

INTRODUCTION TO CHILD RIGHTS

What we will address:

(a) Child Rights in the Context of Child Friendly Justice

In this part of the session, we will look at:

- Sources of child rights and in particular the UN Convention of the Rights of the Child.
- Scope of the UN CRC
- Spotlight on the Best Interests' Principle & the Child's Right to be Heard

(b) The Actors in Child Friendly Justice & Achieving a Multi-disciplinary & Inter-agency Approach

In this part of the session, we will overview:

- the actors involved in child-friendly justice;
- their roles, qualifications, skills and tools;
- the different ways they may need to cooperate.

(a) Child Rights in the Context of Child Friendly Justice

- Before we review the legal framework, let's consider first the concept of childhood which informed the establishment of specific rights for children.
- How actors approach the concept of childhood may vary depending on cultural issues, individual attitudes and practices.

A. Autonomy: in contrast with adults, a child does not have full autonomy. However, it is interesting to think about different dimensions of autonomy which may occur at different times and indeed these may be recognised in different ways in different countries: such as ability to marry, leave the parental home, care for themselves.

B. Agency: is a key element to consider; some see children as having essentially a passive place in society, where they are guided into their roles, and some see children as having an active role in society. The scope of parental authority in a child's life may differ from country to country, and the reach of family life.

C. Development: childhood is also uniformly recognised as involving an intense state of development in terms of cognitive, psychological, physical dimensions. Attitudes to how States should support, or not hinder, a child's development may differ.

- In applying children's rights, actors bring with them their own conceptions of childhood and its various dimensions. It is important to recognise this and sometimes challenge, or broaden, our own conceptions of childhood.
- This can be particularly true in justice settings where legal professionals may be tempted to treat a child essentially as a passive object of proceedings, because of their complexity, rather than taking specific and effective steps to inform them and support them throughout the process. Another area where differences in concepts of childhood may be evident is when a decision-maker

looks to establish the best interests of the child. The principle has sometimes been called “a convenient cloak for paternalistic bias” but recent guidance aims to show how it must root in a comprehensive assessment of the child’s circumstances and a careful weighing of different factors.

Sources of Child Rights

- The starting point when considering the rights of the child is the UN Convention on the Rights of the Child of 1989 (UN CRC), its optional protocols and relevant recent guidance on the Convention.
- The UN CRC is a Convention with solid credentials, being the most signed and ratified of the international conventions.
- In the European context, reference must also be made to key regional measures, in particular, those emerging from the Council of Europe which as we have said will be addressed in a later session. This includes the Council of Europe’s guidelines in the area. These Guidelines are one of the most comprehensive documents in the field.
- Moreover, through a series of recently adopted legislative instruments, the EU legal framework plays a significant role in strengthening standards throughout Europe through its binding legislative instruments and supporting policy and funding. We will return to this in Part Two of this session.

UN Convention on the Rights of the Child

- The UN CRC (along with its two Optional Protocols on the Sale of Children, Child Prostitution, and Child Pornography and the Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflict) is relatively comprehensive, covering a whole range of civil and political rights, economic, social and cultural rights, as well as protection rights.
- The adoption of the UN CRC marked a firm recognition of the child not only as an object of the law, but also as an active subject on which rights are bestowed.
- What is clear in the UN CRC is that, children have many of the human rights of adults, there are also rights that are relevant specifically to children including right to development, education, special labour rights.
- The UN CRC has been described as bringing together elements of human development and human rights approaches, as it aims to ensure the optimum development of children as well as observance of their rights.
- The rights it establishes are often general in their nature. Sometimes they are qualified in some way. For example “with regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation”. But many of them are clear and unambiguous, including the rights of the child to protection from violence.

