CHRONICLE CHRONIQUE CRÓNICA

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Editorial — Avril Calder

New mandate

May I begin by thanking members for the confidence they have placed in me by electing me as President of our Association. During my mandate I will do my very best for IAYFJM, which naturally includes maintaining a high standard Chronicle. I have printed my inaugural address which sets out thoughts on how to move forward the aim of hearing the voice of the child.

This edition has two principal and connected themesð vulnerable witnesses and the voice of the child. A point that emerges clearly from both sets of articles is that the need for specialisation in communicating with and on behalf of a child is increasingly being addressed in legal contexts.

Vulnerable witnesses

There has recently been a lot of media coverage of intimidating cross-examination of sexually abused children in England. As a Magistrate (now retired) with 35 yearsôexperience in the Youth and Family Courts, I found this disturbing.

I am therefore very pleased to publish articles by **Dame Joyce Plotnikoff** & **Dr Richard Wilson**, and by **Andrew Glover** which demonstrate that the concerns expressed by **Justice Renate Winter** in her article are being taken very seriously by the authorities. Renate, as you know, is not only a past-President of IAYFJM, but currently a member of the UN Committee on the CRC.

Dame Joyce and Dr Wilson have for many years been involved in research into the operation of the legal system and Andrew Glover is a barrister at the Crown Prosecution Service. Their contributions bring us up to date with developments in improving the experiences of young vulnerable witnesses. They emphasise the role of intermediaries and the training of advocates.

Professor Benedito Rodrigues dos Santos, Vanesssa Viana do Nascimento and **Itmar Batista Gonçalves** of Brazil set out for us the ways in which their judicial system allows for a case-by-case approach to delicate issues. For example, an alleged perpetrator may be removed from the court during a trial if this is prejudicial to a vulnerable young witness and his/her ability to give evidence. The defendantôs lawyer would remain.

In part of his Masterôs dissertation on International and European law **Pierre-Yves Rosset** of Belgium addressed the Third Optional Protocol to the CRC. The synopsis published here discusses childrenôs ability to take full advantage of the Protocol, *capacitation,* and the training of stakeholders so that child-friendly justice systems evolve.

The voice of very vulnerable, destitute girls is being heard in Ivory Coast where a project to help them by rebuilding their self-worth and means of expression is described by **Rosalie Billault**, an international lawyer and **Eliane de Latour,** an anthropologist and cinéaste.

The voice of the child in civil proceedings

You will remember that the July 2014 Chronicle focused on the voice of the child in criminal proceedings. This edition continues to examine the voice of the child, but in the civil context of the family court.

There are several articles covering this topic.

The support given to children by the Child and Family Court Advisory and Support Service (Cafcass) in England and Wales is clearly elaborated by **Anthony Douglas, Cafcass'** Chief Executive.

Judge Paul Geoghegan & Emily Stannard of New Zealand and **Judge Beatrice Borges** of Portugal set out the legal processes of their systems and the ways in which children are heard.

In Scotland, the Childrenôs Hearing system deals with children who are in need of care and protection as well as with young offenders. **Malcolm Hobbs** & **Nick Schaffer** introduce us to the Childrenôs Hearings (Scotland) Act 2011. A core aim of the Act is to improve childrenôs participation in the hearings and to ensure that their legal representatives are trained and registered for their roles in a Hearing.

Monica Horna and **Justyna Podlewska** of Poland discuss the implications for children being heard under Polandôs Civil Code Act (1964) under which children under 13 years do not have legal capacity and children between 13 and 18 years old have limited legal capacity.

Psychologist **Élise-Mercier Gouin** of Quebec writes that it is often in the most difficult family cases that the childôs voice needs to be heard. However, she cautions that there seems to be a drift from the right for children to be heard to a right for the child to take the decision about the future.

In Belgium, **Fabienne Bouchat** explains that the law which came into force on 1 September 2014, establishes family courts where the principle is *one family, one dossier, one judge*. Specialisation by all professionals is clearly encouraged by the new Law.

Youth Courts

Shauneen Lambe was a member of the 2014 Carlile Inquiry into the functioning of the courtsô system in England and Wales as it affects young offenders. Shauneenôs insights into the Inquiryôs report are most welcome as is Lord Carlileôs stated comment:

> *greater understanding would be aided significantly by improved and required training for the Bench [judges] and advocates. We recommend that nobody should be permitted to fulfil these roles unless they have been trained, and ticketed as competent to work in the Youth Court.*

On 1 June 2012 the Hungarian Parliament adopted a new Penal Code which, in part, approved reform of the juvenile justice system. **Eszter Párkányi**, a criminologist, explains why, in the view of many, including the countryôs Ombudsman for Fundamental Rights, the new system is neither forward-looking nor child-friendly.

Most of you will know that Defence for Children Internationalôs (DCI) call for a global study on children deprived of their liberty has been successful, which is marvellous. Before that success **Anna Tomasi** of DCI wrote an article for *Scottish Justice Matters* setting out why there should be such as study. It is helpful to read those reasons along with the related press notice of 18 October 2014.

You will remember the leading article by Judge Françoise Tulkens in the July 2014 Chronicle. The European Court of Human Rights has delivered its Grand Chamber judgement in the case of *Centre for Legal Resources on behalf of Valentin Campeanu v Romania*, the full text of which may be found at:

http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-145577

Members' news

The Chronicle is always glad to carry reports of the meetings of our affiliated national associations and so I am happy to publish that of the Polish Associationôs 2014 AGM written by **Dr Magdalena Arzewska**.

Please do read about new books published by members **Anil** and **Ranjit Malhotra** and **Ton Liefaard** and **Jaap Doek** as well as the recent School of Human Rights research publication by **Gustavo Arosemena Solorzano.**

Editorial Board

Cynthia Floud and **Atilio Alvarez** have served on the Editorial Board for several years and are stepping down. I am most grateful for their help and support.

In their place I would like to welcome **Magda Arczewska** of Poland and **Patricia Klentak** of Argentina who have already started to work!

It is with sadness that the closing words in this editorial are about **Paolo Vercellone**, President IAYFJM/AIMJF 1990-1994, who died late last year. In tribute to him I publish again the open letter that Renate wrote to him on the occasion of his 80th birthday.

May I send you my very best wishes for 2015 when I trust that you will send to me and members of the Editorial Board, articles on topics of interest to you for they are sure to be of interest to other members too.

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Inaugural speech — Avril Calder

One of our advantages as an international organisation is that, within our membership, we encompass knowledge and experience of a wide range of different judicial systems and approaches. Each approach has its strengths and weaknesses. I try to capture and distil some of this in the pages of the Chronicle. And having such a broad view can help us see what is really fundamental in our quest to make the lives of children, young people and their families better.

Twenty-five years agoð following years of campaigning by far-sighted and dedicated peopleð we saw the establishment of the Convention on the Rights of the Child. This year is a year of celebration for that significant charter. The perception and assertion that children have rights which they are entitled to enjoy has almost literally turned the world upside down and has immeasurably changed judicial systems and the outlook of all those who are involved in them.

As those changes have developed over the last quarter-century, it has become increasingly clear that an essential right that all children have is to be heard. And not just heard, but listened to, with their views and concerns given proper consideration and children helped to articulate what may be difficult for them to express, especially in unfamiliar, possibly intimidating surroundings.

In my view, articulating and hearing the voice of the child is now a key priority for justice systems across the globe and one that our Association should put at the forefront of our endeavours over the years to come.

How should we, as an Association, promote the voice of the child?

We know, of course, of work done on child-friendly justice ranging from the Council of Europe and Mercosur Child Friendly Justice Guidelines, to the African Charter on the Rights and Welfare of the Child and to the recent UN Conventionôs 3rd Optional Protocol. And three of our members sit on the influential committees that give force to these key instruments.

My life as a Magistrate started well before any of these came into being. I am sure we can all think of ways in which, sitting in court, we make sure that the voice of the child or young person is heard. But what about outside our courts?

- How does a child who is unhappy about the divorce or separation of parents make her voice heard in stressful proceedings?
- How does a child with mental health difficulties make clear his part in an offence, when he has little understanding of the proceedings?
- And the new third Optional Protocol? How easy will it be for an impoverished child who may not read or write to lodge a complaint about being held in an adult prison in a third-world country?

I could go on and oné .

So it is essential that we pursue hearing the voice of the child (and access to justice for children and young people everywhere) while recognising that it takes time for the necessary changes in mindset to be established and to alter behaviour in every corner of the world.

At the last General Assembly we were at the beginning of the financial crisis which is not yet over and, some would argue, is getting worse with inequality widening. Against this background, what are my thoughts on how to move forward the aim of hearing the voice of the child?

I suggest there are 6 possible ways.

1. through a growing organisation;
2. by making more use of our expertise;
3. by working with NGOs
4. by working more closely with national and international bodies;
5. through the Chronicle and
6. through the website

Firstly through a growing organisation
Four years ago the European Section was born. It has done a job our founders foresaw in helping to identify commonalities. The voice of the child is such a commonality and one which regional sections could focus on.

In South America, plans are afoot to increase the membership and realise a MERCOSUR section. I know that colleagues will work hard to achieve this.

During the last mandate, the South Pacific Council for Youth and Childrenôs Courts affiliated and it is pleasing to have not just New Zealand, but Australia and Samoa now represented on our committees. Iôd like to see more representation of this kind from Asia and Africa.

I hope too that our very strong membership in Quebec will expand into other provinces of Canada.

Secondly by making more use of our expertise
Some members are doing valuable work to help countries with under-developed youth and family justice systems by drafting laws and organising training programmes. This is usually under contract to bodies receiving UN or EU funding.

How can we be more involved in this kind of work? One way may be my **third** proposition.

Working with NGOs
Terre des Hommes(TdH) is affiliated to us. Defence of the Child International(DCI) and the International Juvenile Justice Observatory (IJJO) have individual members. It gives me great pleasure to have Bernard Boëton on our general committee and to see him here today. I have worked with Bernard and Benoît van Kiersbilck (DCI) and Cédric Foussard (IJJO) and other NGOs, particularly in relation to the Chronicle, and in other ways too. These links are important since we gain insight into the valuable work they do in, for example, pushing for the 3rd optional protocol and they gain something from us since we are decision makers working at the ócoalfaceô I hope we will be able to forge stronger working links with them and others.

And **fourthly** we need to work more closely with established international and national bodies. We need to develop an efficient and focused way of responding to consultation documents and assessing how to lobby successfully for the sorts of changes we would like to see for children. As Iôve just said, we should also be examining calls to participate in contracts.

Here I must mention the International Juvenile Justice Panel (IJJP) which has recently lost its financial support from the UN. It may be that, in association with the NGOs Iôve mentioned, we can help to sustain some of that Panelôs work that will otherwise be lost.

Fifthly Can we do more with the Chronicle? Could we broaden both the contributors and the readership? Would NGOs like to reach our members in a more formalised way? What about the óvoice of the childô from their point of view? Would Child Commissioners like to contribute? And can we reach out effectively to children and young people?

Sixthly Iôd like to see the website develop further, particularly the jurisprudence section. I recognise that this may be a tall order. Could we make a start by asking members to be ówatchersô? By this I mean, members taking note of important or ground-breaking decisions in fields of interest to us. For example, in cases where a child was or was not heard and how the judicial decision was subsequently affected.

Finally, it is not too soon to start planning our next Congress.

What are the options for 2018?

1. If we wish to remain a vibrant Association with a four-yearly Congress, we need to urgently discuss our approach to 2018. What arrangements are likely to be both affordable and practical?

2. Finance on the scale needed is available from few sourcesô Governments who funded the last 3 Congresses, big business both local and global, the European Union, the United Nations. Have we the expertise to tap into these resources?

3. Are partnerships between NGOs and IAYFJM possible? For example would it be possible to ask each NGO to join with us and fund some part of a Congress?

These questions need to be addressed urgently. I would welcome your comments and suggestions so that a set of proposals can be drawn up for the Council.

So my message is that we have important work ahead of us. The timescales for the six developments Iôve outlined will vary. Some will be accomplished sooner than others; some already have foundations and some do not. Taking an organisation forward, building its future depends essentially on teamwork, so I ask all of you here and the membership as a whole to join me and the Bureau in making sure that not only the voice of the child but the voice of our Association is heard loud and clear.

Avril Calder
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Bruxelles 17th October 2014
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‘Every reasonable step’: a revolution in rules for vulnerable witnesses and defendants in England and Wales

Joyce Plotnikoff DBE & Richard Woolfson

Joyce Plotnikoff DBE

Richard Woolfson

Recent guidance in England and Wales has created new expectations for judicial case management and control of cross-examination of vulnerable witnesses and defendants. (ôVulnerabilityôcovers all children under 18; people with a mental disorder or learning disability; and those with a physical disability or physical disorder ï section 16, Youth Justice and Criminal Evidence Act 1999). These policies build on a series of Court of Appeal decisions.

The change of direction is being facilitated by new Judicial College training introduced in 2014. By March 2015, the Ministry of Justice will ôdevise a requirementô for publicly funded criminal advocates to undergo specialist vulnerable witness training before being allowed to take on sexual assault and rape cases.[1] The Advocacy Training Council has asked His Honour Judge Peter Rook QC to chair a group representing the legal professions and others, tasked with devising courses for advocates across the professions and training the first cadre of trainers. These training initiatives are consistent with the European Directive on victims of crime, to be brought into force by November 2015. This requires Member States ôwith due respectôfor the independence of the judiciary and legal profession, to recommend the availability of ôboth general and specialist trainingôto increase awareness of victimsôneeds.[2]

Changing the approach to questioning

The new approach has been influenced by the work of **intermediaries,** a special measure introduced by section 29 of the Youth Justice and Criminal Evidence Act 1999; it was piloted in 2004 and rolled out nationally in 2008 following evaluation.[3] Intermediaries are communication specialists who are independent of the parties and owe their duty to the court.[4] Judges and magistrates approve the appointment of an intermediary with the appropriate skill set to facilitate the evidence of a child or vulnerable adult witness at trial. The statutory scheme is also available to witnesses at investigative interview. Both prosecution and defence witnesses are eligible for the assistance of an intermediary. In some cases judges use their inherent jurisdiction to appoint an intermediary for vulnerable defendants, who are not covered by the legislation.

The intermediary begins by assessing the personôs communication abilities and preparing a report recommending how best to communicate with the child or vulnerable adult. Intermediaries have become adept at making recommendations which further opportunities for ôbest evidenceô(the quality of the witnessôs evidence in terms of its *‘completeness, coherence and accuracy’* section 16(5), Youth Justice and Criminal Evidence Act 1999).

The Criminal Practice Directions 2014 (CPDs) set out the framework for the new regime. A key tool for judicial control of questioning is the setting of ground rules that make clear how it should be

[1] Ministry of Justice (September 2014) Our Commitment to Victims.

[2] Articles 25.2 and 25.3, Directive 2012/29/EU of the European Parliament and Council establishing minimum standards on the rights, support and protection of victims of crime.

[3] Joyce Plotnikoff and Richard Woolfson (2007) The ‘Go-Between': Evaluating in six pathfinder areas the use of intermediaries to assist vulnerable witnesses to communicate with the court when giving evidence. Ministry of Justice (full report at www.lexiconlimited.co.uk).

[4] See Penny Cooper and Adel Puk (July 2014) Rome wasnôt built in a day ï and neither was the intermediary scheme for child witnesses. Chronicle: International Association of Youth and Family Judges and Magistrates 32-38. See also paras 3F1-7, Criminal Practice Directions (2014).

conducted: *'Over-rigorous or repetitive cross-examination of a child or vulnerable witness should be stopped. Intervention by the judge, magistrates or intermediary (if any) is minimised if questioning, taking account of the individual's communication needs, is discussed in advance and ground rules are agreed and adhered to'* (para 3E.1).

Ground rules discussions are essential in any case involving an intermediary: they must be discussed by the judge or magistrates, advocates and intermediary before the witness gives evidence (para 3E.2). Ground rules hearings have proved of such value that they are now recommended as good practice, even if no intermediary is used, in any young witness case or where a witness or defendant has communication needs (para 3E.3). The hearing should be held before the day of trial to give advocates time to adapt their questions to the witnessôs needs; a trial practice note of boundaries may be created at the end of the ground rules discussion (para 3E.3)[5].

The CPDs make clear that all witnesses, including the defendant and defence witnesses, should be enabled to give the best evidence they can: in relation to the young and/or vulnerable, *'this may mean departing radically from traditional cross-examination'* (para 3E.4). Leading questions with a tag ending which invites the answer (ôHe didnôt do it, did he?ô) are powerfully persuasive. Forensic linguist Anne Graffam Walker advises that tag questions are *'surprisingly complicated linguistically'*, requiring at least seven operations to answer correctly; she concludes that *'Tag questions of all kinds should be avoided with children'*.[6] This advice has been incorporated in judicial guidance and extended by analogy, to *'adults whose intellectual development equates to that of a child or young person'*.[7] It is increasingly common for the judiciary to direct that no tag questions be used, especially where an intermediaryôs assessment indicates that the child or vulnerable adult is unlikely to provide reliable answers. A similar ruling may be imposed in respect of statements such as ôYou werenôt thereô which may not even be recognised as a question to which the witness should respond.

The Lord Chief Justice has described assertion as *'not true cross-examination. This is unfair to the witness and blurs the line from a jury's perspective between evidence from the witness and inadmissible comment from the advocate'*[8] and as *'particularly damaging'* in respect of young witnesses.[9]

The defendantôs case may be that the witness is lying. Judicial guidance states that, provided this is

'developmentally appropriate for the witness it should be addressed separately, in simple language, at the end of cross-examination. Repeated assertions to a young or vulnerable witness that (s)he is lying are likely to cause the witness serious distress. They do not serve any proper evidential purpose and should not be permitted'.[10]

It is now permissible for the judge to direct that the advocate should not ôput his caseôto the witness in cross-examination. When the witness is young or otherwise vulnerable,

'the court may dispense with the normal practice and impose restrictions on the advocate "putting his case" where there is a risk of a young or otherwise vulnerable witness failing to understand, becoming distressed or acquiescing to leading questions. Where limitations on questioning are necessary and appropriate, they must be clearly defined. The judge has a duty to ensure that they are complied with and should explain them to the jury and the reasons for them. If the advocate fails to comply with the limitations, the judge should give relevant directions to the jury when that occurs and prevent further questioning that does not comply with the ground rules settled upon in advance. Instead of commenting on inconsistencies during crossexamination, following discussion between the judge and the advocates, the advocate or judge may point out important inconsistencies after (instead of during) the witness's evidence. The judge should also remind the jury of these during summing up. The judge should be alert to alleged inconsistencies that are not in fact inconsistent, or are trivial' (para 3E.4).

While restrictions on ôputting the caseô remain unusual, they have been upheld by the Court of Appeal. Advocates

'cannot insist on any supposed right "to put one's case" or previous inconsistent statements to a vulnerable witness … It is perfectly possible to ensure that the jury is made aware of the defence case and of significant inconsistencies without intimidating or distressing a witness'.[11]

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5 This is reinforced by new Criminal Procedure Rule 3.9(7), 2015, which also sets out an agenda for the hearing

6 (2013) Handbook on Questioning Children: A Linguistic Perspective. American Bar Association on Children and the Law, 58-60.

7 Judicial College (2013) Equal Treatment Bench Book, chapter 5, para 64a.

8 *R v Farooqi and others* [2013] EWCA Crim 1649, para 113.

9 Lord Judge (20 March 2013) Toulmin Lecture in Law and Psychiatry, Half a Century of Change: The Evidence of Child Victims, page 9.

10 Judicial College (2013) Equal Treatment Bench Book, chapter 5, para 64i.

11 *R v Lubemba* [2014] EWCA Crim 2064, para 45.

This may mean that the judge will not permit an assertion that the witness is lying to be put even once.[12]

The judge is entitled to impose time limits on cross-examination (Rule 3(11)d, Criminal Procedure Rules 2014) and is

'duty bound to control the questioning of a witness … He is entitled to and should set reasonable time limits and should interrupt where he considers questioning is inappropriate'; a 45 minute limit on cross-examination of a 10 year-old was deemed reasonable.[13]

Lengthy, aggressive cross-examination in multi-defendant child sex exploitation trials was the subject of much adverse publicity during 2013. The CPDs now require that if there is more than one defendant,

'the judge should not permit each advocate to repeat the questioning of a vulnerable witness. In advance of the trial, the advocates should divide the topics between them, with the advocate for the first defendant leading the questioning, and the advocate(s) for the other defendant(s) asking only ancillary questions relevant to their client's case, without repeating the questioning that has already taken place on behalf of the other defendant(s)' (para 3E.5).

A judge who describes himself as having *"a firm, no-nonsense"* approach timetabled the duration of cross-examination of a 12 year-old with a learning disability in a trial with five defendants. He told the lead advocate who asked most of the questions: *"You can't have two and a half hours; you can have one and a half hours"*. While it is important for evidence to be completed as quickly as possible, breaks are likely to be necessary for a witness with a short concentration span. Evidence in multi-defendant cases may be spread over several days, for example, by taking the witnessô evidence only in the morning.

In every study in which we have interviewed young witnesses, some have been asked at trial to demonstrate intimate touching on their own body. Without exception, children considered this embarrassing and humiliating. The CPDs require that, where questions require clarification of intimate touching, a ôbody mapôor diagram should be provided on which the witness can point:

'In sex cases, judges should not permit advocates to ask the witness to point to a part of the witness' own body. Similarly, photographs of the witness' body should not be shown around the court while the witness is giving evidence' (para 3E.6).

Judges are expected to alert the jury to the adoption of stereotypes *'which could lead the jury to approach the complainant's evidence with unwarranted scepticism'*, for example, that someone who has been sexually assaulted *'reports it as soon as possible'* or *'remembers events consistently'*.[14] In a widely reported 2013 case in which these rape stereotypes went unchallenged, the complainant was told by defence counsel that *'It beggars belief'* that she would have stayed all night in the bed of someone who raped her and that if she was *'telling the truth about these matters, then I suggest that your answers would be consistent'*.[15] Prosecutors are also expected to challenge the use of 'myths and stereotypes' about child sexual abuse.[16]

The judiciary has a role in safeguarding vulnerable people at court in ways which further the Overriding Objective of the Criminal Procedure Rules, *'that criminal cases be dealt with justly'* (Rule 1, 2014) and do not interfere with judicial independence. Ways in which to discharge this responsibility include being alert to safeguarding concerns when dealing with a child or vulnerable adult and addressing them through effective planning and proactive enquiries; *'ensuring that a named individual has responsibility for the vulnerable person's welfare at the hearing, with a line of communication to alert you to difficulties; having contingency plans (e.g. regarding the timing of the vulnerable witness's evidence) if things go wrong in ways affecting the witness's welfare'*. Safeguarding concerns should not be over-ridden because of pressures arising elsewhere in the justice system process. Safeguarding is most at risk when responsibilities are unclear and there is a breakdown of communication.[17]

Case management powers and greater procedural flexibility

The CPDs require cases involving children or young people to be heard as soon as possible, with delay for child victims kept to *'an irreducible minimum' (*XIII A.3ii). Timetabling is an issue that impacts upon best evidence and safeguarding: Judicial College guidance calls for trial management powers to be *'exercised to the full'* where a vulnerable witness or defendant is involved and asks the judiciary to *'be alert to the possibility that needs have not been considered or identified and ask for information to be updated if necessary'*. Trial dates in cases involving a young or vulnerable adult witness should only be changed *'in exceptional circumstances'*.[18] A

[12] *R v E* [2011] EWCA Crim 3028.

[13] *R v Lubemba* [2014] EWCA Crim 2064, para 52.

[14] Judicial Studies Board (2010) Crown Court Bench Book, chapter 17, para 12.

[15] ôSex abuse victimôs suicide sparks call for review of court proceduresôThe Guardian 9 February 2013.

[16] Crown Prosecution Service (2013) Guidelines on Prosecuting Cases of Child Sexual Abuse, paras 77-9 and Annex C.

[17] Judicial College (2013) Equal Treatment Bench Book, chapter 5, paras 12-16.

[18] Judicial College (2013) Equal Treatment Bench Book, chapter 5, paras 5.20-21, 23-25.

central plank of the new approach requires courts, in preparing for trial, to take *'every reasonable step'* to facilitate the participation of witnesses and defendants (Criminal Procedure Rule 3.8.4(b), 2014). This ethos is reflected in the Criminal Practice Directions 2014.

Legislative special measures provisions allow vulnerable witnesses to give evidence from the live link room (where they cannot see the defendant but the defendant can see them) or in the courtroom behind a screen (where they can neither see nor be seen by the defendant or anyone in the public gallery).[19] However, some witnesses prefer to give evidence in the live link room but do not want to be seen. The CPDs provide for the special measures to be combined: if a witness who is to give evidence by live link wishes, *'screens can be used to shield the live link screen from the defendant and the public'* (para 29A.2).

1. While witnesses are entitled to visit the court before the trial for familiarisation purposes[20] there is a long-running difficulty in ensuring that vulnerable witnesses are enabled to express an informed preference for the live link or screens. They are entitled to have a practice session using the live link: the CPDs make clear that *'simply being shown the room and equipment is inadequate for this purpose'* (para 29B.4). In a departure from the traditional prohibition on taking photographs, courts should *'tend to permit'* photographs to be taken to assist vulnerable or child witnesses to familiarise themselves with the setting (para 3F.7).

Where there is a risk of the witness seeing the defendant or the defendant's supporters in or around the court building, judges are also encouraged to arrange for the witness to give evidence using a remote live link from a different court building or to use mobile police equipment enabling the witness to give evidence from another location, such as a school or hospital.[21]

Experimental and observational research confirms the common-sense view that the presence of a known and trusted supporter can improve recall and reduce stress; this in turn can enhance the quality of testimony and decrease suggestibility.[22] Some judges have preferred witnesses who give evidence over a live link from outside the courtroom to be accompanied only by a court usher, even though such a person is not a source of emotional support to the witness.[23] The application to use the live link may now specify a named supporter to accompany the witness. In determining who this should be, the court *'must have regard'* to the witness's wishes; *'an increased degree of flexibility'* is appropriate as to who can act as supporter (para 29B.1-2, Criminal Practice Directions, 2014; section 102, Coroners and Justice Act 2009). Prosecutors are expected to be proactive in raising questions about the need for support of a child at an early stage and to keep it *'under close review during the progress of the case'.* [24]

2. It is becoming increasingly common for judges to meet vulnerable witnesses before they give evidence if the witness wishes to be introduced. Judicial guidance is gently encouraging: *'It is up to you whether to accompany the advocates but it can be a useful opportunity to "tune in" to the witness's level of communication. Where justified by the circumstances, some trial judges have met the vulnerable witness with the advocates before the day of the witness's evidence'.* [25]

Case by case adaptations

In light of the Criminal Procedure Rule admonition to take *'every reasonable step'* to facilitate participation, the judiciary is adopting a more flexible approach on a case by case basis. Thus

where witnesses have been unable to start or continue to give evidence because of distress, they have been permitted to come back the next day (if necessary, following a discussion between the judge and advocates to consider how questions and procedures can be modified to accommodate witness needs), rather than dismissing the case immediately.

It is the norm for a vulnerable witness to answer questions from lawyers in the courtroom over a live link, but for some use of the technology

[19] Sections 23 and 24, Youth Justice and Criminal Evidence Act 1999.

[20] Standard 11, Witness Charter 2013.

[21] (2013) Equal Treatment Bench Book, chapter 5, para 30.

[22] For a brief research summary, see page 100, Joyce Plotnikoff and Richard Woolfson (2009) Measuring up?: Evaluating implementation of Government commitments to young witnesses in criminal proceedings, NSPCC and Nuffield Foundation.

[23] HM CPS Inspectorate and HM Inspectorate of Constabulary (2012) Joint inspection report on the experience of young victims and witnesses in the criminal justice system.

[24] Crown Prosecution Service (2013) Guidelines on Prosecuting Cases of Child Sexual Abuse, paras 17-21.

[25] Equal Treatment Bench Book (2013) Judicial College, chapter 5, para 27e.

reduces the quality of communication. Where recommended by an intermediary, advocates have joined the witness and intermediary in the live link room to question the witness face to face. In 2012, an intermediary accompanied a girl aged four during a live link practice session and observed that her communication over the link was much less effective; her face became less expressive and her use of gestures declined. Speaking to the screen also appeared to impair her concentration. At the ground rules hearing, the intermediary suggested that the lawyers move into the live link room to question the girl face to face.

This innovative proposal was accepted by the judge. By way of preparation, the advocates and the intermediary met to re-organise the furniture and camera angles in the live link room and agree the use of photos and drawings as communication aids. A small chair was obtained for the child. Both lawyers, the court usher and intermediary were in the room for her cross-examination. She was able to attend fully and respond to questions; the advocates could share the aids with her directly. The judge usually watches from the courtroom but in some recent cases judges have joined the lawyers, witness and intermediary in the live link room.

Taking breaks adapted to the vulnerable witnessôs concentration span is important, but in a jury trial, breaks last at least 20 minutes and can disrupt the trial schedule. Intermediaries may recommend ómini breaksô of a couple of minutes in which everyone stays in place; this is often enough to let the witness refocus (a large egg-timer is sometimes used to time the breaks for little children).

Little children can reduce heightened anxiety and ósettleô through physical activity during breaks in giving evidence: agreed activities have involved vacuuming, riding a tricycle, bouncing on a mini trampoline and rocking in a small rocking chair. A 15 year-old with psychological problems was told that, if necessary, she could pull up her óhoodieô (creating a sense of safety when she was stressed) and write down her answers. With this reassurance, along with the presence of the supporter and intermediary, she gave her evidence without covering her head. (Quite often, permission is reassurance enough and the óextra stepô is not used.)

Other arrangements negotiated by an intermediary have allowed young witnesses to pause cross-examination briefly to relieve stress without leaving the live link room by going under a table, behind a curtain or under a blanket.[26]

A child with urinary urgency was allowed to leave the live link room to go to the toilet without seeking the judgeôs permission first. Judges have also agreed that: a court usher would knit quietly during cross-examination because it was calming for the child, and meant the usher was not obviously observing; and at a childôs request, a male usher would cover his face with a cushion when the child said ónaughtyôwords.

óVisual timelinesô are increasingly used by intermediaries to assist vulnerable witnesses in giving evidence about offences alleged to have taken place at different times and locations. For example, a child of seven with delayed language and severe emotional and behavioural problems was able to give detailed evidence about numerous incidents in a two-year period. He used a strip of card several feet long to draw on at the police interview (eg he drew a Christmas tree if he was talking about something that happened around Christmas) in combination with cut outs of buildings to represent each location. He was allowed to use these aids at trial. Timelines are also used by vulnerable adults.

Other adjustments agreed by the judiciary in respect of vulnerable adult witnesses have included having a ticking clock removed from the live link room where it would have disturbed a witness with autism and setting aside a óquiet roomô for witnesses on the autism spectrum or with mental health problems to use during breaks. Intermediaries have been allowed to: relay the answers of a witness with autism and behavioural problems who gave evidence with her back to the live link camera; relay replies of witnesses who would only whisper their answers; and hold and rock a witness with learning difficulties and mental health problems when she showed signs of psychological disturbance.

A witness with autism was permitted to wear a lionôs tail, his ócomfort objectôin daily life.

Modifications have also been made in respect of vulnerable defendants. These have included allowing a young defendant with autism to practise walking towards the witness box while his favourite music was played, then answering quiz questions from the box about his favourite subject when the court was not in session. This relaxed him and enabled him to give evidence from the witness box at trial. Judges have permitted defendants with autism to have quiet, calming objects (including an iPad with a relaxation programme) in the dock, to help them attend and keep calm. A judgeôs opening remarks and defenceôs questions were prepared in large print for a defendant with hearing loss and learning difficulty. In the case of a defendant with complex needs but no intermediary, the judge requested that *all* witnesses be asked simple questions and give short answers, to help the defendant to follow proceedings (*R v Cox* [2012] EWCA Crim 549).

[26] Picture reproduced with the permission of Registered Intermediary Ruth Marchant of Triangle (www.triangle.org.uk).

The Advocate's Gateway toolkits

While the new policies provide an enormously helpful framework, it is difficult for practitioners to keep abreast of changes. When we reviewed compliance with government commitments to young witnesses in 2009, we identified over 50 relevant policies, across agencies, dealing with different aspects of case management, witness care and giving evidence.[27] It is almost impossible for even the most motivated judge, magistrate or lawyer to keep up.

In 2011, the Advocacy Training Council, established by the Council of the Inns of Court, recommended that: ó*All advocates should be issued with 'toolkits' setting out common problems encountered when examining vulnerable witnesses and defendants, together with suggested solutions ... [They] should be considered amongst the essential elements of trial preparation'*.[28]

In 2012, we took the concept of a free website hosting a range of toolkits to Penny Cooper and David Wurtzel at City Law School, City University. Penny kindly arranged for City University to design and host a ôblogô showing what such a website would look like. (Penny is now a professor at Kingston University Law School and is chair of *The Advocate's Gateway* management committee, of which David is a member.)

In order to get the project underway, the Nuffield Foundation gave us a grant to develop three toolkits concerning young witnesses and defendants. Our company, Lexicon, funded a further seven toolkits covering case management, ground rules hearings, autism, learning disability and certain ôhiddenô disabilities. The toolkits bring together policies, research and case law ï a baseline of information to be tailored to the needs of the individual witness or defendant. Intermediaries contributed anonymised good and poor practice examples from cases around the country; these include examples of developmentally inappropriate questions asked in cross-examination and suggestions as to how they could be asked more effectively, something that judges and advocates find particularly helpful.

The Advocacy Training Council generously offered to develop and host a formal website and *www.theadvocatesgateway.org* was launched by the Attorney General in April 2013. It is supported by the Judicial College, lawyersô organisations and the Ministry of Justice.

The *Gateway* added new toolkits in 2014 on mental disorder, deafness, identifying vulnerability and use of remote live links and more are planned. The website provides lists of relevant cases and other resources. It also hosts the training film, *A Question of Practice,* produced by the Criminal Bar Association along with a consortium of other organisations, explaining how to adapt questions for young and other vulnerable witnesses or defendants. The film explores the circumstances in which an advocate need not put his case to the witness and considers alternative ways in which challenges to the witnessôs evidence can be made.

The Criminal Practice Directions 2014 commend the toolkits as ôbest practiceô *'Advocates should consult and follow the relevant guidance whenever they prepare to question a young or otherwise vulnerable witness or defendant. Judges may find it helpful to refer advocates to this material and to use the toolkits in case management'* (para 3D7)[29]. The toolkits form part of judicial guidance for a pilot scheme on the pre-recording of a vulnerable witnessôs cross-examination, in which judges are óvettingô cross-examination questions before they are put.[30] Subject to a positive evaluation, the Justice Minister has pledged to roll out the scheme for child victims throughout England and Wales by March 2017. [31]

The influence of the toolkits is extending beyond the criminal courts: the *Interim Report of the Children and Vulnerable Witnesses Working Group* set up by Sir James Munby, President of the Family Division was published in August 2014. Many of its recommendations derive from the toolkits: they *'demonstrate that a sensitive approach does not inhibit cross-examination and fair trials are perfectly achievable'*.[32]

The toolkit concept is readily adaptable to any jurisdiction: we would be happy to discuss the development work with anyone who is interested.

