, social workers, psychologists, court officials, teachers, medical staff, housing officers etc. Legal professionals are sometimes perceived by other professionals as having an adversarial rather than collaborative approach to representing children. However, they have an important role to play in encouraging close cooperation between professionals working with children so that all concerned have a full understanding of a child and his or her needs and work together to deliver their rights. At the same time, the principle of confidentiality should not be breached without the express and informed consent of the child. In practice, this means that legal professionals should:

- know how the system works, who the different actors are and be able to explain their roles to their child client;
- promote the views and opinions of the child with other professionals whilst also ensuring that a child's confidentiality is maintained where required;
- be aware of service providers to help children and the services they offer;
- be a link between other professionals and the child; and
- attend multi-disciplinary trainings and meetings which can help to build understanding of different professionals supporting children.

RESOURCES AND FURTHER READING

International standards and guidance on children and access to justice

- UN Convention on the Rights of the Child (1989)
- Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure (2011)
- UN Committee on the Rights of the Child, General comment no. 5 (2003): *General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5
- UN Committee on the Rights of the Child, General Comment No. 10 (2007): *Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10
- UN Committee on the Rights of the Child, General comment No. 12 (2009): *The right of the child to be heard*, 20 July 2009, CRC/C/GC/12
- UN Committee on the Rights of the Child, General comment No. 14 (2013): *The right of the child to have his or her best interests taken as a primary consideration* (art. 3, para. 1), 29 May 2013, CRC /C/GC/14
- UN Standard Minimum Rules for the Administration of Juvenile Justice (1985) (the Beijing Rules)
- UN Rules for the Protection of Juveniles Deprived of their Liberty (1990) (the Havana Rules)
- UN Guidelines for the Prevention of Juvenile Delinquency (1990) (the Riyadh guidelines)
- UN Rules for the Treatment of Women Prisoners and Non-custodial Measures for Women Offenders (2010) (the Bangkok Rules)
- UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime (2005)
- Guidance note of the United Nations Secretary General: UN approach to justice for children (2008)
- UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems (2013)
- General Assembly, Human Rights Council, Twenty-fifth session, Rights of the child: access to justice for children, A/HRC/25/L.10, 25 March 2014

Regional standards and guidance on children and access to justice

- Council of Europe, European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14, (1950)
- Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (2010)
- Directive 2010/64/EU on the right to interpretation and translation in criminal proceedings, 2010 (for children and adults)
- Directive 2012/13/EU on the right to information in criminal proceedings, 2012 (for children and adults)
- Directive 2013/48/EU on the right of access to a lawyer in criminal proceedings, 2013 (for children and adults)
- Directive (EU) 2016/343 on the presumption of innocence and of the right to be present at the trial in criminal proceedings, 2016 (for children and adults)
- Directive (EU) 2016/1919 on legal aid for suspects and accused persons in criminal proceedings, 2016 (for children and adults)
- Directive (EU) 2016/800 on procedural safeguards for children who are suspects or accused persons in criminal proceedings, 2016 (devoted specifically to children in conflict with the law)

Guidance specifically for legal professionals

- *Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana (Cuba), 27 August to 7 September 1990
- *International Principles on Conduct for the Legal Profession*, International Bar Association (2011)
- *Guidelines on Children in Contact with the Justice System,* International Association of Youth and Family Judges and Magistrates (2017)
- *Practical Guide for Lawyers, How to defend a child in conflict with the law?* Defence for Children International (2018)

Further reading

- *Child-friendly justice: Perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States*, EU Agency for Fundamental Rights (2017)
- *Child-friendly justice: Perspectives and experiences of professionals on children's participation in civil and criminal judicial proceedings in 10 EU Member States*, *EU Agency for Fundamental Rights (2015)*
- *Children's Equitable Access to Justice, Central and Eastern Europe and Central Asia*, UNICEF, Geneva, (2015)
- *Child-Friendly Legal Aid in Africa,* UNDP, UNICEF and UNODC (2011)
- *Twelve, Children's right to participation and the juvenile justice system: Theory and Practices for Implementation*, Defence for Children International (2016)
- *Access to Justice for Children with Mental Disabilities*, Mental Disability Advocacy Centre (2015)
- *UN Handbook for Professionals and Policymakers on Justice in Matters involving Child Victims and Witnesses of Crime* (2009).