International Bodies Monitoring the UN CRC

- A UN Committee on the Rights of the Child has also been established and comprises independent experts who monitor implementation of the UN CRC.
- It is the body to which States must periodically report on implementation of the Convention nationally. These reports and shadow reports from NGOs and other stakeholders, as well as the conclusions of the UN CRC on the reports, have been used before the courts as evidence on the situation of child rights' compliance.
- The Committee also provides guidance on interpretation of the UN CRC and of particular relevance to children in justice settings are:
 - General Comment No 12 the right of the child to be heard;
 - General Comment No 10 on children's rights in juvenile justice and
 - General Comment No14 on the right of the child to have his or her best interests taken as a primary consideration.
- In addition, the Committee hosts annual days of general discussion of important themes, for example, on juvenile justice in 1995 and the right of children to be heard in 2006.
- A recent development of considerable importance is the adoption of a further Optional Protocol to the Convention on the Rights of the Child on a communications procedure to the UN CRC, establishing a new complaints mechanism for children directly to the Committee.

Scope of the UN CRC

- Let us examine the overall scope of the UN Convention on the Child, emphasising some elements which have a particular relevance when considering child friendly justice procedures.
- The rights under the UN CRC can be delineated into eight "clusters" of provisions which are also used in reporting to the UN Committee on the Rights of the Child as follows:
- **(1) Definition of a child:** the UN CRC defines a child as every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier.
 - States typically have laws which define a child's capacity to act independently in certain matters by reference to different age thresholds (such as the age of sexual consent, ability to marry, drink alcohol, age of criminal responsibility).
 - In general, regardless of capacity rules, children should benefit from their general rights as children until they are eighteen, including in justice settings.
 - Assessing the age of a child can be an important issue in the instance of an individual who has no documentation, for example, a child who has been trafficked into Europe.
- **(2) General principles:** there are four general principles set out in the UN CRC and they inform the application of all other UN CRC rights.
- They include:
 - (a) the principle of non- discrimination;

- (b) the best interests of the child as a primary consideration in all actions in their regard;
- (c) respect for the views of the child; and
- (d) the right of the child to life, survival and development.

- The principle of non-discrimination means that all UN CRC rights apply to all children within the jurisdiction and must apply without discrimination, regardless of their status. Consequently, access to and participation in justice must be promoted for all groups of children, including groups which may have the most difficult in accessing justice, for example, children with disabilities or children from third countries.
 - Moreover justice proceedings must respect a child's life, survival and development, rather than hindering it. As an illustration, procedures concerning children involved in sexual abuse or trafficking cases must avoid secondary victimisation of the child, through procedures for providing testimony that are adapted to the child's situation, for example, video recording.
 - In a moment, we will explore in more detail the implications for child friendly justice of the best interests' principle and the right to be heard more fully. These principles are central throughout the experience of a child in any justice system.
- **(3) Civil freedoms** which include the right to identity, birth registration, freedom of thought, conscience and religion; birth registration for example is an issue that may prove problematic in some contexts, leaving children statelessness and without the ability to benefit from key rights such as access to health and welfare services. It may be that such children can only access such rights through a child rights claim.
 - **(4) Family and alternative care:** the UN CRC supports the family environment and addresses the way in which the State should intervene if the family environment is not working; the principles it contains are central to family law cases, including restoring or ensuring family contact in cross border cases;
 - **(5) access to health and welfare services:** as an example, in the field of children in migrant families with an irregular status, there are cases concerning access to housing and medical care;
 - **(6) access to education, leisure and cultural activities** (which will also be relevant to conditions for children in criminal or administrative detention);
 - **(7) special protection measures**, i.e. children in emergency situations, refugee children, children involved in juvenile justice, exploitation and minority groups.

More specifically in relation to children in juvenile justice, the UN CRC provides that “neither capital punishment nor life imprisonment without possibility of release shall be imposed for offences committed by persons below eighteen years of age” and also contains rules in relation to the deprivation of the liberty of a child.

- (8) **General measures of implementation of the UN CRC.** These provisions underline that States are obliged to adopt laws, but also adopt policies, and dedicate resources to ensure the fulfilment of children's rights.

General Comment No 5 on General measures of Implementation for the Convention on the Rights of the Child emphasises the importance of the justiciability of the UN CRC. It notes that, "for rights to have meaning there must be effective remedies", reinforcing the need for justice processes adapted for children.