Joyce Plotnikoff DBE & Dr Richard Woolfson

Please address correspondence to jplotnikoff@lexiconlimited.co.uk

More information can be found in ôMaking the most of working with an intermediaryôat www.lexiconlimited.co.uk and in our book ôIntermediaries in the criminal justice system: improving communication for vulnerable witnesses and defendantsô(Policy Press, University of Bristol, July 2015).

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27 Joyce Plotnikoff and Richard Woolfson (2009) Measuring up? Evaluating implementation of Government commitments to young witnesses in criminal proceedings, NSPCC and Nuffield Foundation.

28 Advocacy Training Council (2011) Raising the Bar: The Handling of Vulnerable Witnesses, Victims and Defendants at Court, page 49.

29 The Court of Appeal describes the toolkits as ôexcellent practical guidesô *R v Lubemba* [2014] EWCA Crim 2064, para 40.

30 Judiciary of England and Wales (2014) Section 28 of the Youth Justice and Criminal Evidence Act 1999: Pre-recording of cross-examination and re-examination.

31 Ministry of Justice (September 2014) Our Commitment to Victims.

32 Felicity Gerry QC (19-20 November 2014) Vulnerable witnesses ï dignity and respect. Paper delivered at the Independent Academic Research Studies Conference, London.

Fairness to vulnerable child witnesses in England & Wales?

Justice Renate Winter*

England is the country that "invented" Human Rights, especially for people in the justice system. Way back in the dark Middle Ages, wasn't it?

England is the country that created the notion of "fairness", at all levels of human life, "fair play", "fair trade", "fair trial", wasn't it?

England is a country where everyone is supposed to be granted access to justice, to equitable justice, be it offender, victim or witness, isn't it?

Is that so?

In Rotherham[1], England, over the last 14 years, approximately 1,400 children were sexually abused by Asian men, a fact known to the police since 2005. For that area, authorities now speak about a blatant failure of political and police leadership, and finally the political and police leadership had to go, not without denying any involvement and/or knowledge.

From 2005 reports were being given to the police and the social welfare institutions by researchers and NGOs dealing with children saying that a group of Asian men systematically and repeatedly groomed and raped children, the majority of whom were white girls. None of the institutions reacted in a satisfactory way. Some police officers now say that they did not intervene for fear of being labelled "racists". The leadership of the police has acknowledged this statement. Since when, may one ask, have the British police been so frightened of being labelled? Since when has it been more important for the police to think about what they might be called, rather than to provide protection, "fair" protection, for those who need it?

One of the responses from social services was that those children were children from very difficult backgrounds, children with many problems, children who would have needed a lot of assistance psychologically and financially, assistance which was not available due to financial and personnel restrictions. Of course scarce economic resources cannot be wasted on children who are hopeless cases anyway! Can they? Thus, it would have been a waste of time and money to assist approximately 1.400 "lost children" abused in a horrific manner.

Fairness doesn't seem to matter with "lost" children in whom nobody seemed to be interested. You may ask what about the children's families? They were not inactive. Many of them did in fact repeatedly approach the police and authorities but were "brushed off". Many mothers trawled the streets looking for their children.

Of course, as I mentioned above, there is equitable access to justice granted to everyone in England but are some people more equal than others? Are children less equal than adults?

Investigations into the conduct of 10 police officers and into the local authority social services are now underway.

And maybe, as the problem is acknowledged by police and social services and known by the prosecution and the courts, we can surely expect a fair trial for rape and other sexual violent abuses according to the traditions of the country? [2]

But consider what has happened in the recent past in a court of law in England?

In Telford, England, operation "Chalice"[3] [4], there were 7 accused men with 7 lawyers cross-examining a 16 year old gang-raped girl, sexually exploited over two years. The cross examination went on every weekday for three weeks. Three weeks, where lawyers called the girl a "compulsive liar", tried to break her at any cost, making her retell her ordeal time after time, ridiculing her, belittling her, repeating questions over and over again in order to pick on details that might differ and could be used to weaken her credibility. In short, the lawyers did their job as assigned by the adversarial system.

Is that fair?

[1] http://www.bbc.co.uk/news/uk-28955170

[2] 5 men convicted Rotherham Operation Central Nov 2010 Sentenced 4-9 years.

[3] Complex Police operation with 50 officers who worked with Telford & Wrekin Council, the UK Human Trafficking Centre and supported by the Crown Prosecution Service.

[4] 7 men sentenced 30 months to 18 years: http://www.bbc.co.uk/news/uk-england-shropshire-22379414

In the adversarial system, just as in the continental system, it is the judge who delivers the fairness and correctness of procedure for everyone concerned, meaning the parties, their witnesses and the victims. It is the judge who has the right not to allow repeated questions which involve calling somebody a liar. Whether a person can be called a liar or not, is decided by the judge and the judge alone, based on evidence submitted by the parties.

In the adversarial system the judge has the right not to allow questions that cover issues that have already been addressed, unless something new is involved in the question or might be revealed by the expected answer. What was the judge in this trial doing when the same questions about the same issues were asked many times by different lawyers, questions that did not concern differences for the different accused, such as the lifestyle of the victim?

The UK has ratified the Convention on the Rights of the Child. This Convention protects children up to the age of 18. A 16 year-old girl, testifying in court as a victim, is certainly a child and should therefore be protected by the Convention and thus in the UK. A child-victim has to be considered as a ñchildò first of all and has the right to be treated as such. This means that during the trial the judge has to consider the needs of a child-witness for breaks, for protection against grossly insensitive treatment by the parties and especially for protection during cross examination.

Defence lawyers always maintain that it is the defendantôs right that a prosecution witness is cross examined and it is their job to do that thoroughly in the interests of their client. This includes, they would state, their right and duty to attempt to discredit a prosecution witness at any cost, even if it means ñdestroyingò the witness, especially a victim-witness. The judge, in their opinion, should not interfere as that might amount to bias.

If the situation were really like that, it would mean that the justice system is fair only to the defendant and not to the victim, especially not to a child victim who needs special protection according to the Convention ratified by the UK. In order to ensure that the justice system is fair to the victim, the judge as the leader and referee of the procedure has the right mentioned above to evaluate, allow, reject or disapprove of inappropriate questions by the parties. He/she also has the right to allow a victim to have a lawyer and, according to the international interpretation of child rights, he/she even has the right (in difficult cases, the duty), to provide a lawyer for a child-victim. He/she also has the right and the duty to see to it that child-witnesses have the necessary time for recreation and rest during examination depending on their mental and psychological condition.

Avoiding bias, a seemingly constant concern for a common-law judge, does not mean that his/her duty to protect children in a court of law can be neglected.

ñHard cases make bad lawò as the saying goes. Would it not be better to say ñpoor conduct of hard cases makes bad practiceò? The problem in the adversarial system seems not that it allows unfair treatment of child-victims and witnesses, but rather that the very limited knowledge of the correct handling of children according to their developmental capacity by judges leads to secondary victimisation of child-victims of sexual crimes.

The inexperience of the judiciary in handling children might have been the reason why the Lord Chief Justice for England and Wales came up with the idea of re-thinking adversarial hearings in civil/family cases, largely, as he mentioned, because in these times of austerity, the legal aid budget for lawyers is being cut and so litigants are going unrepresented. It is easily arguable that the same problems exist in criminal cases and that, notwithstanding the rights of the defendant, unrepresented child-victims or witnesses have to be protected. The last report of the Childrenôs Commissioner of England also mentions that vulnerable teenagers are being denied justice due to financial cuts to legal aid.

The solution, therefore, has to be that ground-rules for the conduct of trials, especially those dealing with children, have to be agreed at the outset in all cases, not just some. The judge has to monitor the ethical handling of children during the trial and even after the trial, if special protection for child victims and witnesses is needed. Such monitoring has to be strict and would involve special training for judges, prosecutors and defence lawyers alike. It would mean that the best interests of a child must be paramount, including child-witnesses and especially child-victims as stated in the Convention. As a consequence, even in the adversarial system, the duty to protect a child victim/witness is an overriding duty of the trial judge and has nothing to do with bias.

One should also ask if the ethical code of the common law Bar has a chapter dealing with children in a child appropriate manner, as most of the continental Bar Associations do.

Another question should be raised as well: Has the technical development used at courts in many countries, the use of pre-recorded cross examinations, stopped at the borders of England and Wales? Or is this technique not used because the defence believes that by directly threatening and intimidating a testifying child victim they can

influence the jury much more effectively[5]? (see Crown Prosecution article on page 15 below.)

And finally there are two other thorny issues to be considered in the adversarial system: first the issue of consent and second the issue of the burden of proof.

Very often a defendant accused of sexual abuse of children statesЬif he (in most of the cases it is a ñheò) states anything, as he doesnôt have to do so at all if he doesnôt want toЬthat there was consent from the child. Sexual abuse means exploitation of a child and no child can be held to have consented to his/ her own exploitation. This defence is of no avail, legally speaking, as the crime in question consists of sexual interaction with a child under 16 years of age, when the child is legally incapable of giving consent. The same point applies to raising the victimôs sexual history to make the jury doubt the victimôs credibility.

This leads to the ñholy cowò of the adversarial system, the burden of proof. It seems to be written in stone that the burden of proof always, always and in every case, rests with the prosecution. The prosecution has to prove that the alleged offender did not and could not know that the victim was eg.a 10 year old boy, a 12 year old girl. The defendant can choose to either say nothing at all or to claim that the child told him she was over 16 and thus could consent. If the prosecution calls the victim as a witness, the child can easily be intimidated and might finally agree to anything in order to be left alone. Or, if the child holds firm, the defence will try to discredit the child, stating that the child lied about his/her age to get money/reward/food/drugs/alcohol from the defendant. At this point many child victims break down, because they have been made to think that the horror they have lived was their fault.

If it is a crime to have sexual relations with a child until a legally determined age, it is up to the person wishing to have such interaction, to make sure that the child is over that age before starting to act. How can the prosecution prove that somebody has not tried to do something, prove that the defendant has not tried to get the necessary information? The burden of proof for things not done if they should have been done stays logically with the defendant, not with the prosecution. The fact that this is against the iron rule of the adversarial system shouldnôt prevent logical thinking.

It seems that rethinking in this regard has started already.

During the last hearing of the British delegation at the Committee of the Rights of the Child in Geneva, the leader of the delegation mentioned that, especially in cases of child trafficking for sexual purposes, a law is being drafted which reverses the burden of proof. If such a law comes into being it will be a huge step forward in combating grooming, sextortion, rape and sexual abuse of children and might finally grant some 2,700 trafficked children (the last reported figure for this year), most of them trafficked for sexual purposes, to get access to justice, legal protection and, hopefully, a really fair trial.

Justice Renate Winter*
Member of the Residual Special Court of Sierra Leone

Member of the Committee on the Convention on the Rights of the Child

[5] Sn 28 Youth Justice and Criminal Evidence ACT (1999) is being piloted in 3 Crown Courts during 2014--Editor

Children in the Criminal Justice System in England and Wales

Andrew Glover

In terms of young people, that is those aged from 10 to 17, who are accused of being involved in criminal behaviour there is, of course, a whole youth justice system geared to diverting them from crime as early as possible The Crown Prosecution Service (CPS) in England & Wales has youth specialist prosecutors in all of our 13 Areas who deal with these cases. They have been specially trained and have at their disposal clear guidance that ensures we play our part in trying to turn around the lives of those who find themselves in this position.

A decision to prosecute a youth must only be taken after a full review of the case and consideration of the circumstances and general character of the youth. This includes information about the youth's home circumstances and background from sources such as the police, youth offending service, local authority and/or other children's services. It is essential that all of the public interest matters which give rise to the decision are identified, considered and balanced. The criminal justice system treats children and young people differently from adults, in that, the best interests and welfare of the youth must be considered ï including whether a prosecution is likely to have an adverse impact on his/ her future prospects and which is disproportionate to the seriousness of the offending. The principal aim of the youth justice system is to prevent offending by children and young people.

Our Service to Victims

The CPS has made the service we provide to victims and witnesses a key priority. A key part of that is the work that we are doing to support victims of child sexual abuse and bring their cases, both recent and historic, to justice.

Prioritising Cases with Young Victims and Witnesses

Since 1 April 2013 the CPS has flagged all cases involving witnesses aged 10 years and under as *Young Witness Initiative* cases, thereby enabling priority to be given to these cases, particularly when they are contested. A new protocol between the courts service, police and the CPS is being formulated that will ensure that these cases are expedited as far as possible. This speed is essential in allowing the young victim or witness to be able to give the best evidence as soon as possible.

Courts and trials

The courts in England and Wales operate an adversarial system. That means in all cases that a victim will be questioned by the prosecutor about what happened, the defence then cross-examine and challenge the victim about their evidence, often asking the victim to accept alternative scenarios. The prosecution can then finally re-examine, or ask further questions, to clarify points raised by the defenceôs cross examination. The system has been successfully applied over the last two centuries and has allowed juries to determine where the truth lies in a case.

Intermediaries

The problem arises when the victim being questioned in court is a child or is vulnerable in any other way. It has not been unknown for a child to give their account to the prosecutor, only to then agree with everything that is suggested to them by the defence and then finally, to agree again with the prosecutor.

But the way that questions are asked, the manner in which they are asked and the complicated and confusing language that advocates sometimes use can add to the difficulties encountered by children who find themselves in the middle of a criminal trial. The CJS has, for some time now, put in place special measures to help child victims and witnesses give their best evidence in court whilst at the same time continuing to ensure that the defendant receives a fair trial.

A key support mechanism is the use of registered intermediaries. These are specially trained people who facilitate communication between the police, prosecution and defence legal teams and/or the court and a witness to ensure that the communication process is as complete, coherent and accurate as possible. The intermediary is impartial and neutral. Their input can help the child from the investigation stage at the start, to the court experience at the end of the process. In court in particular, the intermediary tries to ensure that these witnesses are understood and can understand what is being asked of them. They are not used in all cases that they might be but the

Ministry of Justice are currently recruiting more so that their services can be offered in all relevant cases. The level of assistance afforded by an intermediary to a victim can also in certain circumstances be given to a defendant on application to a judge.

Other Special Measures

Child witnesses can also give evidence from a remote location over live video link so that they do not have to face the defendant during the trial. They can also have a supporter in the room with them as they do so. Alternatively, the evidence can be given from behind a screen within the court room if they feel that this is a more helpful process for them. Efforts have been made over the past couple of years to more fully take into account the child's wishes on such issues, rather than assume that the one approach of video evidence is suitable for all.

***Section 28* of the Youth Justice and Criminal Evidence Act 1999 (YJCEA)**

The Youth Justice and Criminal Evidence Act 1999 (YJCEA) introduced a range of measures that can be used to facilitate the gathering and giving of evidence by vulnerable and intimidated witnesses. The measures are collectively known as "Special Measures" and are subject to the discretion of the court. Further measures are being explored. Together with the police, the Ministry of Justice and other CJS agencies, the CPS is currently piloting a Special Measure which allows certain vulnerable victims and witnesses to pre-record their evidence and cross-examination before the trial starts, rather than appear in court. The pilot applies to children under 16 and those with a mental or physical disorder which is likely to result in their evidence being diminished.

The process is intended to improve the experience of the vulnerable victim or witness by ensuring that they give evidence as close to the date of the alleged offence as possible. Indeed, the often long delays between providing a video statement to the police and the case being heard in court can contribute to victims and witnesses having difficulty recalling events and experiencing additional anxiety– particularly so for those who are the most vulnerable.

In those cases falling within the pilot, we are already seeing vulnerable witnesses being cross-examined within a few weeks of the defendant first appearing in court and, in all cases, it is happening before the defendant is asked to enter a plea. As such, a consequential benefit of this Special Measure is that defendants (including those on remand) have a much clearer idea of the strength of the evidence against them much earlier in the proceedings. This ensures that they are in a better position to decide how they wish to plead at the plea and case management hearing and, if it is a not guilty plea, the advocates know what issues to focus on. It is to be hoped that this will ensure better case preparation and reduce delay which can only be a benefit, particularly to those on remand.

In the longer term, this approach could be extended to include those victims and witnesses who are serving prisoners or prisoners on remand. Furthermore, the lessons learned during the piloting of Section 28 will inform courts more generally about the conduct and length of cross-examination of vulnerable people, for example.

Suitably Trained Advocates

The CPS has led the way in ensuring the right advocates with the right skills handle serious sexual cases and has already introduced the ticketing of prosecution counsel for rape and child sexual abuse cases. All advocates that are instructed to prosecute these types of cases are required to fulfil the rigorous requirements of experience, specialism and regular training. The list of qualified advocates is known as the specialist 'Rape and Child Sexual Abuse List'. By implementing the List, the CPS has sought to ensure that the best advocate is instructed to prosecute each case. There are currently over 1200 advocates on the Specialist Rape and Child Sexual Abuse list.

These are some of the measures that have been put in place to improve the victim and witness experience during the trial process and they are increasingly important as the number of cases involving children increases. The CPS receives complaints about the general conduct of advocates and their general behaviour at court – whether they introduced themselves to a victim before giving evidence or even to how they were perceived to interact with the defence team in certain instances. In those types of cases it is the awareness of the advocate to the sensitivity that a victim may be feeling and the CPS requires its advocates to be fully aware of the good practice guidance[1] before they can be instructed to prosecute on behalf of the CPS. There are a number of examples of good practice guidance on the CPS web site and the Advocate's Gateway site[2].

Child Sexual Abuse ('CSA')

The CPS published its Violence Against Women and Girls Crime Report on 2 July 2014 which announced that in 2013-14 the overall number of child abuse prosecutions (sexual and non-sexual combined) reached 7,998, which is an increase of 440 (5.8%) from 2012-13. We expect this number

1 http://www.cps.gov.uk/legal/p_to_r/prosecuting_advocates_instructions/

2 http://www.theadvocatesgateway.org

to increase again next year in the wake of a number of recent high profile cases[3] which has had the result of increasing public awareness of child abuse as an issue. The conviction rate in 2013-14 was 76.2% of all cases charged, a small increase from the previous year.

Whilst charities such as Childline[4] still see a majority of cases of this type being linked to neglect rather than sexual abuse, the exceptionally serious nature of CSA and the long term consequences for the individuals that are abused in this way make it a matter of particular focus for us as prosecutors.

Over the past few years we have changed our approach to such cases significantly, to make sure that victims have the best chance of seeing perpetrators brought to justice

The Code and 'Merits approach'

As well as developments taking place when cases are at court, we have fundamentally changed the way in which cases get there. Together with the Association of Chief Police Officers and the College of Policing, the previous Director of Public Prosecutions held a series of meetings to explore the issues and challenges surrounding these cases. More than 200 people representing victimsô groups, police, judiciary, lawyers, social services, specialist support services, and statutory agencies attended the discussions, which, in addition to the feedback from a public consultation, led to the development of new guidelines on prosecuting cases of CSA published in October 2013.

The new guidelines set out a new approach to assessing whether the evidence is reliable, or credible ï it highlights the need to consider the credibility of the overall allegation rather than just that of the victim.

The Code

The Code for Crown Prosecutors[5] sets out two stages that prosecutors should go through when deciding whether or not to prosecute any case. The first stage is consideration of the evidence. If the case does not pass the evidential stage it does not go ahead no matter how important or serious it may be. If it does pass the evidential stage, Crown Prosecutors must proceed to the second stage and decide if a prosecution is needed in the public interest.

The evidential stage states that Crown Prosecutors must be satisfied that there is enough evidence to provide a "realistic prospect of conviction" against each defendant on each charge. They must consider what the defence case may be, and how that is likely to affect the prosecution case. A realistic prospect of conviction is an objective test. It means that a jury or bench of magistrates or judge hearing the case alone, properly directed in accordance with the law, is more likely than not to convict the defendant of the charge alleged. This is a separate test from the one that the criminal courts themselves must apply. A court should only convict if satisfied so that it is sure of a defendant's guilt. When deciding whether there is enough evidence to prosecute, Crown Prosecutors must consider whether the evidence can be used and is reliable.

Merits

But there are some types of case where successful prosecutions are notoriously hard to obtain, even though the officer in the case and the Crown Prosecutor may believe that the complainant is truthful and reliable. So-called "date rape" cases are an example. If the crown prosecutor were to assess the probability of success based on past experience of similar cases, he might well feel unable to conclude that a jury was more likely than not to convict the defendant. The prosecutor would effectively be adopting a corroboration requirement in such cases, which Parliament has abolished; that is the wrong approach. Similar considerations have arisen historically in cases of child sex abuse where the behaviour of the victims has been seen as undermining their credibility as a witness and therefore affected the prosecutorôs judgement of a realistic prospect of conviction.

Now we look at the issue differently. In the "merits based" approach, the question of whether the evidential test was satisfied does not depend on statistical guesswork.

Instead, the prosecutor imagines himself to be the fact finder and ask himself whether, on balance, the evidence was sufficient to merit a conviction, taking into account what he knew about the defence case. This approach means that, when assessing credibility, the focus is on the allegation overall. By shifting the emphasis away from the credibility of the victim, to the overall allegation including an assessment of the defendantôs credibility the aim is to ensure that victims are listened to, treated fairly and have the opportunity for justice.

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3 Savile, Operation Yewtree and more generally Rotherham

4 Childline is a 24hour counselling service for children and young people www.childline.org,uk

5 http://www.cps.gov.uk/publications/code_for_crown_prosecutors/

Myths, stereotypes and assumptions

In addition, the prosecutor should proceed on the basis of a notional jury which is wholly unaffected by any myths. The prosecutor must further assume that the jury will be properly directed by the judge and that those directions will be followed.

The CSA guidelines emphasise the need to recognise and challenge commonly held myths and stereotypes about the nature of sexual abuse and the way órealô victims behave. It also details the impact of sexual violence on victims and the need to ensure that they are dealt with in ways that avoid further victimisation. This includes keeping the victim fully informed and involved in decision making about their case. Myths arise from and reinforce prejudices and stereotypes and members of a jury may bring them into the jury room in an attempt to explain events, such as a rape.

Juries should be given advice about the common misconceptions and myths at the start of rape trials. Some examples of commonly held prejudices are:

- Rape occurs between strangers in dark alleys;
- Women provoke rape by the way they dress or act;
- women who drink alcohol or use drugs are asking to be raped;
- Rape is a crime of passion;
- If she didnôt scream, fight or get injured, it wasnôt rape;
- You can tell if sheôs really been raped by how she acts;
- Women cry rape when they regret having sex or want revenge;
- Only gay men get raped;
- Only gay men rape men;
- Prostitutes cannot be raped;
- If the victim didnôt complain immediately it wasnôt rape.

It is evident from some recent cases that the victims of child sexual exploitation typically had chaotic lives. Their evidence had been confused and their loyalties seemed to be allied to their exploiters. Rather than being a sign that they and their evidence was unreliable, juries should understand that the effects and result of years of sexual exploitation would be chaotic lives. Another example is the expression that you will have heard concerning a person being a ñchild prostituteò ï implying presumably that a child had taken that career choice at some point. The truth is that they were exploited and forced to take that path for anotherôs gain. This is an example of the victim being a perpetrator of a crime. Another troubling example is when a girl is trafficked to the UK for prostitution who then assists the trafficking of other girls, quite possibly from the same country and with the same vulnerabilities as herself. Quite clearly offending of this nature demands close consideration by prosecutors as it would be wrong to prosecute in these types of circumstances.

Non-Recent Cases

The impact that sexual abuse can have on victims can be severe and long lasting. Often these crimes involve abuse of power. A courtôs finding of guilt ï or an admission of guilt by the offender - may help the victim come to terms with what happened many years before. As Parliament has not placed any limit on the time within which a prosecution can be brought, the CPS will continue to carefully review cases referred to them by the police for a charging decision, however much time has elapsed since the offence complained of. There has been considerable discussion in the media about the decisions to prosecute in these cases. However, where there is the evidence to do so, and it is in the public interest, the CPS will continue to prosecute effectively.

Perpetrators

However, there is a need for us to consider the best approach for the perpetrators of these offences also. It appears that there have been many more cases of CSA than we thought in the past. We need to find ways, as a society, of intervening in the lives of those involved to change their behaviours. Part of this must be about successful prosecution to both punish the individual and send a clear signal that the crimes will not be tolerated.

But we must also consider what factors were behind the offending. Have societyôs expectations on what is acceptable behaviour changed? Does access to child pornography on the internet drive an increase in these unacceptable behaviours? Are there interventions that can be made early to prevent those who might commit some crimes from doing so?

A central part of moving forward is to ensure that victims and witnesses, particularly in these are supported so that they can give their best evidence and feel that the CJS has performed professionally and dealt with them empathetically.

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Children's Special Testimony in the Brazilian Judicial System

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Introduction

ôSpecial testimonyò in Brazil is a result of the search for non re-victimizing methodologies for court hearings involving children who are victims or witnesses of sexual violence. Unfortunately a sexually abused child, going through protective services, investigative agencies and the judicial system, normally tells what happened to them from six to ten times (Santos; Gonçalves, 2009). The dissemination of the special testimony approach has been helping to reduce the number of times that a child has to give evidence, at least during the judicial stage of the process, and to protect children from the hardships of the judicial system (OHCHR, 2000).

Methods, techniques and procedures that come under the heading of "special testimony" are being used before, during and after taking the "testimony" of children who are victims or witnesses of acts typified as a crime by the Brazilian Penal Code.

Broadly speaking, in the special testimony model, the child's statements are taken by inter and multi-disciplinary teams, predominantly but not exclusively composed of social workers and psychologists specially trained for this purpose. These teams follow a variety of forensic interview protocols, particularly the cognitive interview and the National Children's Advocacy Centre (NCAC) interview model used in the United States. The latter has been adapted to the Brazilian cultural and legal context under the title of Brazilian Protocol for Forensic Interviews with Child and Adolescent Victims and Witnesses of Sexual Violence (Santos et al., 2014).

Special Testimony is conducted in a child-friendly environment, separate from the courtroom, specially installed to protect children and adolescents. Interviews are transmitted to the courtroom by means of closed-circuit television (CCTV) (Santos et al., 2013).

The Brazilian Protocol determines that, after concluding the interview, the team should interact with the courtroom to elicit potential questions. This connection with the courtroom is usually achieved by means of a device in the ear of the professional who is conducting the interviews. However, other alternatives are also being experimented with such as using a telephone or the visit of the interviewer to the courtroom, and others identified in subsequent sections of the respective article of the protocol (Santos et al., 2013).

A judge, the prosecutor and the public defender or the lawyer appointed by the state to represent the alleged offender must be present in the courtroom. The alleged perpetratorôs presence in the Courtroom is subject to a case-by-case decision. Under the terms of the Brazilian Criminal Procedure Code, the judiciary authority may determine that the defendant leave the courtroom whenever his or her presence might cause humiliation, fear, or severe constraint to the witness or victim (Article 217). In general, others present at the audience include members of the team involved in taking statements and making audio-visual recordings (Santos et al., 2013). All parties can address questions to the interviewer. In some State Courts judges can object to questions that are considered constraining for children. However, many judges think that this proviso could violate the defendantôs right to cross examination. The interviewer then collects the questions from the courtroom and puts them into an accessible and non re-victimizing form of language.

Audio-visual recording and filming of the interviews is a fairly common practice. However, the procedures can vary from court to court. Some courts only record the audio and others do both audio and video recording. The same thing happens with the transcriptions. In those courts where hearings are not transcribed, a summary of the statement is made, signed by the parties and

registered in the proceedings. In turn, the recorded interview is kept in a secure location at the Court and is only accessible to stakeholders.

The difference between this new model and the traditional way of questioning children can be observed in many aspects: in the traditional model children are questioned directly by the parties in the very formal and solemn atmosphere of courtrooms, often with direct questions that require objective and straightforward answers, which besides re-victimizing them, has been proven to be not very productive. When giving evidence the child is exposed to the presence of several people and to the dispute between the parties. Furthermore, although there is legal provision, as stated by Cézar (2014), the vast majority of forensic buildings have not been designed in such a way that prosecution and defence witnesses can await the audience in separate environments. So, according to the author, "defendants and victims often run into each other in the corridors of the Forum" (Cézar, 2014, p. 269).

In this article we briefly present the evolution of the Brazilian model of taking special testimony, the legal frameworks that support it, a brief sociology of experiences of taking testimony, the main results achieved so far and the challenges to its expansion and consolidation in Brazil.

Multiplying the number of Special Testimony Projects in Brazil

The first two experiments with Special Testimony in Brazil were established in 2003 in the 2nd Court of Juvenile Justice of Porto Alegre, the capital of Rio Grande do Sul State, in the southern region of the country (Cézar, 2007). From then on, the number of new projects has grown exponentially, increasing from two, in 2003, to 42, in 2011, representing a growth of 430% in that period of time (Santos et al., 2013).

The National Council of Justice Recommendation No. 33/2010 may have been a decisive factor in boosting the number of projects implemented or under implementation in the country (CNJ, 2010). By the end of the first decade of 2000, 18 other projects had been implanted, most of them in the years 2006 and 2007, totalizing 20 projects implemented in the country by 2009 (Santos et al., 2013). These numbers more than doubled in the years 2010 and 2011. Estimates of the above-mentioned survey indicate that there may be as many as 78 projects under implementation (Santos, et al., 2013). If all expectations are confirmed, the number of projects may actually be over a hundred.

Regulatory Framework

As yet, Brazil does not have a specific regulatory framework that supports the taking of testimony that considers the particular conditions of the child and the adolescent. The procedural rules used to hear the testimony of children are the same rules as those for adults (Dobke, 2001).

However, the legal framework for the implementation of Special Testimony Projects can be found in two sets of laws circumscribed in different, not to say antagonistic, legal doctrines. On one side, support can be found in the former laws of the Brazilian Code of Criminal Procedure of 1940, which in spite of having been altered considerably in the course of the last decade, is still adult-centric and circumscribed in the punitive tradition. On the other hand, it is supported by the international rules generated by the United Nations and ratified by Brazil, of a more protectionist nature, embodying the doctrine of integral protection and establishing new benchmarks for the participation of children and adolescents in the justice system; and by the subsequent national legislation for the approval of the Convention on the Rights of the Child, which also is more attuned to the doctrine of integral protection.

The rules governing the testimony of witnesses in legal proceedings are the same as those used for taking the statements of the victims, who are referred to as ñthe offended partyò by the Code of Criminal Procedure (Dobke, 2001). These legal rules have instituted the so-called presidential system, in which, according Dobke (2001, p. 48), "it is the judge who exclusively presides the act, asking direct questions to witnesses or victims".

The Brazilian Code of Criminal Procedure (1941), in its chapter V "the offended party" states that "whenever possible" the victim will be qualified and asked about the circumstances of the offense (art. 201). If the victim or witness is subpoenaed, he or she has to appear in front of the judge (art. 201.) but he or she can remain silent (Brasil, 1941).

The witness or victim has the right to be located in a separate space before the start of the hearing and during it (art 201). He or she has the right to a private life, preserving privacy, honour and image. For that reason, the judicial authority can determine that the processes run under ***status judice*** rules (art. 201). When the witness does not know how to speak the national language, he or she is entitled to be assisted by an interpreter to translate the questions and answers (art. 223). If the court finds that the defendant's presence may cause humiliation, fear, or severe constraint to the witness or victim, and therefore, be detrimental to the truth of the statement, it may conduct the hearing by videoconference, and should that be impossible, it will result in the withdrawal of the defendant, and the hearing continuing with the presence of the defendantôs lawyer (art. 217). In turn, the possibility of recording the procedural acts on magnetic tape or equivalent is provided for in the terms of Law 9.099 / 95 (Brasil, 1995).

The international norms established by the United Nations are gradually inscribing the specificities of the peculiar condition of the child and adolescent into the Brazilian legal landscape. The "opportunity to be heard in any judicial and administrative proceedingsò affecting childrenò is established in Article 12 of the Convention on the Rights of the Child (OUNCHR, 1990; Brasil, 1990a).

However, Resolution 2005/20 (ECOSOC, 2005) is the first set of international rules to specify parameters for the application of alternative methodologies for hearing children, offering guidelines for justice in matters related to child victims and / or witnesses of crimes. Besides presenting the definitions for "legal process and procedures adapted to the child", it specifies the right "to be protected from suffering during the judicial procedures," and recommends special procedures to obtain testimony from child victims or witnesses of offenses in order to reduce the number of forensic interviews and statements, as well as any contact that is not necessary for the court case, such as using video recordings.

Echoing those international norms on the national level, the Federal Constitution (Brasil, 1988) and the Statute of the Child and Adolescent (ECA, Brasil, 1990b) provide general protection for childrenôs rights and special protection in the event that they or their rights are threatened or violated. The ECA explicitly states the right of the child to be heard and to participate in acts related to their lives, determining that their opinion should be taken into consideration by the courts (art. 100) (Brasil, 2009). In its article 28, § 1, it determines that "whenever possible" the child should be heard by a multi-professional technical team and art 151 sets out the powers of such teams to advise the judicial authorities (Brasil, 1990b).

However, it is Recommendation No. 33 of the National Council of Justice that most closely matches the content of Resolution ECOSOC 20/2005 from the standpoint of recommending parameters for a new set of procedures for taking special testimony from children and adolescents, namely, "the implementation of video recorded testimony system for children and adolescents, which should be held in separate environment from the courtroom, with the participation of professionals who are specialized in performing this practice". The act recommends that professionals engaged in taking childrenôs statement should be trained to employ the special testimony techniques and that court services should be capable of providing support for children and their families and referral to assistance services, if needed, before, during and after the taking of special testimony process (Brasil, 2010).

This resolution tends to reflect a new role subsumed by the justice system, expressed in the initiatives of the Courts of the states in the implementation of friendly environments for children and adolescents, now implemented in most Brazilian states. However, it is necessary to issue specific regulations to provide legal to support for the universalization of Special Testimony and to reduce the number of times childrenôs testimony is taken. According to the existing legislation, in the best case scenario, children will have to provide testimony twice: once in the investigative stage and again in the judicial stage. The guarantees of the defendantôs right to due process make impossible to reduce the number of statements to only one unless the childôs representation appeals for a regime of anticipated production of proofs, which faces resistance from some sectors, particularly from the Offices of the Attorney General and of the Public Defenders. In Brazil, the judicial system may or may not accept the investigation carried out by police and may adduce its own investigation, which makes difficult to keep the special testimony limited to the police investigation phase.

There have been some efforts to improve legislation. The draft of a new Code of Criminal Procedure includes provisions to make special testimony taking with a victim or witness child or adolescent mandatory (Brasil, 1940), (Brasil, 1941), but there is no provision for this to be approved in a short-term horizon.

A brief sociology of Special Testimony projects

The special testimony modes that are being developed in Brazil have been influenced by three paradigmatic matrices: the first one is the Argentine experience that utilizes the technology of Camera de Gesell and served as an inspiration for the implementation of the pioneer project in Rio Grande do Sul, Brazil, in 2003. The Project was materialized with the installation of two special rooms for taking childrenôs testimony (Cézar, 2007; Santos et al., 2013).

Since then, other models have been exposed to the Brazilian reality such as the experiences of England and the National Children's Advocacy Centre (NCAC), which has particularly contributed to the composition of the Brazilian model, both using closed circuit television. The NCAC forensic Interview protocol is being adapted for the taking of testimony in the judicial system and should be recommended by the National Judicial Council.

