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THE RIGHT OF CHILDREN TO BE HEARD: CHILDREN'S RIGHT TO HAVE THEIR VIEWS TAKEN INTO ACCOUNT AND TO PARTICIPATE IN LEGAL AND ADMINISTRATIVE PROCEEDINGS

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THE RIGHT OF CHILDREN TO BE HEARD: CHILDREN'S RIGHT TO HAVE THEIR VIEWS TAKEN INTO ACCOUNT AND TO PARTICIPATE IN LEGAL AND ADMINISTRATIVE PROCEEDINGS

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Summary: This paper addresses the right of children to be heard in any judicial or administrative proceeding affecting them. It introduces the subject based on examples from the laws and practices of 52 countries around the world, shedding further light on a topic covered in the UNICEF Innocenti Research Centre publication *Law Reform and Implementation of the Convention on the Rights of the Child* (2007).

Section 1 analyses the text of article 12.2 in the light of other provisions of the Convention on the Rights of the Child and other norms of international human rights law.

Section 2 reviews the legislation of selected countries, including laws that establish fixed limits concerning the age at which a child can or must be heard in various types of legal and administrative proceedings (such as child protection proceedings, family law proceedings, criminal proceedings in which the child is a witness). It also addresses laws that establish other criteria (such as maturity, ability to understand, risk of adverse psychological consequences) for such purposes.

Section 3 explores the reasons that underlie the criteria such as age limits used in different legal systems for determining when a child will be heard in legal or administrative proceedings.

Section 4 concerns how laws are applied in practice in different legal systems, including the flexibility of the criteria as applied in practice and the extent to which the views of children are actually taken into account.

Section 5 reviews efforts made by selected countries to make children's participation in legal and administrative proceedings child sensitive, such as by making the courtroom less intimidating, barring repeated interrogation on sensitive subjects and establishing new modalities of cross-examination.

Section 6 reviews the advances made in some countries in recognizing children's right to legal services and legal representation. This is vitally important in enabling them to exercise the right to be heard and to have their views taken into account in legal and administrative proceedings.

Section 7 contains findings and recommendations.

This paper is addressed primarily to child rights advocates, researchers, legal practitioners and other professionals working in the area of children and the law. Further research is needed document good practices and to complement this introductory, global overview with studies focusing in more detail on different regions or legal traditions and specific types of proceedings.

Keywords: rights to be heard, child participation, legal and administrative procedures, judicial or administrative procedures

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"This is, and has always been, a case about children, their rights and the rights of their parents and teachers. Yet there has been no one here or in the courts below to speak on behalf of the children. No litigation friend has been appointed to consider the rights of the pupils involved separately from those of the adults. No non-governmental organization … has intervened to argue a case on behalf of children as a whole. The battle has been fought on ground selected by the adults."

Baroness Hale in *Regina v. Secretary of State for Education and Employment and others (Respondents) ex parte Williamson (Appellant) and others*,
decision of 24 February 2005, United Kingdom, [2005] UKHL 15, para.71

Contents

1. INTRODUCTION: ARTICLE 12.2 AND INTERNATIONAL HUMAN RIGHTS LAW

> Article 12 of the Convention on the Rights of the Child:
>
> 1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
>
> 2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

The right to express views and to be heard in judicial and administrative proceedings touches on many areas of the child's life: the relationship with parents and family; access to alternative care for children without a family or home; treatment of children who become victims of abuse or exploitation; children having difficulties in school; child asylum seekers and children having a parent who lives in a foreign country; and children denied social benefits. Indeed, the right to be heard in a legal or administrative proceeding is, in principle, relevant for any child who believes that his or her rights have been denied or violated.

This paper grew out of the UNICEF Innocenti Research Centre's 2007 publication *Law Reform and Implementation of the Convention on the Rights of the Child*, which addressed the many issues concerning legislative reform needed to ensure fulfilment of child rights including the right to be heard. This paper aims to shed further light on the complex issues involved in implementing the second paragraph of article 12 at a time when the Committee on the Rights of the Child is developing a General Comment on article 12. General Comments are an important tool the Committee uses to guide States parties on the content of their obligations under the Convention and on the best ways of fulfilling them. This paper addresses (1) children's right to be heard in proceedings initiated by others that affect the child, and (2) the extent to which States recognize the right of children to take legal action or invoke an administrative procedure to protect their rights. It is linked to IRC's ongoing study of the general measures of implementation of the Convention on the Rights of the Child (CRC), focusing mainly on 52 of the countries covered by that study.[1] Although relevant legislation has been consulted when possible, this paper is based mainly on documents generated by the process of reporting to the Committee.

A small number of rights recognized by the International Bill of Human Rights are not reaffirmed as child rights by the Convention on the Rights of the Child. One of these is the right to legal personality; another is the right of access to the courts or the right to a remedy for the protection of one's rights.

The right to a legal personality is recognized by the Universal Declaration of Human Rights (Universal Declaration) and the International Covenant on Civil and Political Rights (Covenant) in identical terms: "Everyone shall have the right to recognition everywhere as a person before the law."[2]

[1] The overall study of implementation of the general measures of the CRC covers 62 countries. The law reform research considers 52 of these.

[2] Article 6 of the Universal Declaration and article 16 of the Covenant.

The right of access to the courts or to a remedy for protection of one's rights is recognized by articles 7, 8 and 10 of the Universal Declaration and by articles 2.3, 14 and 26 of the Covenant. Article 7 of the Universal Declaration states: "All are equal before the law and are entitled without any discrimination to equal protection of the law…" Article 8 provides: "Everyone has the right to an effective remedy by the competent national tribunals for acts violating the fundamental rights granted him by the constitution or by law." Article 10 states: "Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations…"

Article 2.3 of the Covenant provides:

> Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy … [and] that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative... [or] other competent authority provided for by the legal system of the State…

The right to equal protection of law in article 26 and article 14.1 of the Covenant provides in part:

> All persons shall be equal before the courts and tribunals. In the determination of … his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law.

These rights are closely related. The term 'legal personality' means the person is the subject of legally recognized rights and obligations. In general, being the subject of rights also means having the capacity to exercise and defend them, when appropriate, in legal proceedings.

There is little jurisprudence on the right to 'legal personality' in international human rights law, perhaps because the very purpose of international human rights instruments is to recognize the person as subject of the basic rights they contain. Most discussion of legal personality concerns entities other than individual human beings, such as corporations, trade unions, religions or indigenous communities.[3] The right does seem to have some specific content, however; namely, the capacity to perform formal legal acts such as making a contract or will, witnessing a legal document or making a legal complaint. The right to birth registration and the right to identity, in particular the right to family ties, may be considered related to the right to legal personality.[4]

All legal systems recognize, however, that certain categories of persons lack capacity to exercise their rights personally. This issue is especially relevant where children are concerned because the lack of legal capacity is the essence of the concept of minority. For this reason, it may not be surprising that these two rights were not incorporated – at least not in easily recognizable form – into the Convention. Rather than simply reaffirm these rights, the drafters made an effort to identify the aspects of them to which children are entitled, notwithstanding their status as minors.

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[3] The exception is the debate on whether or in what circumstances the human foetus has legal personality.

[4] The right to birth registration and the right to identity, a composite right, are recognized by articles 7 and 8 of the CRC; the generic rights of the child and family to protection are recognized by articles 23 and 24 of the Covenant, and the right of the family to protection is also recognized by article 16 of the Universal Declaration. The Human Rights Committee recognized the link between birth registration and the child's right to legal personality in its General Comment No. 17 on article 24 of the Covenant, adopted in 1989 (para. 7). In a decision under the Optional Protocol, the Committee decided that a State had violated the right to legal personality of a child by failing to duly recognize her true family ties (Mónaco de Gallicchio c. Argentina, Communication No. 400/1990, decision of 3 April 1995, para. 10.5).

