

II. ENSURING EFFECTIVE PARTICIPATION: THE CHILDREN'S RIGHT TO BE HEARD

The purpose of **part two** of this training is to explore:

1. Conceptual Background to Article 12 of the UN Convention on the Rights of the Child 1989 (CRC)
2. Why Listen to Children?
3. Nature and Scope of Article 12 CRC
4. Article 12 in Practice
 - a. Family law proceedings
 - b. Criminal Law proceedings
 - c. Administrative proceedings
5. Common Barriers to Participation in practice
6. Sharing experiences about how to implement Article 12 in practice.

1. Conceptual Background to Article 12 of the UN Convention on the Rights of the Child 1989 (CRC)

Over the past few decades, there has been a heightened awareness globally around the need to include the views of children in decision-making processes, which affect them. In effect, this means that children are being recognised as key stakeholders in such cases, with potentially important information to contribute. This increased recognition concerning the need to actively involve children in decision-making processes affecting them, is in large part owing to the existence of Article 12 of the UN Convention on the Rights of the Child 1989 (CRC). This international legal provision sets a minimum legal standard, which specifically requires that all children have a voice in all matters affecting them, once they are capable of forming views. The fact that it is a legal requirement for countries to implement Article 12 is not the only positive reason for ensuring its effective implementation. Listening to children offers a host of benefits not just to the children themselves but also for society more generally.

2. Why Listen to Children?

There is a litany of positive reasons as to why children should be encouraged to contribute to decision-making processes affecting them. One of the basic reasons is that children often think of things that adults do not, particularly when the decision being made concerns their world. Listening to children leads to the increased fulfilment of other rights and it enhances child growth and

development more generally. For example, through contributing to decisions, which affect them, children learn to interact with adults and others, thus gaining confidence and learning critical skills. Giving children space to have a voice enables them to protect themselves, it enables their needs to be met and it allows them to develop to their full potential intellectually, socially and emotionally. Indeed, it is well accepted that listening to children and young people's experiences and views contributes to better decision-making based on the reality of their lives and not untested adults assumptions. Lansdown has noted that by not allowing children to be involved in decision-making processes affecting them, they are being denied their fundamental right to have their views considered in decision-making processes affecting them¹. In the long term, society also stands to benefit from effective child participation in school. Indeed, the encouragement of critical thought, the promotion of democratic principles and contributions to policy development actively contribute to a more widespread understanding of children's rights. However, as acknowledged by Marshall, adults cannot deny children the fundamental right of participation on the basis that it may prove damaging to the child².

3. Nature and Scope of Article 12 of the CRC

According to the UN Committee on the Rights of the Child, Article 12 is one of the Convention's four

General Principles, which guide its effective implementation.

Article 2 – Non-Discrimination

Article 3 - Best Interests

Article 6 – Right to Life, Survival and Development

Article 12 – Right of the Child to be Heard

Thus, as a General Principle, the Committee considers Article 12 not only as a right in itself, but it is also relevant in the interpretation and implementation of all other rights. It is a substantive right in that

it highlights the role of the child as an active participant in the promotion, protection and monitoring of his or her rights but it is also a procedural right in that it gives children the ability to indicate if any of their other rights have been violated. The status given to Article 12 reflects the fact that the right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention. Although Article 12 contains a right of the child, and places obligations, explained below, on duty bearers to fulfil this right, it does not impose a duty on the child to express his or her views.

¹ Lansdown, G. *Promoting Children's Participation in Democratic Decision-making* (UNICEF, 2001) 7.

² Marshall, K., *Children's Rights in the Balance: The Participation-Protection Debate* (Edinburgh, The Stationary Office, 1997) 130.

Article 12 & Child Participation

Often the terminology around Article 12 can be confusing. Sometimes, it is referred to the right of the child to participate. However, participation, which is not specifically mentioned in Article 12, is a multi-faceted concept and much broader in scope than this particular provision. Child Participation encompasses not only children having their views respected in decisions affecting them but it also embraces all the CRC articles which must be read together with Article 12 to ensure effective participation. First Article 12 will be addressed based on a literal interpretation of this provision. Following this, the other provisions (Articles 3, 13 and 17 in particular), which enhance the process of listening to children, will be explored.