A survey conducted by Santos et al. (2013), from 2003 up to mid-2011 mapped out projects in special testimony taking in 15 of the 26 Brazilian states and the Federal District. Therefore, it appears that a little more than half of the Federative Units (states plus Federal District) (56%) have at least one Project.

The regional distribution of these projects offers an uneven picture: the majority (55%) of special

environments for taking testimony are concentrated in the Southern Region. The Southeast Region ranks second, with 17% of the special rooms for taking testimony; followed by the Northeast Region, with 15%; Middle West Region, with 8%; and, finally the Northern Region, 5% (Santos et al., 2013).

In most of the 15 Federative units in which the research recorded the existence of child-friendly courtrooms, there was just one experience in progress (73%); then come those states with two experiences (13%) and with five or more experiences being implemented (7%). The state of Rio Grande do Sul by itself has 22 of the 42 (52%) of the existing projects in Brazil (Santos et al., 2013).

The Child and Youth Courts are the main institutional *locus* (65%) chosen for the physical installation of this child-friendly justice project. Interestingly, the percentage of projects that have opted for the physical installation in the premises of Child and Youth coordinating body linked to the presidency of the courts is an expressive 19%. In some states special rooms have been installed in Child and Youth criminal Courts (8%). Finally, in smaller numbers come the projects that have installed such spaces in the Psychosocial Forensic Division (5%) and the Integrated Centre for Children and Adolescents (3%), both on the premises of the Child and Youth courts (Santos et al., 2013).

In general these projects have a small number of professionals who carry on the forensic interviews. In 33% of the experiences there is just one professional to perform this work and in 32% of the survey responses there were two professionals responsible for conducting forensic interviews with children and adolescents. A total of three professionals conducting the interview was identified by 8% of respondents, 11% of the responses identified four individuals responsible and for 11% of the respondents declared that the interview is conducted by a team. 5% of respondents chose not to provide this information (Santos et al., 2013).

In most Courts of Justice targeted by the research (43%), the professional who carried on the forensic interviews are from the fields of psychology and social work. In 41% of experiences, interviews are conducted only by social workers. A multidisciplinary team figures in 11% of participants in Courts of Justice and only 5% of them have established the figure of the psychologist as the only professional interviewer (Santos et al., 2013).

Closed Circuit Deletion is widely used to broadcast the interview to the observation rooms or courtrooms in several countries on the five continents (Santos; Gonçalves, 2009). According to our research, that technology was also identified as the type of technology most used in the special testimony in Brazilian projects, totalizing 95% of cases, while the remaining 5% reported using other types of technology (Santos et al., 2013) .

Although CCTV is the core technology for the vast majority of rooms / country projects, teams from some state courts implemented their projects according to their local institutional conditions. In the state of Rio Grande do Sul, for example, the sole exception is the city of Vacaria, which uses a walkie-talkie type radio communicator for the transmission of the audio and TV only for broadcasting the image. An experience developed in the city of Abaetetuba, in the State of Pará, makes use of a software for the exchanges of instant messages, but without making use of VoIP (Voice over IP) system, because it does not perform any type of filming or videoconferencing communication provided by this software (Santos et al., 2013).

The vast majority of rooms / experiences (92%) in Brazil have adopted a way of audio-video-recording the testimonies in digital media (DVD) and in 3% of them, only the audio is recorded. The recorded interviews are stored in the Courts of Justice and are available to the parties. Only 5% of respondents declared there was no use of electronic devices to record and document the evidence collected during the special testimony, which is registered in written form (Santos et al., 2013).

When asked about the main protocols or interview techniques used, 37.8% of respondents indicated the cognitive interview as the main option; 19% describe the steps of interview procedures without mentioning any particular protocol (using techniques free account, open and closed questions, games); 19% were using investigative or a combination of interview models. It is noteworthy that 22% of respondents did not answer this question (Santos et al., 2013).

The impact of Special Testimony

Santos et al.ôs research (2013) examined the perceptions of professionals who head these projects regarding their achievements. Two main results were expressed: a decrease in the levels of victimization of children and adolescents and an increase in the levels of conviction of perpetrators of sexual violence (Santos et al., 2013).

The data show that when asked if taking special testimony helps to reduce the victimization of children, 72% of participants responded positively. In the case of conviction rates for perpetrators of sexual violence, although most experiments have not provided this information, one quarter of respondents indicated percentages between 60-100%, with average percentage ranging between 60 and 70% (Santos et al., 2013).

Among the respondents of this survey, 81% said that children and adolescents are usually

interviewed once when the special testimony methodology is applied, 13% reported that the interview is conducted once, but with the possibility of leading to other sessions; 3% answered that, in principle, the interview occurs once, although there may be other hearings in the pre-process phase, and finally, 3% said that the number of times is at the discretion of each judge. The latter answer calls attention more for the symbolic content than the percentage value in itself, because it tends to imply certain authoritarianism of the judiciary power as the premise of the freedom of discretion attributed to the judge (Santos et al., 2013).

When asked about the main perpetrators of violence, most respondents (45%) attributed the authorship to persons of the domestic circle of the child and adolescent (i.e. father / mother, stepfather / stepmother, grandfather / grandmother, neighbour and uncle/aunt). In the 36% of the cases the alleged perpetrator belonged to the child's close social network (i.e., neighbours or acquaintances, 3% mentioned child care institutions or teachers and 16% did not report this data (Santos et al., 2013).

Basically two main types of crimes have been handled by special testimony: crimes against sexual dignity, and neglect, mistreatment and physical violence. The first, with 61% of responses, involved sex crimes, which include the following law violations: sexual exploitation; sexual abuse; pornography; corruption of a minor for sexual purposes. In 16% of the responses, violations such as mistreatment, neglect, threat, embarrassment, physical assaults, psychological violence and family violence were cited (Santos et al., 2013).

It is interesting note the conviction rates of perpetrators of violence against children and adolescents mentioned here compared to other studies (SAFFIOTI, 1999), as this aspect will dramatically change the landscape of accountability. Among the participants in this study, 11% said that the processes have resulted in sixty per cent of conviction; 5% reported that there is conviction in seventy per cent of the cases, 3% reported that the process resulted in eighty per cent of conviction and 5% responded that there were between 90% and 100% conviction; unprecedented data for crimes against child sexual dignity. We emphasize, however, that 76% of the participants did not reply to this research item (Santos et al., 2013).

Final Thoughts: A look forward

There has been notable progress in a short period of time :

(i) the growth in the number of projects on the basis of a self-adhesion and a recommendation of the National Council of Justice has been exponential;

(ii) most projects perform some kind of preparation of the child for testifying; and

(iii) the technical teams of most projects receive specific training in the taking of special testimony (Santos et al., 2013).

Besides improving the quality of services, we must remember that, for the consolidation of these practices in the judiciary system, it is necessary to face some other challenges (Santos et al., 2013), namely:

a) Obtaining their institutionalization in the State Courts to avoid interruption in case of change of judges who are sympathizers of the methodology of Special Testimony.

b) Expanding the experiences to other cities, not just the state capitals.

c) Expanding the training opportunities and ensuring the provision of continued-education type of training. Adherence to new methods of 'hearing' children and adolescents depends heavily on cultural change, for which the training is an essential component.

d) Increasing the visibility of special testimony experiences on the websites of the State Courts.

The reduction to a minimum level of the number of statements that the child or witness has to provide will be only possible with a change in the legislation. However, the use of a single protocol of forensic interview can help to qualify the forensic interviews currently being conducted in the Judicial System.

The Special Testimony is not just a friendly space for children and adolescents and a set of procedures for taking testimony, although these two components are essential elements of the methodology. Its purpose goes beyond the intent of increasing the conviction rates for perpetrators of sexual violence against children and adolescents, despite the fact that such conviction is necessary to protect the child or adolescent, which is its overriding goal.

We advocate that the special testimony is a special new legal philosophy that elevates children and adolescents to the condition of contractors, subjects with the right to speak. That way, it expresses a new attitude of judicial authority, seeking complementarity of its activities in inter-disciplinarity, particularly through participation in inter-professional teams formed specifically to conduct forensic interviews with children and adolescents.

The dissemination of methodologies for special testimony resulted from the pursuit of non-victimizing cultures and practices for hearing child and adolescent victims or witnesses of sexual violence, with a focus on protecting children and adolescents from the adult-centred perspective of traditional legal culture and the generation of a new ethic of obtaining testimony whereby "hearing" takes the place of ñinquiringò In that

light, it is the harbinger of a new legal culture of compliance / adherence to the principle that children and adolescents are subjects endowed with rights.

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3OP CRC–towards improved access to justice for children?

Pierre-Yves ROSSET

The third Optional Protocol to the International Convention on the Rights of the Child (called hereafter "the OP3") was adopted on 19th December 2011 and came into force on 14th April 2014, in accordance with the provisions laid down under Article 19, *"three months after depositing the tenth instrument of ratification"*. The ratification by Costa Rica on 14th January 2014 allowed the Protocol to come into effect[1], thereby showing the global community's will to raise "*children's rights to the same level as that of the other human rights and* [to acknowledge] *that children also have the right to call on an international mechanism, just like adults do*". The OP3 can thus be regarded as a "revolutionary" legal instrument not because it is innovative, as it has appended itself to the Convention of the Rights of the Child (hereinafter "the CRC") relatively late, but because it enshrines the child's capacity to assert his rights at the international level by enabling him to really become the actor of the procedure.

It is therefore legitimate to wonder about the rationale, the nature as well as the content of this Protocol. In what ways does this legal instrument represent an added value in the framework of the protection of children's rights? What stakes and challenges ensue from its implementation[3]?

The Rationale of the OP3

Until its coming into force, the Committee on the Rights of the Child was the only Human Rights treaty body that did not have an individual complaint mechanism, which gives way – and legitimately so – to questions. One of the reasons lies in the States' reluctance to grant minors a voice (and means) so that they can speak out for their rights in the same way as adults. The issue of authenticity and reliability of the child's speech has always been at the heart of the problem. Furthermore, the concept of "discernment" (i.e. the capacity of forming one's own views), dear to the Convention, arouses fears due to a lack of understanding of the legal reality in the application of children's rights. Moreover, the notion of the best interests of the child implies a primacy of children's rights over adults', which may lead one to believe that, in terms of complaints, the principle of equality of arms would not be observed. Yet the complaint mechanism of the OP3 completely complies with the procedural safeguards that are generally included in every complaint mechanism. In addition, it should be highlighted that children's rights are an integral part of human rights and coexist with adults' rights. It goes without saying that the OP3 is an extra guarantee of protection of children's rights and by no means a new stage towards the recognition of an "*enfant roi*" (mollycoddled child) status[4]. The complaint mechanism thus finds a solution to the ineffective reporting mechanism[5] and meets the need of the minor's "capacitation" to assert his rights.

The Ratification Procedure

The OP3 provides children with two new ways of protesting against the infringements of their rights by the State. This new international treaty creates, on the one hand, a communications procedure and, on the other, an investigation procedure for serious violations[6].

[1] To date, 14 States have ratified the OP3 (Albania, Germany, Andorra, Belgium, Bolivia, Costa Rica, Spain, Gabon, Ireland, Monaco, Montenegro, Portugal, Slovakia and Thailand).

[2] Defence for Children International (DCI) Belgium, French-speaking section, *press release. Les ONG de défense des droits de l'enfant accueillent avec satisfaction la décision de l'ONU de créer une voie de recours internationale pour les enfants*, 19th December 2001, www.defensedesenfants.be

[3] Concrete examples from the Belgian and French laws will illustrate the effects that are expected from the OP3 further to its implementation in the State parties' national system.

[4] This term defines in this context the preconceived general idea according to which children's rights would not be subjected to a limitation and would as well conflict with adults' rights. One should keep in mind that, although the CRC comprises only rights, this does not mean that children are exempt from duties.

[5] The absence of binding force of the Committee's recommendations as well as the omnipresence of a "judicial fuzziness" that only the States can demarcate at the whim of their priorities and capacities (structural, institutional and financial, in particular) are so many causes of the lack of effectiveness of the reporting system.

[6] To be more complete, one can note that an interstate complaint procedure is provided for in the article 12 of the OP3. This procedure needs an *opt in* ratification, that is, the State must – in addition to ratifying the Protocol – expressly accept the implementation of the interstate complaint mechanism.

The first one suggests that children or their representatives can file complaints concerning an infringement of their rights before the United Nationsô Committee on the Rights of the Child, if the child feels that he could not obtain satisfaction before the national courts.

The second procedure gives competence to the Committee to take the initiative to review serious or systematic violations of childrenôs rights that would be brought to its attention. In practice, it serves as a means of circumventing the absence of collective redress mechanism (which was not incorporated when the OP3 was adopted). This inquiry procedure, planned in virtue of article 13 of the OP3, could thus give to the Committee the opportunity to tackle a large-scale issue[7].

Furthermore, the second paragraph of article 13 provides for the possibility for the Committee to task one or several of its members with an investigation on the field in order to report the urgent situation. This inquiry takes place in strict confidence, and the cooperation of the State party is encouraged at all the stages of the procedure. Thanks to this mechanism, one can deduce that the scope for the Committee to exercise its expertise and in its room for manoeuvre will greatly improve. However, the States can *opt out,* that is, they can declare that they do not wish to ratify the investigation mechanism, if they do not want the latter to apply to them.

The flexibility of the aforementioned process[8] enables some collaboration between the Statesô interests and the Committeeôs and, through the latter, the interests of all childrenôs rights defenders. It can now be relevant to examine the admissibility criteria provided for by the OP3 and to determine the potential impediments to a child-friendly procedure.

The Admissibility Criteria

These conditions are formulated in article 7 of the OP3. First of all, four basic questions should be answered: ñWho? What? How? Where?ò This complaint mechanism affects the child victim or his representative, provided the latter acts with the childôs consent (unless it is impossible). This communication can relate to any violation of a provision from the CRC or of its protocols, provided that the State concerned has ratified them and that the Committee has not yet examined the same question or as part of another investigation or regulation international procedure.

It is about lodging a written, non-anonymous complaint arguing an infringement which happened after the implementation of the OP3 (except in the case of continuous violation) and this after the exhaustion of domestic remedies (subject to exceptions), and within the civil year of the violation of the right in question. Finally, this procedure falls exclusively within the abilities of the Committee on the Rights of the Child.

It would be appropriate to ask oneself about the minorôs capacity to exhaust domestic remedies. In this respect, the OP3 provides that *"this rule does not apply if the remedy procedure exceeds the reasonable time periods or if it is unlikely that this rule enables one to obtain effective redress"* [9]. It would seem legitimate that the Committee shall be flexible, to a certain extent, in this respect in order to maximize the protection of the minorôs rights. Yet to what extent will the Committee show flexibility?

The Minor's Legal Incapacity

It goes without saying that the admissibility criterion of exhaustion of domestic remedies constitutes a major obstacle when it comes to minorsôaccess to justice. This analysis introduces the notion of minorsô legal incapacity which represents a brake in all judicial and quasi-judicial proceedings at the ñdisposalò of minors. A child is vulnerable because of his lack of discernment and experience. This is why the law aims to protect him by demanding that he be represented for any legal act that relates to him. However, rarely does the law provide for the hypothesis according to which this representation would fail. Yet the child is often the main victim of a family environment that deteriorates, of a divorce, of a father or mother who fails to do his/her primary duty: to ensure that the child enjoys physical, moral as well as emotional safety in accordance with the childôs best interest and self-growth. In most justice systems, minors are considered incapable and subjected to parental responsibility with regard to their belongings and themselves[10]. The child thus depends on his parents to perform and undertake legal acts, gain access to justice and attend a trial. A minor may certainly be heard in any procedure that affects him[11], but this right does by no means confer on him the quality of party in the proceedings.

The minorôs legal incapacity in terms of lawsuits is generally justified by the fact *"that the minor is not capable, because of his age, of understanding the importance of the decision to take legal action"*[12]. This argument seems to be totally legitimate if it is taken into account that, for the same reasons, a minor must not, in principle, be judged as ñseverelyò as an adult is. However, this

[7] The terms ñserious or systematic violationsò lead to a factual situation that would affect a large number of children.

[8] This process can considerably reduce the scope of the Protocol as well.

[9] Article 7§e of the OP3.

[10] Article 372 C. Belgian civil.

[11] Article 12 of the CRC.

[12] Juvenile Court. Antwerp, 14th April1994, JDJ, nr 147, Sept. 1995, p. 322.

overprotection can cause harmful effects and it would not be speculative to maintain that this overprotection might represent a paternalistic approach with potential liberty killer repercussions.

The fear of weaker parental responsibility as well as of the recogition of an ñenfant-roiò status still plays a significant role.

Although the minorôs legal incapacity is almost absolute by virtue of most pieces of legislation, there are some exceptions developed in the jurisprudence[13]. In several cases, the Court has judged that a minor can act on his own judicially speaking, without being represented by his parents. However, this possibility is coupled with three conditions: there is a conflict of interests between the minor and his parents, the minor is capable enough of forming his own views and the nature of the lawsuit is characterised by the absolute necessity to pay alimony[14] or to grant social assistance. For example, the admissibility of an action brought by a non-emancipated minor has been declared numerous times by Belgian[15] and French[16] jurisdictions. This jurisprudence accepts that minors are capable of performing protective acts and, therefore, acknowledges the minorôs right to engage in legal proceedings before the ñ*Juge des Référés*ò (Interim Relief Judge). The minorôs legal incapacity could thus be assessed as a ñcontravenableò obstacle in case of emergency and imminent as well as actual violation of the minorôs fundamental rights. However, this judge does not give a ruling on the substance of the dispute and, therefore, the capacity of performing protective acts does not allow one to exhaust domestic remedies.

It should be noted that the minorôs legal capacity still remains too limited and dependent on subjective assessments; some questions regarding the implementation of the OP3 must be raised. Two alternatives[17] could be considered in order to overcome this legal incapacity. One solution could be provided by the States. The other one could be initiated by the Committee on the Rights of the Child. The States that have ratified the third Optional Protocol to the CRC have committed to implement effective remedies for minors.

Therefore, it will be the legislatorôs duty to take measures, not to recognise a minorôs general legal capacity (which would not benefit the minor and could even put him in danger), but to provide for more flexibility in regard to the position adopted by the jurisdiction, notably when they pronounce a judgement on the admissibility of a minorôs appeals to the court. Legal measures should, for example, provide for a derogation agreement in case of conflict of interests between the child and his parents[18]. The degree of the childôs maturity and discernment should be taken into account more often in order to give the child the opportunity to be a party to the proceedings (with a lawyerôs assistance). In addition, the procedures should be shorter for children. The aforementioned decisions demonstrate that very often does the ñ*Juge des Référés*ò intervene in order to preserve the minorôs interests which could be prejudiced because of the length and complexity of the procedures. Even though the time limits are often adjusted for minors, notably in terms of statute of limitations[19], the laws are still not at one with the CRCôs decisions. This is why the State parties to the OP3 should improve minorsôaccess to justice as well as take concrete and effective measures supported by action plans. It is the governmentsô duty to work, on the one hand, for the implementation of prevention mechanisms (by helping families and taking cooperation and social assistance measures) and, on the other, from a corrective/coercive point of view, for a more effective justice system, by allowing any minor to access justice without getting lost in the twists and turns of a legal system that is not child-friendly.

As for the Committee on the Rights of the Child, it can opt for a certain amount of flexibility in terms of admissibility and especially in terms of exhaustion of domestic remedies. The real challenge is to interpret the aforesaid condition. Article 7 § of the OP3 provides that *ñthis rule does not apply if the appeal procedure exceeds the reasonable time periods or if it is unlikely that this rule enables one to obtain effective redressò*. It goes without saying that the terms ñreasonableò and ñunlikelyò might arouse scepticism and speculations. What does the Committee mean by exhaustion of domestic remedies? Will the child, who will have tried anything without gaining access to a jurisdiction determining the merits, have his appeal deemed admissible by the Committee? It seems that the whole wording ñunlikelyò would represent an opening in which rights defenders could dive into in order to maximize the chances that minorsô interests will be protected or at least taken into account before

[13] The jurisprudence of the Belgian and French jurisdictions will illustrate the existence of such exceptions.
[14] Civ. Court of Ghent (Ref.), 16th May 2002, JDJ, nr 228, Oct. 2003, p. 35. A 17-year-old minor, after her father chases her out of the family home, sues him to receive alimony in order to meet her vital needs.
[15] Civ. Court of Namur (Ref.), 19th June 1987, J&D, *autonomie du mineur et droits sociaux,* January 2014, p.450. Civ. Court of Liège (Ref.), 8th July 1986, J&D, *autonomie du mineur et droits sociaux*, January 2014, p. 449. Liège Juv. Court, 11th February 1997, J&D, *autonomie du mineur et droits sociaux*, January 2014, p.444.
[16] Judgement of the Council of State, Interim Relief judge, 12th March 2014, 375956, §3.
[17] It is not about being exhaustive but rather prospective.
[18] And/or provide for the naming of a substitute legal representative, such as an ñad hoc guardianò
[19] For example, the French criminal law provides that, in case of serious sexual abuse of a minor, the latter can press charges until he is 38.

the Committee. Furthermore, it seems logical and pragmatic that the Committee should adopt a more "clement" position regarding the admissibility criteria in cases that relate to a serious infringement of children's rights and that it should assess each appeal on a case by case basis in order to give the minor every chance to assert his rights. Yet one must keep in mind that clemency is not synonymous with negligence. The Committee, in order not to lose its credibility, must not conceal these admissibility criteria and must, through its "jurisprudence", adopt a clear judicial position.

Expected Scope and Relevance of the OP3

The OP3 adds another stone to the edifice that seeks to optimise the guarantees offered to children so that they can assert their rights. Its implementation is going to be at the root of positive obligations which are incumbent upon the States as well as of new challenges for law practitioners.

The minors' legal incapacity, illustrating their lack of independence before the court, shows that minors do not truly play an active role in the assertion of their rights and that the justice system is often the stage of disillusionments. The length and complexity of the procedures[20], the solemnity of its stakeholders and places, make justice a societal mime show in which children cannot find their landmarks. Thus, most of the time, the child hoping to be heard will only feel disappointment and will fail to understand. This is why the States must work for a real improvement in the legibility of the law through unambiguous and understandable texts formulated in a child-friendly language. Children should be consistently informed and made aware of the existence of their rights and remedies at their disposal so that they can rise against abuse and violations of their fundamental rights. The States must also work in order to implement structures that are adaptable to children's needs. The accessibility of lawyers, the training and specialisation of all the stakeholders who work with children are all challenges that need to be taken up in order to evolve towards a child-friendly justice system[21].

Moreover, the complementary of children's rights protection mechanisms raises strategic issues. For example, complementary may be synonymous with effectiveness loss.

Lawyers will have to face a most difficult strategic choice, which will raise questions. For which human rights protection body, for which remedy should one opt[22]? Which procedure would be the least difficult for a minor? Which Convention would be the most protective in the specific situation of such and such a child? Additionally, it is legitimate to wonder about the legal scope of the judgements that the Committee will pronounce in the framework of this individual communications procedure. Once the appeal is deemed admissible, the Committee has two options. It can either solve a communication by a friendly settlement[23] or decide on the alleged violations through recommendations. Although the States, by ratifying this Protocol, recognise the Committee's competence to rule on individual complaints and its ability to have his decisions executed, its quasi-judicial character may raise some questions. Facing a potential "deficiency" of the CRC's binding power, would it not be better to bring one's action before the ECHR?

The Strasbourg jurisdiction, for example, has available an almost indisputable binding force. However, one should ask oneself whether the procedure before the ECHR is more child-friendly. Although the Court has strived to standardise and simplify its petition filing procedure[24], this procedure remains complex. Cases involving children must in principle be dealt with rapidly. In this respect, it is legitimate to ask oneself whether the minor's interest is still the same when the judgement and then the execution of the decision take place several years after the violation. Thus, one must consider improving the treatment of these appeals since, in practice, they are not handled in priority; while the Committee on the Rights of the Child, in virtue of Article 10 of the OP3, *"[…] examines as fast as possible the communications that are addressed to it [...]"*. Additionally, Article 8 of the OP3, regarding the transmission of communications, provides that the States, through statements as well as clarifications on the corrective measures that have been taken, submit their reply to the Committee *"as soon as possible, within three months"*[25]. The procedure before the Committee thus aims to encourage the States to give a quicker answer than in other communications procedures. Furthermore, one should underline that Article 11 of the OP3 provides that *"the State party duly takes into account the analyses and the potential recommendations of the Committee and submits to it a written response including the information about each measure taken or considered in light of its analyses and recommendations"*.

[20] One must keep in mind that children's time perception is not the same as adults'

[21] Particularly by transposing in their domestic law all the rules that relate to child-friendly justice: *The UN Standard Minimum Rules for the Administration of Juvenile Justice* adopted by the General Assembly in its 45/113 resolution of 14 December1990. *Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime*, adopted by the UN Economic and Social Commission in its 2005/20 resolution of 22th July 2005. The general comment nr 10 of the Committee on the Rights of the Child. The *Guidelines of the Committee of Ministers of the Council of Europe on a child friendly justice* adopted on 17 November 2010.

[22] The minor may notably act before the European Court of Human Rights, the Committee against Torture, the Committee on the Rights of the Child.

[23] Article 9 of the OP3.

[24] Filing of a petition without procedure fees simply by post.

[25] Article 8 § 2 of the OP3.

Therefore, one can conclude that the procedure before the Committee on the Rights of the Child claims to be child-friendly and that real monitoring is implemented in order to maximise the effectiveness of the individual communications mechanism which further provides for an avenue of redress (compensation, reinstatement) of the damage suffered by the child at the root of the complaint, if a violation of his fundamental rights and liberties has been observed.

Conclusion

In conclusion, the flexibility and effectiveness deductible from the procedure regulation of the Committee with regard to handling of complaints filed by minors are factors that explain why the Committee on The Rights of the Child is to date the body which is the most capable of asserting childrenôs rights by taking into account his best interest as well as his specific situation in light of the CRC. The OP3 represents a new momentum for the protection of childrenôs rights. Even though there are still many challenges to rise to, this Protocol, supported by the civil societyôs hard work, is likely to sound the death knell of the Statesô inertia in terms of childrenôs access to justice. Numerous issues are appearing from this point forward. The information must circulate in order to optimise the effectiveness of this new Protocol.

The States must reinforce their domestic remedies and implement the guidelines on a child-friendly justice. It is crucial that they become aware of the significance of the OP3 that is not just another mechanism but rather a ñcapacitationò instrument that minors can use to assert their rights. It is their responsibility to ratify this Protocol in order to realise the commitments made further to the ratification of the CRC. It is a ñdeclaration of faithò, as it were, from the States reaffirming their will to recognise the child as a rights holder. The OP3 embodies the corner stone of the protection system of childrenôs rights as well as of human rights, thereby guaranteeing the preeminence of the rights. Its implementation is a step forward towards the advent of the Rule of law that will provide a higher, more successfully completed dimension of democracy, by giving all the meaning to the principle of participation.

Extract from *Le troisième protocole facultatif à la Convention internationale relative aux droits de l'enfant établissant une procédure de présentation de communications individuelles – De la nécessité de ratifier un instrument ouvrant la voie à l'effectivité des droits*, September 2014 (available on www.defensedesenfants.be)

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Go de Nuit–night girls: the voices of young girls of Abidjan, Ivory Coast

Rosalie Billault & Eliane de Latour

Rosalie Billault

Eliane de Latour

In Abidjan, Ivory Coast, an ever-increasing number of young girls between the ages 10 and 25 are engaged in the lowest level of prostitution. Charging between one to two euros (ú1-2) per encounter, they are at the bottom of the hierarchy among sex workers in the ghetto. Wherever they turn for help, they are treated with distain. For the families who should be their first source of protection and support, they are ó*too far lost*ô society sees them as ó*miscreants' and 'the wretched poor* rather than as victims of exploitation and violence; and to charities who should assist them they are *'beyond saving'*.

Through her anthropological work ó*Abidjan -- the invisible youth*ô and in her exhibition ó*Abidjan— forgotten beauties*ô Eliane de Latour has given a voice to these otherwise unheard young girls. Through the images Latour produced, the ógoôs were able to see themselves as beautiful and worthwhile. For the first time, replacing the contempt they feel from society with a positive self-image. Following the initial success of the photography project, some of the girls agreed to take part in a social reinsertion program. This project helped them re-establish a fulfilling role in society, continue their education and become wage earners in an occupation of their own choice.

Family breakdown is common in a context where political and economic insecurity are an ever-present reality. When violent conflict erupts, young and adolescent girls are among the primary victims. In Cote dôIvoire this reality has worsened in the cyclical wars of the last decades[1].

Following the partition of Ivory Coast in 2002, mass population displacement resulted in many girls from the central and north-western regions looking for a new life in the economic centres of the south, instead finding themselves stuck in the ghettos. In the years since, other girls have joined petty gangs of *fraîchenies* (meaning ófresh fleshô) Most of the girls are from Muslim families, displaced or destroyed during the conflict and its aftermath. They are illiterate, without identity papers and often lacking their birth certificate. Together with boys of the same age, themselves often involved in small-scale drug trafficking and racketing, they eke out an existence on the fringes of society.

Prostitution

The go charge around 1,000 to 1,500 CFA (about ú1.50 to ú2.00) per encounter and for just a few more francs, they will agree to unprotected sex. By charging so little, they have undercut the street prostitution market. The óprofessionalô prostitutes, whose rates are much higher, consider the ófraicheniesôa threat to their business and despise the young girls. Yet, despite operating at the very bottom of the prostitution network, they can still earn in a day as much as they would make in a week if they joined other young girls in the market selling oranges, sachets of water or date-expired medicine.

Tata : My first client was when I was 12. I had never been with a boy.

But unlike the sellers in the market, the ógoôs are disgusted by what they do to earn a living. They describe themselves as criminal, shameful, revolting: an image that their ópimpsô play on to maintain control.

[1] See for example the summary of the paper : ó*A national Strategy to counter gender-based violence in Ivory Coast*ô September 2014 ó*Moreover, the sociopolitical and post-electoral crises which the country has experienced have exacerbated gender inequalities and vulnerabilities [é] Studies and surveys have shown that the majority of survivors [of gender-based violence in Ivory Coast] are girls and women. For example, between 2011 and 2013, 97-99% of survivors interviewed were female.*

In this existence, youth in the ghetto live a self-perpetuating unhappiness, and none know how to escape; whether we are talking about their young, sexually frustrated, and equally impoverished clients, or their pimp- boyfriends to whom they report and share their wages, this generation of girls and boys find themselves in a spiraling misery.

Aicha : If there's no clients, I shout, ''standing up blowjob for 200', but if a client comes, I say it's 1,000.

The girls are not incorporated into any official prostitution network nor are they working for organized pimps who might prevent them from leaving an area. They are free to come and go, but they also highly vulnerable. Petty criminals, violence, police and sometimes simply restlessness keep the girls on the move within and between towns. Known as going on a *ôgôdougou',* as soon as they think they are under threat, they will often disappear and hide, sometimes for months.

Urban nomads

The *'go de ghettos'* live in porous groups, without clearly delineated territory and characterized by the unpredictability of their movements.

Essentially, they are urban nomads, when they are unable to negotiate a room from the manager of one of the *hôtels de passé,* they sleep in shacks called *entré-couché*[2]

Others live with a pimp-landlord. He acts as a sort of sexually exploitative father figure, ensuring the girlsô basic survival in exchange for the profit he makes renting his space to clients. This scenario often applies the youngest of the gos, aged around 10 years. They have runaway or been chased from their family and are in desperate need of protection. Such places have deplorable conditions, with neither toilets nor running water.

Ami : In the market-place in Gouro we slept on our sarongs or on cardboard boxes in front of the Lebanese shops. At two in the morning the watchman came to collect money. I told him I didn't have the 100 CFA, so he made me go away. Then a man came with CFA 1,000 and told me to go and sleep with him.

Outcasts

The ógosôfall through societyôs safety-nets. In part this is because they avoid approaching anyone who looks as if they could be an authority. More significantly, they tend to be ostracised by the organisations that should be there to support them; more often than not, the ógosô induce fear rather than sympathy. In the girlsô own words, society sees them as ódirty, diseased, dishonest, thieves, delinquent, volatile, beyond control, dangerous and violentô

Gbiki : I took risks, I took risks. I told myself it was the only way to protect myself, to be able to eat and to keep myself going.

The gos are not to be primarily motivated by economic needs when they attempt to break away from the ghetto, More than anything, they feel deeply shamed of their lives and desperately want to restore a sense of respect for themselves, for their children and in the eyes of those around them.

Tatiana : I am shame itself. I see myself as wrong; when I look at myself, what I see is just a whore standing in the street.

Family breakdowns

The girls are not prepared to concede an inch of the autonomy they have won by living off their bodies in the streets. In most cases, their underlying motive for leaving their families was to gain freedom from authority imposed on them as children, often in the form of severe violence. Regardless of societyôs strong disapproval, they want to continue fending for themselves and not to be told what to do by anyone else. To successfully reach out to the girls, we must first understand and recognize their search for freedom and dignity.

[2] These are wooden shacks situated in the poorer areas where you go in and you sleep. The rent is about 6 to 8,000 CFA a month (ú9 to 12), often more.

Rama : My mum said never to set foot in her house again, even if she was dying of hunger— she would rather die.

Disease, sickness and early pregnancy

Growing up on the street, ideas of hygiene and cleanliness are rudimentary and filth is everywhere. To wash, they use public showers, as it allows them to avoid searching for water or cleaning up afterwards. With no means to pay for medicine and very little information about healthcare, the girls tend to use traditional medicine to take care of themselves. Some helps, other treatments are very harmful. Early pregnancies are very frequent, whether wished for or not and abortion, which is illegal in Ivory Coast, can be fatal. In the ghettos where they live, the girls have little access to information on contraception, to treatment, to family planning and to curettage which is only available in some clinics and for a price of 40,000 ï 100,000 CFA (ú60 - ú150). Despite their desperation, the girls often see the birth of a child as a positive thing: a way of perpetuating their memory, avoiding a violent death and also way of providing for their old age. In their understanding of womanhood, women are defined by giving birth. For the gos, becoming mother feels like a step towards reentering normal life.

Kanté : The child will call me 'Mummy, Mummy'. Even if he does not help me, even if I am dead, when you see him you will say, 'Here is Kanté's child'. It would be as if I were still alive.

Prospects of better future

Few girls will ever realise their dreams in the ghetto. At best, they leave to follow a ótoy-friendô, but that involves being dependent and is thus a precarious existence.

To help them rebuild a life for themselves, it is necessary to integrate them into the workforce with a job or other means of generating income, and to help them eventually achieve a qualification. Yet this is not easily done. Local social services and international humanitarians alike tend to consider the girls beyond the reach of their programmes and capacities. Up until now, the only small hope for the future these girls have had was to use their own voice and will to escape.

Bijou : I'm not aiming to go backwards ; I'm looking to the future.

Vulnerable beneficiaries existing outside the professional nomenclature

Local NGOs see the girls as an impossible cause or even as a nuisance. They are considered too lost to be reintegrated into society and are thus not a éefficientô use of resourcesô In other instances, they are seen as a drag on the NGOôs work and results, measured in terms of bodies órescuedô, medicine dispensed or amounts of material provided. If ever taken into account by NGOs, the girls unique problems are overlooked. They are thrown together with other beneficiary groups as they crosscut humanitarian intervention categories focused on young women, gender-based violence, AIDS, education or help for street children. Yet, in reality, their lives and their needs cannot be understood nor addressed so simply.