Article 12.2 may have been intended, in effect, as a partial substitute for the right to a remedy and to equal protection of law. Two other provisions of the CRC recognize specific dimensions of the right to participate in legal proceedings: article 9.1, which recognizes the right of the child to be heard in legal or administrative proceedings that may result in separation from his or her family, and article 37(d), which recognizes the right of any child deprived of liberty to challenge the legality of this measure before a court or other competent, independent and impartial authority.[5]

The content of these rights as recognized by the CRC is narrower than the content of the right to legal personality and right of access to the courts/right to a remedy as recognized by the International Bill of Rights.[6]

One of the most important differences is that neither article 12.2 nor any other provision of the CRC except article 37(d) recognizes expressly the right of children to initiate legal action. This does not necessarily mean that children do not have this right. Children may enjoy the right, even though it is not recognized expressly by the CRC, as subjects of rights recognized by other international instruments or by national law. Most of the States parties to the CRC are also parties to the Covenant.[7] A State is not relieved of the obligation to respect the norm that requires more protection just because one instrument (such as the CRC) does not recognize a right that is recognized by another treaty or by customary international law, or recognizes it to a lesser extent.[8] The Human Rights Committee has declared that, in its view, "children benefit from all of the civil rights enunciated in the Covenant..." It has pointed out the importance of providing children with remedies that take account of their special needs.[9]

The right of access to the courts or the right to a remedy also may be considered implicit in the CRC, as a measure that is necessary to effectively guarantee the other rights contained in it. Indeed, this is the conclusion reached by the Committee on the Rights of the Child after a decade of reviewing the efforts made by States to implement the CRC: "For rights to have meaning effective remedies must be available to redress violations," the Committee observed, adding that the obligation to provide a remedy is, in its view, "implicit in the Convention."[10]

Since "Children's special and dependent status creates real difficulties for them in pursuing remedies for breaches of their rights," the Committee continued, "States need to give particular attention to ensuring that there are effective, child-sensitive procedures available to children and their representatives."[11] This conclusion echoes the last clause of article 12.2 and recognizes

[5] The latter reaffirms the right recognized by article 9.4 of the Covenant.

[6] This term refers to the Universal Declaration of Human Rights and the two human rights treaties adopted in 1966, the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights.

[7] There are 192 parties to the CRC and 160 parties to this Covenant, according to the website of the Office of the UN High Commissioner for Human Rights (OHCHR) <www.ohchr.org> as of 24 September 2007.

[8] This general principle of international human rights law is recognized expressly by article 41 of the CRC. Many human rights experts believe that, over the six decades since it was adopted, the Universal Declaration has become legally binding customary international law. See e.g. Sohn, Louis B., 'The New International Law: Protection of the rights of individuals rather than states', *American University Law Review*, Vol. 32, No. 1, 1982, p. 17.

[9] General Comment No. 17, op. cit., para. 2; General Comment No. 31, para. 15 ("… States Parties must ensure that individuals also have accessible and effective remedies to vindicate their rights. Such remedies should be appropriately adapted so as to take account of the special vulnerability of certain categories of person, including in particular children").

[10] General Comment No. 5, 2003, para. 24, available at the website of the OHCHR, op. cit.

[11] Ibid.

implicitly that, in some circumstances, children lack the capacity to exercise this right personally. Therefore it is legitimate to require that it be exercised on their behalf by a representative of the child. That is why this working paper reviews not only the right of children to be heard in proceedings initiated by others that affect them, but also the extent to which States recognize the right of children to take legal action or invoke an administrative procedure for protection of their rights and interests.

1.1 Views, testimony, participation and the language of article 12.2

Article 12.2 does not refer to the right of children to 'participate' in legal and administrative proceedings, but only to their right to express their views and have them taken into account. In most legal proceedings, the views of persons who participate in them are largely irrelevant; what is relevant is their knowledge of the facts in dispute.

The inclusion of the right to be heard and to have one's views taken into account in legal and administrative proceedings in an article recognizing these rights in broader terms suggests that this limitation on the scope of article 12.2 is not accidental and cannot be ignored or overlooked. The only possible conclusion is that article 12.2 does not recognize the 'right' to be heard as a witness – that is, to testify. This point must be borne in mind in discussions of the 'participation' of children in legal and administrative proceedings.

The use of the term 'views' in the second paragraph of article 12 makes this right more relevant to certain kinds of legal and administrative proceedings than others. In family law proceedings concerning issues such as custody or visitation, and in proceedings concerning alternative care, the views of the child – and hence article 12.2 – are highly relevant. The child's views also are relevant and should be taken into account in proceedings concerning name, nationality and other aspects of the right to identity.

In contrast, when a child is the victim of a crime or witness to a crime, his or her views concerning the issues before the court are almost entirely irrelevant.[12] What is relevant are the child's views concerning the modalities of his or her participation in the trial, which should be heard and taken into account. And when the perpetrator admits responsibility or is convicted – with or without the child's participation as witness – the views of a child victim on the measures that should be imposed on the offender should be heard and taken into account.

Although article 12.2 does not recognize a 'right' of children to be witnesses, the use of testimony and other evidence received from children is essential to efforts to combat the many kinds of exploitation, abuse and other violations of child rights prohibited by the CRC. In this sense, it is possible to infer a duty on the part of the State to facilitate the participation of children as witnesses in legal investigations and proceedings concerning such matters.

To the extent that children may be allowed, invited or even summoned to testify, the modalities of their participation must be consistent with the whole range of rights and principles recognized by the Convention and other pertinent international standards. This includes the

[12] Section 14 of the Criminal Justice (Scotland) Act 2003, which allows an alleged victim to make a 'victim statement' about how she or he has been affected by the offence before sentencing, appears to be a rare exception, but it applies only to children over the age of 14. The statements are made in writing and an evaluation suggests that, while writing them often has therapeutic value, there is little evidence that they have any impact on the proceeding or the offender. Brookes, Derek and Steve Kirkwood, 'Will the Victim Statement Scheme Secure Greater Participation for Victims in the Criminal Justice Process?', available at the website of CJ Scotland, <www.cjscotland.org.uk/index.php/cjscotland/dynamic_page/?id=64>.

Optional Protocol on the sale of children, child prostitution and child pornography.[13] They must be, in the words of the Committee on the Rights of the Child, "child-sensitive."[14] For these reasons, this study covers the issue of the participation of children in legal and administrative proceedings as witnesses.

The General Comment of the Committee on the Rights of the Child cited above recognizes that access to other "independent complaints mechanisms" also can be effective means for protecting the rights of children. This appears to refer mainly to statutory bodies such as children's ombudspersons, children's commissioners and human rights commissions.[15] To the extent that they have procedures for receiving and examining complaints from children, they might be considered an informal, quasi-administrative proceeding. An analysis of such procedures is beyond the scope of this study.[16]

This participation of children in proceedings involving their own alleged participation in an offence is not addressed here.

[13] Article 8 of this Protocol recognizes "the vulnerability of child victims and adapting procedures to recognize their special needs, including their special needs as witnesses." Also of particular relevance are the comprehensive Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime adopted by the UN Economic and Social Council in 2005 (Res. 2005/20) <www.un.org/docs/ecosoc/documents/2005/resolutions/Resolution%202005-20.pdf>.

[14] General Comment No. 5, op. cit., para. 24.

[15] Ibid.

[16] IRC has published three studies on ombudsmen for children and another is now underway as part of IRC's research on General Measures of Implementation of the CRC. Flekkøy, Målfrid Grude, *A Voice for Children: Speaking out as their ombudsman*, Jessica Kingsley, London, 1991; *Innocenti Digest* No. 1, *Ombudswork for Children,* 1997; *Innocenti Digest* No. 8, *Independent Institutions Protecting Children's Rights*, 2001.

2. AGE LIMITS AND OTHER CRITERIA: AN OVERVIEW OF LEGISLATION

2.1 General

Much legislation concerning the right of children to be heard in legal and administrative proceedings concerns specific types of proceedings, but there are also laws that regulate this right in broader terms.

The right in the constitution

A few countries have incorporated the right to be heard into their constitutions. Ecuador's 1998 Constitution contains extensive references to the rights of children, including the "right to be consulted in matters affecting them."[17] In 1995, the Constitution of Finland was amended by the addition of a sentence providing: "Children shall be treated equally and as individuals and they shall be allowed to influence matters pertaining to themselves to a degree corresponding to their level of development."[18]

The Polish Constitution of 1997 provides: "Organs of public authority and persons responsible for children, in the course of establishing the rights of a child, shall consider and, insofar as possible, give priority to the views of the child."[19] A 1999 report by Poland to the Committee on the Rights of the Child indicates that this applies to the right to be heard in legal and administrative proceedings, but also recognizes that ordinary legislation gives courts broad discretion to limit or bar the participation of child witnesses in various kinds of proceedings.[20]

The South African Constitution of 1996 does not recognize this right as such, but does recognize the right "to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result."[21]

The right in children's codes and laws

Most norms recognizing the right to be heard in legal and/or administrative proceedings in broad, general terms are found in children's codes or comprehensive laws on children. The Organic Law on the Protection of Children adopted by Spain in 1996 provides in part:

> The minor has the right to be heard … in any administrative or judicial proceedings in which [she/he] is directly involved and which may lead to a decision that will affect his personal, family or social sphere.[22]

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[17] Article 49, "… El Estado les asegurará y garantizará el derecho … a ser consultados en los asuntos que les afecten", available at the website of Georgetown University <pdba.georgetown.edu/Constitutions/Ecuador/ecuador98.html> (articles 47 to 52 concern the rights of children).
[18] Constitution of Finland, chapter 2 – Basic rights and liberties, section 6 – Equality, para. 2 (731/1999).
[19] Article 72.3.
[20] Second Report of Poland, CRC/C/70/Add.12, 1999, para. 89.
[21] Article 28.1(h), cited in *Law Reform and Implementation of the Convention on the Rights of the Child*, Innocenti Research Centre, 2007.
[22] Article 9.1, Law No. 1 of 1996, available at the website of the Ministry of the Presidency <www.boe.es/g/es/bases_datos/doc.php?coleccion=iberlex&id=1996/01069> ("El menor tiene derecho a ser oído, tanto en el ámbito familiar como en cualquier procedimiento administrativo o judicial en que esté directamente implicado y que conduzca a una decisión que afecte a su esfera personal, familiar o social").