Article 12 (1) and (2): A Literal Interpretation

Article 12 of the Convention has two distinct parts or paragraphs.

Article 12

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.

Article 12 establishes the right of every child, once they are capable of forming views, to freely express her or his views in all matters affecting her or him. Once the child has expressed their views in a manner suited to their circumstances, those views must be considered seriously by being given due weight in accordance with the child's age and maturity. This right imposes a clear legal obligation on States parties to ensure that this right is recognised in practice and ensure its implementation by listening to the views of the child and accord them due weight. According to the UN Committee on the Rights of the Child, the international body responsible for monitoring the CRC's implementation, this obligation requires that states, 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.

It is important at the outset to point out that Article 12 refers to the voice of the child not choice. In other words, the views of the child are not determinative, they are merely to be considered as one factor in the overall decision-making process. Thus, it differs from a child's right to consent for example, as the right to consent implies that the child decides. In the context of Article 12, the child does not make the final decision – he or she merely contributes informed views (provided information is given to them beforehand) into the decision-making process.

The interpretation of Article 12 is drawn from General Comment No 12³ of the Committee on the Rights of the Child.

'Shall assure': The provision requires that states "shall assure" the right of the child to freely express her or his views. According to the Committee, "shall assure" is a legal term of special strength, which leaves no leeway for State parties' discretion. This means that states parties are under strict obligation to undertake appropriate measures to fully implement this right for all children.

'Capable of forming his or her own views': Given the literal interpretation only a child capable of forming his or her own view enjoys the right under Article 12. According to the Committee, this phrase should not be seen as a limitation on which children can enjoy Article 12 rights, rather it creates an obligation on states to assess the capacity of each child to form an autonomous ('his or her own') opinion to the greatest extent possible. States should presume that a child has the capacity to form her or his own views and recognise that she or he has the right to express them; it is not up to the child to first prove her or his capacity.

Although many states use age limits, the Committee on the Rights of the Child discourages states parties from introducing age limits either in law or in practice, which operate to restrict the right of the child to be heard.

The Committee makes the following points:

1. Children of young ages and who are non-verbal are capable of forming views and have the right to have them heard by adults using creative approaches like play, body language, facial expressions, and drawing and painting, to demonstrate understanding, choices and preferences.

³ UN Committee on the Rights of the Child, General Comment No 12 (2009): The Right of the Child to be Heard, UN Doc. CRC/C/GC/12.

2. Sufficient understanding rather than comprehensive knowledge is required before children can form their views.
3. Particular efforts will be necessary to ensure the views of children who have disabilities, are marginalised or who do not speak the majority language are heard.
4. It is important to be aware of the potentially negative or harmful effects for some children in expressing their views. This might be relevant, for instance, to victims of abuse or children who for whatever reason risk reprisal or rebuke for speaking out.

“The right to express those views freely”: This requirement of Article 12(1) means that children can express their views without pressure and they can choose whether or not to exercise the right to be heard. It also means that children must not be manipulated or subjected to pressure. This requirement also means that children must have the benefit of a safe environment to speak out and share their views. The environment must be one in which the child feels respected and secure when freely expressing her or his opinions. The Committee on the Rights of the Child has highlighted that a child should not be interviewed more often than necessary, in particular when harmful events are explored because this can have a traumatic impact on the child.

“In all matters affecting the child”: This indicates a broad and inclusive interpretation of Article 12(1) is important. The provision does not list those matters in which the child’s views must be heard but rather states that the child has a right to be heard with respect to all issues and subjects, which affect him or her.

So to recap the first part of Article 12(1) requires that:

Every child capable of forming his or her own view must be facilitated to express that view in all matters that affect him or her.

The second part of Article 12(1) deals with what must then happen to those views.

“Being given due weight in accordance with the age and maturity of the child”: This part of Article 12 makes it clear 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. Once a child has expressed his or her own view, the child’s age and maturity must be assessed in order to identify the weight to be attached to those views.

Crucially, this is a dual process – neither element of age nor maturity can be taken in isolation – as both age and maturity are relevant to the assessment. This reflects that age alone is not an adequate indication of what weight to afford to a child's views. The Committee has recognised that children's levels of understanding are not uniformly linked to their biological age; research shows 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.

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.

Relevant here too is the concept of evolving capacity, set out in Article 5 of the CRC. Under Article 5, 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. This recognises that the more the child, 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.