In international and national conference rooms where social policy is decided, these categories of aid are standardised and often compete with each other for priority status, sometimes more on the basis of lobbying pressure than analysis. As a result, the ó*go de ghetto'* are poorly identified and remain outside existing aid programmes. The stigma that hangs over them perpetuates their exclusion from the sympathies and thus the assistance of international and local social assistance programs.

The drive to leave, to change and to grow…..and in a short span of time!

With Latourôs photographic exhibition the girls suddenly felt part of the something powerful and beautiful. Through ó*Go de nuit--forgotten beauties*ô , they became models and actresses in a completely new and exciting context. For most of their lives, the girls have tried to hide themselves out of shame. Through the photographic project, they were finally recognized as victims of an unjust and criminalizing system for which they cannot be blamed. The self-respect and confidence gained through this experience proved an important first step towards helping them leave the ghetto and create a new future.

Although a positive starting point, the girls lacked a personal support network and remain vulnerable to negative influences that drag them back into old patterns.

It is difficult for the girls to understand that set backs, the need to restart and reflect on these lessons are a necessary and normal part of their personal growth when searching to escape the ghetto. In their eyes, only results that are quick and easily identified are órealô By consequence, when frustration or self doubt sets in, they easily give in to their fears, to self-criticism and to the judgments of others. Months of positive steps forward can be thrown away in an instant should the girls feel a loss of support or abandonment. Working with the girls towards long term, sustainable results require constant and personalized follow up.

Bijou : Before I was nothing ; now I am somebody.

There is no clear path towards helping the gos leave their circumstances. There will always be pit-falls, failures and the need to restart. But seeing their óbeauty rediscoveredôin photographs and knowing that their voices are finally being heard is motivation enough to continue supporting the gos through their daily challenges.

In much the same way the struggles and successes of the go drive us to continue pushing forward, social workers and NGOs could encourage and accompany the girls, if only those services knew how to listen to them.

Restoring a civic identity and finding a profession

ó*The house of the Go*ô is a pilot project in place from 2013 through 2014. The initiative was developed with the goal of assisting young girls and women, aged 14-25, who wanted to leave prostitution in search of a new social and professional life. The services available were specifically adapted for the circumstances of the gos with the hope of creating a resilient and effective approach responsive to their specific needs and challenges.

For approximately one year, the project has offered counseling services, health services and psychological services. The project funds tuition fees, accommodation, medical care, and reintegration kits to help them start small businesses. We also offer general support to their efforts at rebuilding social and family life, and assistance in conflict prevention. Family mediation initiatives are conducted in order to rebuild a support network and to help retrieve the civic identity of each girl. Building and maintaining a strong relationship of trust between the gos and the project team is essential. A personal investment in each girl allows us to define together their objectives and to help guide them through their daily efforts.

Unlike child prostitutes (usually aged between 10 to 13 years), the 14 to 25 year-old gos in this project have a longer experience in prostitution, spending much of their childhood and their full adolescence on the street. The prolongation of such a dangerous lifestyle has a tragic effect on their physical and mental health.

At the end of 2014, five of thirteen original beneficiaries of the project still continue their work placements and income-earning activities that they began during the project. This pilot project taught us that the amount of time needed to support reintegration and independence differs widely with each case. Successes depend on the availability of finances, on staff capacities and on the degree to which the girls have become inured to economics of survival during their time in the streets.

To the young prostitutes, the value of joining the workforce is worth the risk of failure. After all, there can be no true failures in their efforts to escape prostitution. The seeds of their struggle may grow later, somewhere else. The important thing is that they received the support needed begin sowing a new life.

Bijou : my friends ask me how I have got home. They would also like to go to school, like me.

The notions of ó*outputs*ô, ó*quantification of results*ô, ó*indicators of success*ô dominate the international development community approach. These concepts have little bearing on the human reality confronted by this project. The projectôs success cannot be evaluated in terms of the number of girls who stayed to the end. Achieving any break with their previous environment is already a success. Hitherto nobody had given any thought to these girlsð they were considered ñtoo savage, too immature and too violentò.

A range of skills emerged from girls once considered worthless: they now count amongst them a jewelry designer, a tailor, an electrician and a pastry chef. Despite these successes, the dignity recovered through their new identities remains fragile. The girls often feel that the new challenges faced entering school or the workforce are insurmountable. To stay motivated, they need daily encouragement.

The example set by the girls who are now out of prostitution is creating a dynamic of change in their ghetto networks. As the group of girls who left the ghetto grows, these success stories encourage others to themselves try. Moreover, local authorities, government services and NGOs alike are beginning to see that there are indeed effective methods available to assist these young women, that they are not a lost cause after all.

Future directions

In 2014 the Abel Community of Grand Bassam (an Italian NGO), with the support of the international NGO Terre des Hommes, conducted an inquiry into the underlying causes of prostitution among young girls. The inquiry interviewed 200 girls age 10 to 16 from different areas of Grand Bassam, a seaside town 15 kms from Abidjan. The study results focus on the individual circumstances of the girls, their families and the surrounding community and analyses the particular characteristics of prostitution amongst young girls.

In 2015, the programme piloted by Latour will grow into a permanent programme for the social and professional reintegration of girl prostitutes aged between 10 and 25. The project entitled ôGo de nuitô, will bring together in a single centre the full range of services needed to support the gos in their search for a new life: education facilities, civic reintegration assistance, mental and physical health care, hygiene, emergency accommodation, sport, cultural and recreation activities, and professional development. At ôGo du nuitô each participant will have the support needed to rebuild their social and civil identity by means of a professional and educational program based on their individual ambitions and desires.

Eliane de Latour, anthropologist, cinéaste and director of research at the National French Research Centre (CNRS), works in France and Africa. Through cinema, photography, scientific articles or literature, she takes a careful look at the closed worlds of those who are pushed behind physical or social boundaries.

Rosalie Billault, international lawyer, has worked for seven years for international cooperation organizations in the field of human rights and the rule of law. Her experience focuses on the international mechanisms to promote and protect children's rights and women's rights.

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http://elianedelatour.com/projets/go-de-nuit-dabidjan/

The Voice of the Child in English Family Courts

Anthony Douglas CBE

The international dimension

In the last twelve months, I have spoken with those responsible for child protection in many jurisdictions. How we work in England is only one approach to how children's needs, wishes and feelings are understood and acted upon ï or not. My conversations have led me to conclude that the problems we face in this field across the globe are converging, just as the political context for providing services is increasingly diverging. So, we are facing a convergence of the issues, and widespread difference in how we should respond.

We often think that the scale of what we do in England is at times unmanageable. We have around 85,000 children in care at any one time and half a million children assessed as being 'in need' Yet within the space of a few months, social care agencies in Russia have been faced with supporting 450,000 people displaced by the conflict in Eastern Ukraine, primarily Russian speakers from Crimea heading for Russia where they feel safe. I met the official in charge of children's services in China, who confided in me that he felt a little stressed out with his job, which I did not find surprising when he told me he had responsibility for 800,000 abandoned children, often abandoned without any means of identification. Nearly all children in care in England can be identified, and some of the work I will discuss in this article is about how children's voices can be heard by their birth parents from whom they are taken away and the reason why this is important.

The flip side of this is how children who cannot live with their parents are being helped to understand the problems faced by their birth parents, and why they cannot live with them anymore. One technique is digital life story work, including videos and photos, which can be accessed throughout that child's life.

Most countries and jurisdictions I have visited or where we have received delegations in England are trying to improve their in-country services. I will mention two: the Hungarian officials who wanted to strengthen their child protection response after a local magistrate bailed a father who had killed one of his children back home to look after his other children without him being assessed. They were examining ways of introducing rigorous assessment standards into their professional culture. And in Kazakhstan, the government decided to call time on 'baby touristsô from the West coming to their country to find a child to adopt. At one point, a high percentage of visas for the country were being granted to 'baby touristsô Like so many countries experiencing a 'baby drainô to more affluent countries, Kazakhstan acted to put in place an effective and child-focused welfare service; now tourist visas are being granted for better reasons.

I do not mean to imply that family court practice in England is easy. A delegation from Sweden told me that they would make on average three visits to the one visit we in England are resourced to make to families. The care system here is based upon reducing risk to children rather than that found in the more pedagogically-based care systems in some Northern European countries like Denmark. No country has it easy and each needs to respond to its own circumstances. Working with children and families is complex and difficult wherever you are. In Western Australia, which is characterised by the 'tyranny of distance', judges, magistrates and social workers fly together to remote townships every few months to hold a family court in the 'outback', undertaking as much direct work as they have time for when they are there.

So what do we do in England?

In England, we have a legal responsibility to put the best interests of the child at the forefront of any decision making process. This has been reinforced in legislation since 1969 and most clearly in 1989 with the introduction of the Children Act. This legislation has been consolidated and built on over the last 25 years with new provisions, extending the rights of various children like care leavers, children with disabilities and their carers and children who are adopted from care and their adoptive parents. Future developments include a new legal definition of long-term foster care, giving so-called 'permanent fosteringô a higher status. Attention is being placed equally on more effective ways of keeping children at home safely, with the Government using funding incentives to local agencies to come up with innovative approaches. This applies to all sectors: legal; social care; health; and education. For example, a programme which originated in Australia, MECSH (Maternity Early Childhood Sustained Home Visiting programme), in which health visitors have 25

contacts with a vulnerable new mother in the first two years of a childôs life, is currently being trialled in five areas of the United Kingdom, with excellent initial results in terms of improved outcomes for the children being supported. These programmes seek to enable the voice of the child not just to be heard, but to be acted upon.

It is the role of all professionals operating in the English Family Justice System to represent the voice of the child. Social workers from local councils, Cafcass practitioners, solicitors, judges and magistrates, each have different roles in proceedings, but all aim to understand the needs of each child and to make that childôs life better. The Family Justice Young People's Board (FJYPB) is a group of around 40 children and young people who have been through the family justice system or who have an interest in children's rights and the family courts. Originally created by Cafcass in 2006, the Board was established to help the organisation remain focused on children and young people. Recently, the Board has been expanded to cover the family justice system on a national scale. The Board's remit is to help ensure that the work of the Family Justice Board is child centred and child-inclusive.

Cafcass are asked by the courts to report on over 140,000 children a year throughout England. Our work can be divided into two areas: public law and private law. In public law proceedings, where a local council applies to take a child into care or for a supervision order to monitor the familyôs care of the child, Cafcass represents the voice of the child through childrenôs guardians, who are appointed by the court. In private law proceedings, Cafcass practitioners provide safeguarding information to the court and may also be asked to recommend to courts where children should live and who they should spend time with after their parents separate or divorce. The final decisions for the childôs future are taken by judges or magistrates, using all of the evidence available.

The following feedback to one of our practitioners from a mother about a girl in a private law case shows what we aim and try to achieve:

ñWhen Rose[1] *had to come and meet you, you were wonderful with her. You explained why she was there, what was going to happen and you made a strange environment feel safe and secure for her, meaning that she warmed to you quickly and opened up to you.*

With my husband and myself you showed us that communication between us had got into a far worse state than either of us realised. We worked on that with your help.

Rose now looks forward to seeing her dad again, instead of being upset at the prospect. He is happy theyôre having fun together again and are rebuilding what had broken down between them. I am happier because thanks to you, our daughterôs feelings have been acknowledged, we have all listened and tried to communicate better and trust between us all is re-growing.ò

The current operating model in public law cases

Where a local council applies for a care order or a supervision order, we provide the independent social work oversight of the local authorityôs assessment and care plan. In some cases, we work with the local authority before they apply to court, including to support a diversion away from court back into child protection planning in the community, or to ensure that where a case does need to go to court, that everything that needs to be done has been done. Our work in proceedings is set out in the Revised Public Law Outline and provisions in the Children and Families Act 2014. The focus is to complete all but the most exceptional cases within six months. To assist with this, we have developed a joint tool with local councils so that council social workers and childrenôs guardians are reporting to court on the same domains. The key domains in a case analysis are the following:

1. **A significant harm threshold analysis.** This looks at the harm the child has suffered or is at imminent risk of suffering.
2. **An analysis of parenting capability and whether any shortfall in capability can be made up in the child's timescale**. The crucial question to answer is whether the parent(s) in question can look after the child who is subject to the court application in a safe way and within the timescales for the child.
3. **A child impact analysis**. This considers the impact of what has been happening and what is proposed for the future on the child. If a sibling group is the subject of the application, the impact on each individual child has to be differentiated. Here is an example:

Paul[2] *was born with the classic symptoms of drug withdrawal ï shaking, hyper vigilance etc. An assessment was made that his mother was more in love with the drugs she was using than him and that she could not focus on him and his needs. He was placed in foster care and within a few weeks was starting to thrive. At the start of the care proceedings, he was five months old and a happy boy without any problems. He felt safe with his foster mother.*

[1] Not her real name

[2] Not his real name

4. **An early permanence analysis**. This is the analysis of what should happen next for the child. The main options are: returning home; kinship care, with relatives; permanent fostering; special guardianship; or adoption. The permanence option put forward to the court has to be a customised one, and must include a support plan. The crucial importance of support plans in achieving positive permanence for children is a strong feature of English social work and family court practice. Recent case law emphasises the importance of analysing all viable permanence options as well as the preferred option.

The current operating model in private law cases

Over 90% of parents resolve the arrangements for caring for their children following separation or divorce without recourse to court. Those who do go to court usually do so for one of two reasons ï either because communication has broken down and both parents are seeking care of the child; or because one parent thinks the other is unsuitable or dangerous to have the care of the child or to spend time with the child. There are high levels of conflict and distress in many private law cases; a small number of homicide/suicides over the last few years illustrate just how high the stakes can be.

A range of voluntary sector organisations provide out of court services for separated parents in the community, but these can be patchy and hard to find. Work is underway through a range of pilot programmes to increase the number of parents who can be supported to resolve their conflict out of court. This is especially important as we find that the court process itself is often the mortar to strengthen the wall between parents even more.

A recent innovation in English law requires the parent who applies to court to first attend an information session, which is publically funded, with a mediator (a Mediation Information and Assessment Meeting, MIAM), other than in specific exceptional circumstances, for example, where there is evidence of domestic violence. There is a growing campaign arguing for more child-inclusive mediation; whilst there are over 400 mediators accredited to practice direct child consultation (DCC), most mediators do not include children in the process. Through their representative groups, children themselves are arguing strongly for inclusion on some basis, proportionate to their age and understanding.

Under the Child Arrangements Programme (April 2014), Cafcass is required to undertake police checks, checks with local council social services and screening for risk factors. A safeguarding letter is then produced for the first hearing in court. Where final resolution is not possible at this stage, the case may be passed to Cafcass for further work.

Children are not seen before this hearing but they will always be seen if the case goes beyond this point. A pilot is currently underway to assess whether it is beneficial to include children prior to the first hearing in some way. Between 5% and 10% of parents who do turn to the court to decide the arrangements for the care of their children have sufficiently serious problems for their children to be granted separate legal representation and to be allocated a childrenôs guardian to represent the childôs best interest.

Since April 2014, England and Wales have been governed by a single family court. In practice, this means that magistrates are hearing more private law cases rather than judges hearing nearly every case, and applications are being gate-kept in a more structured way and then being allocated to the right level in the judiciary. This is a massive change programme that can only be delivered over time. It also has a major training requirement for magistrates which is under way.

Listening to the voice of the child

The best way of making the voice of the child heard varies depending on that childôs individual circumstances, for example, their age and understanding. Many need support over a period of time to be able to articulate their needs, wishes and feelings, although for some, talking about their experiences and feelings can in itself be therapeutic. Part of assessing a child is to assess how best to hear from them directly or indirectly.

Hearing from a baby or young child may involve the observation of the child with their carer(s), as well as obtaining the views of those who know the baby or child well. Such indirect views are proxies for the voice of the child. Hearing from those who know the child well is particularly important, for both younger and older children especially if a practitioner only has one visit with the child. Some children do have conflicting views, and may express different views at different times. A safe carer or a reliable professional such as a teacher is usually able to say how the child behaves or thinks over time. In this way, it is preferable to identify the ñteam around the childò and to gauge their aggregated view of the child, supplemented by direct work where possible.

Cafcass has a range of highly-developed tools to use when working with children, particularly to draw out their deep and often hidden emotions. Our 'Needs, Wishes and Feelings' resources are used by practitioners in their work with children to enable children to share their views; the materials completed may be used by practitioners to help inform their analysis and may also be submitted directly to the court. In private law, children of sufficient age and understanding (usually around seven and above) are encouraged by Family Court Advisors (FCAs) to complete a ñletter to the judgeò and most children choose to do this. Children may also be encouraged to draw a

picture for the judge. These tools are also being used increasingly in public law as well. Our practitioners use technology to engage with children, with applications on tablet devices being used interactively with children, allowing them to draw, write their own text, and describe their daily lives and express their feelings through activities. These include selecting pictures to show what is important to them, like family members, pets or hobbies and what makes them feel safe and happy. Cafcass practitioners have noted that sitting side by side with children, rather than talking to them in an interview format can elicit much better information.

Whilst in the vast majority of cases children are satisfied with Cafcass reporting their feelings to the court on their behalf, in some cases judges and magistrates do meet children and young people themselves in court ï usually in their rooms ï and as part of the court process. These meetings must be handled carefully to avoid any evidential difficulties.

The prospect of meeting the judge or talking directly with them can be empowering for some children and young people and can serve to reassure them about the court process and the judge who is making important decisions on their behalf, but it can also be impossibly threatening for others. Whilst some judges are excellent at facilitating such meetings, other judges and magistrates may have less experience and may need training to do this well. In addition, children benefit from some preparation before such meetings. Where a Cafcass practitioner helps to facilitate a meeting between a child and a judge or magistrate, managing the childôs expectations of the purpose and outcome of the meetings is an important part of their role. ôSeeing the judgeôhas led to breakthroughs in many cases, where the child feels heard for the first time. Many children on the Family Justice Young Peopleôs Board speak eloquently from personal experience about such breakthroughs. The UK Justice Minister, Simon Hughes, recently announced a change in Government policy to introduce a presumption that children over 10 in private law cases would be able to speak to the judicial decision-maker in their case. This is an important step in childrenôs rights in court. Various working groups are currently determining how best to achieve this reform in practice and Cafcass are assisting with a number of pilots where children are being given the opportunity to meet the judge. In one of these areas, the Family Justice Young Peopleôs Board gave a training session to judges and magistrates about seeing children in proceedings.

This new right can be contrasted with the appalling experience of many child witnesses in recent criminal cases in England, notably cases involving child sexual exploitation. Girls said that their experience of being cross-examined in court was, in a different way, as abusive as the original abuse and trauma. It is clear that significant work is needed within the criminal justice system to ensure that hearing the voices of young people is done sensitively and appropriately without causing further harm to the child.

The voice of the child is gaining greater prominence in family courts and family court cases throughout England, and this is building on solid foundations. Obtaining the voice of an individual child is a complex process in its own right. For the court process to produce the right future framework for the child, their voice has to be at the heart of any set of public or private law proceedings. And it has to be kept there. It can only be kept there by the sustained effort and concentration of all the professionals involved, and the continuing efforts of safe family members. Their input is the most important of all, as they will need to be around after the court case to support the recover, growth and development of the child.

Anthony Douglas CBE, Chief Executive Cafcass

The Child and Family Courts Advisory and Support Service is a specialist national agency which has supported over 140,000 children in public and private law cases since 2004. Anthony Douglas has also been a non-executive director of the Criminal Records Bureau (CRB) and a government adviser on youth justice and children in need of care and protection. He is currently a Visiting Fellow of the University of East Anglia and of the University of Plymouth, and has been Chair of the British Association for Adoption and Fostering (BAAF) since 2005

December 2014

Voice of the child in New Zealand Family Court proceedings

Judge Paul Geoghegan & Emily Stannard

Judge Paul Geoghegan

Emily Stannard

I. Introduction

I was sitting in my chambers with a young boy aged between 7 and 9 and his Court appointed lawyer. He was the subject of a custody battle between his parents, and a matter which had been raised by his mother was the inherent danger present in a boy of his age being permitted to be in the cow milking shed at milking time, a risk which clearly his father did not appreciate. As I spoke with this boy about life on the farm it was clear to me that he enjoyed every aspect of it. As to being in the milking shed I asked him whether anything bad had ever happened to him in the milking shed. He thought for a very brief moment before telling me that while nothing bad had ever happened to him a cow had once ñpooedò on his head. He then started laughing in a way which had me laughing along with him. It was clear that at least from his perspective the cowshed at milking time was a fun place to be. In many respects, the judicial interview is simply an opportunity to put a face to a name but often it is also an opportunity to allow matters at issue between parents to be placed into perspective by a child.

The judicial interviewing of children in disputes regarding their care and guardianship is a well established part of the New Zealand legal framework. While there is still some debate as to the purpose of such an interview, namely whether it is simply an opportunity to meet a child or whether the interview should serve some more substantial purpose, the interviewing of children by Judges is commonplace. It is not however, the only way, or even the primary way in which children are given a voice in the proceedings affecting them. The most common way of providing them with that voice is through the appointment of a lawyer to represent them.

Another method of doing so is through the obtaining of psychological reports. Much will be dependent on the nature of the proceedings before the Court. Where the childôs care arrangements are in dispute or where their guardians cannot resolve a disputed guardianship issue such proceedings are dealt with under the provisions of the Care of Children Act 2004. Where there are issues of neglect which has prompted intervention by the State those proceedings are dealt with under the provisions of the Children Young Persons and Their Families Act 1989.

The purpose of this article is to demonstrate how the voice of the child is heard in Family Court proceedings in New Zealand. The primary focus of the article will be upon proceedings under the Care of Children Act 2004 and upon the undertaking of judicial interviews with children in such proceedings.

II: Legislative provisions

Care of Children Act 2004

The Care of Children Act 2004 (COCA) applies to proceedings involving the guardianship, day-to-day care for, or contact with a child, or the administration of a childôs property. It requires that a child be given reasonable opportunities to express views on matters affecting him or her, and any of the childôs views must be taken into account, either directly or through a representative.

A childôs views are not the same as a childôs wishes. Views include a wide range of issues such as the advantages and disadvantages about being in a personôs care, what the child enjoys, and what matters are important to the child and which are not.[1] The Family Court has noted that

[1] *C v S* [2006] NZFLR 745 (HC).

ówishômeans a desire or hope while óviewômeans an attitude or opinion.[2]

The plurals óopportunitiesô and ómattersô indicate that it may be necessary to provide the child with more than one opportunity to express his or her views, especially if the hearing is over a long period of time.[3] Of some significance is that the section is not limited by the childôs age or maturity as it is in Article 12 of the United Nations Convention on the Rights of the Child 1989 (UNCROC).[4] In practice however, the weight to be attached to a childôs views will be affected by those very considerations.

COCA has additional criteria for taking childrenôs views into account where proceedings are issued pursuant to the Hague Convention which is implemented in New Zealand law through the provisions of COCA. Section 106(1)(d) allows the Court to refuse to make an order returning the child abducted to New Zealand if satisfied that the child objects to being returned and has attained an age and degree of maturity at which it is appropriate to give weight to the childôs views. This is in addition to taking into account the childôs views under s 6(2)(b).

Other Statutory Provisions

Children, Young Persons, and Their Families Act 1989

The Children, Young Persons, and Their Families Act 1989 (CYPFA) applies to proceedings involving alleged neglect or abuse of children requiring intervention of the State, and to criminal proceedings involving young persons aged between 14 and 17 (and in some cases criminal proceedings against 12 and 13 year old children). Section 5(d) requires the Court to give consideration:

ñTo the wishes of the child or young person, so far as those wishes can be reasonably ascertained and that those wishes should be given such weight as is appropriate in the circumstances, having regard to the age, maturity and culture of the child or young person.ò

This section has the weaker ógive consideration toô rather than the ótake into accountôin s 6 of COCA. It also places additional qualifications on the childôs views (age, maturity and culture) which COCA does not. This would appear to be a logical and legitimate distinction given that a childôs wishes as to the outcome of the proceedings must necessarily be weighed against the welfare issues inherent where abuse or neglect has been established.

Where care and protection proceedings are filed in respect of a child or young person the appointment of a lawyer to represent that child or young person is mandatory pursuant to the Act.[5] The voice of the child or young person is then heard through the representations of counsel those representations either being made orally, or, more commonly, by the filing of a report in the proceedings.

A childôs voice may also be heard through the appointment of a lay advocate, the principal functions of whom are to ensure that the Court is ñmade aware of all cultural matters that are relevant to the proceedingsò and to represent the interests of the childôs or young personôs family group to the extent that those interests are not otherwise represented. A lay advocate is specifically empowered to:

ñMake representations on behalf of the child or young person in respect of any matter relating to the detention of that child or young person in secure care, or the care of that child or young person in a residence.ò[6]

The Court also has the power to direct the undertaking of medical, psychiatric or psychological reports ñin respect of any child or young person to whom the proceedings relate.ò[7]

It is suggested that although there is no bar to a judicial interview between children and the Judge in care and protection proceedings, such interviews would be far less common than in COCA proceedings given that the principal enquiry being undertaken is whether a child is in need of care and protection. Once that finding has been made a childôs view as to the outcome of the proceedings becomes more significant but is generally communicated to the Court through the Court appointed counsel.

Adoption Act 1955

Section 11(b) of the Adoption Act 1955 prevents the Court from making an interim adoption order before it is satisfied that the welfare and interests of the child are promoted by the adoption, due consideration being given to the wishes of the child, having regard to the age and understanding of the child. This again does not require the childôs views to be taken into account and is qualified by the age and understanding of the child. In practice the views of the child, where they are able to be ascertained will come before the Court through the mandatory report of a social worker. It is possible for the Court to appoint counsel to assist the Court for the purpose of ascertaining a childôs wishes however it is suggested that this would be a rare occurrence in New Zealand.

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2 *Chief Executive, Ministry of Social Development v C* FC Wanganui FAM-2004-083-374, 2nd September 2008, Judge Callinicos.

3 *C v S* above at n 1.

4 *Child Law* Brookers online edition at CC6.02

5 Section 159 Children, Young Persons and Their Families Act 1989.

6 Section 164 Children, Young Persons and Their Families Act 1989.

7 Section 178 Children, Young Persons and Their Families Act 1989.

Property (Relationships) Act 1976

In property disputes between spouses, civil union partners or de facto partners, those disputes being governed by the Property (Relationships) Act 1976, there are no specific provisions which provide a vehicle for a childôs voice to be heard, however s 26 of the Act requires the Court to have regard to the interests of any minor or dependent children and provides the Court with power to make an order settling relationship property on such children.

Domestic Violence Act 1995

The Domestic Violence Act 1995 makes provision for the issuing of protection and related orders through the Family Court in circumstances of domestic violence. The Act contemplates, and makes provision for an application for a protection order by a minor aged 16 years.[8] In such circumstances the Court has jurisdiction to appoint a lawyer to represent any such person. In other circumstances where an application for a protection or related order is made by one party to a relationship against another and there are related applications under COCA the Court will commonly appoint a lawyer to represent the children in both sets of proceedings to ensure that their voice may be heard, not only in the dispute regarding their care arrangements but also in the proceedings regarding allegations of domestic violence.

III: How the statutory provisions are put into practice

Lawyer for Child

In COCA proceedings the Court may appoint a lawyer to represent the child if it has concerns for the safety and wellbeing of the child and it considers the appointment necessary.[9] The role involves:[10]

- Acting for the child in the proceedings in a way that promotes the welfare and best interests of the child;
- Ensuring any views expressed by the child to the lawyer affecting the child and relevant to the proceedings are communicated to the court;
- Assisting the parties to reach agreement on the matters in dispute to the extent that doing so is in the childôs best interests;
- Providing the child with information about rights to appeal and the merits of any such appeal; and
- Undertaking any other task required by the Act.
- The lawyer for child must meet with the child and ascertain their views on matters affecting the child which are relevant to the proceedings, unless there are exceptional circumstances where this would be inappropriate.[11] The requirement to ascertain the childôs views is enforced quite stringently in the New Zealand courts.

In *C v S*[12] the lawyer for child met a four year old child three times and observed her at her preschool. He had spoken with the child to build rapport with her, but had not specifically asked what her views were. Randerson J found that section 6 of COCA had not been complied with. The child was intelligent and articulate and able to express her views. However he did point out that care would have to be taken in deciding how much weight to give the childôs views due to her young age, that her behaviour around each of the parties might be more helpful than her verbal views, and that not all children aged four would be able to give verbal views.

In circumstances where lawyer for child is uncertain or unclear as to the views being expressed by a child, or, more commonly, as to whether the child is being unduly influenced by another person as to those views it is common for a psychological report to be requested to investigate such issues.

A lawyer for child will provide regular reports to the Court in respect of the proceedings and the childôs views and will also advise the Court as to whether or not a child wishes to engage in a judicial interview.

Psychologist's Report

The Court may request a psychologistôs report to help determine the outcome of an application for a guardianship order, parenting order, or a Hague Convention proceeding.[13] The report can cover all or any of:[14]

- How current arrangements for the childôs care are working for the child;
- The childôs relationship with each party, including, if appropriate, the childôs attachment to each party;
- The childôs relationship with other significant persons in the childôs life;
- The effect or likely effect on the child of each partyôs parenting skills;
- The effect or likely effect on the child of the partiesô ability or otherwise to co-operate in the parenting of the child;

[8] Section 9 Domestic Violence Act 1995.

[9] Section 7 Care of Children Act 2004. Section 81(1)(b) of the Domestic Violence Act 1995 also gives the Court discretion to appoint a lawyer for child.

[10] Section 9B(1)(a)-(e) Family Courts Act 1980.

[11] Supra at 9B(2) and (3).

[12] *C v S* [2006] NZFLR 745 (HC).

[13] Section 133(5) Care of Children Act 2004.

[14] Section 133(1)(a)-(g) Care of Children Act 2004 under the heading ópsychological reportô

- The advantages and disadvantages of the options of the care for the child; and
- Any other matters the court specifies.

However the Court may only order a psychologistôs report if it believes it is essential, is the best source of the information required, it will not cause undue delay and that the report is not solely or primarily to determine the childôs wishes.[15] The Court is also required to take into account the partiesôwishes about a psychologistôs report being ordered if the views can be found speedily.[16] Given the provisions of s 6 of COCA and the emphasis on ascertaining the views of a child the restrictions on directing a report solely or primarily to determine a childôs wishes may be viewed as somewhat puzzling.

Cultural Report

A cultural report covers aspects of a childôs cultural background including religious denomination and practice.[17] There are similar restrictions on obtaining a cultural report as there are on obtaining a psychologistôs report. While a cultural report will not focus upon the views of a child it is certainly another important means of enabling a childôs voice to be heard in respect of cultural matters relevant to that childôs background.

Judicial Interview of Child

Childrenôs views can also be ascertained through a meeting with a Judge. Judges have a discretion in deciding whether to conduct an interview, and how it is conducted and recorded. Section 6(2)(b) of COCA allows for children to have opportunities to express their views directly to the Court. The Family Courtôs rules of procedure allow a Judge to order the parties, their lawyers, and lawyer for child be excluded from the hearing while the childôs wishes or views are ascertained.[18] Judges are able to direct where and when they will ascertain those views.[19] In practice this will often occur in the interviewing Judgeôs chambers. Lawyer for child will be present at such interviews together with anyone else the Judge may consider necessary.

The Act does not offer guidance about the timing, place and purpose of the judicial interview[20] and the rules of procedure do not set rules for interviewing or recording the childôs views.

However it is common for the lawyer for child to be present and case law has stated that there is a strong preference for the childôs lawyer to be present at the interview.[21] Such interviews are normally undertaken immediately prior to the commencements of, or during, the substantive hearing of the issues in dispute.

IV: Literature

There has been a significant amount of academic and judicial comment on the way childrenôs views are ascertained in Family Court proceedings. This is especially the case with judicial interviews of children where the lack of a standard procedure has given rise to concerns about natural justice and procedural fairness.[22]

Caldwell and Taylorôs Study

Associate Professor John Caldwell and Nicola Taylor interviewed all of New Zealandôs Family Court Judges in 2012 to ascertain their interviewing practices and how they dealt with issues such as natural justice.[23] The five topics relating to natural justice were:

- Situations where children said they were prepared to discuss their views with the Judge, but only if their parents were not told;
- How Judges dealt with information, other than the childôs views, conveyed by the child when it is evidence the Judge regards as important;
- Recording the interview;
- Providing feedback to the parties on the interview; and
- Any lingering natural justice concerns about judicial interviews.

Situations where the child would only discuss their views if the parents were not told

This request was reasonably rare, with 49% of the Judges reporting they had received such a request but that it had only happened on a very occasional basis. Of those who had a child ask them not to speak to their parents, 27% had agreed to keep it confidential. However the remaining Judges advised the child that any information would need to be conveyed to the parents.[24]

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15 Section 133(6) Care of Children Act 2004.

16 Section 133(7) Care of Children Act 2004.

17 Section 133(1) Care of Children Act 2004 under heading ócultural reportô

18 Rule 54(a) Family Court Rules 2002.

19 Rule 54(b) Family Court Rules 2002.

20 *Child Law* Brookers online edition at CC4.12.

21 *S v S* [2009] NZFLR 108 (FC) at [63].

22 Doogue óA seismic shift or a minor realignment? A view from the bench on ascertaining childrenôs viewsò (2006) 5 NZFLJ 198 at 198 and 204 cited in Caldwell and Taylor ñNatural Justice and Judicial Meetings with Children: Documenting Practice within the New Zealand Family Courtò (2013) NZFLJ 264.

23 Calwell and Taylor ñNatural Justice and Meetings with Children: Documenting Practice within the New Zealand Family Courtò(2013) NZFLJ 264.

24 Ibid.

Situations where the child disclosed information, other than their views, which was important to the proceeding

Judicial responses on this issue varied, however the most common response was that the Judge would disclose such information to the parents (53%), with almost all of those Judges also saying they would disclose to the lawyer for child and any report writer as well. Just over half of those who would disclose to the parents said they would also disclose to Child Youth and Family Services, a branch of the Ministry of Social Development, where relevant material had been disclosed by a child.[25]

Slightly fewer said they would adjourn the proceedings to enable further investigation (42%), while 6% said they would recuse themselves. One Judge noted that there might be a need for the Judge to call evidence and another even speculated that the Judge might need to become a witness.[26]

The authors noted that this potential ñprocedural nightmareò of new and important evidence being disclosed so late in a proceeding has not yet eventuated in New Zealand.[27] However they do note that there is hypothetically a serious natural justice concern which could arise here.