This law further provides that the hearing shall be consistent with the level of development and circumstances of the child, while safeguarding his or her right to privacy.[23] It also recognizes the child's right to be heard personally or to choose his or her representative, when the child has sufficient understanding (*juicio*).[24] The views of a child who does not have sufficient understanding may be presented by the child's parent or guardian, unless they are parties to the proceeding or have interests that may diverge from those of the child. In that case a person who enjoys the confidence of the child or a professional able to present the child's views objectively shall assume this role.[25] If a child's request to be heard is denied, the reasons must be stated in writing.[26]

The Child Protection Code adopted by Tunisia in 1995 provides another example:

> The present code guarantees the right of the child to freely express his opinions which shall be taken into consideration in accordance with his age and degree of maturity and, to this end, the child shall be given a special opportunity to express his opinions and be heard in all judicial proceedings, and social and educational measures concerning his situation.[27]

The Romanian law on the promotion and protection of the rights of the child provides that children over the age of 10 must be heard in any legal or administrative proceeding involving them. It adds that younger children may be heard "if the competent authority deems it necessary, in order to solve the case."[28] The opinions of the child must be taken into account in accordance with his or her age and maturity, and the right to be heard entails the right to information about the consequences of any decision that an authority may take as well as the consequences of any statement the child may make.[29] Reasons must be given for any decision to deny a child's request to be heard.[30]

The Children Act 2005 of South Africa contains several provisions concerning the right of children to be heard.[31] Section 10 provides in general terms that "Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration."[32] Section 14 provides that "Every child has the right to bring, and to be assisted in bringing, a matter to a court, provided that matter falls within the jurisdiction of that court." Section 53 also recognizes, in general terms, the standing of children to bring matters affecting them to the children's court. Other provisions of the Act indicate that in

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[23] Ibid. ("En los procedimientos judiciales, las comparecencias del menor se realizarán de forma adecuada a su situación y al desarrollo evolutivo de éste, cuidando de preservar su intimidad").
[24] Ibid., para. 2.
[25] Ibid.
[26] Ibid., para. 3.
[27] Article 10, Act No. 95-92 of 9 November 1995, cited in Second Report of Tunisia, CRC/C/83/Add.1, 1999, para. 149 ("Le présent code garantit à l'enfant le droit d'exprimer librement ses opinions qui doivent être prises en considération conformément à son âge et à son degré de maturité, à cette fin sera donnée à l'enfant une occasion spéciale pour exprimer ses opinions et être écouté dans toutes les procédures judiciaires et les mesures sociales et scolaires concernant sa situation").
[28] Law 272/2004, article 24(1); see also article 125(2).
[29] Ibid., article 24(4) and (3), respectively.
[30] Ibid., article 24(5).
[31] Selected sections of the Act came into force on 1 January 2007: they include sections 10 and 14, cited in this paragraph, but not sections 53, 58 and 59, which had not yet entered into force at this writing. See generally *Reforming Child Law in South Africa: Budgeting and implementation planning*, Innocenti Research Centre, 2007.
[32] This provision of the Act entered into force in 2007.

specific kinds of proceedings the right of children to bring an action or be heard is discretional with the court. The right of children to be notified of proceedings that concern them before the children's court and to produce evidence in such proceedings also is recognized.[33]

Most countries of Latin America have adopted children's codes, and most such codes recognize the rights of children to be heard in legal and/or administrative proceedings in broad, general terms. The Colombian children's code, adopted only days after the CRC, recognizes the right of every child "to be heard in every judicial or administrative proceeding that may affect him, directly or through a representative, in accordance with the laws in force."[34]

The Costa Rican children's code also recognizes this right in broad, general terms.[35] The right to be heard in person and to have one's views taken into account in all legal or administrative proceedings under the code, and the right to appeal any legal or administrative decision taken in their regard, also are recognized specifically and expressly.[36] Only children over the age of 15 have standing to be parties to legal actions under the code, however.[37]

The Nicaraguan children's code recognizes the child's right to participate in legal proceedings as a corollary of the child's status as a subject of rights.[38] This code not only recognizes this right in terms substantially identical to those of article 12.2 of the CRC but also provides that the failure to respect this right nullifies everything done during a proceeding.[39]

The Statute of the Child and Adolescent adopted by Brazil in 1990 recognizes the right of any child[40] having an interest in a legal matter being addressed under the statute to intervene through an attorney, and the right to free legal assistance for this purpose.[41]

The Ecuadorian children's code of 2002 recognizes in general terms the right of children to be heard and to have their opinion taken into account in "all matters affecting them."[42] It also contains an interesting safeguard against abuse of the 'best interests' principle. It states in part that the best interests principle "may not be invoked … without previously listening to the

[33] Sections 58 and 59.
[34] Article 10, Código del Menor, Decree No. 2737 of 27 November 1989.
[35] Article 14(b) of the Código de la Niñez y la Adolescencia, Law No. 7.739 of 1998 ("Las personas menores de edad tendrán derecho a la libertad. Este derecho comprende la posibilidad de … b. Expresar su opinion … con las limitaciones de la ley, en todos los procesos judiciales y administrativos que puedan afectar sus derechos"). See also article 107.
[36] Article 105 ("Las personas menores de edad tendrán participación directa en los procesos y procedimientos establecidos en este Código y se escuchará su opinión al respecto. La autoridad judicial o administrativa siempre tomará en cuenta la madurez emocional para determinar cómo recibirá la opinión") and 107.
[37] Article 108(a).
[38] Article 3 of the Código de la Niñez y la Adolescencia, Law No. 287 of 1998 ("Toda niña, niño y adolescente es sujeto social y de Derecho, y por lo tanto tiene derecho a participar activamente en todas las esferas de la vida social y jurídica, sin más limitaciones que las establecidas por las Leyes").
[39] Article 17 ("Las niñas, niños y adolescentes tienen derecho a ser escuchados en todo procedimiento judicial o administrativo, que afecte sus derechos, libertades y garantías, ya sea personalmente, por medio de un representante legal o de la autoridad competente, en consonancia con las normas de procedimiento correspondientes según sea el caso y en función de la edad y madurez").
[40] Although most Latin American codes distinguish between children and adolescents, and apply to both, unless otherwise indicated this study uses the term child to refer generally to persons under the age of 18, and the term adolescent to refer to children over a certain age, in particular when referring to legislation that establishes an age limit for this purpose.
[41] Article 206.
[42] Article 60, Código de la Niñez y Adolescencia, Law No. 100-2002 ("Los niños, niñas y adolescentes tienen derecho a ser consultados en todos los asuntos que les afecten. Esta opinión se tendrá en cuenta en la medida de su edad y madurez").

opinion of any child who is able to express one."[43] Some other codes also provide that the child's views must be taken into account in determining what is in his or her best interests, a key consideration in many legal and administrative proceedings.[44]

The Guatemalan children's code recognizes the right of children to be heard in their own language in all stages of judicial proceedings in cases concerning violations or the threat of violations of their rights. It also recognizes the duty of the court to take into account the child's "opinion and version [of the facts]."[45]

The Child Care and Protection Act adopted by Jamaica in 2004 does not recognize the right of children to be heard in legal and administrative proceedings as such. But it does recognize this as a principle that shall be taken into account in interpreting and administering the Act.[46] A law on the rights of children adopted by Mexico in 2000 provides vaguely that "The right [of children] to express their opinion implies that their views be heard in … matters affecting them and the content of decisions concerning them."[47]