In short, the second part of Article 12 details the right of the child to be heard in judicial and administrative proceedings. This can be done either directly or indirectly.

The fact that Article 12(2) begins with a link ("for this purpose") to Article 12(1) explains the important connection between the first and the second paragraphs of Article 12.

“in any judicial and administrative proceedings affecting the child”: On top of the more general right to be heard in all matters affecting the child, Article 12(2) requires in furtherance of this right and addition that the child shall be provided with the opportunity to be heard in ‘any judicial and administrative proceedings’. According to the Committee on the Rights of the Child, this provision applies to all relevant judicial proceedings affecting the child, without limitation.

The following are the types of proceedings to which Article 12(2) applies

Judicial proceedings: Parental separation, custody, alternative care, adoption, maintenance and succession, children in conflict with the law, children as victims of violence, abuse or other crimes, health care, social security, separated asylum-seeking and refugee children, children as victims of humanitarian crises, armed conflict or emergencies.

Administrative proceedings: Decisions about children’s education, health, environment, living conditions, right to state benefits like social security and housing.

Both kinds of proceedings may involve alternative dispute mechanisms such as mediation, arbitration and restorative justice mechanisms.

The state, the child or another party may initiate proceedings. They may involve the child directly as a party or the child may be a third party – a victim, witness or other participant – involved indirectly.

“Either directly, or through a representative or an appropriate body”: According to the Committee on the Rights of the Child, after the child has decided to be heard, he or she must decide how they want to be heard. The Committee recommends that, wherever possible, the child must be given the opportunity to be directly heard in any proceedings.

Representatives: The representative of the child can be the parent, a lawyer, or another person like a social worker or a youth worker for instance. The Committee on the Rights of the Child has warned, however that in many cases there may be a conflict of interest between the child and their most obvious representative (e.g. his or her parent). The representative must ensure that he or she transmits the child’s views correctly to the decision maker and representatives must have sufficient knowledge and understanding of the various aspects of the decision-making process and experience in working with children. The representative must be aware and act so as to convey the understanding that that he or she represents exclusively the interests of the child, representing his

or her views. The Committee on the Rights of the Child has recommended that codes of conduct should be developed for representatives who are appointed to represent the child's views.

“In a manner consistent with the procedural rules of national law”: The Committee on the Rights of the Child has warned that 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.

In summary:

- All children capable of forming a view have the right to be heard – this is not a duty;
- Children may need assistance, support and creativity to help them to express their views;
- Their entitlement is to express those views on all matters that affect them, broadly defined;
- The process of determining what weight should be given to the child's views is a distinct process that requires an individual assessment of the child's age and the child's maturity.
- It is important to remember that as children's capacity evolves, it will involve them taking on greater responsibility for decision-making.
- Article 12(2) applies the principle in Article 12(2) by recognising the right of the child to be heard in judicial and administrative proceedings affecting the child;
- This can be done directly or indirectly, as the child chooses;
- Representatives have particular obligations to act for the child.

Child Participation: Article 12 and Relationship with other CRC

It should be noted that the holistic nature of the CRC requires that in order to effectively implement

Article 12, other rights of the child must also be adhered to in tandem with Article 12. These include: Article 3 requires that children be heard in order to help determine what decision will be in their best interests; Article 13 which protects the child's right to freedom of expression and acknowledges that children express themselves 'regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice'; and finally, Article 17 which together with Article 13 requires that States 'shall ensure that the child has access to information and material from a diversity of national and international sources'. Thus, in effect, in order to make sure that any decision affecting a child is made in his or her best interests, he or she must be provided with an opportunity to express views on the decision being made. However, in order to be able to contribute to a decision, the child should be provided with relevant child appropriate information concerning the decision. Where the child wants to contribute to the decision making process and has been provided with this information, he or she must be facilitated in expressing his or her views in a manner which is appropriate under the circumstances. Any views expressed must be seriously considered during the final decision-making process with feedback being provided to the child following the decision-making process. In the absence of feedback, the process runs the risk of being a tokenistic one and may cause more harm than good to the child concerned.