Recording the discussion with the child

The majority of Judges (64%) did not record interviews, while 36% did.[28] Of those who did record, very few recorded all interviews. Some would record interviews only where the parties were particularly litigious, there was a suspicion that serious allegations would be made, or for some reason there might be an issue about the weight given to the childôs views.[29] Those who recorded did so because of natural justice concerns, protecting themselves on appeal, and to comply with case law.[30]

Reasons for not recording included: the child becoming unwilling to talk, the child possibly feeling like he or she is being treated like a criminal, that recording the child was just another way of making the child give evidence, the possibility of the recording becoming evidence, and the interview becoming overanalysed and potentially blown out of proportion.[31]

Almost all Judges said that they would take handwritten notes of the interview. Most Judges did not believe that these were evidence with some Judges destroying the notes after reporting back to the parties while others put them on the court file.[32]

Providing feedback to the parties on the judicial meeting with the child

All the Judges interviewed said they would provide oral feedback of the interview. Some provided a typed minute with notes of the interview, and a very small percentage provided the transcript of the taped interview.[33]

Lingering concerns about natural justice in judicial interviews

Here it was pointed out that interviews while helpful, were not game changing and if they were game changing there might be more natural justice concerns. Interviewing early in the hearing and allowing the parties to comment helped to resolve natural justice concerns. Most Judges noted that the theoretical natural justice issues did not come into play in practice, although a small percentage expressed concerns that they were interviewing a key witness without the opportunity of cross examination by the parties.

Conclusion

The authors noted that ñ[t]he benefits of judicial interviewing for both the child and judge, and the invariable practice of feedback to the parents, were usually thought to mitigate any residual concerns over process.ò[34]

Judge Ian Mill – New Zealand Family Court Judge

Judge Mill analysed 20 cases in 2007 involving 42 children.[35] In 17 of the 20 cases, judicial interviews were conducted before the evidence was completed and the Judge reported back to the parties before the evidence continued or began. [36] The rationale for this is that in the New Zealand Family Court all evidence in chief is given through affidavits filed prior to the commencement of the hearing. Accordingly the background facts are known and conducting interviews at an early stage meant parents had an opportunity to consider and respond to any feedback regarding the interviews.

The author listed commonly identified risks in judicial interviews of children and then addressed each of these concerns. The concerns were:[37]

[25] Ibid.

[26] Ibid.

[27] Caldwell and Taylor article above at n 22 at 266.

[28] Ibid.

[29] Supra at 267.

[30] Supra at 268.

[31] Supra at 267.

[32] Supra at 268.

[33] Supra at 269.

[34] Supra at 270.

[35] Mill ñConversations with children: a Judgeôs perspective on meeting the patient before operating on the familyò (2008) 6 NZFLJ 72.

[36] Ibid.

[37] Supra at 73.

- Judges competence to interview children and the possible harm to children of being interviewed in an artificial environment by a well-meaning amateur;
- The potential damage to due process and nature justice by private discussions with children;
- Judges will not be able to tell when a child is being coached;
- Potential difficulties created by a child wishing to speak in confidence;
- Uncertainty around the form of record of the interview and the way in which the interview is reported back to the parties.

Competency

Judge Mill pointed out that while there are risks of traumatising or misinterpreting children, Judges meet with their parents and other witnesses ñwho are often far more complex and deceptive.ò[38] And while Family Court Judges are neither social workers nor psychologists, they are required to make decisions and need the best information to be able to do that.

Furthermore hearing their childôs views from a Judge can have quite a powerful effect on parents, and can help resolve conflict.[39] Judge Mill also noted that Judges often do not have to interpret the childôs wishes without help.[40] In this regard, Judges do not meet with children in a vacuum. In all cases where the childôs views can be ascertained those views will have been set out in a report from lawyer for child or in a psychological report.

Fairness and due process

Interviewing children and not making a transcript of an audio recording available does not accord with the normal rule of natural justice. However Judge Mill referred to a paper by Associate Professor Caldwell which emphasised the flexibility in natural justice.[41] He also referred to the House of Lords Decision *Official Solicitor v K*[42] which held the importance given to the childôs welfare could mean that the rules of natural justice could be modified[43]

Feedback was given in all 20 cases and parties were given the opportunity to respond.[44]

The harmful amateur

In none of the cases was the child compelled to speak with the Judge. While the situation could be intimidating for children, Judges could have the interview in a less formal setting such as chambers, or lawyer for childôs office. The child would also have been briefed by his or her lawyer.[45]

Forensics best left to the experts

While Judges make findings from the interview, often but not always those findings are not significant. However the author contends ñ[a]n impression of the strength of feelings or the views of a child, although seeming minor, can be decisive.ò[46] Findings from some interviews studied included:[47]

- The Judge getting a picture of the child and his anxiety;
- The Judge observing the interaction amongst four children who were separated by the current care arrangements;
- Appreciating the childôs grasp of adult issues;
- Sensing a childôs reluctance to live with his father, and that this reluctance did not come from his mother;
- The childôs views were accurately reported;
- The child giving detailed reasons for why he wanted to live with a certain parent;
- Hearing further allegations of abuse;
- Assessing the strength of the childôs views; and
- Finding it clear the child had been influenced.

The Coached Child

Here Judge Mill noted that ñ[t]he best a Judge can do is look for any signs of coaching and, if in doubt, leave it to an expert assessment.ò[48]

Confidentiality

In the cases studied, every Judge made it clear to the child at the start of the interview that they would be reporting back to the parents.[49] Furthermore the likelihood of a child disclosing previously unknown information to the Judge was regarded as slim.

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38 Supra at 74.

39 Ibid.

40 Ibid.

41 Supra at 74 and 75 quoting Caldwell ñJudicial Interviews with children: some legal backgroundò (2007) 5 NZFLJ 215 at 218 and 219.

42 *Official Solicitor v K* [1963] 3 All ER 191.

43 Above at n 36 at 75.

44 Supra at 75.

45 Ibid.

46 Supra at 76.

47 Ibid.

48 Ibid.

49 Ibid.

If a Judge did receive confidential information there are several possible consequences:

- The child later agreeing the information should be given to the parents;
- The proceedings being abandoned the child being referred for specialist assessment or a referral being made to the appropriate authority as a result of the material disclosed;
- The case proceeds without disclosing the information.

The Record

The author noted that there are differing views on audio recording. He predicted that the use of recording will increase as Judges become more comfortable with the process.[50]

Robinson and Henaghan – "Children Heard but Not listened To?"

Professor Mark Henaghan and Antoinette Robinson of the University of Otago analysed 120 cases decided under COCA between 2005 and 2010.[51] The importance of the childõs views was cogently expressed by the following statement.

ñSince every child is unique and no one is able to understand a childõs world better than the particular child, judges and others working with or making decisions about children *must* attempt to understand the *child's view* of his or her world, rather than making their own assumptions of the childõs world through predetermined ideas.ò[52]

One of the observations made by the authors with reference to the requirement that childrenõs views be taken into account was that while Judges often ascertained the childrenõs views and then sometimes discussed the weight to be placed on those expressed views, the study undertaken showed that very rarely do Judges indicate how they are taking account of the views they have before them. The authors stated:

ñPerhaps Judges think this is implied in their discussion about the weight to be placed on the views. However, in the cases studied, weight was often either not discussed at all, or was dealt with very briefly in a way that did not make it clear how the Judge had actually taken account of the views before them.ò

Several recommendations were made about improving the effectiveness of section 6 of COCA. Most importantly, the authors recommended that Judges and psychologists be trained in socio-cultural theory and in how to take childrenõs views into account. Such training would ñprovide the theoretical information which underlies the changes to s 6, *and* the practical training in how to engage and talk with children of all ages.ò[53]

This training would enable Judges to get the best out of judicial interviews and work through a process which takes into account any views expressed. This would hopefully increase the number of judicial interviews.[54] It would also promote natural justice, enabling children to better express their views and their views to be better understood.

Other possibilities included the childõs participation to extend beyond the court hearing and having other child-related statutes such as the Domestic Violence Act 1995 and CYPFA promote the modern concept of childhood (that children are separate people with a right to be heard) as COCA does. [55]

V: Conclusion

There is clear legislative emphasis in New Zealand on the need to take account of childrenõs views in matters which affect them. There are significant opportunities at any stage of appropriate proceedings to hear the voice of a child who is the subject of those proceedings. It is clear however that there is room for improvement. Issues raised around the competence and suitability of lawyers and Judges not simply to hear what a child is saying, but to understand what a child is saying and to then take account of that childõs views in a meaningful and relevant way in the proceedings are legitimate and cannot be dismissed lightly. While processes such as the judicial interview are well established in Family Court proceedings there are still differing views as to the purpose of such a meeting. The reality is that the process is one which will continue to evolve, hopefully in a way which will continue to ensure that the most vulnerable and important persons in the Court process are not merely bystanders but participants with the ability to make a meaningful and relevant contribution in matters impacting directly upon them.

Judge Paul Geoghegan* is a Family Court Judge in New Zealand and **Emily Stannard** is research counsel to the Tauranga District Court judges.

[50] Supra at 77.

[51] Robinson and Henaghan ñChildren: heard but not listened to? An analysis of childrenõs views under s 6 of the Care of Children Act 2004 (2011) 7 NZFLJ 39.

[52] Supra at 46.

[53] Ibid.

[54] Supra at 47.

[55] Ibid.

The voice of the child in Portuguese family courts: protection and private law

Judge Beatriz Borges

Summary:
This article focuses on the importance of children and youths under 18 years of age being heard in Portuguese courts in general, and on the evolution of Portuguese legislation, which holds that being heard is a right of children and youngsters. This followed the enactment in 1999 of the Law for the Promotion and Protection of Children and Youths in Danger[1] (hereinafter referred to as the Law).

Also analyzed here is the right of children and youngsters to participate and be heard on the dissolution of marriage and/or separation of their parents, and on the regulation of parental responsibilities when their residence and the establishment of relations between parents and children must be settled.

1. Hearing children and youngsters in Portuguese Courts

Principles of the Law

The principles governing hearing children and young people were brought in Portugal, with the publication of the Law.

This law, according to article 69 of the Portuguese Constitution, aimed to adjust parental rights to reflect the freedom and self-determination of children, who were seen for the first time not as unable to exercise their rights fully as a minor, but as being entitled to rights during the stage in their lives when they have not yet reached full development and still need help and protection.

Therefore, the Law and subsequent legislation have considered children or young people in general to be those under eighteen, or those who, being under twenty-one, have been the object of a protective intervention of the court before they reached eighteen, according to the terms of the Convention on the Rights of the Child, signed in New York in 1989 and approved by the Portuguese Parliament under Resolution 20/90 of September 12.

Extent of rights

Children and young people are not granted the same rights as adults.

Rights that are not assigned to children and youths are exercised by

- parents or, in the absence or inability of parents, by
- someone appointed by the judge (known as a tutor[2]), or by
- the prosecutor[3], or by
- the court itself[4] or
- even by a protection committee[5].

Exceptionally, a youth over sixteen can, provided it is authorized by his legal representatives[6], manage and dispose of the assets he has acquired through work and can run an everyday business according to his natural skills, but only when the amounts of money involved are small and when the money is earned through the exercise of his profession or craft.

A point to be especially noted is that in **adoption proceedings**[7] children and young people over the age of twelve[8] have a right to be consulted on their future and their consent must be given to a proposed adoption.

Representation

In courts, as a rule, children and youngsters under eighteen are represented by parents, and both parents must agree if they wish to propose actions in court to defend or promote the interests of their children. But, as already noted, the best interests

[1] Law 147/1999 of September 1

[2] Ssomeone who cares for the child (family, neighbour)

[3] e.g. authorization for the alienation of property - article 5 of DL 272/2001 of 13 October

[4] e.g. extrajudicial partition - article 1889 of the Civil Code

[5] authorization for participation in shows or cultural, artistic or advertising activities (Law 105/2009 September 14

[6] article 127 of the Civil Code

[7] article 1981, paragraph 1, letter a), both of the Civil Code

[8] article 1984, point a

of a child are of paramount importance[9] to a court; those of the parents are secondary.

The defence of the best interests of a child/youngster is carried out by their legal representatives[10]. Unless there is a conflict of interest between the parents or legal guardians and the children, when a lawyer **must** be appointed or the presentation of their case ultimately rests with the prosecutor.

Since 1999 it has been emphasised that, in **civil guardianship lawsuits**, the principles contained in the Law are applicable. They are *inter alia* :

- the best interests of the child;
- participation in and being heard during proceedings,
- the admissibility of contradictory statements in the collection and examination of evidence;
- intervention and use of mediation services; and
- co-ordination between decisions made in the civil and criminal jurisdictions where the criminal jurisdiction has decided on guardianship measures.

2. Rights and duties of children and young people according to civil law and civil procedural law

Concerning the capacity of the child or young person to give evidence in court, the Law details certain rights concerning their participation in the processes and hearings directly related to them, for example in:

- promotion of welfare and protection hearings;
- decisions on the exercise of parental responsibilities;
- divorce;
- guardianship, etc.

In such civil suits there is a wide-ranging hearing[11], allowing the judge, who considers the physical and mental fitness of the deponent, to admit or exclude any testimony or hearing. The evaluation of the testimony is at the sole discretion of the judge[12].

However, as a rule, this latitude is restricted in some civil lawsuits involving parents because in these, family members may refuse to testify as witnesses[13]. Such lawsuits may be concerned with eviction from housing, buying and selling goods contracts nullity of contracts, etc.

In civil proceedings, children and young people who testify must comply with the general rules of evidence applied to adults[14] and may, in particular, be directly heard by the court or by teleconference in the court of their residence, if this is different from the court conducting the trial[15].

As a first step, the court will consider the fitness of the child/youth to testify, given that his testimony can be contested by the opposing party. The examination is conducted by counsel for the party concerned and the judge may intervene when necessary, taking over the examination himself, when this is needed to avoid unduly disturbing the child witness[16].

When there is serious difficulty in bringing witnesses of any age to court and provided the parties agree, the deposition may be made in writing to questions previously formulated by the court, and known by the witness. In giving testimony[17] in this way, a witness must not lay him or herself open to a charge of perjury.

With the aim of accelerating and easing the completion of the proceedings, the telephone may be used to obtain any clarification necessary for the proper determination of the case, once prior consent of the parties to act in this way and to act with due diligence has been obtained[18].

The child/young person may be challenged / contradicted[19], on the facts or circumstances of his testimony which may affect his credibility and can also be confronted[20] with opposing testimony given by someone else.

The judge also has the power to call as a witness any person who has not been engaged by the parties but who is known to have important facts relevant to the proper decision of the case[21].

3. Special features of the right of children/youths to be heard during the promotion of welfare and child protection civil suits

The hearing of children and young people in danger is of particular importance in all phases of ópromotion and protectionô lawsuits that are designed to ensure their well-being and development. A ópromotion and protection measureômay:

[9] articles 18 of the Civil Procedure Code and 1902, 1 and 1906, paragraphs 1 and 2 of the Civil Code

[10] article 23 paragraph 1 of the Civil Procedure Code

[11] article 495 of the Civil Procedure Code

[12] article 495 the Civil Procedure Code

[13] article 497 of the Civil Procedure Code

[14] articles 495, 526 the Code of Civil Procedure

[15] article 500 of the Code of Civil Procedure

[16] article 602, paragraph 2, letter d) of the Code of Civil Procedure

[17] article 518º the Civil Procedure Code

[18] article 520º the Civil Procedure Code

[19] article 521º the Civil Procedure Code

[20] article 523º the Code of Civil Procedure

[21] article 526º the Civil Procedure Code

- provide support to parents or other relatives,
- entrust the child to someone outside the nuclear family,
- provide support to the autonomy of the youths to have a foster family or,
- as a last resort, may give the child or young person in trust to a person or institution, accredited as an agent for adoption, with a view to his or her future adoption.

It is assumed that the child or youth is in danger when their safety, health, education, training and development are inadequate and those whose duty is to remove that danger have not done so.

As these processes initially take place within official administrative entities (such as protection committees and social services for the support of children and youth), it is required that a child or young person **over twelve** accepts these entitiesô jurisdiction.

The same applies when the child is **under twelve**, if his opposition is considered relevant by the administrative agencies and is also considered relevant by the court hearing the case.

The right of the child or young person to be heard and the right to participate is established as a guideline in all mandatory protective processes and in the definition of the measure that should best protect his rights[22].

In addition, a child or young personð over and under the age of twelve- may **require** the intervention of the court, if the administrative process has been stopped for more than six months in protection committees.

As mentioned earlier, in judicial proceedings, the appointment of a legal representative for the child is mandatory when their interests conflict with those of his parents or legal guardians. In addition, the appointment of a legal representative is compulsory, whenever a proposal for ǿpromotion and protectionôis discussed.

Repeated questioning of a child or young person

The hearing of children or young people more than once on the same subject must be avoided at various stages of the protective proceedings in order to avoid symptoms of rejection of the proceedings or restlessness or distress from the child or the youth.

Continuity of judge

Usually the judge of the family and juvenile court will deal with all files (one judge one child). Only if there is not a family or juvenile court in an area, which is rare in Portugal, will the civil or criminal court deal with the situation.

If this is the situation, children cases start in the civil court where the judge will deal with all matters that arise in relation to the same child eg regulation of parental responsibilities, protection and educational guardianship (which has a criminal nature).

A judge sitting in the criminal court only deals with all the files relating to a child if the educational process was first presented there and only if that judge orders the attachment of files relating to other matters concerning the child.

Hearing the child or young person

The child or young person of **twelve or more** years **must** always be heard, at the risk of procedural invalidation if he is not heard.

When the child is **under twelve**, the right to be heard is maintained and the court may be helped by the assistance of physicians, psychologists or other skilled technicians and of a reliable person who may provide the child with any information necessary to understand the aim of the measures that are to be applied with a view to overcoming the dangerous situation in which the child has been.

The child or young person may address the proceedings through counsel, or personally, if the judge agrees, depending on the maturity shown by the child or young person and their ability to understand the nature of the facts in question[23].

Finally, in order to preserve the **privacy** of the child or young person, proceedings and tests done in the promotion and protection processes have a reserved character.

4. Dissolution of matrimonial ties, their consequences and hearing of the child on parental relationships

Unilateral divorce

Today Portuguese legislation admits that divorce can occur without the consent of the other spouse through a family and minorsôcourt, in which during the court proceedings the hearing of children is similar to that in other civil proceedings and with the rules regarding witness statements as described above.

The couple's children may be heard, although they may refuse to testify, on facts that may be the grounds for the divorce. According to article 1781 of the Civil Code, they can be heard about the

- *de facto* separation between parents for more than one consecutive year,
- change in the mental faculties of the other spouse lasting for more than one year and whose severity compromises the possibility of life in common,
- absence for a period of no less than one year, without any news and, in general,

[22] article 4 of Law 147/99 of 1 September

[23] article 88, paragraph 4 of Law 147/99 of September 1

- any facts that, regardless of the spouses´ guilt, show the definitive rupture of their marriage.

Divorce by mutual consent

In the context of divorce by mutual consent, the spouses may have recourse either to a Civil Registry Office in the first instance, if they agree on the dissolution of their marriage, or change an initially unilateral divorce at the court, into proceedings with mutual consent.

In any case of divorce by mutual consent, parents **must** submit a prior agreement on the regulation of their parental obligations to their minor children, so that their file for divorce may be accepted both by the civil registry and by the family and juvenile court.

The prosecutor or the judge can, however, take the view that the agreement does not safeguard the rights of children and youths and consider that the proposals could and should be clarified through hearing what the children have to say, so that any remaining doubts can be removed and the proposed regulatory regime of parental responsibilities accepted.

5. The hearing of children and young people in processes regulating the exercise of parental responsibilities(PR) and other civil juvenile suits

Voluntary jurisdiction process

Outside the processes of matrimonial litigation or divorce by mutual consent, the regulation of parental responsibilities always takes place by in a court for example when parents are unmarried. In such situations the hearing of the parents, of the extended family and children is held under the rules of the voluntary jurisdiction process.

Resolution of disagreement regarding PR

In general the regulation of parental responsibilities is requested when parents or those exercising parental responsibility for the children, do not agree on the manner of its exercise and when parents no longer share a common life, whether or not residing under the same roof.

In the absence of consensus and because of inaction by parents to exercise PR, the public prosecutor requires the regulation of parental responsibilities.

After an application to the court for the adjustment of PR a conference is held within fifteen days, where children of twelve or more years should always be heard.

If the child is **less than twelve** he/she will be heard when appropriate and according to his/her degree of maturity and especially when the possibility of abduction abroad is foreseeable.

If parents or holders of PR cannot reach an agreement during the hearing, the statement of parental responsibilities is subsequently set down by the court, which, first and foremost, acts in the interests of the child or young person regardless of who has custody.

Contact

Another necessary aspect is the regime for visits or social intercourse between the child or young person and his parents, because, due to the dissolution of marriage or separation between the ex-spouses, the child or young person will live with one parent and is expected to socialize with the other.

Hearing the child or youth is relevant to establishing the meetings between him and the non-resident parent. Thus the court shall be mindful of the preferences and/or the wishes of the child or young person about meetings, taking into account the availability of parents, depending on their working commitments, kind of job and proximity of the child to the non-resident parent.

It is considered that, wherever possible, there should be ample opportunities for contact between children and both parents so that a true cooperation between them may assure the proper development of the children, despite the couple`s separation.

Although the child or young person is heard about the way the meetings with the non-resident parent are held and the children may express their opinion about the matter, the court always decides according to the child´s best interests.

Residence

The residence of the child should be fixed according to his/her best interests, taking into account all the relevant circumstances.

The child or young person should be heard about his everyday life so that his feelings may be understood. It must always be clear that his/her opinion has been heard, but the decision will be taken by their legal representatives or by the court if there isnôt consensus between the child and parent(s).

6. Conclusions:

- Under the Law and the Convention on the Rights of the Child signed in New York in 1989 and ratified in Portugal by Parliamentary resolution 20/90 of 12 September, Portuguese legislation maintains that children and young persons under eighteen are entitled to rights and duties and are not merely lower beings deprived of their legal capacity in comparison to adults in general;
- Children and young people under eighteen have been recognized by that Law and subsequent laws to have a binding right to be heard and to participate in the promotion of protection measure that may be applied when they are in danger.

- The Law also defines the right of children and young people to intervene in their own interest and for their own protection. They must be present, or represented by counsel, with total independence from their parents to protect their own interests and to appeal against measures that may be applied to them[24]
- Even before the Law a child or young person could give evidence in civil cases, according to the relevance of their testimony and their maturity and development, regardless of their age, and provided that their testimonies followed the rules generally applied to adults;
- In divorce suits relating to their parents, irrespective of their age, children and young people can be heard as witnesses about facts which may be relevant for court decisions, but they may decline to testify on the grounds of family ties;
- In civil guardianship proceedings, such as regulation of parental responsibilities, the child has the right to be heard and is represented in the process by the civil prosecutor.
- The guiding principles defined in the Law tend to be progressively implemented in Portuguese law combining the traditional principles of civil law and civil suits. Thus the principles
  - of the best interests of children and youths,
  - of challenge/contradiction of testimony,
  - of the intervention of private mediation and
  - the consideration of other legitimate interests given the plurality of interests involved
  - are applied.

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[24] articles 103, paragraph 2 and 122, paragraph 2 of the above Act);

Children's participation in the Children's Hearings System, Scotland

Nick Hobbs & Malcolm Schaffer

Nick Hobbs

Malcolm Schaffer

Fifty years ago this year, a report was produced by a committee under the chair of a senior Scottish judge, Lord Kilbrandon. The committee's remit was:

'to consider the provision of the law of Scotland relating to the treatment of juvenile delinquents, and juveniles in need of care and protection or beyond parental control and in particular the constitution, powers and procedures of the courts dealing with such problems'

The Kilbrandon report as it became known had a profound influence upon the landscape of child care law in Scotland which has continued and remains relevant through to today. It led to the creation of the children's hearing system in Scotland as the main mechanism for dealing with children in trouble and was enshrined in statute through the Social Work (Scotland) Act 1968. Some of the core principles of that reform were:

1. That decision making about children should be separated between the adjudication of facts which was a function for courts and decision making about what measures of care might be necessary that could be more appropriately dealt with by a lay tribunal of members of the public specially chosen

2. That decisions about children should be based on the welfare of the child , regardless of whether the child has been referred for his/her own behaviour or because of how they have been treated by others.

3. That such decisions would be more effective if the family have been involved in the consideration of the decision.

In relation to the participation of children and the importance of obtaining their views, Kilbrandon said little which may be a reflection of those times when the voice of the child had less prominence than today and where The Social Work (Scotland) Act 1968 built in provision for the required attendance of children at hearings and for them to be able to bring along a friend or representative with them. Legal aid was, however, not provided for the children's hearing itself, only the court stage in the event that the grounds for bringing the child to a Hearing were disputed or where an appeal was made against the hearing's decision.

The development of human rights case law and legislation in the last twenty years has influenced the move to a greater emphasis upon participation rights rather than the more paternalistic welfare approach evident in the early years of the hearing system. Influenced by comments from courts, a system was introduced in 2001 to give all children judged mature enough to understand, a copy of all reports submitted to hearings. In 2009 regulations were introduced to allow legal representation of children at hearings where there was any threat of a decision being taken that would deprive them of their liberty eg by placement in secure accommodation. Legal representation was provided through a panel of legal representatives appointed by local authorities.

Most recently, in June 2013, the Children's Hearings (Scotland) Act 2011 came into force, introducing a number of measures of reform to the system. Improving the participation of children was seen as a core aim of the new legislation. To this end:

1 The responsibility for the provision of legal representation for children at hearings was transferred from local authorities to the Scottish Legal Aid Board .The Board were tasked with

introducing a system of quality assurance to ensure that those providing legal representation had been registered following a demonstration that they had the necessary expertise and knowledge in this area. A code of practice was subsequently introduced by the Board, setting out the standards which representatives must adhere to.2 A duty was placed on the chair of the hearing to ensure that any reports written by professionals such as social workers, had properly and accurately incorporated the views of the child.

3 Provisions were introduced which continued the ability of the child to submit anything in writing to the hearing and for the hearing to be able to speak to the child on his/her own without the presence of parents or other parties but which also allowed any views expressed by the child to be withheld from the parents if revelation would be likely to cause that child significant harm

4 In addition to the legal aid provisions the act introduced a requirement for Ministers to make available general advocacy services for children coming to hearings who might need more general support than that provided by a solicitor. This provision has not yet been implemented and its potential scope is still unclear.

Whilst these provisions are supportive of the aim of ensuring greater participation of children, legislation cannot solve the issue by itself and important changes of culture and practice by relevant organisations are equally important.

This view has been informed by a number of different research papers, mainly produced by young people who may have had direct experience of the Hearing System. These papers which can be found on the Scottish Childrenôs Reporters Associationôs (SCRA) website-www.scra.gov.uk-include:

- Childrenôs Hearings Reform ï the views of the Childrenôs Parliament 2010
- Hearing Scotlandôs Children-Who Cares (Scotland) 2011
- Young Peopleôs Views On Decisions, Services and Outcomes ï SCRA and Aberlour 2011

These reports have many common themes: they stress the importance of listening and respect for young people to gain their trust, recommendations applying to panel members, reporters and social workers. For SCRA , they challenge the quality of our written communications and information leaflets as well as some more material issues such as the lay outs of our hearing centres and in particular the reception areas. The work described in this paper is strongly influenced by these reports.In order to achieve those changes however, we must be clear about what we mean by óparticipationô Traditionally, the focus has been on the childôs ability to express a view in the Hearing or in the court room. The legislative provisions reinforce that view, with section 27(3) of the 2011 Act requiring the Hearing or the Sheriff to, so far as practicable and taking account of the age and maturity of the childð

(a) give the child an opportunity to indicate whether the child wishes to express the

child's views,

(b) if the child wishes to do so, give the child an opportunity to express them, and

(c) have regard to any views expressed by the child.

However, it is not enough just to be satisfied that every child has spoken up in the Hearing or in the court room, that they have answered questions or expressed a view. Participation is not simply a numbers game; there must be a qualitative element as well. In order to give full effect to the policy intent of the 2011 Act, what we must strive for is what might be termed ñinformed participationò In other words, the child attending the Hearing understands the grounds for referral and why the Hearing has been called, knows who will be present and what their roles are, understands his or her rights in the process and what decisions the hearing can make. Most importantly, they have considered what they want to happen in terms of the Hearingôs decision. The expression of a view at the Hearing is, in other words, the culmination of a longer process aimed at ensuring that the childôs participation is meaningful, considered and effective.

In order to achieve this, SCRA established in 2010 a Participation Group, which involves staff from across the organisation coming together to consider how we might meet our commitment to improve participation. In 2012, our sister organisation Childrenôs Hearings Scotland[1] joined the group, which allows a more holistic approach to issues and for collaborative work to make changes more effectively across the system.

From the start, the Group has recognised that there is no single silver bullet solution to improving levels and quality of participation. Every child is different in terms of their age, capacity, maturity and confidence and will need different kinds of support. The aim is to provide a range of different routes to increase the chances that there will be at least one that suits an individual child.

It may be worth at this stage setting out in simple terms the process by which a child moves through the system in order to put the rest of the article in context. Children may be referred to the Reporter by anyone, but most referrals come from either the police or the social work department. Reasons for referral are set out in section 67 of the

[1] www.chscotland.gov.uk

Childrenôs Hearings (Scotland) Act 2011[2], but the most commonly used are; lack of parental care, exposure to an individual who has carried out domestic abuse, and that the child has allegedly committed an offence. When a child is referred, an investigation/assessment is conducted by the Reporter. Some of the factors taken into consideration include the evidence supporting the ground(s) for referral, the extent of concerns over the childôs needs and behaviour and the level of co-operation with agencies. All of the factors for consideration are set out in SCRAôs Framework for Decision making by Reporters[3], which can be found on our website www.scra.gov.uk.

In making this assessment of the need for compulsory intervention, the Reporter will rely upon information provided by other agencies, most commonly Social Work and Education staff who are often asked to provide reports outlining the social background and the attendance and behaviour of the child in school (if appropriate) as well as any engagement the child has with services. Other information may be provided by agencies or individuals with an insight into the childôs circumstances.

In most cases, the Social Worker will recommend a course of action, but ultimately it is for the Reporter to decide whether there is a need for compulsory intervention or if other measures would be more appropriate and effective in addressing the childôs needs and behaviour. Should compulsory measures be required then the Reporter will arrange a childrenôs hearing.

The Hearing consists of three lay panel members, volunteers from the local community who are given specialist training to equip them to make decisions in the best interests of the child. The hearing will listen to the childôs circumstances and discuss them with the child and with their parents or carers before making a decision about what measures of supervision might be necessary.

Notwithstanding its relatively informal set up, the Hearing is a legally constituted tribunal and its decisions are binding upon the child and the local authority which is required to give effect to them.

Recognising the need to ensure that children are informed about the system and about their rights from the earliest stage in proceedings, one of the key areas of work for the Participation Group in its initial phase was around communications, and more specifically leaflets and letters. A range of materials was produced, aimed at different age groups and covering the most important things that children and young people need to know about the childrenôs hearings system. Among the more popular resources was a cartoon storybook aimed at younger children[4], telling the story of two young children called Chloe and Billy and their involvement with the hearings system. The book proved popular with social workers looking for a way to explain the system to younger children. It was later produced as a colouring-in book, as a way to further encourage children to engage and provide a more interactive experience.

Another important addition to our library of materials was the ñYour Rightsò poster and card. This sets out in child-friendly language the rights that children and young people have in the system, including the right to have their views considered and the right to bring a representative with them to the Hearing. It is included with correspondence sent to young people as well as being displayed in poster format in all of our hearings centres.

There is a recognition that simply providing materials in written form risks excluding some children and that we need to explore more creative ways of presenting important information. To that end, SCRA has produced two short films[5] on attending a Hearing, and attending court. These seek to demystify the process and show children exactly what they can expect, while also signposting possible supports and where to go for additional information.

An important part of encouraging participation is for the child to feel comfortable in the environment in which the hearing is to take place. Based on feedback from SCRAôs Modern Apprentices (see below), the hearing rooms and waiting rooms have been repainted in a selection of brighter, less ñinstitutionalò colours, decorated with pictures, stencils and stickers, and restocked with a wider range of age appropriate toys and games.

This is part of a broader set of property standards intended to ensure that Hearings centres are accessible and child-friendly. SCRA also offers children the chance to undertake a pre-hearing visit. This allows them to see the hearing room and for the Reporter to explain what will happen on the day, who will be there, where the child will sit etc. This also gives the child an opportunity to ask any questions they might have, or even to tell the Reporter what they might want to say to the Hearing. The Reporter will offer to write it down and pass it on to the panel members.

Another mechanism for the child to express their views is the All About Me form.[6] This is sent out,

2 http://www.legislation.gov.uk/asp/2011/1/pdfs/asp_20110001_en.pdf

3 http://www.scra.gov.uk/cms_resources/Framework%20for%20Decision%20Making%20by%20Reporters.pdf

4 http://www.scra.gov.uk/cms_resources/Framework%20for%20Decision%20Making%20by%20Reporters.pdf

5 http://www.scra.gov.uk/young_people/scra_information_leaflets_for_young_people.cfm and http://www.scra.gov.uk/young_people/going_to_court.cfm

6 http://www.scra.gov.uk/cms_resources/Teenager%20All%20A

in age appropriate format, by the Reporter with the Hearing papers. It provides a structured means for the child to express a view about a range of different issues likely to be of interest to the Hearing, including where the child is living, who they have contact with and what they would like to happen in the future.

It is of course important to remember that one of the most important sources of support for a child can be a family member. SCRA therefore produces a range of materials aimed ensuring that parents and carers[7] understand that operation of the Hearings system and can assist in informing and supporting the child through the process.

While the lead up to the Hearing is important, there is also clearly a need to ensure that there are mechanisms within the Hearing to support and encourage children's participation. For panel members, Children's Hearings Scotland has produced a set of National Standards[8]. Standard 1.3 states that:

"Panel members will help and encourage every child or young person to participate in their hearing"

A significant part of the training provided to panel members is aimed at helping them to fulfil this role. As mentioned previously, one of the ways they might do this is by speaking to the child on their own if they feel that the presence of one or more of the adults is inhibiting the child from speaking up.

The Participation Group has considered what tools might be useful for Panel Members to encourage children's participation during the Hearing itself. A set of Flash Cards was produced in 2011, which can be given to the child at the start of the Hearing.

The card reads simply "This Hearing is All About Me" and can be held up at any time to indicate that the child has something they want to say. An evaluation found that they were particularly effective for children aged seven and eight, though less so for older children and teenagers.

While the main responsibility for facilitating the child's participation in the Hearing itself lies with the panel members, the Reporter has a clear role to support fair process. This includes being alert to the child's needs and ensuring that they have an opportunity to express themselves.

In addition, there are other individuals within the Hearings system that have a part to play. For example, the Hearing can appoint an independent official called a Safeguarder to ensure that the child's best interests are being considered. Safeguarders are appointed from a national panel and come from a variety of professional backgrounds, including lawyers, social workers, police officers and Reporters. While the Safeguarder's role is focused on providing a recommendation to the Hearing about the child's best interests, it is expected that they will speak to the child and that their report will include what they have been able to ascertain about the child's views, even if ultimately the recommendation departs from them.

Some children may also have a legal representative at the Hearing, and legal aid is available for children's hearings proceedings. This, as mentioned above , is administered by the Scottish Legal Aid Board[9]. Registration for lawyers conducting children's hearings business is dependent on adherence to a Code of Practice[10], which includes duties to:

"…promote and facilitate the effective participation of a child in Children's Hearings and ensure that the child's best interests remain central to proceedings" and;

"…communicate with the child/client in a way they will understand and in such a manner that an appropriate understanding of their views can be communicated to the hearing/court"

Determination of fact within the Hearings System takes place in court before a Sheriff and this can be a particular challenge in terms of children's participation. SCRA has a policy in place that instructs Reporters to avoid calling children as witnesses unless there is no alternative and which makes clear the Reporter's duty to support any child witness before, during and after the court process.