Some children's codes establish specialized courts having broad competence over matters concerning children. In Paraguay, for example, specialized children's courts have competence over cases concerning paternity, guardianship, maintenance, custody, foster care, adoption, child abuse, child labour, issues concerning health and education, and the protection of child rights in general.[48] Children have the right to bring matters before this court, and the presiding judge has an obligation to listen to the child concerned, in accordance with the age and maturity of the child, before resolving any matter before the court.[49]

Amendments of legal codes to conform with article 12.2

Other countries have amended their civil, family procedural or judicial codes in order to bring them into greater conformity with article 12.2. In Chile, for example, a new law establishing family courts aims to guarantee the "full and effective enjoyment of their rights" to all children. It adds that "The best interests of the child and his or her right to be heard are guiding principles that the family court judge must always treat as a principal consideration in the resolution of matters before him or her."[50]

The Public Administration Act of Norway was amended in 2004.[51] Children who are parties to administrative proceedings are still represented by a parent or guardian. But a child who is party to a case and is capable of forming opinions must now be given an opportunity to express his or

[43] Ibid., article 11 ("El interés superior del niño es un principio de interpretación de la presente Ley. Nadie podrá invocarlo contra norma expresa y sin escuchar previamente la opinión del niño, niña o adolescente involucrado, que esté en condiciones de expresarla").
[44] See, for example, article 3 of the Código de la Niñez y la Adolescencia of Paraguay Law No. 1.680 of 2001; section 2(2)(g) of the Child Care and Protection Act No. 11 2004, Jamaica.
[45] Articles 119(a) and 123(b).
[46] Article 2(3)(d).
[47] Article 41A ("El derecho a expresar opinión implica que se les tome su parecer respecto de: A. Los asuntos que los afecten y el contenido de las resoluciones que les conciernen").
[48] Articles 119(a), 123(b) and 161.
[49] Article 167 ("El Juez, para resolver las cuestiones, escuchará previamente la opinión del niño o adolescente en función de su edad y grado de madurez").
[50] Article 16 of Law No. 19.968 of 2005. Article 17 provides, however, that all persons under the age of 18 shall be represented by an attorney who shall act as guardian ad litem.
[51] Third Report of Norway, CRC/C/129/Add.1, 2003, para. 83, and Written Replies to the Committee, 2005, p. 13.

her views, and those views must be taken into account according to the age and maturity of the child.[52] Administrative proceedings are normally written, however, and the decision to hear any party in person is discretionary.[53] Moreover, only children over the age of 15 have the right to be informed personally by the administrative body of information in its possession that is relevant to the matter under consideration.[54]

In Belgium, the chapter of the Judicial Code concerning evidence was amended in 1994 with the addition of a new article on the testimony of children. It provides that only children over the age of 15 may give sworn testimony. But younger children capable of discernment can be heard by the court or by a person designated by the court, either at their request or at the initiative of the presiding judge. If the judge takes the initiative, a child under the age of 15 may refuse to participate; if the child requests to be heard, the request can only be denied on ground of lack of discernment, and the reasons for the decision must be stated in writing. The statement of a child is taken behind closed doors, and the parties are not entitled to a copy of the records. The court has discretion to appoint someone to assist the child during such a hearing.[55] The Committee on the Rights of the Child expressed concern about the degree to which the right to be heard is discretionary.[56]

2.2 Proceedings concerning child protection and children in care

Much of the law regulating the right of children to be heard in legal and administrative proceedings refers to specific types of proceedings. Proceedings concerning child protection and children in care are among those in which the child's views and right to be heard are of particular importance.

In Denmark, the Social Services Act was amended in 2003 to provide that all children must be heard in matters concerning special support to children, unless hearing the child would be contrary to his or her interests, considering the nature of the case and the maturity of the child.[57] 'Special support' includes placement in care as well as financial and other non-residential forms of assistance. The parent or guardian cannot oppose the interview of the child.[58]

In 2004 Norway amended several laws to bring them into greater compliance with article 12.2. The Child Welfare Law, as amended, provides in part:

> A child who has reached the age of 7, and a younger child who is able to form his own viewpoints, shall be informed and given the opportunity to state his/her opinion before a decision is made in the matter which affects him or her. The child's opinion shall have weight in accordance with the child's age and maturity.[59]

[52] Third Report of Norway, paras 84–85; section 17 of the law as amended, available at the website of the law faculty of Oslo University, <www.ub.uio.no/ujur/ulovdata/lov-19670210-000-eng.pdf>.
[53] Ibid., section 11(d).
[54] Ibid., section 17.
[55] Article 931. Text available at the website of the Yale University project Representing Children Worldwide, <www.law.yale.edu/rcw/rcw/jurisdictions/eurow/belgium/belg_cod_jud.htm>.
[56] Concluding Observations, CRC/C/15/Add.178, 2002, para. 21.
[57] Third Report of Denmark, CRC/C/129/Add.3, 2003, para. 102.
[58] Ibid.
[59] Section 6-3, available at the Representing Children Worldwide website, <www.law.yale.edu/rcw/rcw/jurisdictions/euron/norway/frontpage.htm#_edn13> accessed 3 March 2009.

A child may appear as a party in a case if he or she has reached the age of 15 and understands the issues at stake, and younger children may be recognized as a party in special cases.[60]

In Iceland, the Child Welfare Act was amended in 1998. The law now recognizes in general terms the right of children to be heard and the duty of decision-makers to take their views into account in accordance with the child's age and maturity, and an unqualified duty to give children an opportunity to be heard from the age of 12 years.[61] In 2002, the Act was replaced by the Child Protection Act, which retains the age limit of 12 years. The new Act also gives children aged 15 or older the right to be heard in placement proceedings even if the parents consent to placement, and to appeal or challenge to appeal a decision ordering placement.[62] At the beginning of proceedings the authorities must determine whether the child should be represented by an independent spokesperson.[63]

In Finland, the right of children to be heard was strengthened by the adoption of the Act on the Status and Rights of Social Welfare Clients, in 2000.[64] A child who has reached 12 years of age must be given an opportunity to be heard when decisions are made concerning placement, and the views of children who are younger than that must also be considered, in so far as it is possible considering the child's age and the level of his or her development.[65] Indeed, when a child aged 12 years or older is placed without the consent of the parents or guardians, the placement is conditional upon the child's consent.[66]

In Sweden, children aged 15 or over were entitled to appear in cases arising under the Social Services Act and the Care of Young Persons (Special Measures) Act. Granting a hearing to children under this age was discretionary.[67] In 1998, the Social Services Act was amended to eliminate this age limit. The law now emphasizes the duty of the authorities to determine the views of all children, regardless of age. Where very young children are concerned, a social worker attempts to determine their views by interviewing persons close to the child.[68]

In Belgium, the law on child protection was amended in 1994 to recognize the duty of courts to hear children over the age of 12 in child protection proceedings.[69] A decree adopted by the French Community (the French-speaking Community of Belgium) in 1991 provides more generally that children must be heard in such proceedings unless they are too young to be heard.[70] If a decision is taken without hearing the child, the reason must be stated in writing.[71] In the German-speaking community, a decree adopted in 1995 recognizes the right of children

[60] Ibid., Summary and Analysis.
[61] Second Report of Iceland, CRC/C/83/Add.5, 2000, para. 125, citing section 43(a).
[62] Articles 25, 27 and 34, available at the website of the Ministry of Social Affairs, <eng.felagsmalaraduneyti.is/legislation/nr/351>, accessed 17 July 2008.
[63] Ibid., article 46.
[64] Third Report of Finland, CRC/C/129/Add.5, 2003, paras 8 and 142.
[65] Ibid., para. 118.
[66] Ibid., para. 44.
[67] Second Report of Sweden, CRC/C/65/Add.3, 1997, para. 194.
[68] Third Report of Sweden, CRC/C/125/Add.1, 2002, para. 224.
[69] Second Report of Belgium, CRC/C/83/Add.2, 1999, para. 61.
[70] Article 6. (The decree is available at the website of the European Training Centre for the Struggle against Violence <www.joconda-aigs.be/Joconda/Valise%20pedagogique/moniteur_belge/4_mars_1991.htm>, accessed 17 July 2008.)
[71] The decree also provides that children age 14 and older must consent to measures taken concerning them, and children in institutional care may not be transferred without their consent, except for medical or security reasons; ibid., articles 7 and 15.

aged 12 and over to be heard in child protection proceedings, except in special circumstances, and the child's right to be accompanied by a person of his or her choice.[72]

In the United Kingdom the Children Act 2004 provides that local authorities must "in so far as is reasonably practicable and consistent with the child's welfare" ascertain the views of the child and give due consideration to them before determining what services (including placement) the child requires.[73]