Spotlight on the Best Interests of the Child and the Right to be Heard

- We will now look more closely at two key principles which are central to the design and daily operation of child friendly justice processes.

The best interests of the child

"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." Article 3 (1) of the UN CRC

- The principle contains a number of elements, some of them more obvious in their application than others. Article 3 has been the subject of much discussion and dispute over the years. A new General Comment has been adopted by the UN Committee on the Rights of the Child (General Comment No 14), intended to generate a deeper and more widespread understanding of the provision.
- The term "all actions" ensures that the best interests of the child are to be a consideration in individual cases involving children or affecting children. It also means that the best interests of the child has to be taken into consideration in relation to general law and policymaking; and a part of this is how systems, including justice systems, are designed. For example, the Committee underlines in General Comment No 10 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.
- The term "a primary consideration" means that the best interests is not the only factor to be considered, although there are some circumstances where the best interests is established to be a determining or paramount factor, for example, in cases dealing with the separation of a child from his or her parents (Article 9 of the UN CRC). However, it is also clear that the best interests of a child is not simply one factor amongst others. It should be given precedence when considered alongside other factors, and other considerations must be sufficiently serious to displace it.
- As emphasised in General Comment No 14, the best interests principle has a number of dimensions, including:
 - as a principle of interpretation in relation to any legal measures applicable to a child;
 - requiring certain procedural safeguards, in particular that the rights should be properly considered, including through the provision of any necessary support to the child, such as representation, and
 - having substantive implications within a case, in that it can, in and of itself, be a basis on which to make a decision.

- More broadly when a child is in a justice process, at every stage, the guiding principle should be what action and what outcome fulfils the best interests of the child.
- General Comment No 14, which states that “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.” Nonetheless, the Comment emphasises that “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”.
- A key question is how to examine the best interests. Typically, this requires a comprehensive assessment of the child’s situation, and this relies on having the right kind of information available from the right sources. It may also require expert review or indeed a multi-disciplinary assessment. Moreover, “An important part of this is discovering the child’s own views”, as Lady Hale noted in a landmark UK Supreme Court Case, “children can sometimes surprise one”.
- Beyond the child’s views, General Comment No 14 cites a range of other factors which should be taken into consideration, including:

- *The child's identity*

As General Comment No 14 notes “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.”

- *Preservation of the family environment and maintaining relations*

General Comment no 14 notes that “the family is the fundamental unit of society and the natural environment for the growth and well-being of its members, particularly children “. It emphasises that “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”.

- *Care, protection and safety of the child*

General Comment No 14 notes that “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.” It underlines the fact that the term “protection and care” must 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.

- *Situation of vulnerability*

General Comment no 14 highlights the fact that 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. It notes that 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.

- *The child's right to health*

The child's right to health (art. 24) and his or her health condition are central in assessing the child's best interest.

- *The child's right to education*

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.

In conclusion, General Comment No 14 emphasises 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.

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." (Article 12)

- The right of the child to be heard was a key development of the UN CRC. Children are to be viewed as active participants in proceedings. This principle is at the heart of child friendly justice and this seminar contains a full session on the right to be heard.
- At this stage, let us simply note that General Comment No 12 notes in a forthright way that "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".
- General Comment No 12 provides detailed guidance on a wide array of aspects of this right in justice settings. It addresses family law settings, juvenile justice, refugee children and immigration setting amongst others. It serves as a practical guide examining different moments and different aspects of the justice setting. For example, it notes that "a child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age." It goes on to indicate that "[p]articular 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."
- The Council of Europe Guidelines on Child Friendly Justice provides detailed guidance on child friendly guidance and starts with the principle of participation, followed by the best interests of

the child. It also underscores respect for dignity and protection from discrimination. It emphasises that the rule of law principle should apply fully to children as it does to adults. It identifies general elements of child friendly justice including information and advice, protection of privacy and family life, safety and deprivation of liberty. It emphasises the importance of interdisciplinary training for all professionals working with and for children and calls for a particular emphasis on a multi-disciplinary approach. We will explore these points more fully in other sessions.