The child can also be excused from attending court, but even where they do need to attend, there are other ways of mitigating the impacts of what can be a stressful experience. In Dundee, an arrangement is in place that results in the court, including the Sheriff and the Clerk, coming to the Hearings Centre. This allows business to take place in an environment with which the child is familiar and we are keen to see this roll out further across the country where possible.

There is a further element to participation within the hearings system and SCRA has a programme in place that allows young people aged 16-19 to join the organisation as Modern Apprentices (MAs). The scheme was developed in collaboration with Who Cares? Scotland and Glasgow City Council, and undertaken with the

bout%20Me%20Electronic%20form.pdf and http://www.scra.gov.uk/cms_resources/Children%20All%20About%20Me%20Electronic%20Form1.pdf

7 http://www.scra.gov.uk/children_s_hearings_system/information_for_parents_and_carers.cfm

8 http://www.chscotland.gov.uk/about-chs/national-standards/

9 http://www.slab.org.uk/

10 http://www.slab.org.uk/export/sites/default/common/documents/profession/practitioner_info_guides/ChildrensRegisterandDuty/Code_of_Practice_in_relation_to_Childrenxs_Legal_Assistance_February_2013.pdf

support of the Scottish Government. Applications were restricted exclusively to children and young people who had been looked after (children who are in the care of the local authority, whether at home or otherwise) and who had experience of the Children's Hearings System. Two of the first batch of MAs are now working permanently for the organisation, while the next intake are now in their second year with SCRA. The scheme is regarded as a real success and a way of ensuring that the voices of young people are heard not just in their own hearings, but in the context of decision making within the system on issues such as training, recruitment, budgets, strategy and policy. The MAs have undertaken regular research into the standard of SCRA's facilities and way in which we deliver services to children. Many of the initiatives outlined above came about as a result of their recommendations.

Before concluding, it is perhaps worth reflecting on the number of challenges relating to participation with which we are grappling at present. Chief amongst them is an awareness that more focus is required on how well we are meeting the needs of particular groups of children and young people, especially where there are vulnerabilities or support needs that must be considered. We have been working with the Scottish Consortium for Learning Disability to revise the content of our website and review our communication materials to make them more accessible. We are also in the process of adding a Children's Rights Impact Assessment to our existing Equalities Impact Assessment tools, allowing us to ensure that we are considering the needs of all children and young people in policy and strategic decision making.

In order to achieve our goal of informed participation, we have to involve other partners across the Children's Hearings System, including Social Workers, Education staff and others. Those working on the front line with children and families have a key role to play in helping them understand and contribute effectively to the process.

To that end, we have developed an e-book for Social Work staff[11], setting out how they might help to prepare a child for a hearing. We have also been working with Education Scotland to make sure that information about the Hearings System is available in schools, both to teachers and to students. However, this is an ongoing area of work and more multi-agency collaboration is necessary to progress it further. In an era of ever tightening budgets, this is likely to be a challenge.

Finally, it is important to remember that the right to express a view includes the right not to express one. It can be difficult to determine whether the silent child, the one who sits arms crossed and head down refusing to make eye contact or to engage, simply needs more encouragement and support to express a view, or whether they have made a considered, informed decision not to participate that ought to be respected.

The voice of the child has become one of the most important elements of the children's hearings system and we are rightly proud of the progress that has been made in this area. However, it is also the area about which we can least afford to become complacent. Research continues to tell us that we have not yet been able to create an environment and set of supports that allow all children and young people in the system to contribute as much and as meaningfully as we would wish. We remain committed to making further progress in this area and we would very much welcome contact from colleagues in other countries who might have expertise or ideas to share.

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11 http://www.scra.gov.uk/sites/scra/cms_resources/Social%20Work%20Protocol%20ebook.html

The voice of the child in the Polish legal system

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In Poland there is no complete system of child protection. The Polish system of government and local government institutions does not consist of institutions like ñChild Protection Servicesò dedicated exclusively to protecting and fulfilling childrenôs rights. There is also no separate act dedicated exclusively to children. However the Polish Constitution does include provisions related to state-child relations. Article 72 of the Constitution[1] guarantees the following:

1.The Republic of Poland provides for the protection of child rights. Everyone has the right to demand from public authorities the protection of a child against violence, cruelty, exploitation and demoralization.

2. A child deprived of parental protection has the right to care and support from public authorities.

3. In the course of determination of child rights, public authorities and people responsible for a child are obliged to hear and as far as possible take into account a child's opinion.

Thus a child has a right to: be heard, to express opinions in matters related to her and to the consideration of her opinion when decisions are being made by public authorities and other people. This regulation is reflected in the form of specific legal provisions, included in the Code of civil procedure and in Family and guardianship code. The Code of civil procedure obliges the Family and guardianship courts (hereinafter referred to as the ñ**Family Court"**) hearing child cases to hear a child, whereas the Family and guardianship code obliges to it parents and guardians.

The only legal instrument concerning exclusively the child is the Convention on the Rights of the Child ratified by Poland in 1991. It is a world constitution of child rights[2]. The direct consequence of adopting this instrument has been the Child Rights Spokesman Act of 2000[3] and the subsequent appointment of a Child Rights Spokesman and his office. The Act in article 1 para 2 defines the goals of the Spokesman thus:

The Spokesman guards the rights of a child as set out in the Constitution of the Republic of Poland, the Convention on the Rights of the Child and other law provisions, with respect to the responsibilities and rights and duties of parents. Polish legislation expanded and strengthened the competences of the Spokesman by amending the 2003 Act in 2008.

In addition, in Poland there is a separate branch of civil law ï family law ï whose regulations are contained in the Family and Guardianship Code 1964[4] (hereinafter referred to as the ñ**Family Code"**). It regulates such issues as: kinship, fatherhood, motherhood and above else the relationship between parents and children including parental authority and foster care, contact with a child, adoption and alimony obligation.

[1] Journal of Laws of the Republic of Poland 1997 No. 78 item 483 as amended.

[2] Statement of the Child Rights Spokesman, Minister Marek Michalak on the conference ñRights of Child Patientò in 29 October 2014.

[3] Journal of Laws of the Republic of Poland 2000 No. 6 item 69 as amended.

[4] Uniform text - Journal of Laws of the Republic of Poland 2012 item 788 as amended.

Legal situation of a child in the Polish legal system.

In Poland, according to the Civil Code of 1964, to be adult and have a full legal capacity, one must be 18 years old. The Convention on the Rights of the Child in article 1 provides the following definition of this concept ï ñchildò means all human beings under 18 years old, unless, according to the law relating to the child, it acquires majority earlier. Polish family law provides only one such case, a woman may acquire majority after the age of 16 if, according to the law and after obtaining consent of Family Court, she marries.

A child under 18 years old functions in legally on the basis defined in the Civil Code Act 1964[5] (further referred as ñ**Civil Code"**). Thus, a child under 13 years old does not have any legal capacity, which is the ability to receive and submit statements of intent, with a goal to create, cease or change a legal relationship. A child between 13 and 18 years old has a limited legal capacity, i.e. may perform the following actions:

- make an agreement commonly conducted in minor, current matters of everyday life,
- dispose of its earnings, unless the Family Court for important reasons decides otherwise,
- administer the property items given to him by statutory representatives for free use,
- give consent for the change of surname,
- give consent to adoption.

The consequence of such regulations is the necessity for representation, guidance and custody of the child by adult people. Until 18 years of age the child stays under parental authority, which includes above all:

- the duty and right to have custody of the child,
- the management of the childôs property,
- child representation (the parents are the childôs statutory representatives).

Parental authority is granted to both parents. Only the Family Court may limit, suspend or deprive parents of it. Such cases are where they exercise it improperly, cannot exercise it or endanger the child.

To secure a childôs best interests in its relations with his parents, the Family Code imposes on parents limitations in the scope of child representation. No parent may represent a child:

- during legal actions between children under their parental authority:
- during legal actions between a child and one of its parent or its parentôs spouse, unless the legal action is free and for the childôs benefit **or** concerns financial support and upbringing due to the child from the other parent[6].

The above regulation is used not only in regard to social life but also in procedures before a Family Court or other state authority. In the situation where none of the parents may represent the child, the child is represented by a curator established by a Family Court.

In 2009 legislation[7] introduced into the Family Code the provision strengthening a childôs position in the family life by giving a child a right of voice in matters related to him. Parents before making a decision in major cases related to a child or its property must hear the childôs view, if mental development, health and level of maturity allow it, and include, as far as possible, the childôs reasonable requests. It is a direct realization of the above mentioned provision of the Constitution and non-compliance may be considered by the court as an improper exercise of parental authority[8].

Child hearing by a family and guardianship court

The duty to hear a child, recognize its opinion, and as far as possible take into account its opinion, rests not only on parents, but also, as it was mentioned in the beginning of the article, on the Family Courts considering childrenôs cases. Such a duty is set out in specific provisions of Civil Procedure Code under Articles 216^1 and 576 para 2. The first provision is used in Family Court **trials** and it obliges the Court to hear a child only in cases related exclusively to it i.e. in cases related to determination of non-property rights, to parental authority, divorce, separation, establishing a childôs origin, negating a childôs origin, cancellation of child recognition and cancellation of adoption cases[9]. A child does not speak out in alimony cases.

Article 576 para 2 is used in **non-trial proceedings** and obliges a court to hear a child in family and guardianship matters involving both the property of the child and the child himself i.e. in matters concerning contact with a child or in establishing curator cases.

[5] Journal of Laws of the Republic of Poland 1964 No. 16 item 93 as amended.

[6] Art. 98 (2) of the Polish Family and Guardianship Code

[7] Act of 6 November 2008 amending the Act - Family Code and other acts, Journal of Laws of the Republic of Poland 2008 No. 220 item 1431.

[8] Article 95 para 4, Uniform text - Journal of Laws of the Republic of Poland 2012 item 788 as amended.

[9] Code of civil procedurñ. Comemntary, edit. Małgorzata Manowska, LexisNexis, Warsaw 2013.

The duty to get to know a childôs opinion is conditional in Poland--the voice of the child is heard only if the childôs mental development, health status and the maturity level allow it. If all above three conditions are met ï the court **must**

- hear a child and in accordance with Articles 216[1] and 576 para 2 of the CPP and
- it must be done outside the courtroom and
- include the childôs opinion and reasonable request(s) if the circumstances of the case allow it.

Child hearing is an extraordinarily unique procedural step. It is not a normal hearing and it does not give a child party status in the proceedings. However it grants a child a right to express its thoughts and feelings directly before the judge conducting a proceeding. However the activity of a Child Rights Spokesman[10] and clinical experiences of Nobodyôs Children Foundation[11], show that courts very rarely use an option to hear a child and some are not aware of the provision, and in the situations when they do, they use it in an ñfaultyôway because of

- lack of experience in doing it,
- incomplete regulation of this procedural step and
- childrenôs lack of awareness of a vested right.

Pillars of child protection

Child harming is a very broad concept, undefined in Polish law. According to the World Health Organization(WHO), harming is the intentional or unintentional act of an adult which negatively influences the physical and psychological development of a child.

Translating this legal definition we may say that the following ways of harming children are within the scope of law:

- crimes to the detriment of a child,
- endangering the childôs welfare .eg by. neglect,
- violence against a child in a family.
- In these three areas in Poland we have different ways of reacting and taking actions:
- criminal path,
- civil-family path,
- realization of the procedure of ñBlue Cardò

- Crimes detrimental to a child

Crimes detrimental to a child are defined as a class of crimes committed to the detriment of someone under 18 years old by a criminal offender 17 years and over, subject to a responsibility under the Penal Code, **or** by a juvenile offender under 17 years old subject to a responsibility under the Act of procedure in juvenile cases[12].

Polish criminal law guarantees special protection to a child victim of or witness to a crime. Under the Penal Code, where a victim of a crime is a child, more severe punishment of the offender is allowed. In addition, the provisions of the Penal Code protect the welfare of a child, from all other types of offences. The Code of Criminal Procedure sets down, that a child in a criminal procedure does not solely hold its rights (until acquiring maturity it is represented by a statutory representative or the actual guardian) and, that, in specific cases it is entitled to special protection during a hearing.

Crimes, which especially endanger the welfare of a child are[13]:

- crimes against life and health[14];
- crimes against freedom[15];
- crimes against sexual freedom and decency[16] [17] [18];
- crimes against family and custody[19] [20];
- crimes against honour and physical integrity[21].

The Police, Public Prosecution service must be informed about facts relating to the commission of a crime detrimental to a child. There are two ways in which such offences may come to light. The first is information gained by the police and prosecution going about their normal business. The second is via a crime report[22] which may be oral or written information about the commission of a criminal act addressed to law enforcement.

[10] Statements 23 03 2012 & 10 09 2014

[11] The Nobodyôs Children Foundation is a non-governmental non-profit organization working toward the goals of protecting children from abuse and providing help for abused children, their families, and their caregivers. The facilities run by the Foundation offer psychological, medical, and legal help to victims of abuse and their caregivers. More informations www.fdn.pl/en

[12] Dzieci-ofiary przestñpstwò D. Drab, J.Podlewska, O.Trocha w: Dziecko Krzywdzone. Teoria. Badania. Praktyka. Nr 3 (36) 2011, edit. M. Sajkowska, Nobodyôs Children Foundation, Warsaw.

[13] Dzieci-ofiary przestñpstwò D. Drab, J.odlewska, O.Trocha w: Dziecko Krzywdzone. Teoria. Badania. Praktyka. Nr 3 (36) 2011, edit. M. Sajkowska, Nobodyôs Children Foundation, Warsaw.

[14] Article 149 ï infanticide

[15] Article 189a - trafficking in human beings

[16] Article 197, para 3.2 ï rape of a person under 15 years old

[17] Article 200, para 1 - sexual intercourse/other sexual activities

[18] , Article 200,para 4 ï presentation of a sexual activity

[19] Article 207, para 1 -mental and physical abuse

[20] Article 208 ï making minor drunk

[21] Article 217 ï violation of physical integrity

[22] W. Sych, Wpływ pokrzywdzonego na tok postñpowania przygotowawczego w polskim procesie karny, Zakamycze 2006, page 69.

A person filing the report does so when not only when sure that a crime was committed, but also when he or she only suspects that a crime was committed[23]. Additionally if the crime is prosecuted by the law enforcement agencies of the police an prosecution service, anyone who had a knowledge about such an offence has a social duty under the Code of Criminal Procedure[24] to inform the appropriate authorities. Failing to perform such a duty generally does not result in criminal charges although there are exceptions[25]. Public authorities and local government institutions have a legal duty of immediate informing the Police or Public Prosecutor and conducting necessary actions in order to prevent obliteration of the traces and evidences of a crime detrimental to children.

Law enforcement after conducting a preliminary evaluation of an offence and ensuring that there is a justified suspicion of its commission institutes criminal proceedings. During the criminal procedure the rights of a child will be exercised by her parent or by a actual guardian. In the situation where a crime detrimental to a child was committed by one of its parents a second (not violating) parent will not be authorized to represent the child; the child will be represented by a procedural curator appointed by the Family Court. The procedural curator guarantees that the childôs rights will be exercised and will also protect her welfare against the conflict of interests of her parents. Unfortunately, currently, binding legal provisions do not define the requirements concerning the qualifications, education and skills of a person performing such a function. And the appointment of a curator is done only in a civil procedure. As a result the voice of most child victims and witnesses is not properly heard in a criminal trial.

Even so, a child victim or witness has a duty, in the case of being summoned by a criminal proceeding authority, to make a personal appearance and give testimony. In a Polish criminal trial children are being heard:

- in a normal mode[26] ï in preparatory proceedings by a police/public prosecutor and in court proceedings by a judge in a courtroom. No obligatory participation of expert psychologist and a hearing registration is guaranteed;
- in a special mode[27] ï in preparatory proceedings it is possible that a judge will hear a child especially if there is a possibility that the child will not be heard during a future hearing,
- in a special mode[28] ï when a child of an age defined by legal provisions, was either victim or witness[29] to a certain type of crimes defined by legal provisions.

The last above mentioned special mode[30] consists of:

- generally a one-off hearing,
- a hearing before a judge during a judicial sitting,
- a closed catalogue of people participating in a hearing,
- an absolutely **mandatory** participation of an exert psychologist,
- an absolutely **mandatory** recording of both image and sound[31] [32],
- the absolutely **mandatory** conducting of a hearing in a room designed for the purpose either in or outside courthouse[33] [34]

The special conditions apply to victims (CCP article 185a) to witnesses (CCP article 185b). Thus the provisions are mandatory for;

- child **victims** , who at the time of testifying are **under 15** and whose legal interests are endangered or violated by a crime defined in chapters XIII, XXV and XXVI of the Penal Code or by a crime committed with the use of violence or with unlawful threats.
- children who are victims of above mentioned crimes and who at the time of testifying are **15 or older**,,

but only if there is a justified surmise, that questioning victims {both 15 or over years of age} in different conditions would negatively influence their psychological condition,

[23] R.A. Stefaœski, Komentarz do ustawy z dnia 6 czerwca 1997 r. Kodeks postňpowania karnego (Dz.U.97.89.555), w zakresie przepisów o postňpowaniu przygotowawczym., LEX/el., 2003.

[24] Article 304, para 1

[25] Article 240 of the Penal Code

[26] Article 177 of the Code of Criminal Procedure

[27] Article 316 of the Code of Criminal Procedure

[28] Article 185a

[29] Article 185b of the Code of Criminal Procedure

[30] Provisions of articles 185a and 185b of the Code of Criminal Procedure 1997, Journal of Laws of the Republic of Poland 1997 No. 89 item 555 as amended.

[31] Article 147 para 2a of the Code of Criminal Procedure

[32] Absolutely mandatory duty will be in force on 27 January 2015.

[33] Absolutely mandatory duty will be in force on 27 July 2015.

[34] Article 185d of the Code of Criminal Procedure and the ordinance of the Justice Minister of 18.12.2013 regarding ways of preparing of a hearing in the mode defined in Articles 185a-185c of the Code of Criminal Procedure.

- children who at the time of testifying are under 15 and who were **witnesses** of crimes defined in chapters XXV and XXVI of the Penal Code or crimes committed with the use of violence or an unlawful threat but only if the testimony of a minor witness may have a **significant value** for a determination of the case.

Threat to the child's welfare

Child's welfare is generally in harmony with its parents interests. If there is a discrepancy between them, the parents interests may not be omitted but to protect the child's welfare the parents' interests must be held back especially when they cannot be reconciled with the justified interests of a child[35].

The Family Code sets out a concept of a ñ*threat to the child's welfare*ò as a foundation for the Family Court to take actions in the field of parental authority over a child. It is a so called ñ*general clause*ò that is a concept intentionally undefined by legislation, and related to rules in society. All interferences in parental authority or with the right of contact with a child should be justified on the grounds of the welfare of the child. The Family Court is obliged to act ex officio in all cases in which it is informed about a threat to a childôs welfare.

If a childôs welfare is threatened, the Family Court basing on article 109 of Family Code, may conduct a series of actions, for example:

- oblige parents and a minor to behave in a specific way, in particular to cooperate with a family assistant or be amenable to other means of cooperation with the family;
- order a placement of a minor in a foster family, family childrenôs home or an institutional foster care or order a placement of a minor in a nursing facility or in a facility for medical rehabilitation.

The duty to react in the event of threat to a childôs welfare is specified in Article 572, paras1 and 2 of the Code of Civil Procedure 1964[36]. According to those provisions, everyone is obliged to inform the Family Court about the harming of a child. Such duty particularly rests on organizations and facilities dealing with the care of children.

Violence against a child in a family – procedure of a "Blue Card"

In 2005 the Act of preventing violence in the family was introduced into legal system[37]. The statute defined for the first time the rules of conduct towards people affected by family violence as well as towards people using violence in a family.

In 2010 the statute was amended and Interdisciplinary Teams which carry out the procedure of the ñBlue Cardòwere appointed. The procedure is defined in the ordinance of the Council of the Ministers dated 13 September 2011 *regarding the procedure of the "Blue Card" and model "Blue Card" form*[38]. It is a special kind of interdisciplinary intervention for a family affected by a violence, which includes all actions undertaken and implemented by representatives of:

- organizational units of social support,
- municipal commissions charged with solving problems relating to alcohol,
- police,
- education,
- health care,

The most important duty within the ñBlue Cardò procedure is diagnosing the effect of family violence on a child and also reacting when there are suspicions that such violence occurs. A child as mentioned above does not have full legal capacity and may not in its own name conduct actions protecting it against violence. It may not report to an Interdisciplinary Team, Police, Public Prosecutor or Family Court, that it is affected by violence from a parent. Young children often do not know, that the things they are affected by in home ï screams, insults, beatings ï are inappropriate, and that such behavior constitutes violence. In such a situation adults, especially professionals who have professional contact with children have a special duty to react to a suspicion that a child is affected by a violence in a family[39].

Where there is a suspicion of family violence against a child intervention is effected either by filling in form ñNK-Aò or as a result of a notification made by a family member or a person who is a witness to the violence[40].

35 Resolution of the Full Civil Chamber of the Supremme Court, dated 9 June 1976, III CZP 46/75.

36 Journal of Laws of the Republic of Poland 1964 No. 43 item 296.

37 Journal of Laws of the Republic of Poland 2005 No. 180 item 1493.

38 Journal of Laws of the Republic of Poland 2011 No. 209 item 1245.

39 Uwaga dziecko! Realizacja procedury ĂNiebieskie Kartyò w sytuacji przemocy w rodzinie wobec dziecka, J. Podlewska, Fundacja Dzieci Niczyje, Warsaw 2013.

40 Paragraph 2 of Council of Ministers Ordinance dated 13 September 2011 regarding procedure of the ñBlue Cardò and model ñBlue Cardòform.

Diagnosis to determine if particular behaviour of a parent or a family member constitutes violence is based on a statutory definition contained in Article 2:

ñ*Violence in a family –should be understood as a one time or repeating intentional behaviour or lack of behavior violating the rights or personal goods of people listed in para 1, in particular putting those people in danger of losing life or health, violating their dignity, psychological integrity, freedom, including sexual freedom thereby causing damage to their mental and physical health and causing suffering and moral harm*[41].ò

Filling out ñNK-Aòis based on a talk with a person affected by violence ï a child. If such a talk is impossible, the card is filled based on observation of a child in a facility. Ordinance in the case of establishment of a card ñNK-Aòfor a child (person under 18 years old) defines special conditions:

- the card must be filled out in the presence of a parent, legal or actual guardian.
- the actions involving a child in the blue card procedure must be implemented, if possible, in the presence of a psychologist. This concerns mainly the situation of filling out the ñNK-Aò because the child does not take part in completing the form and cannot be invited to meetings of a working group. After receiving the ñNK-Aò form, the leader of the team forwards it to the team members and together they decide, in what way to work on a case involving family violence. The Blue Card procedure is not a criminal or administrative procedure; there are no parties to the proceedings, there are no punishments. While the procedure generally concerns a specific person, or people affected by family violence, the procedure is conducted for the whole family not for a single person. Its goal is to stop family violence by creating an individual plan of help for the family.

In the case of a direct threat to the life and health of a child, related to family violence, there is a special procedure for retrieving a child from a family, based on Articles 12a-12c of the Act for preventing violence in the family. A social worker, policeman, doctor, paramedic or nurse together make a decision to receive a child from a family and place it in the house of an adult related person (grandparents, siblings), in a foster family or a care and educational institution.

The article outlines the scope of the legal provision concerning the protection of a child in a Poland and the evolution of the perception of the role of the child by the legislator. The perception has changed from one of the child being the subject of protection to one where he or she is able to affect decisions made about him or her.

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41 Article 2 para 2 of the the Act of preventing violence in the family 2005, Journal of Laws of the Republic of Poland 2005 No. 180 item 1493.

The voice of the child in family separation–Quebec, Canada

Élise-Mercier Gouin

When families split up, children take centre stage. It is for them, in their interests, for the love that each parent bears for them and their concern for their protection that gives rise to and prolongs the majority of legal actions that follow family splits. Break-downs have important emotional and financial consequences. Above all, they involve a lossð whose effect is always underestimatedð of day-to-day contact with the child. After a separation, one part of a childôs life is lost to each of the parents. They will no longer be privileged to witness every moment of it and will have to share their influence on the childôs education and values. Parents often find it difficult to accept and accommodate this loss of control over their childôs life and to have complete trust in the other parent. This is the driving force in a lot of litigation and the childôs role is central.

Everyone involved in the justice systemð judges, lawyers and experts, as well as parentsð agree on the importance of the childôs life and the need to consider the child as a key participant in the decisions that will determine how her life is to be organised after the separation. How will the childôs time be shared and how will decisions about her be taken in future and what role will each parent play? In order to determine the best interests of the child, it is necessary to stand back and look beyond what each parent imagines, believes, fears or claims and to impose some coherence on often contradictory statements. Sometimes, the circumstances are so complicated that, after the parentsô and expertsô testimony and the examination and submissions from the lawyers, it is still difficult to see what arrangements would be in the childôs best interests.

Childrenôs voices are heard most often during difficult, complicated cases. Less problematic separations involve agreement between the parents and they decide how to take their childrenôs views into account and what weight to give to those views. The childôs thoughts and feelings about--and also his understanding of--what his life will be like in future are essential parts of the considerations that lead parents to take good decisions. The childôs views should be welcomed; his understanding of the familyôs problems and his proposed solutions to them listened to; and his wishes and desires should be considered. In contested cases the child may be represented by a lawyer or speak directly to the judge with or without his parents and their lawyers being present. His words may also be reported by his parents or gathered and analysed by a psychologist or social worker as part of a psychological report presented to the court. All these people face the same problem in understanding what the child says. His words express his wishes at the time of the interview but not the whole spectrum of his needs and there can be no guarantee that his wishes will not change or that they will be in agreement with his best interests. It is tempting for adults to accede to the childôs belief that his is the only way of seeing things. Yet it is easy to see that what each parent says can be influenced by their negative feelings about the other and rarely reflects the true situation. It seems harder to come to the same conclusion about what the child says and to deny him an independent value. My aim is certainly not to diminish what the child says, but to draw attention to the need to put his words in context in order to see both their meaning and their limitations. What the child wants often varies depending on which parent he is with or recent events that he is unable to fit into a broader picture.

One needs to keep hold of the thought that a child is both a small well-formed person and also a growing and developing being whose experience of life is accordingly limited. A childôs wisdom, the relevance of her comments on her life and her ability to express herself in an articulate, coherent way can lead us to forget that her emotional and intellectual capabilities are still developing and that she may not be mature enough to understand her familyôs situation with all the subtleties that such an analysis requires. The childôs emotional security derives from her links to each of her parents. During family upheavals she can lose her reference points and want everything and its opposite. What she says can change in response, of course, to the pressures she feels, but also from the influence of her parents according to what she thinks adults expect of her and to the responsibility she takes on herself to resolve her parentsôirresolvable conflict.

A child can also mistake a temporary obstacle for a permanent problem, because of an inability to look very far into the future. Children are single-minded and dislike subtle analyses with qualifications which can be a source of uncertainty and anxiety. This also applies to adolescents. However good their reasoning powers may be, their judgement is not yet fully formed and their faculties of foresight, ability to organise their thoughts, control their impulses and weigh the consequences of their actions are still developing. In most other areas of life adults recognise that parental authority still applies and that adolescents still need to be guided towards responsibility and independence and cannot take sole responsibility for the choices that they make in life. In care matters, it is too often the case that the childøs single wish and expression of her immediate interests dominates the decision process.

Article 12 of the UN Convention on the Rights of the Child recognises the right of 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*

This extract contains two vital wordsð *express freely*. To decide whether a child is expressing himself freely, what he says must be put in context. That means being able to grasp the way of life in which he is growing up, what his relations with family members are like, his emotional ties to each of his parents, his comfort zones and his areas of stress. Putting his words in context is a big challenge for those who have only a fragmented view of his life derived either from what he says or from his parents. Because of the stress that the child feels during the separation of his parents, his need to maintain an unbroken attachment to each of them and the resulting conflict of loyalty, his need to love and be loved and because of his suggestibility, what the child says must be treated with caution. In the middle of a family conflict, the childøs ability to see both sides is reduced and his feelings tend to become polarized. However vehemently a child puts things, it is impossible to be sure that he is accurately describing his relationship with a parent in all its aspects and with all its subtleties.

However, over the time that childrenøs voices have been regularly heard in the courts, there has been a drift from a right to be heard to a right to take the decisions. The childøs opinion is held up as the only truth, which confuses her wishes and desires with her needs and best interests. The voice of the child accordingly takes up a position of power because of a confusion between the attention that should be paid to exactly what the child says and the power to take the corresponding decision, which should not belong to the child. This puts the child in a commanding position which can only unsettle her by affecting her relationships with the adults and, in particular, with her parents. The adults are responsible for her well-being and must go beyond their own wishes to work out the childøs best interests. Family life will carry on when they have left the court and one must make sure that the balance between the parents exercising their authority and the position of the child has not been damaged. Total power is not compatible with a situation where parents are the natural people to guide their children, which is an aspect of society that all its institutions should support. A childøs mental development takes place within a network of relationshipsð to quote the writer Nancy Huston[1];

> *We do not fall from the sky, we perch on our family tree.*

This means that we must find a place for children when their family is breaking up and listen carefully to what they have to say, while avoiding further damage to a family in crisis. After the separation, the family will still be the childøs primary mentor about societyøs rules of operation.

What the child says sometimes reduces to a simple statement of preferenceð often a choice between his two parentsð rather than a summary of his overall situation. This may prove a serious obstacle to his development. For a child to choose one parent may mean his getting into a fight with part of himself, setting up a dissociation between the people who have given him life and the images from which his personality has formed and losing his sense of identity. Most childrenð apart from those in conflict with their parentsð wish to keep as much contact as they can with both parents and leave it up to them to reorganise their lives.

[1] La Presse, Montreal 25 October 2014

Children take centre stage during a separation and it is for their sake that parents will confront each other in court. What children have to say is increasingly welcomed in judicial proceedings where they have the right to be heard. Nevertheless, one must remain conscious of the fact that--however well-expressed or however high the quality of her thoughts--the words remain the childôs point of view on her parentsô litigation and although they are highly important they are nonetheless subjective. The childôs opinion must be considered and take its rightful place alongside the whole of the evidence gathered from witnesses. It should not take precedence over the parents and become the only truth about the family. It can be surprising to realise that in complex family litigation, where the adults are striving to find ways forward that would calm the situation and help the family, what the child says can be decisive. Everyone should be aware of the need to accord children their rightful place in discussions about their life after the separation.

They should welcome and discuss the childrenôs views openly while avoiding becoming their mouthpiece, which would abdicate their role and responsibility for making choices that take all the childôs needs into account. This approach is essential if the childôs best interests are to be met and she is to be protected from the sometimes bitter conflicts that occur within families.

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Reform of the Family Court in Belgium— what is actually going to change?

Fabienne Bouchat

After several decades of mulling over the desirability of dealing with every kind of family dispute in a single court, the Law of 30 July 2013, published in the Official Gazette, *Moniteur belge,* on 27 September 2013, set up the Family Court and the Youth Court. The law came into force on 1 September 2014. Family litigation will be radically changed but will also be greatly simplified. This simplification will bring greater clarity for litigants but also for the professionals who accompany these families. This paper aims to summarise the intention behind the law and to inform the reader about the main changes that the reform will usher in.

Setting up the new courts in each district has not been without difficulty and has required a great deal of reorganisation. There will need to be time for the new system to bed in before it will be possible to get a full picture of the effect of the changes.

A. Creation of the Family Court

Article 76§1 of the Judicial Code amends the structure of the courts of first instance. From now on, they will consist of four divisions :

- Criminal Court (*le tribunal correctionnel*)
- Civil Court (*le tribunal civil*)
- Youth and Family Court (le *tribunal de la famille et de la jeunesse*) and
- Sentencing Court (*le tribunal d'application des peines*)

The Youth and Family Court is itself composed of :

- One or more **family courts** (*tribunal de la famille*) ;
- From now on, these family courts will hear the totality of family disputes (article 572 bis *code judiciaire*) except for the system for the legally incompetent (of all ages)
- One or more **youth courts** (*tribunal de la jeunesse*) ;
- Youth courts are responsible for the protection of young people at risk and young people who have committed a criminal act ;
- One or more **mediation courts** (*chambres de règlement à l'amiable*) responsible for achieving and/or confirming agreement between the parties.
- The legislation aims to promote alternative ways of dealing with family disputes. It especially encourages family mediation or judicial conciliation.
- At the start of proceedings, the parties are informed about the various opportunities for mediation.
- At any point in the proceedings, either at their request or if the judge considers it appropriate, the parties can come back to the mediation court to record their agreement or with a view to achieving an agreement.

B. A single court for family matters

Before the new law came into force, family disputes were spread between four tribunals :

- The justice of the peace (*le juge de paix*) ;
- The youth court (*le tribunal de la jeunesse*) ;
- The court of first instance (*le tribunal de première Instance*) ; and
- The president of the court of first instance sitting on appeal (*le président du tribunal de première instance siégeant en référé*)

Within the space of a few months, the same dispute could be the subject of decisions by several magistrates.

Under these previous arrangements, a justice of the peace could make an order valid for 6 months determining where a child belonging to a married couple who had temporarily separated was to live. While this order was in force, a juvenile judge might make a second order requiring the same child to live somewhere else. Finally, when the couple's divorce petition came before the court of first instance, the president, sitting on appeal, might make a third residence order for another means of accommodation. This was not easy to sort out! Moreover, it provided a persistent or vengeful litigant with a deadly weapon through an ability to get several different decisions from different tribunals.

From now on, the legislation places the totality of a family dispute in the single Family Court, except for the system for the legally incompetent which will remain with the justice of the peace.

Among other matters, the Family Court will consider issues to do with affiliation and adoption, marriage and divorce and also legal partnerships (cohabitation) and the lifting of bans on marriage.

It will have jurisdiction in all matters to do with parental authority, residence and contact concerning young people. It will also be responsible for deciding on levels of financial support and share each party should contribute.

The Court will be able to make emergency and interim orders concerning married couples, parents and legal cohabitants.

Applications concerning marriage, bequests, gifts *inter vivos* and wills are no longer within the scope of the Family Court.

The Justice of the Peace retains jurisdiction in guardianship cases. Under the Law of 17 March 2013, which came into force on 1 June 2014, these justices have sole jurisdiction concerning the legally incompetent. That law effectively introduced a new regime of protection for people whose state of physical or mental health requires it. Note that the Family Court does not act on appeal from decisions of the Justice of the Peace in these disability cases. These are still dealt with by the court of first instance.

C. One family, one dossier, one judge

The drafters of the legislation hoped that *ñfor civil matters, the judicial history of the family should be held in a single file.ò* The aim is to achieve coherence between decisions but also to limit debate to the minimum needed to resolve the dispute. In practice, it is not helpful to bring up all the earlier matters[1].

- **One family**

Under the legislation, a family consists of at least two people:

♦ A married or divorced couple or a couple that is or has been cohabiting ;

♦ A parent and a child to whom the parent is affiliated;

♦ Two parents and the children they have in common.