In Quebec (Canada), the Youth Protection Act recognizes in general terms the right of children to be heard "at the appropriate time during the intervention."[74] It also provides specifically that the child shall be consulted before placement in foster or residential care "if he is capable of understanding."[75]

In Japan, amendments to the Child Welfare Law made in 1997 impose on the competent administrative bodies a duty to hear the opinion of the child before authorizing institutional placement.[76] If the child or his guardian does not agree, the authority must consult a council of medical and legal experts.[77]

In the Czech Republic, legislation adopted in 1999 recognizes the child's right to speak with a social worker in private and to have his/her opinions taken into account in considering any measures that might be imposed, as well as the right to contact social workers without the knowledge of their parents.[78] This development was welcomed by the Committee on the Rights of the Child.[79]

In Slovenia children aged 15 and older have the right to initiate legal action to terminate parental authority if they believe that statutory grounds for removing children from parental care exist. In Russia children over the age of 14 can take legal action to seek protection from their parents or other persons exercising parental authority.[80] In Tunisia, children over the age of discretion (13 years) may take action in "matters of special urgency and in the case of danger at home."[81]

The Colombian children's code provides that children involved in child protection proceedings must be interviewed by the competent authority before any decision is taken.[82] The Paraguayan

[72] Second Report of Belgium, op. cit., paras 224, 304 citing the decree of 20 March 1995.
[73] Section 53 amending sections 17 and 47 of the Children Act 1989, available at the website of the National Archives' Office of Public Sector Information <www.opsi.gov.uk/acts/acts2004/20040031.htm>.
[74] Article 2.4, Youth Protection Act. (In Canada, most legislation regarding the participation of children in civil proceedings is provincial or territorial, not federal.)
[75] Ibid., article 7.
[76] Second Report of Japan, CRC/C/104/Add.2, 2001, para. 125(a).
[77] Ibid., para. 125(b).
[78] Second Report of the Czech Republic, CRC/C/83/Add.4, 2000, paras 73 and 89, citing section 8 of the Law on Social and Legal Protection of Children No. 359/1999 Coll.
[79] Concluding Observations, CRC/C/15/Add.201, 2003, para. 36.
[80] Article 64, Non-Litigious Civil Procedure Act; Second Report of the Russian Federation, CRC/C/65/Add.5, 1998, para.71(o). Younger children can of course make complaints of abuse to the competent administrative authorities. Ibid. See also Second Report of Ukraine, CRC/C/70/Add.11, 1999, paras 190 and 191, citing the Marriage and Family Code.
[81] Second Report of Tunisia, op. cit., para.146, citing article 19, para. 1 of the Code for Civil and Commercial Procedure.
[82] Article 38. (The competent authority is the 'Defensor de Familia', an attorney employed by the national child welfare agency who has very broad statutory powers; article 277-278. The administrative decision must be confirmed by a judge only if the parents object – the child's agreement is immaterial; article 61.)

children's code provides that children may ask the authorities to begin protection proceedings, and they have the right to be heard in them "with due process."[83] The children's code of Costa Rica provides that children must be informed of what is happening, and their views must be heard when they are removed from their home as a temporary preventive measure.[84]

The Brazilian children's statute provides that children and adolescents shall be heard and their opinions taken into account in proceedings concerning adoption and other forms of alternative care.[85] The Bolivian children's code contains a similar provision, and it also provides that temporary placement with a substitute family (*guarda*) cannot be revoked without first hearing children over the age of 12, and younger children if appropriate.[86] The Ecuadorian children's code provides that children whose parents have lost custody may not be returned to them without having first been heard.[87]

Russian and Georgian legislation provides that children over the age of 10 whose parents have been deprived of custody cannot be returned to the care of their parents without the child's consent.[88]

In Italy, children over the age of 12 must be heard before foster placement is approved.[89] Courts are not required to listen to children before ordering other forms of placement, but some judges have adopted this practice.[90]

Nigeria was one of the first African countries to adopt a comprehensive law on the right of children based on the CRC.[91] It does not recognize the right of children to be heard in proceedings concerning removal of children from their homes.[92] Children subject to care or supervision orders may, however, move to have the order lifted or modified.[93]

Some European countries have a policy that removal of children from their family and placement in care should be based on consent, whenever possible. When the child is young the consent of the parents is material, but when children are older their own consent is solicited. The Youth Care Act of the Netherlands, for example, provides that the consent of both the child and parents is required for voluntary placement of children aged 12 to 16.[94] Consent of the child alone is required for children aged 16 to 18.

The consent of children over the age of 14 is normally required for placement in Romania; if the child does not consent, a placement may only be ordered by a court and only if it finds

[83] Articles 74 and 78, respectively (lit: proceedings for the suspension or termination of *patria potestad*, parental authority).
[84] Article 35; see also article 133.
[85] Article 28, section 1 of the Estatuto da Criança y Adolescente; see also article 168. (The term 'children' for purposes of this law refers to persons under the age of 12, and the term 'adolescent', to those between the age of 12 and 18.)
[86] Child and Adolescent Code, 1999, articles 38.1 and 49.
[87] Article 117.
[88] Initial Report of Georgia, CRC/C/41/Add.4/Rev.1, 1998, para. 66; Second Report of Russian Federation, op. cit., para. 90.
[89] Second Report of Italy, CRC/C/70/Add.13, 2000, para. 113.
[90] Ibid., para. 111.
[91] Act to Provide and Protect the Right of the Nigerian Child and Other Related Matters, 2003. It should be noted that state courts apply the Act only if it has been ratified by the state legislature.
[92] Ibid., section 14. (The extensive provisions on fostering also make no reference to the views of the child or his/her right to be heard. Part IX, section 100-124.)
[93] Ibid.
[94] Third Report of the Netherlands, CRC/C/NLD/3, 2007, p. 14.

strong motives for doing so.[95] Children over the age of 14 also have the right to bring legal action to challenge placement and are entitled to free legal assistance for this purpose.[96]

In Spain, the consent of children over the age of 12 is required for placement in a foster family.[97] Younger children who have sufficient judgment (*juicio*) also may make a statement to the court.[98]

2.3 Family law proceedings

The right of children to be heard and to have their views taken into account is of great importance in proceedings concerning custody, contact with non-custodial parents and other family law matters. Many of the countries covered by this study have amended their legislation in this area to ensure greater conformity with article 12.2.

The Nicaraguan children's code contains an exceptionally broad provision to the effect that the mother and father shall take joint decisions regarding the raising of their children. When they disagree the matter shall be resolved by the competent court, taking into account the views of both parents and the children.[99] The Paraguayan code contains a similar provision, in addition to one recognizing the right of children to be heard in custody proceedings.[100] The children's code of Ecuador also recognizes the right of children to be heard in custody proceedings and establishes a presumption that the court should follow the views of children over the age of 12.[101]

In Sweden, rules allowing children to express themselves in judicial proceedings involving custody or access were introduced in 1996, and in 1998 they were expanded to administrative proceedings. In judicial proceedings, the court is required to take the child's wishes into account in custody and access proceedings, having due regard to the child's age and maturity.[102] However, children may testify in court only if there are special reasons and it is clear that the child will not suffer harm as a result.[103] In most cases a person appointed by the court tries to clarify the child's standpoint and give an account of it to the court.[104] In proceedings to enforce custody or access orders, there is a presumption that the views of children over the age of 12 should be respected. Enforcement will be ordered against the wishes of the child concerned only if the court finds it to be necessary for the best interests of the child.[105] The same applies to children under the age of 12 if they are considered mature enough for weight to be given to their views.[106]

In Denmark, interviews with children over the age of 12 have long been required in custody and access proceedings, unless the interview is considered "without any importance for the decision of the case" or likely to be detrimental for the child.[107] In 2002 the law was amended to provide

[95] Article 53(3) of Law 272/2004 on the protection and promotion of the rights of the child.
[96] Ibid., article 57.
[97] Second Report of Spain, CRC/C/70/Add.9, 1999, para. 464.
[98] Ibid.
[99] Article 23.
[100] Articles 92 and 93.
[101] Article 106.
[102] Second Report of Sweden, op. cit., para. 195.
[103] Ibid., citing the Code of Parenthood and Guardianship.
[104] Ibid., para. 195; Third Report of Sweden, op. cit., para. 216.
[105] Second Report of Sweden, op. cit., para. 196.
[106] Ibid.
[107] Third Report of Denmark, op. cit., para. 95, citing article 29 of the Act on Custody and Access.