4. Article 12 in Practice

Having considered what Article 12 together with the other relevant CRC provisions require generally, the manner in which this applies in the context of judicial and administrative proceedings as envisaged under Article 12 (2) specifically will now be explored. This next section explores the right of the child to be heard in specific judicial proceedings – **[trainer may choose ONE of the following areas depending on who the target audience is]**

- 1)** Family law proceedings,
- 2)** Criminal law proceedings where the child is in conflict with the law and
- 3)** Administrative proceedings.

In such circumstances, 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).

It is important to note that there was very little international guidance in this area up until 2009 and so countries all over the world sought to implement Article 12 in a manner which they understood to be Article 12 compliant. This has resulted in the evolution of a variety of mechanisms all over the world designed to facilitate children being heard in legal proceedings and administrative proceedings affecting them.

In 2009, the UN Committee on the Rights of the Child developed a General Comment on Article 12 which is essentially a roadmap for countries seeking to implement Article 12 in an effective manner.

[Guidance from the Committee on the Rights of the Child \(2009\)⁴:](#)

According to the UN Committee on the Rights of the Child, the following steps are especially relevant to the implementation of Article 12 in judicial and administrative decision-making.

1. Preparation – those responsible for hearing the child must ensure that the child is informed about her or his right to express her or his opinion in all matters affecting the child, 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 receive information about the option of either communicating directly or through a representative and be made 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.

2. The Hearing – the context or environment where the child is heard has to be enabling and encouraging, so that the child can be sure that the adult responsible is willing to listen and seriously consider what the child has decided to communicate. Hearing a child in such settings should not be a one-sided examination, according to the Committee on the Rights of the Child, but should have the format of a conversation. In judicial proceedings, a child should not, preferably be heard in open court, but rather in a confidential setting. Every effort should be made to ensure that the environment is comfortable and safe, that the child understands the parameters of the conversation and how his or her views will be taken into account. It should be made clear to the child that his or her views will be listened to, taken into account but they may not be definitive or decisive for the outcome of the case being heard.

⁴ Supra n. 3

3. Assessment of the capacity of the child – the person hearing the child will normally have the responsibility to determine what weight should be attached to the child's views in line with his or her age and maturity. In many cases, the adult hearing the child will be in a position – and indeed best placed – to determine the child's maturity and following on from that to determine what weight should be given to the child's views. In more complex or sensitive cases, it will be necessary to have professional expertise determining this element of Article 12. 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.

4. Information about the weight given to the views of the child – an important part of concluding the Article 12 process is to ensure that the child receives feedback as to what has happened to his or her views once they have been expressed. According to the Committee on the Rights of the Child, 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.

5. Complaints, remedies and redress – if a child's right to be heard and have their views taken into account is not taken seriously, is ignored or is violated, children should have access to complaints mechanisms or remedies. For instance, children should be able to make a complaint to an independent and impartial body, such as an Ombudsman or a similar person in children's institutions like schools and residential settings. Children should know who they are and how to access them. Children should have the right to appeal a judicial or administrative decision that does not take their views into account.

[a. Family Proceedings](#)

In cases of separation and divorce, the children of the relationship are often affected by decisions of the courts and other bodies. Judges can determine with whom the child should live, with whom and in what form contact should be maintained between the child and his or her parents, and issues of maintenance and inheritance can be decided. Sometimes these decisions are made in family court or they might be facilitated through a process of mediation. Many jurisdictions have included in their laws a requirement that the judge have regard to the best interests of the child in such decisions and many countries also require that children's views are taken into account in this process. The Committee on the Rights of the Child has recommended that family law legislation

should include the right of the child to be heard by decision makers in court-based and mediation processes. Although some jurisdictions prefer to state an age at which the child is regarded as capable of expressing her or his own views in this context, the Convention anticipates that this matter be determined on a case-by-case basis, requiring an individual assessment of the capacity of the child.

Methods of Direct Participation

In the case of direct participation in legal proceedings, the Committee has interpreted Article 12 to mean that in each case, once a child is deemed capable of forming views, they should have the option of being heard directly by the judge. There are two main ways in which the child may express his or her views directly to a judge: (a) in open court or (b) in a private discussion in chambers. It is worth noting that hearing the child in open court has been strongly discouraged by the Committee who has emphasised confidentiality issues in such cases.⁵ Children may also write a letter to the judge which is also a form of direct participation.