Reconstituted families consist of at least two and perhaps three families with children in common.

Cohabitants without children who do not have a legal cohabitation contract are outside the scope of the Family Court.

- **One dossier**

A family dossier is opened as soon as an application has been made to the Family Court.

Each new request relating to the same family will be attached to their unique family dossier and, in theory, will be dealt with by the same judge.

The family dossier contains only applications within the scope of the Family Court. A protection dossier that may be open before the Youth Court for a child who belongs to the family is kept separate. Moreover, it will be handled by a different judge.

According to the promoters of the legislation, it would not have been appropriate to create a link to the protection dossier, which is concerned only with the child.

If the judge considering the protection matter were also to work with the family, his/her concern would be to protect the child and not the family as a whole. Moreover different protection measures may be needed for different children in the same family.

The separation between the family dossier and the protection dossier is, of course, necessary, but it does not appear to be absolute. A prosecutor working in both courts can act as a link between the two dossiers if he/she considers it necessary.

- **One judge**

The judge dealing with a family dossier is identified by a unique number which corresponds to the dossier. This judge (ie the same person) should in theory be aware of all the applications made by members of the same family.

This single judge, who knows the whole situation, is in a position to take more consistent decisions, to get a better picture of relationships within the family and to steer a steady course.

However, a judge dealing with a family dossier in the mediation court cannot deal with the same dossier in the Family Court. Rules of confidentiality must be respected if the mediation is to succeed.

The same applies to a judge who has sat on a childôs case in the Youth Court. That judge may not sit in the Family Court in a hearing concerning the childôs family.

Experience will show whether this principle is tenable and can be made to work in the smaller districts.

D. Territorial jurisdiction

The idea is to standardise the rules of territorial jurisdiction in family matters, which has not necessarily been the case in the past, and to put into practice the principle of one family, one dossier, one judge.

Article 629 bis *code judiciaire* sets out the rules in a hierarchy:

a) the first court applied to by a family determines jurisdiction for all further applications by that family.

b) All applications concerning parental authority, residence or support of a minor come before the court where the child is domiciled or habitually resident. If there are several children

[1] In Doc 53 0682/001, proposition de loi instituant le tribunal de la famille, exposé des motifs p.14. (proposal for legislation to establish family courts).

who live in different places, the first court applied to has jurisdiction over the whole family dossier;

c) If the family has no children, the applicantõs residence determines the court that has jurisdiction; and

d) If it is in the childõs interest, the Family Court in one district can remit the dossier to a Family Court in another district.

E. Specialised training for magistrates

Magistrates who sit in the Family Court and also prosecutors and appeal court judges must undertake a course of specialised training.

More specific training is to be provided for magistrates who sit in mediation courts. This targeted training was sought by magistrates who deal with family issues. The training will cover family matters and techniques for mediation and active involvement in order to respond better to the delays in the justice system.

F. Prosecutors office (*le parquet*)

Prosecutors appear in all the courts comprising the Family and Youth Courts.

Prosecutors give advice or issue demands in all applications that concern a minor and in any matter that requires their involvement.

The prosecutor alone has an overview of the family circumstances of the child and he/she can act as an information channel between one set of proceedings and another.

G Urgent matters and interim decisions

The underlying principle is that all litigation, however urgent, should be dealt with by the Family Court.

Only cases of absolute necessity remain within the province of the President of the Court of first instance, who has an overriding power under article 584 of the Judicial Code.

The second principle is that from now on a distinction is made between provisional (or interim) orders and emergency orders.

a. interim orders

Article 1253ter/5 sets out the areas in which interim orders may be made. These include :

- decisions regarding parental authority, residence and relationships with a minor child ;
- setting, amending or terminating financial support ; and
- decisions on the residence of separating couples (married or in legal cohabitation) as well as decisions on the residence of married couples where there is disagreement.

When an application is made, an action must be started within 15 days. From that point, interim orders can be made

b. emergency orders

An emergency has no effect on which court has jurisdiction, because in all cases the Family Court hears the application. However, the procedure is different.

Emergency hearings can result in interim orders, but also in final decisions (subject to what is said below on *permanent applications*, which occur in the majority of family cases, nothing is ever finalð everything can be reviewed in the light of new evidence).

The legislation distinguishes between *presumed emergency* and *claimed emergency*ð ie a need for urgency that must be demonstrated by the applicant.

The list of *presumed* emergencies is extremely long and includes almost all family litigation. Alain-Charles Van Gysel wonders elsewhere[2] if it will be possible to deal with all the disputes that are presumed to be emergencies with a really high priority.

We should bear in mind that emergency is presumed in the following areas of litigation:

- interim orders between married couples[3]
- interim orders between legal cohabitants[4]
- orders to do with parental authority, residence and contact with a minor, irrespective of the marital status of the parents ;
- orders for financial support ; and
- removal of children abroad[5].

A *claimed* emergency must be demonstrated by the applicant and can cover any area within the jurisdiction of the Family Court. If a case for urgent treatment is not made out, the Family Court will not declare the application inadmissible, but will remit the dossier to an ordinary hearing. This method of remission saves time and is quicker and so more efficient. It also reduces costs.

H. Rules of procedure in the Family Court

The general procedures of the civil courts clearly remain applicable to the Family Court, apart from some special rules that are peculiar to family litigation.

Some general rules that apply to the Family Court have been established, alongside civil procedures.

In the outcome, the reforms have not altered the particular procedures applicable to each area (affiliation, divorce, etc).

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2 Alain-Charles Van Gysel, Précis de droit des familles et de la personne, ANTHEMIS, 2013, p.512

3 Articles 223 and 1280 of the judicial code.

4 Article 1479 ibid

5 Article 1322 bis ibid

a. personal appearance by the parties

When the case is deemed urgent, a personal appearance by the parties is now required at the introductory hearing. As has been said above, these are cases between married or legally cohabiting couples, cases concerning parental authority, residence and contact with a minor, applications for financial support, etc.

A personal appearance by the parties is required both at the intoductory session and substantive hearings when a case concerns a minor.

The judge may grant an exemption from this rule in exceptional circumstances.

When the application is for the Court to endorse an agreement drawn up by a barrister, solicitor or mediator, a personal appearance is not required unless the agreement is clearly not in the interests of the child.

In requiring the presence of the parents when the case involves children, the intention behind the legislation is to hear the litigants and get a better understanding of the relations between the parents.

A personal appearance by the parties enables the judge to make them aware of alternative ways of resolving disputes (mediation) and to gauge the likelihood of reaching agreement in the present case in the mediation court.

Having met and heard the litigants, the magistrate is able to take fairer and more humane decisions with the continuing concern to reduce conflict.

Finally, requiring the parents to attend in person makes it possible to make them aware both of the procedures relating to the children and to their respective roles in the exercise of their joint parental responsibility.

Applicants who do not appear can have their application thrown out and a contrary judgement may be made in default against a defendant who does not appear.

b. priority accorded to the parties

The legislation set itself the aim of simplifying and making the procedures in family disputes user-friendly. It encourages alternative methods of resolving conflicts and, in particular, conciliation and family mediation.

Accordingly, at all points in the process from the initial application, the parties are encouraged to seek agreement.

Article 1253ter/1 states « In all cases before the Family Court, once an application has been made, the clerk will inform the parties of the possibility of mediation, conciliation and all other methods by which a resolution can be amicably reached».

Setting up the mediation court contributes to the same objective because this courtôs role is to achieve conciliation between the parties or to tell them about the various possibilities available to them to reach an agreement.

At every point in the process, priority is given to achieving agreement between the parties as that can be endorsed by the judge unless it is contrary to the interests of the children.

c. hearing children

Hearing the child within the framework of family litigation, especially in cases to do with parental authority, residence and contact with the child, has the aim of allowing the young person to exercise his/her rights to be heard in cases which concern him/her. These rights are enshrined in article 12 of the UN Convention on the Rights of the Child and in article 22 bis of the Belgian Constitution.

Before this reforming legislation, the effective exercise of the right to be heard depended on various criteria. The choice of court and the age of the child determined whether or not the child would be called by the judge. In the Youth Court, children of 12 and above were systematically called in cases involving parental authority or the childrenôs residence. In other courts, whether the child was heard depended on the magistrateôs assessment of the childôs capacity to form a judgement.

This was potentially discriminatory and a source of confusion.

The reforming legislation standardises the hearing of children and contains a relevant section.

Article 1004/1 of the judicial code now contains a provision that, in all cases involving parental authority, residence and personal relations, a young person of 12 or over affected by the case will be sent a form by which he/she can ask to be heard.

The Law also allows children below the age of 12 to be heard at their request, at the request of the parties, of the prosecutor or of the judge.

The judge will hear a young person in person with no one else present in a place that seems best suitedô certainly not in the court room.

The judge will consider the young personôs views, taking into account, « his/her age and maturity ».

As before, the interview with the child will be written up in a joint report in the dossier which may be made available to the parties.

d. permanent applications

In most family matters where urgency is presumed, the principle of a permanent application to the court has been retained.

Once the Family Court has received such an application, the matter remains in the court register. That means that when a new issue occurs in the familyôs circumstances, one of the parties can request that the dossier should be put before the court again. This can be done by a simple message or by putting conclusions before the clerk.

The applicant must explain what the new matter is to justify the application. The legislation defines what constitutes a new matter in article 1253 ter/7.1, line 2 of the judicial code.

A permanent application procedure offers greater access to justice, reduces costs and ensures better continuity in judicial proceedings. On the other hand, it is possible that this procedure may lead to overuse of judicial processes because whenever anything changes it is very easy to apply to a judge for changes to the order. The risk of an increase in proceedings could adversely affect relations between the parties.

I. Transitional provisions

The Law came into force on 1 September 2014.

Proceedings that were current on the date when the Law came into force will continue before the judge currently hearing them and any appeal will be to a judge of appeal in the same jurisdiction.

However, if a decision is overturned and the matter is within its province, the case will be sent before the Family Court.

If a judgement had been given by default by a court before the Law took effect, opposing arguments will be heard by the Family Court if the issue is within that courtôs competence.

Finally, under article 387 bis of the judicial code, which was not amended by the Law and which had already set up a system of permanent application, the Youth court hearing the case before the Law took effect will retain the relevant dossiers until the children involved reach the age of majority or are released.

J. Conclusions

The reforms place family disputes in the hands of a single judge, which should considerably improve litigantsôaccess to justice. The Law seems to me to give greater clarity to family proceedings.

That there is a simplification seems undeniable. A single court considering all types of decisionð emergency, interim and finalð will allow better administration of justice and greater consistency between decisions.

The emphasis given to mediation in family disputes is also a way of reducing conflict within families.

We may confidently expect that the new courts will lead to better management of family conflict, a reduction of tension within families and ultimately better protection for children who are often suffering.

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The Carlile Report---recommendations for the Youth Court in England and Wales.

Shauneen Lambe

The Independent Parliamentariansô Inquiry into the Operation and Effectiveness of the Youth Court was launched in 2013 amid growing concerns that criminal and youth courts do not, in their current form, effectively fulfil their principal aims of preventing youth reoffending and having adequate regard to the welfare of the child.

As a panel member for the Inquiry, I was privileged to be given the opportunity to witness the hard work and commitment of everyone involved: from those giving evidence, to my fellow panel members, the application and interest of the parliamentarians, the leadership of Lord Carlile and the depth and dedication to the report-writing demonstrated by Ali Wigzell a researcher for the Institute of Criminal Policy Research and author of the Centre for Social Justiceôs Rules of Engagement in 2012[1]

However much work was put into the report the hardest work is yet to be done - the implementation of the recommendations. The report urged immediate reform of the way that children in England and Wales are brought into and subsequently treated in the criminal justice system. The thing I most enjoyed about being a part of the Inquiryôs panel was watching the next steps develop and evolve. Everyone involved in the Inquiry is committed to achieving the recommendations contained within the report, which I found to be most unusual and fantastic. I will address some of those advancements in detail below.

First a little background - The Independent Parliamentariansô Inquiry into the Operation and Effectiveness of the Youth Court came about through the diligence and dedication of the Sieff Foundation. The Sieff Foundation was founded in 1978 and is committed to improving policy and practice for the well-being of children and young people.

As well as the Sieff Foundation, the Inquiry was funded by the Dawes Trust and was administrated by the National Childrenôs Bureau[2], which has been improving the lives of children and young people - especially the most vulnerable - through influencing government policy for the last 50 years.

The parliamentarians involved in the Inquiry came from both the upper and lower houses of Government (the House of Lords and the House of Commons) and from across the political parties. The panel of advisers to the parliamentarians were chosen because of their expertise in the field of youth justice. Over the course of the Inquiry, oral evidence was heard from forty three individuals with experience of working with children and young people in conflict with the law, as well as children and young people who had been involved in the youth justice system themselves. Fifty five written submissions were also considered before the preparation of the report. The parliamentarians were invited to visit a secure training centre - a detention centre for those under 15 years of age and those who are vulnerable and also to view a youth court in session. Everyone involved in the report gave their time to the Inquiry for free; the only costs involved were for the administration and writing of the report.

For those who may be interested in the details of the evidence and findings of the report (in English), it can be found here: http://www.ncb.org.uk/media/1148432/independent_parliamentarians_inquiry_into_the_operation_and_effectiveness_of_the_youth_court.pdf

The panel unanimously reached a number of recommendations for immediate improvement of the way that children are treated in the youth justice system. Many of these would not be a surprise to those who work with vulnerable children and young people. The report also published potential timeframes and frameworks for how the recommendations could be implemented.

I do not propose to look at all of the recommendations, nor to trawl through the numerous problems with the youth justice system in England and Wales. I will spend the rest of this article focusing on a few of the fundamental areas of concern and proposed solutions to those.

[1] http://www.centreforsocialjustice.org.uk/UserStorage/pdf/Pdf%20reports/CSJ_Youth_Justice_Full_Report.pdf

[2] http://www.michaelsieff-foundation.org.uk/Lord-Carlile-Parliamentary-Inquiry-into-the-youth-justice-system.html

1. Use of adult Courts for children

There was a consensus amongst those who gave evidence to the inquiry, and also from the parliamentarians themselves, that children should not be tried in adult courts, except on very rare occasions. Some parliamentarians thought there were certain cases where it might be appropriate or necessary for children to be tried in adult courts, such as if they were charged with an extremely serious or high profile offence. Another example was if they were charged with an adult defendant and it would not be fair on victims and witnesses if the adult and the child had separate trials, because the victims and witnesses would have to attend court twice.

The adult court in England and Wales takes two different guises: the adult Magistratesô court and the Crown Court. The Magistratesô court hears relatively minor adult offences and the maximum sentencing power of the Magistratesô court is six monthsôimprisonment for any offence. The Crown Court hears the more serious offences. These adult courts differ from the youth court in a number of ways. The Crown Court, primarily, differs in formality. Judges and lawyers in the Crown Court wear traditional English wigs and gowns and often use archaic language. In Crown Courts there are also juries. A jury is made up of twelve randomly selected lay people who decide whether a person is guilty or not guilty of an offence instead of a judge, although the judge decides the appropriate sentence if a jury finds someone guilty.

The Crown Court can be hugely intimidating for children and can prove to be a real disadvantage to achieving justice for young people. Many young people involved in criminal proceedings have behavioural or mental health difficulties. According to the report ôYoung Lives Behind Barsô just released by the British Medical Association[3], approximately 60% of children in custody have ósignificantô speech, language and learning difficulties; 25-30% are learning disabled and up to 50% have learning difficulties. A vulnerable child defendant may be judged by lay jurors on how they behave in court rather than whether or not they committed the acts they are alleged to have committed, especially if a jury is unaware of any mental health difficulties or not familiar with how they manifest themselves.

A further problem for children caught up in the English and Welsh criminal justice system is that it is an adversarial system, so the purpose of the prosecution is to advance their case and prove the accuracy of their version of events, rather than seek the truth. This means that vulnerable children with communication difficulties are expected to give evidence, defending themselves against the accusations of the prosecution, while pitted against lawyers with, in serious cases, many years of experience interrogating people. There is obviously a mismatch of skills and so it is perhaps unsurprising that when faced with this level of interrogation children do not give the best account of their actions, this is of course also true of child witnesses and victims although efforts are being made on to remedy this on behalf of victims and witnesses, it remains to be seen if the same protections would be afforded to child defendants.

In the 2005 case of *SC v UK*, the European Court of Human Rights overturned the conviction of an 11 year old boy who had been tried in the adult Crown Court because of his inability to effectively participate in the trial. The European Court said if the UK chooses to criminalise its children rather than some other process that is best suited to the welfare of the child it was ôessential 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.ô

There was recognition from all parliamentarians in the Inquiry into the Operation and Effectiveness of the Youth Court that Children's offending flows from a wide range of complex social, communication and mental health needs, which welfare services are failing to address; resulting in children 'falling' into the criminal justice system. Once within the system, criminal courts do not possess the means to address their needs, which frequently continue to go undetected or are identified by chance during the trial. This is caused by a lack of effective assessment of childrenôs needs before they appear in court and leads to young defendants not engaging with, or having a limited understanding of, the youth proceedings and ultimately fails to achieve justice.

Putting children on trial in adult courts frustrates the principle that children are different from adults and frustrates our commitment to the UN Convention on the Rights of the Child. Children should be treated differently by the justice system in recognition of their young age. Sending children to the Crown Court or when jointly charged with an adult to the adult Magistratesô Court makes poor use of the resources of specialist Youth Courts. It can also have grave consequences ï such as in the tragic case of a 17 year old girl who committed suicide after appearing in an adult Magistratesôcourt. I have worked closely with the family of the 17 year old girl, Kesia Leatherbarrow, and her parentsôvisceral pain stays with me at all times. Here was a young girl with a history of depression and self-harm, who clearly needed help and assistance. Instead, Kesia was treated like an adult criminal and locked up in a police cell for three days and two nights for possession of a small amount of cannabis and a broken window.

[3] http://bma.org.uk/news-views-analysis/news/2014/november/helping-vulnerable-children-at-risk-of-incarceration

Despite exhibiting concerning behaviour and after spending the weekend in a cell at the police station, she was sent to an adult Magistratesô Court because that was the only court sitting that day. No one in that setting spotted or considered Kesiaôs vulnerability and she was released, without adult supervision, to return to the youth court the next day. But by the next day Kesia was dead: she was found hanged in the back garden of a house where she was staying.

Lord Carlile CBE QC, chair of the Inquiry, said of children appearing in the adult (Crown) court:

'Although much good practice has developed over the years in relation to crime committed by children, we found that the youth justice system is far from being fit for purpose. Too often children are being left to flounder in court with little understanding of what is happening to them. Nowhere is this disengagement and lack of comprehension more obvious than in the Crown Court. Even with determined special measures to make the court more child-friendly, there is strong evidence that an appearance in the Crown Court for a child is a negative and terrifying experience. Where possible, children should not be taken before a court and Crown Court appearances for under-18s should be the rare exception.'

2. Lack of Specialist Lawyers for Children and the future

The Parliamentary Inquiry found that there is a lack of specialist professionals throughout the youth justice system in England and Wales, with many practitioners, including the judiciary, insufficiently trained to recognise young offendersô needs, and lacking knowledge specific to young defendants and youth court law.

In England and Wales, the youth court is often used as a place for junior legal practitioners to 'cut their teeth', as youth court law is mistakenly perceived to be less complex and less important than adult court criminal law. This often results in poor representation of children by practitioners who have not been trained in how to identify the unmet needs of vulnerable children and inappropriate sentences being advocated by legal representatives.

Following the publication of the Inquiryôs report, The Bar Standards Board and Chartered Institute of Legal Executives (Cilex) Professional Standards - the professional bodies representing barristers and legal executives in England and Wales - sought expressions of interest from research organisations with the expertise to undertake an independent review of advocacy within the Youth Courts in England and Wales. The Bar Standards Board and CILEX said:

ôThe review follows the publication of the final report of the Independent Parliamentarians' Inquiry into the Operation and Effectiveness of the Youth Court, chaired by Lord Carlile of Berriew CBE QC. The Inquiry made a number of key recommendations, including that "all legal practitioners representing children at the police station and practising in youth proceedings be accredited to do so".

The aim of the Bar Standards Board and CILEX review is to identify and examine the skills, knowledge, and attributes needed for youth court advocates to work effectively. The outcome will be an evidence base from which the two regulators can then identify any existing risks within youth court advocacy, and establish what, if any, regulatory action needs to be taken.

This is a welcome outcome of the Inquiry and with a fast turnaround time for the review (the research is due to be published in June of next year) there is real hope that standards of representation in the youth court could be improved. The only disappointing aspect of the review is that it was not supported by the Law Society. The Law Society is the professional body for solicitors in England and Wales. Solicitors make up a large proportion of those who act as advocates for children in criminal proceedings as the vast majority (95%) of youth justice cases are heard in the Youth Court, where solicitors have rights of audience. If the Law Society do not support the research into the standard of advocacy and legal representation for children in the youth justice system we may well end up with a two-tiered system, whereby half the legal profession in England and Wales will require specialisation and training and the other half will not. The victims of this two-tiered system will undoubtedly be the vulnerable children, who will be unable to identify which professional is better trained to represent their needs.

It seems only right to comment that when offered the choice, in medical terms, of a paediatrician or a general practitioner one would be likely to choose the specialist over the generalist to provide particular knowledge and expertise. The same must be true in legal proceedings: someone with a tax problem would want a tax lawyer rather than a generalist lawyer, so a child should have a child specialist lawyer with all that that entails. That means not only the legal expertise but also the ability to communicate with a child (after all we might not agree that a university lecturer has the same communication requirements as a nursery school teacher), and to identify any potential learning difficulties or behavioural problems that might be present in a child involved in criminal proceedings. As Lord Carlile, Chair of the report has stated publicly: ógreater understanding would be aided significantly by improved and required training for the Bench [judges] and advocates. We recommend that nobody should be permitted to fulfil these roles unless they have been trained, and ticketed as competent to work in the Youth Court.ô

3. Rehabilitation and Reintegration

There was recognition amongst all those who gave evidence that the number of children being brought into the youth justice system has gone down. This is a relief to child rights advocates who saw England and Wales having the highest levels of incarceration rates of children in Europe just five[4] years ago. However the decrease in numbers has meant that the children that are now being brought into the criminal justice system are often the ones who are more troubled or more vulnerable. There was a perception by the Inquiry that professionals are struggling to reach a consensus on the core purpose of the youth court, with conflicting emphasis placed on preventing offending and punishment versus the welfare needs of the child and achieving justice.

In England and Wales, because of legislation stating that the primary aim of the youth justice system is to óprevent offendingô, the court's focus has been on determining innocence or guilt and sentencing. An alternative and perhaps more beneficial approach, for society and the child, may be to take a holistic, joined-up approach to tackling the underlying issues behind the offending behaviour. Failure to do so is one of the main obstacles to preventing reoffending. One senior practitioner told the inquiry:

'Our focus on punishment rather than problem solving contributes to our high levels of reoffending'. Re-offending rates of children in the criminal justice system are as high as 70%, the system that we currently have is clearly not working. If any business was failing to achieve its stated aim by 70% it would surely go out of business.

There was consensus amongst the parliamentarians that there needed to be better ways to address the underlying needs of the young people coming into contact with the youth justice system. As Lord Carlile put it:

'Whether in the Crown Court or Youth Court, in numerous instances children with multiple mental health problems have found themselves before criminal courts rather than in child and adolescent mental health services (CAMHS). ……Sometimes court seems the least difficult outcome for the professionals involved, even if the worst for the child.'

Lord Carlile recounted evidence that shocked the panel including one case where a 15 year old, a self-harmer whose aunt could no longer cope, was prosecuted for causing alarm and distress to the police officer who was called to the home: the alarm and distress was apparently caused by the sight of the child attempting to harm himself. No other intervention had been available, and when pressed by the judge in the case, the prosecutor asserted confidently that prosecution was the suitable course. The notion that this was the best outcome available was, to say the least, surprising. Plainly what the boy needed was a full review of his case by services outside the criminal justice system.

Alternatives to prosecution and court appearances do exist in the UK but because these are discretionary and are for decision-makers at a local level, usually the police often in conjunction with youth offending teams, and they are used to varying degrees in different areas. This has led to a ópostcode lotteryôof services that are provided in an attempt to avoid criminalising vulnerable children. As Lord Carlile readily identified:

ôThe problem with putting such children in the court setting is that the courts are usually only able to focus on the offending, rather than the child and the wider circumstances contributing to their behaviour.ô

4. Clean slate

Advocates for child rights have long been pressing for ócleanslateôlegislation allowing those who are convicted as children, especially of minor crimes, a chance to have those offences expunged off their records upon turning 18.

The onerous system in England and Wales of criminalising adolescents and insisting on disclosure of criminal records for employment purposes means a vast number of young people are inhibited in employment and education, because of things they did when they were teenagers. These include the former Prime Ministerôs son, Euan Blair, who was cautioned for being drunk and disorderly and had to overcome that hurdle when wanting to study in the United States, and the former Home Secretary Jack Strawôs son, who was cautioned for possession of cannabis.

This issue of disclosure of juvenile or minor infractions was the subject of a recent case before the UK Supreme Court where a 25 year old man who wanted to coach a football team was required to disclose a caution that he received when he was 11 years old for theft of a pedal bike. The Court found that under the current disclosure system this man would be required to disclose this ôoffenceô whenever he wanted to find a new job working with vulnerable people, which was a breach of his right to respect for private life under Article 8 of the European Convention on Human Rights.

[4] See National Association for Care and Resettlement of Offenders (NACRO) http://www.nacro.org.uk/data/files/useofcustodychildren-802.pdf

One of the Inquiryøs major recommendations relates to criminal records. Children who have committed less serious offences, and who have stopped offending, should be able to have their criminal record expunged once they reach 18. MPs and others receive many complaints about adults having difficulty obtaining employment because of a relatively minor pre-18 record. This is unacceptable. An important aspect of rehabilitation is the ability to enter into adult life on the same terms as others.

Conclusion

In conclusion the Inquiry is a welcome reminder to society and the legal system that there are fundamental failings in the way that we are treating one of the most vulnerable elements of society ï our children. It often feels that British society is willing to see a criminal first and a child second. I think that all of us who work in the Youth Justice sector would like to see this reversed.

With the backing of the Independent Parliamentary Inquiry and the support of a wide range of parliamentarians we hope that the report and the Inquiry will be able to open doors and begin conversations that will start a movement of welfare and concern rather than punishment and example.

Shauneen Lambe, Barrister and Attorney (USA), Executive Director of Just for Kids Law a UK charity which provides holistic support and legal representation to vulnerable children and young people.

News from UK Parliament

On 11 November 2014 the amendment to the PACE[5] codes in the Criminal Justice and Courts Bill was accepted in the House of Lords. As of Spring 2015 no 17 year old will be kept in police custody overnight but instead be transferred to local authority secure accommodation.

Kesia's law (referred to above) is a reality.
@justforkidslaw

[5] Police and Criminal Evidence

Children`s rightsЬchallenges in the juvenile justice system of Hungary

Eszter Párkányi

Introduction

After a long drafting procedure which lasted more than 10 years, the Hungarian Parliament adopted a new Penal Code on 1 June 2012, and, as a part of it, approved reform of the juvenile justice system. Unfortunately, according to the Ombudsman for Fundamental Rights and a number of non-governmental organizations, this new system is not even close to what may be called forward-looking or child-friendly according to the requirements of international documents on children's rights[1]

In September 2014 the Committee on the Rights of the Child also expressed its concerns about the debated features of the new criminal policy, confirming the doubts of the above organizations and urging the government to find the way back to child-friendly law and practice[2]. There is a long list of problematic changes which have shaped the system in recent years, and which may have a significant negative social impact in the coming years.

The present article aims to set out those issues which have direct relevance in the judicial field. Before the analysis I would like to set out a short introduction to the justice system and the trends of delinquency in Hungary.

The juvenile justice system of Hungary builds upon the German-Austrian heritage of the civil law tradition as well as being strongly influenced by features from the socialist era, such as the requirement to base punishability of criminal acts on the assumption of their harmful impact on society.

Juvenile justice is part of the general judicial system, with an established and exceptional type of procedure and special substantive law applicable with regard to the age of the perpetrator. This procedural exception is evident in the legal construct as well, Hungary does not have a separate act on either substantial or procedural juvenile law, but, since 1961, they have been embedded

in the Penal Code and the Act on Penal Procedure. Special rules, however, do not extend to the special part of the Penal Code--age is only recognized as a circumstance which modifies the type or moderates the gravity of the sanction. Children are theoretically able commit any type of criminal act. As a result, the ójuvenile justice systemôis best understood as a "mitigated justice system", rather than a special framework for delinquent children.

The number of children under the age of 18 is approximately 1.9 million, and it has been consistently falling for the last 18 years[3]. The Annual Report of the Ombudsman for Fundamental Rights (2013:p62) presents the number of those children who are at any kind of risk as follows:

õmore than 200,000 children were registered as at [child protective] risk; more than 10.000 children were in the criminal justice system".

Furthermore, about 6000 children per year became a victim of a violent crime[4] and about 30 children die yearly as a victim of physical abuse[5].

After a short period of increase in criminality and after the introduction of the 2012 Penal Code, criminality in Hungary stabilized to a ómid-level rateôin European ranking[6] . Nowadays trends of deviance in the juvenile population follow international tendencies. Based on the data of the International Self-Report Delinquency Study (ISRD)[7] Hungarian tendencies are, in some respect, similar to both Western-European and Post-Socialist countries. According to the ISRD, Post-Socialist countries seem to have the lowest rates both in lifetime and previous year prevalence of offending with the exception of Hungary, which shows, in both regards, similar crime rates to Western-European countries. The only exception is the case of serious offences, where Hungary shows average prevalence among post-socialist countries, which indicates a lower proportion than in Western-Europe.

[1] Ombudsman's Report, 2012
[2] CRC CO, 2014
[3] Comparative data of the last census (KSH, 2011)
[4] latest figure for 2012
[5] Ombudsman of Fundamental Rights, 2013.
[6] Kerezsi and Lévay, 2008; Csemáné, 2010:676
[7] *ISRD* Junger-Tas, 2012

While trying to promote 'criminal' children taking responsibility for their actions, stopping underage criminal activity seems to be a central issue of crime prevention policies in Hungary. Official statistics show a moderate decrease in the records of youth deviance in the past ten years. The absolute number of child delinquents (under 14) declined from 3,553 in 2003 to 2,604 in 2012, while juvenile crime rates are wavering between 10,000 and 12,000 registered cases per year[8]. Children involved in criminal activity represent 0.2% of the same age population (0-14), while the proportion of juvenile delinquents aged 15-18 is about 2.3% of the peer population. Delinquency rates are the highest in the northern and southern regions of the country, while the lowest rates have been registered in the regions at the western border, which may be attributed to the socio-economic disadvantage of northern and southern regions[9]. Children living in these parts of the country are most at risk of social exclusion and segregation as well as involvement in criminal acts.

According to the data of the Office of the Public Prosecutor,

- 43.5% of juveniles commit delinquent acts alone while
- 28.0% get involved in crimes as a member of a group.
- about 8.7 % of those who committed delinquent acts had committed a registered delinquent act before.
- the participation of girls shows a very slow growth[10].
- the overwhelming majority of juvenile delinquents are boys[11] Boys not only commit three times more offences but those offences are considered to be serious enough to be dealt with by institutional reactions, such as detention or reformatory education in closed facilities[12] .

Therefore juvenile justice in Hungary is basically built upon boysôcriminality, and this trend of boysô overrepresentation in conviction rates continues among young adults[13].[14] Girls are typically diverted from the justice system to child protection, or dealt with by non-custodial measures.

The new direction of the Hungarian legislation

The laws which constitute juvenile justice in Hungary have not been amended significantly since the political transition in 1989 despite the fact that the potential direction of the juvenile legislation has always been the focus of codification and public debates.

The Committee of Codification for the new Penal Code was established in 2001; none of the various plans and drafts of the new juvenile justice system were successful until 2012. The reason for the lengthy procedure was not an evidence-based style of preparation, since research on the effectiveness of legal institutions or empirical issues of delinquency is very rare in Hungary.

The long preparation followed rather from the lack of agreement on the political and professional preferences. In 2010 the newly elected government of the Fidesz Party 'inherited' the task of penal codification from the previous governments and after eight years of debates, they drafted a new Penal Code in less than two years. Given the opportunity of governing with a vast majority in the Parliament, the draft was adopted without real debate or previous professional consultation.

But the Penal Code was not the only amendment which affected juvenile justice (see Table 1 below). In August 2010, among the first legislative acts, the Act on Administrative Offences of 1999 was amended, introducing the so-called "short sharp shock" measure of short-term confinement in the youth justice system.

Two years later the Act was replaced by a new law on Administrative Offences, which still allows confinement. In September 2011 Article 448 para (1) of the 1998 Penal Procedure Act on the exclusive jurisdiction of Regional Courts in juvenile cases was **abolished**. With this legislative act the majority of juvenile cases have been assigned to local courts.

This paper aims to give insight to the childrenôs rights' challenges following from the new juvenile justice laws in Hungary, focusing on the effects on judicial practices.

[8] Lagfőbb Ügyészég Informatikai.Osztály(LUOI 2013 Table 1)
[9] LÜIO, 2013
[10] it was 13.9% in 2003 and 17.6% in 2012ˈ , see LÜIO, 2010: Table 6 and LÜIO, 2013: Table 13
[11] Csemáné, 2010
[12] Junger-Tas, 2012:80
[13] Kerezsi and Lévay, 2008
[14] Hereinafter I am going to use "he".

Table 1. Relevant legal changes in the current juvenile justice

Law	Change	In force since
2012/II Act on Administrative offences	**Short sharp shock**	19 August 2010
2012/C Act on Penal Code of Hungary	**Decreasing MACR in case of most serious offences**	1 June 2013
	Criminal measure resulting deprivation of liberty of 12-13 year olds	
1998/XIX Act on Penal Procedure	**Abolishing rules on requirement of specialized judges**	1 September 2011

A) Administrative reaction to misdemeanours

The Hungarian regulation on deviant behaviour separates "socially harmful", and "not harmful" deviances. While the first category covers criminal acts, the latter refers to certain minor offences (such as minor theft under approx. 160 Euros) as well as anti-social behaviour (such as speeding, or begging). This second group is referred to in English as a misdemeanour, however, according to the law, it is an administrative offence, where public authorities, such as the police or the notary may impose a fine, community work or request the court to order confinement. Because there is an assumption of the lack of harmfulness to society, the procedure is traditionally simpler than in a criminal case, and the most commonly used sanction is a fine.

In the summer of 2010 the amendment of the 1999 Administrative Offences Act abolished the prohibition of confinement in cases of misdemeanours committed by children[1]. The amendment aimed to aggravate the consequences of those anti-social acts of children that happen on an everyday-basis and therefore are visible in communities. This is in line with the previously declared law and order policy. According to the new rules a clerk may order up to 45 days of confinement for a child who has committed minor thefts, been forced into prostitution, caught in an act and for other minor cases. It is intended that this harsh reaction will be repressive and act as a deterrent.