that children under the age of 12 also should be interviewed in proceedings of this kind "where the child's maturity and the general circumstances of the case warrant."[108] Article 12.2 of the CRC was cited as the main reason for this amendment.[109] In a report to the CRC Committee, Denmark commented:

> The extent to which the circumstances of the case will require hearing of the child may depend on the complexity of the issues to be decided. A child will, for example, be able to decide on more simple issues already at a quite young age, such as the time when the child has to be picked up for access, access during holiday periods and access on Christmas Eve, but not issues with more far-reaching consequences, for example the question of whether access should be cancelled.[110]

The Committee on the Rights of the Child welcomed "the increased consideration given to the views of children in administrative decision-making process, including children under the age of 12 years."[111]

In Finland, a child who has reached 12 years of age must be given an opportunity to be heard when decisions are made concerning guardianship, visiting rights and custody. The views of younger children also must be considered, taking into account the child's age and the level of development.[112] Decisions that do not have the consent of the parties are reviewed by an administrative court composed of two judges and an expert. Prior to 1996 only decisions regarding placement were reviewed, but since that year decisions concerning contact with non-custodial parents are also reviewed.[113] The role of the experts is twofold: to hear the child and to interpret the best interests of the child.[114]

In Belgium, the law was amended in 1994 to give the child capable of forming his or her own views a right to be heard in any family law proceeding in which he or she is involved, without the presence of the parties to the case. Requests to be heard can only be denied on the grounds of a well-reasoned decision to the effect that the child lacks the ability to form his or her own views.[115] In 1997 the law was further amended to provide that, in divorce proceedings, the judge must hear the views of any child concerned, unless the child does not want to be heard or does not have discretion.[116]

The Czech Act of the Family provides that the child who is capable of forming his/her own opinions and evaluating the effect of measures affecting him/her has the right to obtain needed information and freely express himself/herself about all decisions of the parents concerning significant matters about him/her and to be heard in all proceedings in which such matters are decided.[117]

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[108] Ibid., para. 96; see also para. 452, regarding Greenland.
[109] Ibid., para. 96.
[110] Ibid., para. 97.
[111] Concluding Observations, CRC/C/DNK/CO/3, 2005, para. 27.
[112] Third Report of Finland, op. cit., paras 8 and 142, citing the Act on the Status and Rights of Social Welfare Clients 2000.
[113] Second Report of Finland, CRC/C/70/Add.3, 1996, para. 45.
[114] Ibid.
[115] Second Report of Belgium, op. cit., paras 58 and 225–228, citing Act of 30 June 1994 amending article 931 of the Judicial Code.
[116] Ibid., paras 270–271.
[117] Second Report of the Czech Republic, op. cit., para. 36, citing section 31, para. 3 of the Act of the Family as amended in 1998. (The report also indicates that non-governmental organizations (NGOs) found this provision incompatible with article 12.2 of the CRC because the Convention does not require that children be able to evaluate the effect of measures.)

In Russia, the Family Code adopted in 1995 contains a chapter on the rights of children that requires the views of children over the age of 10 to be taken into account in legal or administrative proceedings.[118]

German legislation also has been amended in the light of article 12.2. A guardian may be appointed to represent a child in family law proceedings, if necessary in order to represent the child's interests, and the court may decide to hear the children themselves.[119]

In Spain, the views of children who have sufficient understanding (*juicio*) must be taken into account in custody and other similar proceedings.[120] There is a presumption that children aged 12 or older must be heard.[121] In Portugal, children aged 12 and older have a right to make their views known in matters concerning foster care and to be heard in court when a parent seeks to adopt another child.[122] Children aged 14 and older in principle have a right to be heard in court cases between parents who cannot agree on how to exercise parental authority, and they have an unqualified right to be consulted in cases concerning appointment of a guardian.[123]

Italian legislation does not recognize the right of children to be heard in most family law matters, and it provides that children shall be heard in divorce proceedings only if necessary.[124] However, the courts have begun to adopt jurisprudence based on the Convention recognizing the right of children to be heard in legal proceedings. In 1997, the Italian Supreme Court declared that a child under the age of 12 who had been adopted without being heard had the right to maintain his or her own identity and family relations and could not be separated from his or her parents if this were not in the child's interests.[125] The decision rejects the idea that the right to be heard can be determined by age limits and concludes that the child must be heard to determine what weight should be given to his or her views. An Italian juvenile court, applying the CRC, recognized the right of an adolescent who is sufficiently mature to recognize his paternity over a child born out of wedlock.[126]

In Belarus, the Supreme Court adopted a decision giving courts discretion to hear the views of children over the age of 10 in custody proceedings. Legislation adopted in 2000 gives children over 10 years of age the right to decide which parent to live with.[127]

In Romania, children over the age of 10 are heard in hearings regarding custody, and those over the age of 14 can request modification of custody arrangements.[128] In the Ukraine, too, children over the age of 10 can be heard in cases concerning custody.[129]

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[118] Second Report of the Russian Federation, op. cit., para. 71(p), citing the Family Code.
[119] Second Report of Germany, CRC/C/83/Add.7, 2001, para. 338.
[120] Second Report of Spain, op. cit., para. 430(g) and (j), citing articles 92 and 159 of the Civil Code, which is available at the website of the University of Girona <civil.udg.es/normacivil/estatal/CC/L1.htm>.
[121] Ibid.
[122] Initial Report of Portugal, CRC/C/3/Add.30, 1994, para. 39, citing article 1984(a) of the Civil Code; Second Report of Portugal, CRC/C/65/Add.11, 1998, para. 122(a) citing article 5 of Decree Law No. 190/92 of 3 September 1992.
[123] Initial Report of Portugal, para. 39, citing articles 1901(2) and 1931(2) of the Civil Code, available at <lexius.no.sapo.pt/page27.html>, accessed 27 September 2007.
[124] Second Report of Italy, op. cit., para. 113.
[125] Decision No. 6899 of 23 July 1997, cited in ibid., para. 4.
[126] Decision of the juvenile court of Catania, 17 April 1997, cited in Second Report of Italy, para. 4.
[127] Second Report of Belarus, CRC/C/65/Add.15, 1999, para. 71, citing a decision of the Plenum of the Supreme Court adopted 16 December 1994; article 15 of the Child Rights Act.
[128] Second Report of Romania, CRC/C/65/Add.19, para. 51(n) and (o).

In Slovenia, children over the age of 15 "who are capable of understanding the meaning and legal consequences of their actions" have the right to participate personally in proceedings concerning the family, as a party to the action.[130] Children over the age of 10 who are capable of understanding judicial proceedings concerning their care and education and the consequences of the decisions that may be taken as a result have a right to be heard, and the right to be informed of the right to be heard.[131]

The Ethiopian Family Code recognizes the right of children to be heard in proceedings concerning custody.[132] The Child Rights Act adopted by Nigeria in 2003, although intended to bring national law into conformity with the CRC, merely recognizes the discretion of courts to hear children in proceedings concerning custody.[133] The South African Children Act 2005 provides that children may, with the leave of the court, take legal action to modify a parenting plan made pursuant to court order or to terminate or modify the rights and responsibilities any person has with regard to them.[134] The Court also has discretion to appoint a legal practitioner to represent the child in such proceedings.[135]

In Japan, children over the age of 15 must be heard in trials concerning family matters such as custody, and younger children may be heard.[136] In the Republic of Korea, the views of children over the age of 15 must be heard in custody proceedings, but only if the parents do not agree.[137] In Viet Nam, children over the age of six are heard in proceedings regarding custody, and children may seek a legal remedy if maintenance payments (child support) are not made.[138]

The Costa Rican and Paraguayan children's codes also recognize the right of children to initiate legal proceedings for non-payment of maintenance.[139]

Voluntary agreements

There is a tendency in Europe to encourage voluntary agreements on issues such as custody and right of access. Some countries have taken steps to give children a voice in such proceedings leading to the adoption of such agreements, which, although they are not legal or administrative proceedings as such, often are legally required and legally enforceable. The Children's Act of Norway contains a section with the title 'The Child's Right of Co-determination'. It provides that parents must take the views of children into account, especially those over the age of seven, and the opinion of children over the age of 12 "shall carry significant weight."[140] While this