(b) The Actors Involved in Child Friendly Justice and Achieving a Multi-Disciplinary Approach

- As much as we need to know about the legal principles that should apply to achieving child friendly justice, from a practical perspective, it is also vitally important to understand what actors should be involved – and how - to ensure that these principles are translated into reality.

The Actors: Who Should be Involved?

- In traditional justice settings for adults, there are several key actors typically directly involved with the case, in particular lawyers and judges. In relation to children we may need to consider how to involve a different or broader range of actors, including both actors directly involved in the specific proceedings who have special skills to engage with children or specialist knowledge of children's issues, as well as actors more generally involved in the circumstances of the individual child who can contribute to the general assessment of the child's best interests or who will contribute to the implementation a decision in a manner that fulfils the best interests of the child.
- More specifically, it includes actors who:
 - provide information to children on justice processes (for example, NGOs providing information on access to justice),
 - provide support throughout a process (sometimes family, a person of support or an appointed guardian),
 - provide legal representation (ideally via a lawyer who should be knowledgeable on children's rights),
 - Engage with specially adapted processes for children who are providing evidence or statements (specially trained interviewers, social workers).
 - Have expertise on the child's circumstances because they are engaged with their lives (social workers, education and health professionals, family members).
 - Have particular expertise as regards children (for example experts in forced marriage or experts in FGM) or clinical child psychologists who can help solicit and interpret information from children.
- General Comment no 14 of the UN CRC notes that "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."
- Equally, as stated in the explanatory memorandum of the Council of Europe Guidelines "a multidisciplinary approach to children in conflict with the law is particularly needed. The existing and growing understanding of children's psychology, needs, behaviour and development is not always sufficiently shared with professionals in the law enforcement areas."

Authority, Qualifications, Skills & Tools – What Should Be Put in Place

- Some actors may need specific authority to act in particular ways and may need specific skills or tools to engage with the child. For example, in some jurisdictions, a guardian will need to be appointed and empowered to instruct a lawyer on behalf of a child.
- Expert qualifications in a specific field may be necessary, for example, a clinical child psychologist may be needed to provide a fuller understanding of the testimony of a child, in a child sexual abuse case, in particular where it involves younger children
- An actor may need to have specialised skills to address the situation of a child. As an example, an asylum officer may need to have training to be able to elicit and understand information provided by a child that may have suffered traumatic experiences. This can be vital as the child may be the only source of information in some cases.
- Specialised tools may be required to allow actors follow adapted processes in cases involving children; in some cases, resources such as checklists of specific issues to be covered or guidance to interviewing children, for example, in civil cases have been developed.

Multi-disciplinary Inter-Agency Cooperation

The different actors, and indeed different decision making bodies where the same child is involved in several cases, may need to cooperate to achieve certain things.

Cooperation is vital but not a simple task and needs to respect fully the different obligations of each actor, fully respect confidentiality obligations, and be established through appropriate protocols or other formal means.

The benefits of cooperation between actors may include *inter alia*:

- *reducing complexity in processes;*
- *reducing polarisation of perspectives;*
- *avoiding fragmentation of information;*
- *facilitating specialisation;*
- *facilitating communication to children and input from children.*

Examples of cooperation can be explored further in the FRA report.

These include:

- Case management between actors: involve the right actors efficiently and effectively and interact with the child in a proper way. It will help if these issues are considered in a practical way and are planned at the outset of the justice proceedings. Depending on the type of proceeding, and how actors are resourced, it may be the judge or the lawyer, the guardian, the prosecutor or some other actor who takes on a central role. This is something to reflect on together in the coming days, as we consider specific skills, processes and tools.
- Protocols in judicial proceedings to promote information sharing in the UK between the Family Court and the Immigration and Asylum Tribunal and criminal courts and the Family Court.
- Co-location of services such as law enforcement, prosecution, health professionals, psychologists, social workers when addressing children victims of violence so as to make the process as child friendly as possible, e.g. Children's Houses in Scandinavia
- Joint training of different professionals such as legal professionals and social professionals