Indirect Methods of Including the Voice of the Child

The reference under Article 12(2) to the right of the child to be heard indirectly in judicial and administrative proceedings implies the use of alternative mechanisms for the representation of the views of the child in family law proceedings. Alternative mechanisms of a similar nature have been adopted in some jurisdictions to facilitate the indirect participation of children in family law proceedings. These include the use of court/expert/social reports, the *guardian ad litem* service and separate legal representatives.

As noted earlier, the decision as to how the child's views are heard by the court or other body is for the child to make. Research indicates that children want to speak directly to decision-makers rather than have their views presented to decision-makers like judges by a third party. However, this may not always be possible- such as where presence in the courtroom might be harmful to the child. However, every effort should be made to ensure that children who want to be heard directly find that means. In some cases, it will be appropriate for a child to be heard in the courtroom. However, the child might also prefer to write a letter to the judge or to speak informally to him or her in an informal setting or venue.

⁵ UN Committee, 2009, para. 43

Article 12 is also relevant to a decision to remove a child from his or her parents when the child is a victim of abuse or neglect within his or her home. In such cases, the view of the child must also be taken into account in order to determine the best interests of the child and to ensure that the process benefits from the child's experience. Frequently in such cases, a social worker or a Guardian ad Litem (a third party) will be appointed to the child to ensure that the judge or decision-maker hears his or her views. This right to be heard also applies to children taken into care so that the child's views are solicited and considered in all part of the process, including in decisions regarding their placement in foster care, in the development of care plans and their review, and as to what decisions are made regarding the child's visits with parents and family.

b. Criminal Proceedings

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. Criminal or penal matters in a variety of ways can affect children, including where they are accused of having breached criminal law, where they appear as witnesses or where they are affected as victims of crime. They are also affected when their parents and other family members are involved in the criminal justice system and increasing attention is being placed on the children's rights implications of sentencing parents to detention.

For children in conflict with the law, there are important due process guarantees set out in Article 40 of the CRC. In addition, however, Article 12(2) contains a more general right to be heard in such proceedings, which the Committee on the Rights of the Child states applies throughout all stages of the proceedings. In particular, the Convention requires that this right has to be fully observed 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. The child should be given the opportunity to express his or her views concerning any measures to be imposed, and the specific wishes or preferences that the child may have in this regard should be given due weight.

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.

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. This reflects the requirement in Article 40 of the CRC to protect the child's right to privacy throughout all stages of the proceedings.

Case-law of the European Court of Human Rights is also relevant to this area. In 1999, in the case of *T v. United Kingdom*⁶, the European Court of Human Rights (the Court) held that the trial of two 11-year-old boys in the English Crown Court violated their right to a fair trial under Article 6. The trial took place over three weeks with high levels of media and public interest and although some measures were taken in view of their young age and to promote their understanding of the proceedings, including shortening of the hearing times and explaining the procedures to the children in advance, nonetheless the Court concluded that the formality and ritual of the Crown Court must, at times, have seemed incomprehensible to such young children. In the circumstances, the Court held that it was insufficient for the purposes of Article 6 that the applicants had skilled lawyers because it was highly unlikely that they would have felt sufficiently uninhibited, in the tense courtroom and in the glare of public scrutiny, to have consulted with them during the trial. Accordingly, it found that neither applicant was able to participate effectively in the criminal proceedings against him and both boys were, as a consequence, denied a fair hearing.

The Court held that:

... a child charged with an offence (must be) dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings⁷.

This principle of effective participation has particular relevance to children tried in the adult courts, but in the absence of any caveats, it must also be intended to inform in a general way how the courts deal with all children.

In the case of *SC v. United Kingdom*⁸, an 11-year-old boy had been sentenced to 2 ½ years detention as a result of his involvement in an armed robbery. SC complained to the European Court of Human Rights that the UK had violated his right to a fair trial as a result of his young age and low intellectual ability. While the court acknowledged that there was no need for the child to understand absolutely

⁶ *T v. United Kingdom*, Judgment of 16 December 1999, Application No. 24724/94

⁷ *Ibid* at para 84.