RECOMMENDATIONS FOR DEVELOPMENT OF THE CHILD JUSTICE SYSTEM

During the event, the conference organizers committed to present the main points of the discussions and the recommendations made by the participants to the responsible institutions.

RECOMMENDATIONS FOR LEGISLATIVE CHANGES:

- **To abolish the concept of „anti-social behavior" from the current criminal law framework;**
- **A new law on the criminal procedure and the imposition of disciplinary measures on minors to replace the current Law against anti-social behavior of minors;**
- **The Ministry of Justice to propose amendments in the Family Code which ensure guarantees for the parent who does not exercise the parental rights to be able to participate in the regime of personal contact with the child/children without any obstacles and in a normal environment as preventive measure against possible traumatizing experiences by the child/children.**

RECOMMENDATIONS FOR IMPROVING THE JUDICIAL SYSTEM:

- **To develop a child friendly and adapted justice system;**
- **To adopt the justice system in a way that is consistent with the child's level of development.**
- **To introduce the principal of specialization in the justice system on all levels;**
- **To maintain and develop the practice of assigning cases concerning the rights and best interests of the child to specialized formations of the Court (formally called *Children's* or *Family Court*);**
- **To prevent the creation of new obstacles which restrict the equal access to justice of children from rural regions and smaller settlements and to endeavor to overcome the existing such obstacles;**
- **To establish as a practice the implementation of a multidisciplinary approach in the judicial process and in the child protection system;**
- **To appoint a special representative in each case when a child is in a position of dependency or conflict based on which the parents cannot exercise their representative powers in the judicial process;**
- **To promote and encourage, to the maximum extent possible, the mediation as a more appropriate and child-friendly way of resolving parental conflicts over the exercise of parental rights;**
- **Firmer and more effective implementation of the international standards including those for the respect to the dignity of the child, for respect and carrying of the child, for hearing the child and for acknowledging the child's opinion and desires from the court).**

RECOMMENDATIONS FOR DEVELOPING POLICIES AND PRACTICE:

- **The development of child justice policies must be based on empirical research and reliable data;**
- **To introduce an institute of shift of criminal justice for children who have committed a crime by pointing to suitable measures in the community and the child to be supported to understand the committed criminal act and the outcomes of it and thus to prevent the child to be traumatized by the criminal justice;**
- **To provide additional and effective child-friendly measures ensuring the enforcement of judgments on the exercise of parental rights and the regime of personal contact with the child / children - a more humane way needs to be found, e.g. via intervention of the child protection**

system. When referring to the enforcement of judgments, one should find such an approach which does not cause traumatic experiences of and violence against the child (separation with one parent to see the other);

- **To adopt adequate standards for assessing and defining children's interests. To develop a system of measures that are tailored to the child's basic specifics and needs: gender, type and degree of disability and other; which to be applied at all levels of the judicial system with regard to the child's access to justice, the opportunity to give testimonies, etc.;**
- **To develop with the participation of professionals in the field procedures which guarantee child friendly hearings and to regulate how does hearings proceed.**

RECOMMENDATIONS FOR FINANCIAL SECURITY:

- **To invest more resources for guaranteeing the participation of psychologists in the court procedures in the smaller settlements where such professionals lack and their participation in the court proceedings is of great importance;**
- **To discuss and provide a procedure for satisfying the interests of the child by appropriate social intervention when dealing with cases of child victims of violence. This cannot be within the framework of court proceedings.**

RECOMMENDATIONS FOR DEVELOPING THE SOCIAL SYSTEM:

- **To adapt and improve the social protection system in order to meet the current needs of children;**
- **To develop services that meet the level of development and specific needs of children, including children with "problematic" behavior;**
- **To discuss the proposal for psychological and socio-psychological expertise in high-conflict cases, to be outsources to independent experts instead of the Child Protection Directorate, and opinion on the matter to be expressed.**

