

5. Common Barriers to the Implementation of Article 12

Although there has been good progress in the implementation of Article 12 in many countries around the world, there remain many barriers to the implementation. These take the form of statutory age limits in areas of custody and access, adoption and medical decision-making, judicial discretion in adversarial common law systems, and cultural attitudes and values, the latter which suggest that children's views are not as important or relevant as adults and that listening to children gives them power which is then taken away from adults who know best.

Obstacles to the realisation of children's Article 12 rights also come from the fact that children, especially children who are young, who have disabilities or who are marginalised and so not used to having their views taken seriously, may need support and help to communicate their views. Listening to children in the legal system involves the added complication of who should undertake this role, who should resource this role and how should the views of the child be brought into the legal process. Sometimes adults are reluctant to bring children into the legal environment of a courtroom because of fears that it might be harmful for them and thus can act as gatekeepers. Here, the desire to protect the child from harm often dominates over the right of the child to be heard.

Difficulties realising the child's right to be heard may also be compounded by the fact that some adults, especially those in positions of authority or responsibility, may not be comfortable speaking directly to children or may not be equipped with the skills or the aptitude to facilitate children's expression of their views. Although many professionals who work with and for children acquire this skill and competence during their training, others do not. With this training, it is envisaged to help you to understand what Article 12 means both in terms of the rights of the child and the obligation on the duty bearer. This section of the training, in particular, aims to develop your understanding of what the right to be heard means in theory and in practice.

The Five steps

The Committee on the Rights of the Child has suggested that there are five steps, which will contribute to effective child participation in practice. These include:

1. The child should be informed in advance of the circumstances and process surrounding the decision in a child appropriate language that they can understand.
2. Encouragement and facilitation by adults so that children are given the space to participate.

3. An individualised approach should be adopted allowing for a case-by-case assessment of each child's circumstances including age and maturity.
4. The feedback loop should be closed after the decision has been made so that the child understands the extent to which his or her views were considered and the reasons for the final outcome.
5. Complaints mechanisms should be provided for in legislation so that in the event that the child is given no opportunity to participate, they highlight this with a view to having a subsequent opportunity to contribute to the decision-making process.