⁸ *SC v. UK*, judgment of 15 May 2004 (2005) 40 EHRR 10.

everything in order to effectively participate in his trial, the court still pointed to the need for the defendant to be able to follow what is said by the prosecution witnesses and, if represented to explain to his own lawyers his version of events and point out any statements which he disagrees with and make them aware of any facts which could be used in his defence. According to the Court, the ECHR does not require that a child on trial should understand or indeed be capable of understanding every point of law or evidential detail, not least because given the sophistication of modern legal systems many adults of normal intelligence are unable fully to comprehend all the intricacies and exchanges which take place in the courtroom. However, in this context 'effective participation presupposes that the accused has a broad understanding of the nature of the trial process and of what is at stake for him, including the significance of any penalty which may be imposed' (para 29). Accordingly, the Court said, the young defendant should be able to follow what is said by the prosecution witness, explain to his own lawyers his version of events, point out any statements with which he disagrees, and make them aware of any facts which should be put forward in his defence. While in this case many of the intimidating features of the trial in T and V cases were absent, and efforts were made to help the accused to understand the process, nonetheless the boy was found to have had little comprehension of the role of the jury and 'even more strikingly' did not seem to have grasped the fact that he risked, or had in fact received, a custodial sentence. In the instant case, the court concluded that the accused was not capable of participating in his own defence and so the applicant's rights under article 6(1) had been violated.

According to the European Court in this case, certain duties flow from the decision to deal with a child by way of criminal proceedings. Where the child risks not being able to participate due to his young age and limited intellectual capacity, 'it is essential that he be tried in a specialist tribunal which is able to give full consideration to and make proper allowance for the handicaps under which he labours and adapt its procedure accordingly' (para 35). The wide application of this principle is apparent from the Court's conclusion that it does not follow from a child being fit to plead that he is capable of participating effectively in his/her trial to the extent required by Article 6.

Children as Victims and Witnesses

A child may also be affected by criminal proceedings where they are a victim of a crime or a witness in the proceedings. A child victim or 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. 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. 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. The European Guidelines on Child-friendly Justice also highlight the importance of avoiding secondary victimisation of children during this process.

[c. Administrative proceedings](#)

What constitutes administrative proceedings in practice is loosely defined. For example, proceedings concerning migration and refugee status would be mainly of an administrative nature in the first instance in most jurisdictions. Other types of administrative proceedings would include school disciplinary proceedings for example. For cases concerning questions of refugee status, Article 22 CRC recognises the right of children who are seeking such status (often called asylum seekers) to appropriate protection and assistance in enjoying their rights under relevant international law. As part of this process, children are entitled as of right to a determination as to refugee status. Furthermore, Article 10 CRC concerns the reunification of family members living in different countries, thus having implications for the right of children to be heard in immigration proceedings.

[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.

Round table discussion

We now have 30 minutes to consider where each participant can consider their own specialist experience and knowledge of the extent to which children participate in decision making processes affecting them.

I would like each of you to take 15 minutes (on your own or in pairs) to consider your own experience in light of this principle with a view to sharing these within the group. This is an ideal forum for identifying the positive practices of implementing Article 12 within your own jurisdictions as well as the challenges associated with the implementation of this right of the child. Indeed it is only through identifying the challenges that we can seek to find solutions to them.

Case study 1: Family Law Proceedings

Case scenario

Tom and Julie have been married for 15 years and in the past few months have decided that their marriage is no longer working out and they wish to separate. They cannot agree on contact and living arrangements concerning the children so they decide to go to court. Tom and Julie have three children: Jenny (3 ½), Bell (6) and Martin (12). Julie has explained to the children that she and Tom no longer intend living together and that the court is going to make a decision about their living arrangements. She tells the children that she wants them to make their views known to the court.

Jenny asks if she can say hello to the Judge. Bell states that she does not want to talk to anyone about living arrangements – she wants things to stay the way they are. Anyway, she thinks court is for bad people and she doesn't know what she did wrong. Martin writes a letter to the Judge, which reads:

Dear Judge,

Please don't make me choose. ☹

Martin

Questions for Consideration

1. Share your experiences of how this issue would be addressed in each of your own jurisdictions? Choose the most Article 12 CRC compliant with a view to reporting back to the group.
2. If you were a professional involved in this particular case, what steps would you take to ensure that the rights of these children under Article 12 and the CRC are protected under the circumstances?

Solution

There are a number of factors to be considered in this case.