Data on administrative offences is only available from April 2012, thus I looked at the data between 15 April 2012 and 31 December 2013[2]. The age of commission is unknown, but the numbers cover children between the age 14 and 18. From the 35,331 cases juveniles

- violated the rules of traffic most often (in 16,766 cases), followed by
- 8,131 offences against property (mostly shoplifting),
- 2,714 cases of public cleanliness,
- 1,956 cases of driving without licence, and
- 923 cases of prostitution.
- In 390 cases the clerk or judge acting in the case found that loss of liberty was the appropriate solution. Interestingly, almost all of detentions were for property offences (280) or prostitution(80).

Unfortunately there is no data about the additional actions taken by the judge to arrange child protection support for those children for whom the administrative offence was clearly the sign of lack of support and protection in their families.

Expressions of concern

- Civil and public organizations for human rights expressed their worries concerning the new regulations, which, in their opinion, conflicted with children's rights to protection and personal freedom. The Ombudsman (Ombudsmanôs Report 2012:p21) asked the Minister of Home Affairs to draft a new regulation which respected children's rights, and focused on support instead of punishment of the child. Despite the warnings of the Ombudsman and complaints of NGOs, the new Act on Administrative Offences, which came into force on 15 April 2012, still allows detention in juvenile cases[3] Therefore, the Ombudsman of Fundamental Rights requested a Constitutional review on the law with regard to the disproportionately hurtful nature of the reaction compared to the underlying behaviour[4]. In its decision the Constitutional Court rebuffed the claims of the Ombudsman, stating that detention serves crime preventive goals,
- there are negative tendencies in juvenile delinquency and
- the need for public safety justifies the harsh reaction.
- In his minority report on the Constitutional Court decision, Judge Lévay presented a different reading of the CRC. He stated that the regulation conflicted with the requirements

[1] Lévay, 2012
[2] Ministry of Home Affairs, 2014
[3] Case AJB-2324/2012
[4] Case II/2806/2012 of the CC

of detention being the last resort and for the shortest appropriate period of time. He disagreed with the surprising majority decision[5].

Apart from the argument on violation of children's rights, Klára Kerezsi (2014) pointed out the irrational nature of detention in terms of cost-effectiveness:

"In 2012, a young, 17 year old offender from Ózd, North-East Hungary stole two bottles of alcohol from the food store, causing a damage of 5 Euros. The loss was immediately compensated for, because the young man was caught red-handed. He was sentenced to 20 days of confinement by the court which sentence was carried out in a youth prison. The execution of this imprisonment cost the tax payers a daily amount of 27 Euros"[6] .

B) Abolishing exclusive jurisdiction

As mentioned above, Hungary does not have a tradition of separate youth court systems, but the law establishes a somewhat special procedure within the general court system, and substantive rules aim to enforce education instead of punishment of children. In this weakly specialized system, where special education or training was never required from a judge assigned to become responsible for juvenile cases, the exclusive jurisdiction of Regional Courts was the only jurisdiction with experienced judges and an appropriate caseload.

This perspective of quality assurance was completely left out of consideration, when the government abolished the paragraph on exclusive jurisdiction from the Act on Penal Procedure of 1998. According to the political justification for the amendment, abolishing the exclusive jurisdiction better serves the aim of distributing cases to speed up the legal procedure. It was noted that in many European countries delayed justice is a serious problem and violates children's rights. However, abolishing the whole juvenile court system in Hungary seems to be a hurried, incautious and disproportionate legislative act in light of Article 40 paragraph 2, point iii of the CRC. As a result of the amendment the majority of juvenile cases have been tried in local courts since September 2011. Judges there do not have the relevant knowledge about this age group. From 1 June 2013, when the new Penal Code came into force, the minimum age of criminal responsibility (MACR) was partially decreased (see below). As a result, deprivation of liberty for 12-13 year old children has also been assigned to local judges in cases of, for example, robbery[7] The judge does not have the discretion to decide whether or not to try the case unless there is a lack of appropriate evidence.

Thus a child will necessarily be involved in criminal proceedings, where the judge has no special knowledge on evaluating his circumstances and behaviour.

Empirical research on the attitude and practices of the judges of local courts is not available yet, but there are some cases which raise the problem of the lack of specialization. For example, the most disproportionate juvenile pre-trial detention, issued in a robbery-case, lasted 13 months. According to the accusation the delinquent tried to force the victim to give him his T-shirt. During his term in the juvenile reformatory the 17 year old delinquent finished secondary school, and stepped into legal adulthood. The case has recently been brought before the European Court of Justice by the Hungarian Helsinki Committee[8].

C) Lowering the minimum age of criminal responsibility

According to the new Penal Code of 2012 MACR had been lowered from 14 to 12 years in cases of serious, violent crimes, namely homicide, voluntary manslaughter, grave assault, robbery and despoliation.

The paragraph provides a variant of the doli incapax presumption, according to which measures may only be imposed against a child younger than 14 years if he was proved to be able to see the consequences of his act. If a child was proved by psychological examination to be able to see the consequences of his acts, the court may use 'sanctions' against him. Most of the sanctions applicable against juveniles cover non-intervention or supervision, but there is an option for deprivation of liberty in the most serious cases. When applying this, the disposal may be reformatory education for at most 4 years in a reformatory institution.

The Ombudsman of Fundamental Rights (2013) and numerous NGOs expressed their concerns when the draft of the Penal Code was published, but the rule was not a matter of professional debate. Arguments of human rights' agents were, again, left out of consideration at the expense of reasoning in favour of public safety. The Ombudsman (2012) claimed later that

"establishment of the lower minimum age of criminal responsibility may be justified, following social argument and professional negotiation; however, this amendment of the Penal Code cannot be justified by the statistical number and nature of the offences committed by minors"..

An opposing argument is hard to build up against the minimum age based exclusively on international requirements, since there is no generally recommended MACR. General Comment Nr. 10 of the Committee on the Rights of the Child mentions 12 years as an absolute minimum age acceptable for MACR and

[5] Case II/2806/2012 of the CC

[6] Kerezsi, 2014:17

[7] *Murder, manslaughter and other serious acts are still tried in Regional Court, because of their gravity.*

[8] 444.hu, 2014

recommending a higher age. The only legally questionable point in the regulation is its exceptional nature. It is applicable based on the criminal offence and the *doli incapax* presumption. It presumes conditional maturity of a child in understanding the consequences of his actions, as well as in being able to participate in a criminal procedure and understand it. Since this presumption may easily lead to misuse of the law, the Committee on the Rights of the Child expressly recommends setting a MACR which does not allow exceptions

"in cases where the child, for example, is accused of committing a serious offence or where the child is considered to be mature enough to be held criminally responsible" (CRC General Comment Nr. 10, Para. 18).

Apart from this irreconcilability, the unpreparedness of the system is more problematic and argument against the rule is elusive.

Concerns and recommendations on improvement

The concerns of the Ombudsman of Fundamental Rights and of NGOs about the above legislation have been ignored by the Parliament of Hungary as well as the Constitutional Court. The last hope of the agents of childrenôs rights was the UN Committee on the Rights of the Child, the opinion of which may put pressure on the legislator to form a more child-friendly system of juvenile justice.

Regarding the administration of juvenile justice[9] the Committee on the Rights of the Child especially expressed its concerns about

- the possibility of deprivation of liberty for petty offences,
- the suspension of juvenile courts which leads to the transfer of cases to local jurisdiction, and
- lowering MACR from 14 to 12 years for a number of offences.

The Committee urged Hungary to bring its juvenile justice system fully in line both with the relevant articles of the Convention as required according to General Comment No. 10 on children's rights. Among others they recommended reinstating juvenile courts which employ judges with special education or training, as well as psychologists who are available for children in conflict with the law[10]

The clear message of the concluding observations was that the Government of Hungary should act upon children's rights recommendations, and reinstate the old institutional setting or develop a new system corresponding completely with children's rights.

Conclusion

In conclusion, it may be stated that the penal reform of the past years in Hungary failed to fulfil its revolutionary task in respect of juvenile justice. The structure of the laws, and a system set up by them remained the same, but some important restrictions, which would maintain a more child-friendly and less punitive sentencing, disappeared.

Apparently, the concept does not reflect statistical facts or empirical research from either Hungary or abroad. Scientific and human rights' rationales on juvenile delinquency and deviance seem to be secondary compared to the 'law and order' objective of the law maker.

Issues in the 'hot spot' of international regulation, such as

- the minimum age of criminal responsibility,
- deprivation of liberty of children,
- promotion of restorative techniques and
- respect for children in judicial and administrative proceedings

are being violated in Hungary despite the obligations specified in various international agreements.

Beyond the actual practices criticised by experts in the field, the apparent public support shown in the lack of civil and political opposition points to a different approach. Thus, when looking at the approach of Hungarian legislation in recent years, one may observe that neo-correctionalist political catchwords follow a path towards a clearly control-oriented system, in which the least important role is that of the children themselves.

The declared policy of distrust of children, and disrespect for their needs and opinions lead exactly in the opposite direction from those requirements which are clearly set in international documents. Children's rights are only referred to together with their responsibilities, and juvenile delinquents are even more frequently labelled as 'bad children', in contrast to the victimized 'good children'. The idea, that those children who commit crimes may belong to both groups, seems impossible in the mind of the public.

Therefore, the most important step towards a possible turn in policy in Hungary must underline the importance of observing children being 'in need' as well as 'at risk', indicating that needs should be a primary consideration while fulfilling the obligation to serve the 'best interests' of the child.

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[9] CRC CO, 2014, point 56
[10] CRC CO, 2014, point 57, (a) (f)

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Calling for a Global Study on Children Deprived of Liberty

Defence for Children International (DCI)

This article first appeared in Scottish Justice Matters (SJM), September 2014

Law & practice

International human rights law, and in particular the United Nations Convention on the Rights of the Child (UNCRC), establishes the clear obligation for states to use detention as a last resort, for the shortest period of time and to apply measures that are in the best interests of the child that aim at rehabilitation (United Nations Convention on the Rights of the Child, article 40, 1989). These obligations, however, are continuously violated in countries around the world. It is estimated that over 1,000,000 children are in criminal detention worldwide (UNICEF, Progress for Children, A report Card on Child Protection, Number 8, 2009). This number does not however include the other forms of detention, beyond criminal, or the many cases that remain unreported. Deprivation of liberty is indeed quite a broad concept and would include ñany form of detention or imprisonment or the placement of a person under the age of 18 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 authorityò (United Nations Rules for the Protection of Juveniles Deprived of their Liberty - Havana Rules, 1990). Children are, for instance, also detained in the context of immigration based on their or their parents' migration status. Immigration detention of children *always* constitutes a child rights violation. Children may also be confined for physical and mental health, among other reasons.

In the case of criminal detention, the majority of children detained in criminal justice systems are in pre-trial detention (UNICEF, Progress for Children, A report Card on Child Protection, Number 8, 2009), which contravenes the right to due process. And in cases where children have been sentenced by judicial decision, it is generally for petty offences (Office of the SRSG on Violence Against Children, Prevention of and responses to violence against children within the juvenile justice system, 2012).

In all cases, children deprived of liberty are exposed to increased risks of violence and abuse by police, adult prisoners, prison officials and other detained children. Their civil, political, economic, social and cultural rights are denied. Deprivation of liberty should not mean deprivation of liberties; detainees should continue to enjoy their human rights (United Nations Basic Principles for the Treatment of Prisoners, Principle 05, 1990), with the ultimate aim of reinsertion into society.

A challenge yet to be overcome

In the 25 years since the adoption of the UNCRC the issue of child detention has never been adequately addressed and continues to lag behind compared to the other areas. Detention of children is an extremely serious issue, not only violating basic international obligations (sensu lato), but exposing each and every child who is detained, for whatever reason, to further human rights violations (sensu stricto). And with immigration detention on the rise, apparently there is more regression than improvement in the situation. The fundamental obligations of States under the UNCRC have clearly not been understood, accepted or acted upon. Another indicator is the number of times States have been urged by international human rights mechanisms to end inhumane practices that constitute per se violations of human rights law, for use of the death penalty, torture, etc. The underlying concern, compared to other situations (child labour, trafficking, etc.), is that children in detention are in the ñcareò of the State, so whatever happens behind bars is actually a conscious choice - ñout of sight, out of mindò?!

The issue of children in detention is not high on the social agenda either. What is failed to be understood is that this is not ñmerelyòa legal issue of international obligations not being fulfilled, but it is also a social concern: there is strong evidence that detention may actually worsen recidivism rates (UNICEF Toolkit on Diversion and Alternatives to Detention, Compilation of evidence in relation to recidivism, 2009). While detained, children are exposed to increased violence and deprived education, making their future lives outside bars even harder. Furthermore, it has been found that detention of children increases public expenditure. Deprivation of liberty of children has short- and long-term impact on the child and society at large.

The way forward

States must seriously commit to concretely and effectively implementing the rights and measures codified in international human rights instruments, primarily the UNCRC. States are required to only use deprivation of liberty in conformity with the law, as a measure of last resort and for the shortest appropriate period of time (United Nations Convention on the Rights of the Child, article 40, 1989). Furthermore, measures such as diversion which do not involve judicial proceedings must be promoted. Diversion avoids stigmatization and has good outcomes for children and public safety, as well as being cost-effective. In cases where judicial proceedings are necessary, social and educational measures are

to be the primary option, as the ñneed to safeguard the well-being and best-interests of the child and promote reintegration must outweigh other considerationsò (UNICEF Toolkit on Diversion and Alternatives to Detention, Compilation of evidence in relation to recidivism, 2009).

To turn rights into reality we first need to analyze and understand the depth the situation on the ground. It has in fact been officially recognized that there is a severe lack of data relating to the situation of children in detention (United Nations Secretary-Generalôs Study on Violence against Children 2005, pg.191; joint report of the Special Representative of the Secretary General on violence against children, the Office of the High Commissioner for Human Rights (OHCHR) and United Nations Office for Drugs and Crime (UNODC) on prevention of and responses to violence against children within the juvenile justice system, 2012); and as aforementioned, the general number of reference (1,000,000) is not comprehensive or certain. On such basis, Defence for Children International (DCI) decided to launch a campaign to call upon the members of the United Nations General Assembly (UNGA) to request that the United Nations Secretary-General (UNSG) undertake a Global Study on Children Deprived of Liberty.

The Study would take into account deprivation of liberty in all its forms, including: children in conflict with the law; children confined due to physical or mental health or drug use; children living in detention with their parents; immigration detention; children detained for their protection; national security; etc. In order to ensure that deprivation of liberty is clearly understood and thus used as a measure of last resort, there is also critical need to improve the clarity around key concepts which are related to childrenôs rights and deprivation of liberty (such as last resort, shortest possible time, best interests of the child; access to justice; pre-trial detention; diversion; restorative justice; formal and informal justice systems; alternative measures; protective measures; age of criminal responsibility; rehabilitation and reintegration; administration detention; inter alia).

In March 2013, after various meetings with the CRC Committee, numerous non-governmental organizations, academics and other UN entities, the campaign ï having obtained eager and strong support ï was officially launched at the office of the United Nations in Geneva. In June 2013, an expert consultation was also held in Geneva to discuss the Study, the strategy to have it formally requested by the United Nations General Assembly and the potential methodology to be followed when conducting the Study. Many experts took part and provided their insight on how to proceed. A mission to New York was then carried out to lobby state representatives at the UNGA in light of the drafting of the UNGA child rights resolution to hopefully formally request the Study. The momentum continues to grow and hopefully the Study will be put into action. So far, over fifty civil society organizations have signed on to support the call for such a Study and the CRC Committee has recommended the UNGA to request the realization of such an in-depth Study. States are also supporting this initiative.

To undertake a Study of such caliber - which would comprehensively and scientifically analyze the status of the situation of children in detention worldwide and consider the good practices worth following - will take time, close coordination with States and other actors, and of course financial and human resources. The Study does not intend to be an end in itself, but rather a starting point: to get the ball rolling on this stagnant and even regressive issue, by getting all actors involved and thus placing it on the political and social agenda of countries worldwide, in the hope to see an improvement in the overall situation. Through the Study, governments will be able to realize and improve their national policies and practices, while serving the best interests of both the child and society at large. For more information, please visit the official website:

http://www.childrendeprivedofliberty.info/

Anna D. Tomasi, Advocacy officer at the International Secretariat of DCI in Geneva

A step in the (human) right direction for children being deprived of liberty worldwide

On 18th December 2014, the United Nations General Assembly (UNGA) officially requested that the Global Study on Children Deprived of Liberty be carried out. In its Child Rights Resolution, the UNGA explicitly calls for the commission of ñan in-depth global study on children deprived of libertyò This marks the success of the campaign calling for such Study and the commencement of its concrete implementation.

Defence for Children International (DCI) is proud to announce the success of its campaign calling for a Global Study on Children Deprived of Liberty, which was officially launched in March 2014, with the support of over sixty non-governmental organizations (NGOs), States and United Nations human rights agencies and experts.

Read the full press release in EN | FR | ES | AR

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Polish Association of Youth and Family Judges–16th Congress report

Dr Magdalena Arczewska

The 16th Congress of the Polish Association of Youth and Family Judges was held in September 2014 in Zakopane, Poland, and focused on "The Position and Tasks of Family Courts in View of Legislative Changes". Professor Małgorzata Gersdorf, the first President of the Supreme Court, extended her honorary patronage over the event. Additionally, the representatives of the National Council of the Judiciary of Poland, the Veillard-Cybulski Foundation, the Family Law Committee operating at the Children's Ombudsman and the Plenipotentiary of the Minister of Justice in charge of Constitutional Rights of the Family were pleased to join the participants of the Congress. As in every year, the Congress was also attended by the representatives of social services responsible for the organisation of the child and family assistance system and researchers specializing in the above-mentioned fields. Over 200 family and youth judges from Poland accompanied by the invited guests had an opportunity to hear many interesting lectures, discussions organised as part of discussion panels and exchange views during informal contacts.

In her opening speech, Professor Małgorzata Gersdorf, the first President of the Supreme Court, emphasised the important role of family and youth judges in raising the young generation of Poles and their participation in the process of shaping good family relations. She also mentioned the negative phenomena affecting judges, including the need of decent remuneration and the negative image of the justice system in the media. Justice Waldemar Żurek, the Press Secretary of the National Council of the Judiciary of Poland, also underlined the need for good communication between the judiciary and the media as well a more positive representation of judges in the media. It should be noted that this issue had already been raised in the resolutions made by previous Congresses.

Because of interesting and topical subjects, there was great interest in this year's lectures. Dr Michał Wojewoda from the University of Łódź spoke about the Establishment of the Content of Applicable Foreign Law by a National Judge. He discussed the specific tasks and responsibilities of the court in the cases involving a foreign element with regard to the choice and establishment of the contents of applicable foreign law to determine the case as well as the principles of finding applicable law defined as norms of confidence. Dr Wojewoda prepared an in-depth analysis of the sources of private international law. He pointed out that the number of trans-border cases was steadily increasing, particularly with regard to family relations, and emphasised that the typical foreign element was foreign citizenship of a party to proceedings.

In a lecture entitled "Contacts with the Child – Law vs Practice", Professor Jacek Wierciński from the University of Warsaw presented the verdicts of the Supreme Court on personal contacts with children explaining how proceedings are conducted in relation to the theory of the applicable law. Another popular point on the agenda was the presentation of Dr Łukasz Kwadrans from the University of Silesia who focused on the problems faced by probation officers when enforcing court decisions. A significant part of the Congress was devoted to the amendments to the Act on Juvenile Delinquency Proceedings, which was discussed in detail by an eminent expert in the field, Professor Henryk Haak from the University of Szczecin.

The Congress participants also heard a lecture given by Supreme Court Justice Jarosław Matras on the selected aspects of disciplinary proceedings for judges based on the Supreme Court jurisdiction. He discussed the provisions on judicial immunity and immunity proceedings, including the ones related to a permission to sue a judge before the criminal court and to detain a judge.

Judges also took part in the workshop on how to cope with difficult situations in the court room provided by Anna Kurzępa, a reporter from the Polish Television. She focused on stress relief and overcoming stage fright and discussed how to behave in a crisis. She emphasised that a friendly attitude towards respondents, the tone and way of speaking as well as the willingness to ensure they are well-informed might be the key to mutual understanding, an extremely important aspect of the judge's profession.

Concluding, it must be added that the results of the 2nd competition for youth and family judges entitled "The Professional Challenges, Dilemmas and Joys of Family Judges" were announced and awards were presented to the winners. The president of the Competition Committee, Professor Henryk Haak, and the Association Board encouraged all judges to take part in the next series of the competition.

Treasurer's column — Anne-Catherine Hatt

Subscriptions 2013

In February 2015 I will send out e-mail requests for subscriptions to individual members (GBP 30; Euros 35; CHF 50 for the year 2015 as agreed at the General Assembly in Tunis in April 2010) and to National Associations.

May I take this opportunity to remind you of the ways in which you may pay:

1. by going to the website of the IAYFJMð click on membership then subscribe to pay online, using PayPal. This is both the simplest and cheapest way to pay; any currency is acceptable. PayPal will do the conversion to GBP;
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3. by **cheque** made payable to the International Association of Youth and Family Judges and Magistrates and sent to me. I will send you my home address if you e-mail me.

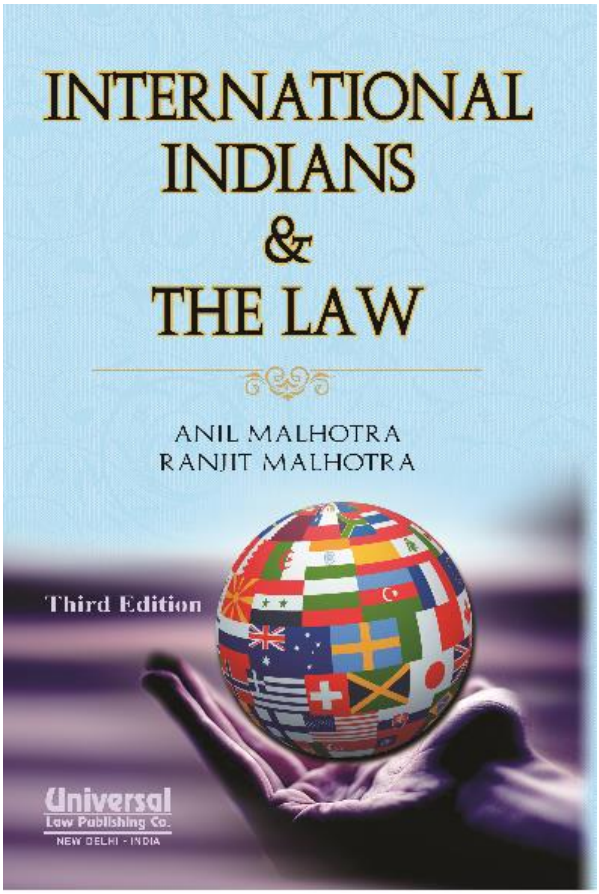
If you need further guidance, please do not hesitate to email me.

It is, of course, always possible to pay in cash if you should meet any member of the Executive Committee.

Without your subscription it would not be possible to produce this publication.

Anne-Catherine Hatt

A book by Anil and Ranjit Malhotra*



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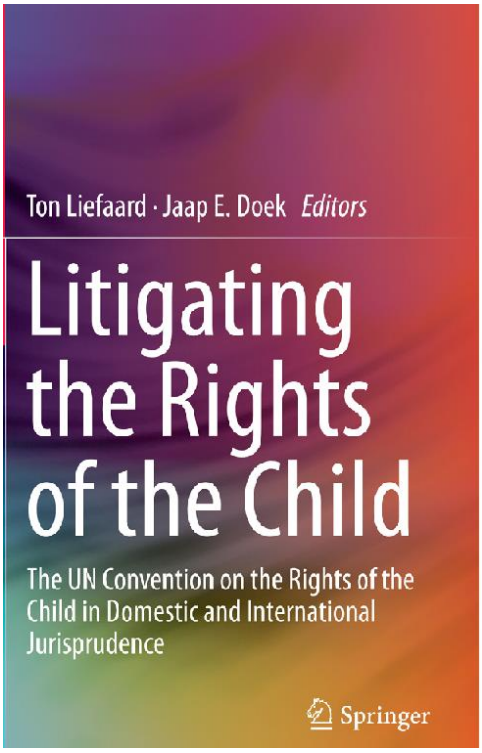
International Indians & the Law

There are 22 million non resident Indians (NRIs) in 200 countries with ties to India. This book of 35 articles and 14 detailed expositions on private international law provides comprehensive answers to the human problems of the diaspora covering marriage and divorce, child abduction, inheritance, surrogacy, child rights, immigration and nationality and other issues.

Aggrieved spouses, foreign litigants, overseas practitioners or any lay person who wants to know where he stands will find help in this book which refers to case law where appropriate.

'This book is a far reaching, up to date and comprehensive examination of Indian law as it applies (especially) to NRIs. Proceeding well beyond marriage and divorce, it covers topics such as adoption, surrogacy, juvenile justice (soon to be termed child justice according to the Juvenile Justice (Care and Protection) Bill of 2014), victim compensation and even human smuggling and emigration. It provides a fascinating account of the interaction between Judge-made law and legislative reforms. Several very recent legal developments are profiled and up to the minute cases discussed. For this reason the book will be of interest to a broad pool of lawyers, scholars and human rights activists.'
Professor Julia Sloth-Nielsen

A book edited by Ton Liefaard* and Jaap Doek



This book examines the impact of the UN Convention on the Rights of the Child (CRC) on national and international jurisprudence, since its adoption in 1989. It offers state of the art knowledge on the functions, challenges and limitations of the CRC in domestic, regional and international children's rights litigation. *Litigating the Rights of the Child* provides insight into the role of the CRC in domestic jurisprudence in ten countries from different parts of the world, with civil law, common law and Islamic law systems. In addition, it offers analyses of the jurisprudence of regional courts, in Europe and the Americas, and of human rights treaty bodies, including the Human Rights Committee, Committee on the Elimination of Discrimination against Women and the African Committee of Experts on the Rights and Welfare of the Child. This book presents a global and comparative picture on the use of the CRC in litigation and identifies emerging trends. This book serves as an important source of reference and inspiration for academics, students, legal professionals, including judges and lawyers, and (inter)national organisations working in the area of children's rights.

Content Level » Research

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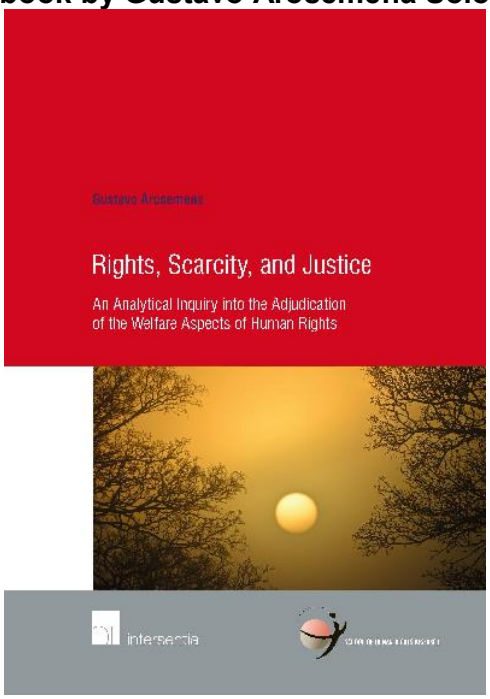
A book by Gustavo Arosemena Solorzao

School of Human Rights Research,vol. 65



Rights, Scarcity and Justice

Can human rights really protect people from want? If one is lacking medical care or housing, can one really go to a judge and ask for the provision of such goods and services? These questions have proved divisive for academics, politicians and judges working in the field of human rights. Some consider that there is no real difference between civil and political rights and economic, social and cultural rights. Others think that economic, social and cultural rights have structural features that make their judicial protection unwelcome.

The book studies the possibilities of judicial engagement with matters of welfare in situations of scarcity. First, it isolates the real problems that such forms of judicial engagement entail. Afterwards, it presents three distinct strategies for protecting welfare duties judicially: reasonableness, prioritization and deliberative democratic dialogue. Reasonableness is based on the practice of reasonableness review present in the Constitutional Court of South Africa. By contrast, prioritization and deliberative democratic dialogue constitute more novel alternatives to reasonableness that are loosely inspired in various developments in comparative constitutional law. Finally, it discusses the relative merits and demerits of these strategies in an analytical framework based on qualitative comparative analysis.

Oct. 2014 | ISBN 978-1-78068-275-4
www.intersentia.co

Contact Corner — Avril Calder

We receive many interesting e-mails with links to sites that you may like to visit and so we are including them in the Chronicle for you to follow through as you choose. Please feel free to let us have similar links for future editions.

From	Topic	Link
Child Rights Connect	A global child rights network connecting the daily lives of children to the UN.	Find it here
	Speak up for your Rights OP3 CRC Child friendly leaflet http://www.national-coalition.de/pdf/1_09_2013/OP3_CRC_Child_friendly_leaflet_EN.pdf	
	Committee on the Rights of the Child Working methods for the participation of children in the reporting process of the Committee on the Rights of the Child. Word document CRC_C_66_2_7576_E.doc at http://tbinternet.ohchr.org	
CRIN	Website	Find it here
The Child Rights Information Network	Email	info@crin.org
	See Toolkit on the OP CRC for a complaints mechanism here: (Also available in Arabic, French, Russian and Spanish forthcoming)	Find it here
Defence for Children International	Website	Find it here
	Campaign success: Global Study on Children Deprived of Liberty-read the full press release in EN | FR | ES | AR	
IAYFJM	Website	Find it here
IDE	Website	Find it here
International Institute for the Rights of the Child	Conference November : 18, 19 & 20 2015 Topics : **Evolution of the status of the child** : in law, protection, education health, family, migrations, sports...and play	
	Contact	Find it here
IJJO	Website	Find it here
International Juvenile Justice Observatory	Newsletter	Find it here
OHCHR Office of the High Commissioner for Human Rights	Website	Find it here
PRI Penal Reform International	PRI is an international non-governmental organisation working on penal and criminal justice reform worldwide. PRI has regional programmes in the Middle East and North Africa, Central and Eastern Europe, Central Asia and the South Caucasus. To receive the Penal Reform International (PRI) **monthly newsletter**, please sign up at find it hereʒ	Find it here Find it here
Ratify OP3 CRC	Campaign for the ratification of the OP3:	Find it here
TdH	Website	Find it here
Fondation Terre des Hommes	Newsletter	Find it here
UNICEF	Website	Find it here
Washington College of Law,- Academy on Human Rights and Humanitarian Law	The situation of human rights of girls and adolescents in Latin America and the Caribbean. Login here: http://kausajusta.blogspot.com/2014/10/american-university-la-situacion-de-los.html Source American University: http://www.wcl.american.edu/	

General Assembly Meeting 17th October 2014, Bruxelles, Belgium

Joseph Moyersoen & Avril Calder

Gabriela Ureta, Pierre Rans, Dorota Hildebrund, Francoise Mainil, Hervé Hamon, Viviane Primeau & Daniel Pical

Avril Calder & Marta Pascual

Patricia Klentak, Roman Guillonet & Olivier Boillat

General Assembly

General Assembly

Bureau/Executive/Consejo Ejecutivo 2014-2018

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Council—2014-2018

Chronicle Chronique Crónica — Voice of the Association

The Chronicle is the voice of the Association. It is published bi-annually in the three official languages of the Associationð English, French and Spanish. The aim of the Editorial Board has been to develop the Chronicle into a forum of debate amongst those concerned with child and family issues, in the area of civil law concerning children and families, throughout the world

The Chronicle is a great source of learning, informing us of how others deal with problems which are similar to our own, and is invaluable for the dissemination of information received from contributions world wide.

With the support of all members of the Association, a network of contributors from around the world who provide us with articles on a regular basis is being built up. Members are aware of research being undertaken in their own country into issues concerning children and families. Some are involved in the preparation of new legislation while others have contacts with colleagues in Universities who are willing to contribute articles.

A resource of articles has been built up for publication in forthcoming issues. Articles are not published in chronological order or in order of receipt. Priority tends to be given to articles arising from major IAYFJM conferences or seminars; an effort is made to present articles which give insights into how systems in various countries throughout the world deal with child and family issues; some issues of the Chronicle focus on particular themes so that articles dealing with that theme get priority; finally, articles which are longer than the recommended length and/or require extensive editing may be left to one side until an appropriate slot is found for them

Contributions from all readers are welcome. Articles for publication must be submitted in English, French or Spanish. The Editorial Board undertakes to have articles translated into all three languagesð it would obviously be a great help if contributors could supply translations. Articles should, preferably, be 2000 - 3000 words in length. ðItems of Interestò including news items, should be up to 800 words in length. Comments on those articles already published are also welcome. Articles and comments should be sent directly to the Editor-in-Chief. However, if this is not convenient, articles may be sent to any member of the editorial board at the e-mail addresses listed below.

Articles for the Chronicle should be sent directly to:

Avril Calder, Editor-in-Chief,
chronicle@aimjf.org

Editorial Board

Obituary

Paolo Vercellone, Italy, 1927-2014 President IAYFJM/AIMJF 1990-1994

Paolo and Emma his wife

IAYFJM/AIMJF Congress 1990

This tribute to Paolo first appeared in the Chronicle of January 2008 to mark his 80th birthday.

Dear Paolo,

I am writing this message to you in English from quite far away (otherwise I would have been very happy to join this great celebration!), from Sierra Leone, where English keyboards donôt have accents, which would allow for a correct understanding of any message in French!

It is a great honour and even a greater pleasure for me to congratulate you on behalf of the IAYFJM and on my own first of all to your 80th birthday, a really ñroundò one, and second to the presentation of your latest book! What an amazing way to celebrate a birthday!

Maybe I should say that it isnôt that amazing after all, to celebrate the finalization of a book on child issues taking into consideration your lifelong dedication to juvenile justice, the work with the field and the best interest of the child, in particular on the issues of adoption and foster care!

Maybe this is an opportunity for me to thank you as well for your membership to our association, where you have been president (during the years 1990-1994)! Isnôt it a wonderful way to show continuous interest and commitment to our common goal in dispersing information on legal assistance to children worldwide , to help to upgrade it and thus to secure some development at least in the right direction, as to combine a birthday party with the presentation of an instrument designed to do just that?

Dear Paolo, let me mention the way I met you for the first time, as a quite personal contribution to praise you for all you have done for the IAYFJM.

I came to our quadrennial international congress in Bremen, quite tired and not really willing to immediately take over the responsible job to assist our Honorary President Horst Schueler-Springorum in revising some texts for the next morningôs session.

I tried to find some excuse to disappear and to be able to sleep. At this very moment you entered the room, a bit shaky with a rather heavily bandaged head. You just arrived from the hospital, where they have treated you after a traffic accident if I remember correctly. You looked a bit scary and really worn out and everyone present told you to immediately retreat and go to bed. I remember your answer till today: You said: ñno way, we have to finalize the content of the paper. Thatôs importantò

It really made me understood what dedication means and I thank you for that. I will try my very best, being the present president of our association, to do my job as responsibly as you have taught me!

Dear Paolo, please accept all the best wishes from the IAYFJM and myself for many other prosperous years and other books to come!

I hope you will allow that your book can be presented in our Chronicle so that all our members have to opportunity to know about it and to use it !

Happy birthday and success for your book!
Renate

Justice Renate Winter, Judge of the Appeals Chamber of the Special Court of Sierra Leone,
President, International Association of Youth and Family Judges and Magistrates, 2006-2010
Currently a Member UN Committee on the Convention on the Rights of the Child.