[129] Second Report of Ukraine, op. cit., paras 192 and 193.
[130] Second Report of Slovenia, CRC/C/70/Add.19, 2001, para. 85; article 409 of the Civil Procedure Act which entered into force in 1999, available at <www.law.yale.edu/rcw/rcw/jurisdictions/euros/slovenia/frontpage1.htm>.
[131] Ibid.; article 410 of the Civil Procedure Act.
[132] Third Report of Ethiopia, CRC/C/129/Add.8, 2005, para. 74, citing article 113 of the Family Code of 2000.
[133] Section 75.
[134] Sections 28 and 34(5) (NB: as of November 2007, these sections of the Act had not yet come into force).
[135] Ibid., section 29(6) (NB: section 29 also had not yet come into force as of November 2007).
[136] Initial Report of Japan, CRC/C/41/Add.1, 1996, para. 65.
[137] Initial Report of the Republic of Korea, CRC/C/8/Add.21, 1994, para. 47, Second Report of the Republic of Korea, CRC/C/70/Add.14, 2000, para. 56, citing the Act on Special Cases concerning the Promotion and Procedure of Adoption. All references to 'Korea' in this study refer to the Republic of Korea.
[138] CRC/C/SR.849, 2003, paras 32–33.
[139] Article 40 of the Costa Rican code ("Las personas menores de edad tendrán acceso a la autoridad judicial competente para demandar alimentos, en forma personal o por medio de una persona interesada"); article 185 of the Paraguayan code ("El niño o adolescente podrá reclamar alimentos de quienes están obligados a prestarlos").
[140] Section 31.

section applies primarily to matters within the family, it also applies to legally enforceable consensual agreements between parents on matters such as custody. In Germany, children are entitled to be involved in an appropriate manner when parents receive counselling designed to help them reach an agreement on parental care in cases of separation and divorce.[141] In Belgium, the prosecutor may decide to hear a child affected by a divorce agreement if she or he suspects that the terms of the agreement reached by the parents may not be consistent with the best interests of the child.[142]

South Africa also has a procedure whereby divorced or separated parents are encouraged to reach agreement on custody and related matters. There is no requirement that the views of children be taken into account in reaching such an agreement, but children may seek to amend or terminate the agreement, with the permission of the court.[143]

Islamic law

Islamic law contains detailed rules on custody and guardianship, but the content of these concepts differs from their content in other legal systems. *Hadana*, often translated as 'custody' in English, refers to the care of a child by his or her mother or, in the absence or unfitness of the mother, another female relative.[144] *Wilaya* or *wilayah*, often translated as guardianship in English, consists of the responsibility of providing for the child and exercising certain civil rights on behalf of the child. It is vested in the father or another male relative. Because the content of these relationships is different, a child can be simultaneously in the care (*hadana*) of the mother and under the guardianship (*wilayah*) of the father.[145] These legal relationships between the child and an adult relative exist regardless of whether or not the child's parents are married or divorced.

There are detailed rules assigning responsibility for these functions, in particular *hadana* over younger children.[146] During the first seven years or more of the child's life, his or her opinion (like those of the adult duty-bearers) has little or no relevance.

The views of the child are taken into account when the parents are divorced and the child has reached the age of discretion.[147] Indeed, some jurists maintain that there is a presumption that

[141] Second Report of Germany, op. cit., para. 269, citing section 17, para. 2 of Book Eight of the Social Code (SGB VIII).
[142] Second Report of Belgium, op. cit., paras 59, 230, 264. (Discretion to hear the child in such cases is limited by article 931, summarized above.)
[143] Section 22.6(a) (NB: section 22 had not yet come into force as of November 2007).
[144] See e.g. Mohd Zin, N., 'How the Best Interests of the Child is Best Served in Islamic Law with Special Reference to its Application in the Malaysian Shariah Court', 2005, available at the website of Children's Rights International <www.childjustice.org/html/papers_fl.htm>. When the child reaches a certain age, *hadana* may be replaced by *damm*, a form of care provided by the father or another male relative. Esposito, J. L. (gen. ed.), *Oxford Dictionary of Islam*, Oxford University Press, Oxford, 2004, p. 101.
[145] See Mohd Zin, op. cit., p. 12.
[146] Some jurists maintain that the rules need not be followed inflexibly if to do so would be contrary to the welfare of the child. See Goolam, N., 'Formulation of the Best Interests Principle in Islamic Law', 2005, p. 6, on the website of Children's Rights International, op. cit.
[147] Criteria for determining when a child has reached this age differ according to the school of Islam and the sex of the child. Mohd Zin (op. cit., p. 15) indicates that the age is seven for boys and nine for girls according to the Shafi'is and seven for boys and puberty for girls according to the Hanafi. Article 214 of the Family Code of Tunisia provides that children aged 12 or older have discretion (website of Yale University project Representing Children Worldwide, op. cit.). The Rights of the Child Act adopted by Yemen in 2002 codifies the rule that children who are "self-sufficient" can choose which parent to live with (article 35, cited in the Third Report of Yemen, CRC/C/129/Add.2, 2003, para. 55).

the child's preference regarding custody should be respected unless there are specific reasons to conclude that doing so would not be in the child's best interests.[148]

In Morocco, for example, boys have the right to choose their guardian at the age of 13 and girls at the age of 15.[149] If a child has been abandoned, his or her views regarding the selection of a guardian are taken into account as from the age of 10 years.[150]

In some Islamic countries, cases concerning the family are decided by Sharia courts.[151] The Committee on the Rights of the Child has expressed concern over recognition of the competence of such courts when children have no right to be heard and to have their views taken into account in matters concerning them.[152]

Capacity of adolescent parents

The capacity of adolescents who are parents with respect to legal proceedings concerning their children is also an important issue. In Spain, fathers under the age of 18 may recognize paternity through a hearing before the competent authority. Parents under the age of 18 have parental rights with regard to their own children, which they are to exercise "with the help of their parents or legal guardians."[153] In Portugal, fathers 16 or older may recognize the paternity of children born out of wedlock, and the consent of parents who are minors is required for the adoption of their child, even if they do not exercise paternal responsibility.[154] Czech legislation on the family, as amended in 1998, recognizes the capacity of boys under the age of 18 to recognize paternity and the capacity of parents under the age of 18 to consent to adoption of their children.[155] Bolivian legislation also provides that the consent of adolescent parents is required for the adoption of their children.[156]

2.4 Proceedings concerning identity

The right to identity is a composite right that includes the right to name, nationality and "family relations as recognized by law."[157] Adoption and paternity proceedings are the two kinds of proceedings that most often affect family ties and identity.[158] In many countries, the law

[148] Mohd Zin, op. cit., p. 10, citing Malaysian jurisprudence in which courts have been guided by the views of children as young as seven years of age.
[149] Second Report of Morocco, CRC/C/93/Add.3, 2000, para. 187, citing article 102 of the Code of Personal Status.
[150] Ibid., citing article 10 of Royal Decree of 1993.
[151] Religious courts of minority communities also are recognized in some Islamic States, a legacy of the Ottoman Empire. (The term "Islamic country" or "Islamic State," as used here, refers to those whose constitution defines them as such, or recognizes the Sharia as a source of law.) The competence of religious courts over family law is also recognized by Israel and in some secular States such as Nigeria and the Philippines, in states or provinces having predominantly Muslim populations.
[152] See e.g. CRC/C/LEB/3, 2006, paras 35–36.
[153] Second Report of Spain, op. cit., para. 430(a) and (l), citing article 157 of the Civil Code.
[154] Initial Report of Portugal, op. cit., para. 40 citing articles 1850 and 1981 para. 1(c) of the Civil Code, respectively.
[155] Second Report of the Czech Republic, op. cit., paras 34–36, citing section 67, para. 2 of the Act.
[156] Article 61 of the Children's Code.
[157] Article 8 of the CRC. (National legislation often gives this right a broader content, including the right to cultural identity.)
[158] Some countries allow two forms of adoption, one of which, often called 'simple' adoption, does not dissolve the legal ties between the adopted child and his or her birth family; Article 21(a) of the CRC requires that adoption be authorized by the competent authorities.

requires not merely that children be heard but that they consent to changes in these aspects of their identity, once they have reached a certain age.