As Article 12 provides that all children capable of forming views have the right to be heard, all three children should have the opportunity to contribute to this decision making process. Thus, the first part of this process is that the children be given an opportunity to express their views which should be communicated to the decision-maker – in this case the judge. Once their views have been expressed on the matter in this case affecting them, whether through speech or alternative forms of expression, those views must be considered seriously by the Judge, with due weight being given to the views of each of the children in accordance with the age and maturity of each child. Age by itself (no matter how young the child is) should never be a reason for not treating the views of the child seriously. Children are not a homogenous group and so an individualized approach needs to be adopted in such cases.

Children should never be forced to participate in a decision-making process affecting them. Children should be provided with the opportunity to be heard in a child appropriate environment where they can talk freely without fear or judgment. Furthermore, children need to be informed in child-appropriate language not only about the decision being made but also about the process surrounding it. It is unfair to expect anyone including a child to contribute to a decision that they do not understand. For example, it needs to be made very clear that it will be the Judge in this case who makes the decision – not the children and even though the children will the judge know their views, these are not always determinative, they are just one factor of the bigger decision being made for which the judge takes full responsibility.

Children also need to be advised about the consequences of them contributing to the decision making process. They should be told that feedback concerning the decision will be given to them as soon as the decision is made. It is imperative that the children in this case are given individual feedback about the decision making process and what this will mean for them in their lives.

Children also need to be advised that they can contribute to the decision-making process directly or indirectly – the method should be of their choosing. Direct participation involves either speaking directly to the Judge or contributing their views in non-conventional or alternative ways (as envisaged by Article 13) such as through art, or a letter or play. Indirect

participation will vary from one case to the next and from jurisdiction to jurisdiction but generally will include: communication of views through a social worker, as part of the court report for example, or through a separate legal representative or a Guardian Ad Litem. Whichever mechanism is used, any communication with the children should take place in a space that is child – appropriate and they should be spoken to and informed in a language that they understand.

It is important to remember that Article 12 is a right of the child and thus must be adhered to in all decision-making processes concerning children. Indeed, in order to be able to make a decision in a child's best interests, it is important that their views (which gives important information to the decision-maker concerning the life of this child) are considered seriously as part of this process. Generally, the intention behind Article 12 is not that the information from the child would be used for forensic purposes, Article 12 should be used for the benefit of the child in question and their wellbeing.

Case study 2: Administrative Proceedings

Case scenario

Tristan (8) boy has recently been subject to a physical attack from John (9) in the school playground. When he comes home one day with a black eye and a broken nose, his mother goes into the school principal and demands that some form of disciplinary action be taken against John. This is not the first time that John has attacked Tristan physically and he regularly taunts him in class when the teacher is not looking.

Unbeknownst to most, Tristan has been sending social media messages in the evenings to John which has caused him much hurt and upset which is why he lashes out each time he sees Tristan.

The Principal of the School calls John's parents into the school to tell them that the School is suspending John pending further investigation. John's parents demand to know if Tristan is also being suspended but the principal asserts that there is no evidence to support such action.

Questions for consideration:

1. How do you think this issue would be addressed from the point of view of ensuring the boys views are considered in your respective jurisdictions? Share your experiences and choose one experience which you think is the most Article 12 compliant – explain why.
2. From an Article 12 CRC perspective, what are the appropriate actions to be taken here by the School Principal as decision-maker?

Solution

In this scenario there is a decision going to be made by the school principal which will directly affect the lives of two young boys here – John and Tristan. This, under the circumstances, once each boy is deemed capable of forming views, each boy should be provided with the opportunity to express those views and have them considered by the decision maker. Neither boy should be forced to contribute views on the matter in question.

It is important that both boys are facilitated in contributing their views in a safe space and initially in a confidential environment. Furthermore, each boy should have the circumstances surrounding the decision explained to each of them in a manner that they each understand including the potential consequences for each of them. It should also be explained to each of them that they can choose the manner in which they contribute their views to the process – this can be directly with the principal or indirectly through their parent or a teacher perhaps, whichever way makes them feel comfortable. Furthermore, they are not expected to contribute solely through speech, they can contribute their views in a variety of ways such as through art or letter.

Once a decision has been made, this should be communicated back to the two boys in a manner that is appropriate to their age and understanding with a clear explanation as to how the decision in question was reached under the circumstances.