RECOMMENDATIONS FOR PROFESSIONAL QUALIFICATION

- **To provide a more comprehensive and integrated approach to working with children. To provide more in-depth training for attorneys who are legal representatives in divorce and custody cases, with a focus on the importance of the child's interests in deciding how parental rights would be exercised and in resolving parental conflicts;**
- **To provide training for bailiffs to enforce decisions for the exercise of a regime of personal contact and for the exercise of parental rights;**
- **The Bailiffs' Chamber to carry out a discussion with its members on the problems encountered during the enforcement of judgments for the exercise of a regime of personal contact and parental rights, and to make proposals for amendments aiming to overcome the consequences of the total refusal of forceful enforcement of such decisions;**
- **To provide coordinated actions, new measures and trainings jointly for social workers at the Child Protection Directorate, bailiffs and lawyers;**
- **To conduct regular trainings in order to increase the capacity and skills of child protection staff, including trainings on the preparation of a social reports by the Child Protection Directorate.**

... THE CONFERENCE


Българското правосъдие за деца
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Конвенцията за правата на детето


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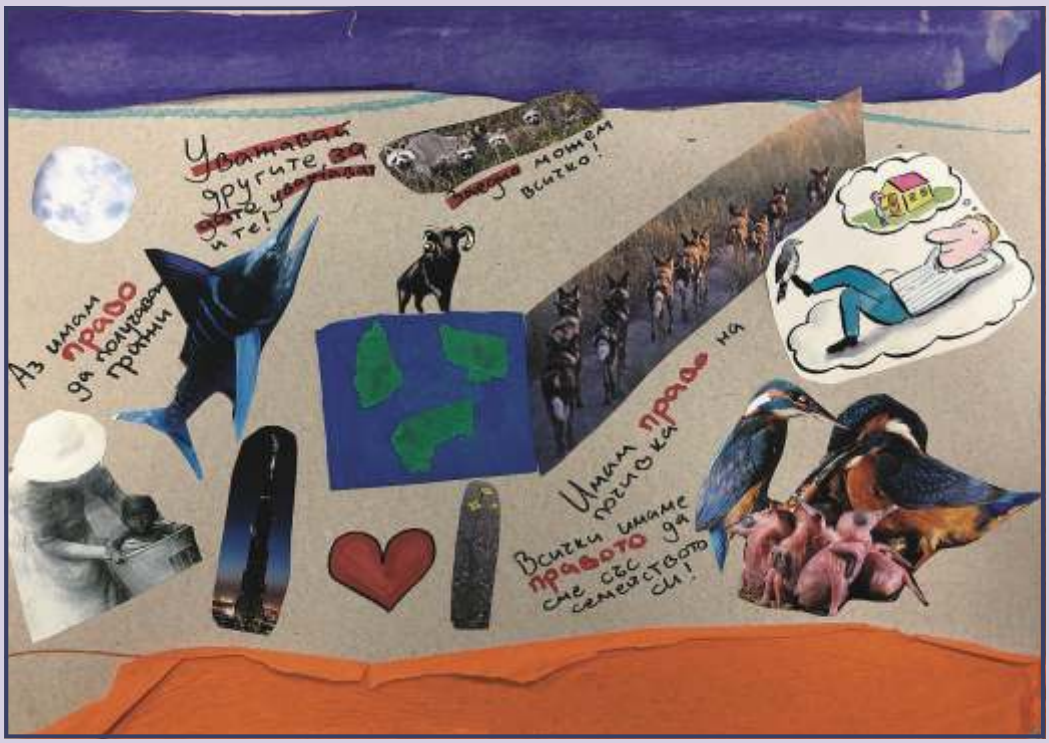
Personality of
Ideology:
Legal system



The collages on the covers have been created by the students **Viktor Belev** *and* **Nicol Boyadjieva** *from 5th grade at the "G. S. Rakovski" Primary School – Sofia, during the "***Associated***" **Children's Workshop for Collages**, organized by the* **Bulgarian Center for Not-for-Profit Law** *and* **ALOS Center** *within the* **Civil Cultural Week Initiative – 2019**.

BULGARIAN CENTER FOR NOT-FOR-PROFIT LAW

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ВИСШИ АДВОКАТСКИ СЪВЕТ
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