Consent to adoption

The consent of older children to adoption is required in many countries. Quebec requires the consent of children over the age of 14, and there is a presumption that children aged 10 to 14 should consent.[159] The consent of children aged 13 and above is required in Poland.[160] Denmark requires the consent of children over 12 years of age.[161] Legislation amended in 2000 provides that an adoption cannot be nullified without the consent of the adopted child if the child is 12 years of age or older. The views of younger children also should be taken into account "to the extent that the child's maturity and the circumstances of the case make it justified."[162] Portugal, Spain and Sweden also normally require the consent of children aged 12 and older for adoption.[163]

In Belgium, the age at which consent to adoption is required was lowered from 15 to 12, and the Norwegian Adoption Law was amended to lower the age requiring consent for adoption from 12 to 7.[164]

Italy requires the consent of children over the age of 14.[165] In Japan, children aged 15 or older can agree to be adopted and can also dissolve family ties formed by adoption.[166] The consent of children aged 15 or older also is required for adoption in the Republic of Korea.[167]

The Children Act of South Africa requires the consent of children aged 10 or older, as well as younger children who are "of an age, maturity and stage of development to understand the implications of such consent."[168] The Ethiopian Family Code contains a general requirement for the views of children to be heard in adoption proceedings. It also allows an adopted child to request revocation of adoption in certain circumstances.[169] The Nigerian child rights law requires the views of children to be taken into account in adoption proceedings, without specifying an age limit.[170] Adoption proceedings are regulated in more detail by the legislation of the states that recognize it.[171]

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[159] Civil Code, articles 549–550. (If a child aged 10 to 14 refuses consent, the court may postpone a decision on adoption or overrule the child.)
[160] Second Report of Poland, op. cit., para. 111, citing article 118.1 of the Family and Guardianship Code.
[161] Third Report of Denmark, op. cit., paras 98 and 450.
[162] Ibid., para. 99.
[163] Second Report of Sweden, op. cit., para. 199. (There is an exception, applicable only to children aged 12 to 16, if the child would suffer harm from being consulted or is incapable of giving consent owing e.g. to mental disturbance.) Second Report of Spain, op. cit., paras 430(d) and 464, citing article 177 of the Civil Code. Initial Report of Portugal,op. cit., para. 40, citing article 1981 para.1(a) of the Civil Code.
[164] Second Report of Belgium, op. cit., para. 60; Third Report of Norway, CRC/C/129/Add.1, 2003, para. 82.
[165] Second Report of Italy, op. cit., para. 93(o), citing Law No. 184 of 4 May 1983.
[166] Second Report of Japan, op. cit., para. 97 (citing the Civil Code).
[167] Initial Report of the Republic of Korea, op. cit., para. 47.
[168] Section 233. Section 234 applies the same standard concerning capacity to understand the implications of consent to the child's consent to agreements made before adoption concerning information about or contact with birth parents. These sections have not yet entered into force at this writing.
[169] Articles 194.3(a), 195.2 ("Where the adopter, instead of looking after the adopted child as his own child, handles him as a slave, or in conditions resembling slavery, or makes him engage in immoral acts for his gain, or handles him in any other manner that is detrimental to his future, the court may revoke the adoption") and 196 of the Family Code, Proclamation No. 213/2000.
[170] Section 126(3).
[171] Second Report of Nigeria, CRC/C/70/Add.24, 2003, para. 97.

In Romania, children over the age of 10 must consent to adoption, and they also have the capacity to request that adoption be terminated. Legislation in Georgia and Ukraine requires the child's consent beginning at 10 years of age.[172] So does legislation in the Philippines;[173] the consent of the children of the adoptive parents is also required, and children must be counselled and advised of their rights before their consent is sought.[174] In Viet Nam the consent of children is required from 9 years of age.[175]

The consent of children over the age of 12 is required for adoption in Brazil, Ecuador and Paraguay.[176] In Ecuador, younger children also may not be adopted without their consent if adoption would result in the separation of siblings.[177] In Colombia, the consent of children who have reached puberty is required for adoption.[178]

Children under the age of 12 who are able to form and express views must be heard in adoption proceedings in Ecuador and Paraguay, while in Bolivia children over the age of 12 must be heard in adoption proceedings, and younger children may be heard "depending on their age and maturity."[179] In Panama, children over the age of seven must be heard in adoption proceedings.[180]

A few countries recognize the right of children to be heard in adoption proceedings without specifying an age limit. The Civil Procedure Code of the Czech Republic, for example, provides that children shall be heard if they are able to understand the significance of adoption and if providing them with a hearing would not conflict with their own interests.[181]

Consent to name change

Many countries require children to consent to a change in their name from a certain age. In Germany, consent from a child aged five or older is required in specific circumstances.[182] Children also may have to request to use the surname of their mother when it is legally established that the man whose surname the child bears is not his or her biological and adopted father.[183]

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[172] Second Report of Georgia, CRC/C/104/Add.1, 2001, para. 73, citing the Orphaned and Abandoned Children (Adoption Procedure) Act; Second Report of the Ukraine, op. cit., para. 99, citing the Marriage and Family Code.

[173] Second Report of the Philippines, CRC/C/65/Add.31, 2003, paras 99 and 120, citing article 188 title VII of the Family Code and section 9, article III of the Domestic Adoption Act of 1998, Republic Act 8552.

[174] Ibid., para. 120. All concerned children over the age of 10 must be counselled and advised of their rights before their consent is sought.

[175] Initial Report of Viet Nam, CRC/C/3/Add.4, 1992, para. 81(b), citing article 36 of the Law on Marriage and the Family.

[176] Estatuto da Criança y Adolescente of Brazil, op. cit., article 45, section 2, and article 1.621 of the Civil Code; Children's Code of Ecuador, article 164; Adoption Act of Paraguay, article 3, respectively.

[177] Article 156.

[178] Código del Menor, article 94.

[179] Código de la Niñez y Adolescencia (Ecuador), article 160.1; Adoption Act, article 19 (Paraguay); Código del Niño, Niña y Adolescente (Bolivia), article 38.1.

[180] Second Report of Panama, CRC/C/70/Add.20, 2002, para. 93, citing article 297 of the Family Code.

[181] Second Report of the Czech Republic, op. cit., para. 45, citing section 182 of the Code of Civil Procedure.

[182] Second Report of Germany, op. cit., para. 342. According to the Civil Code, consent of the child is required e.g. when custodial unmarried parent wishes to give the child the name of the other parent, when joint custody is established only after the child has a name, when the parents decide to adopt a common name.

[183] Ibid., para. 343.

In Europe the age at which consent is required is generally considerably older. In Denmark, children may not request a change of name, but a parent or guardian may not request a change in the child's name without the consent of the child beginning at age 12.[184] Similarly, in Iceland a child between the ages of 12 and 18 cannot have his or her name changed without giving consent, but the child cannot request the name change until reaching the age of majority, 18 years old.[185] Poland requires the consent of children over the age of 13.[186] In Italy, consent for a change of surname is required only when recognition of paternity is the reason for the change.[187]

In Georgia, the consent of children over the age of 10 is required for changes in a family name based on voluntary recognition of paternity, but only if there is a disagreement between the parents.[188] Changes in the family or given name of a child over 10 years of age due to adoption also require the child's consent.[189]

In Ukraine, the consent of children over the age of 10 is required for any change in their name due to adoption, and children over the age of 16 may request a change of name.[190] In Japan, children may change their family name at the age of 15.[191]

In Quebec, the consent of children over the age of fourteen is essential for adoption, and the consent of children aged ten to fourteen is generally required, unless the court decides otherwise.[192]

The Colombian children's code contains an unusual provision indicating that adopted children shall use the family names of the adoptive parents, but that the given name of children over the age of three years shall not be changed without their consent.[193] The children's codes of the Dominican Republic and Venezuela provide that an adopted child shall use the family names of the adopted parents, but that his or her given name may not be changed without hearing the child, and without the consent of a child over the age of 12.[194] The Ecuadorian Code provides that the given name of an abandoned child whose parents are unknown shall be respected, and the child's views shall be taken into account in this regard.[195]

Consent to change of nationality

The law of many countries provides that the nationality of minor children changes when parents change their nationality. In some countries, the nationality of children above a certain age cannot be changed without the child's consent. In Viet Nam, for example, children over the age

[184] Third Report of Denmark, op. cit., paras 100, 449 and 499.
[185] Second Report of Iceland, op. cit., paras 106 and 127. (Until the age of majority was raised from 16 to 18, a person could request a name change at sixteen.)
[186] Second Report of Poland, op. cit., para. 111, citing articles 88.2, 89.1 and 2, 90.1 and 1222.3 of the Family and Guardianship Code.
[187] Second Report of Italy, op. cit., para. 93(o).
[188] Initial Report of Georgia, op. cit., para. 50.
[189] Ibid., paras 50 and 181.
[190] Second Report of Ukraine, op. cit., para. 192 citing the Marriage and Family Code.
[191] Second Report of Japan, op. cit., para. 97.
[192] Civil Code, articles 549–550.
[193] Article 97, Código del Menor, (or unless the change is a court finds good reason to authorize a change of name).
[194] Article 46 and articles 430–431, respectively.
[195] Article 36.

of 15 must consent to a change of nationality.[196] In Denmark, the consent of children aged 12 or older also is "generally required" for naturalization.[197] The consent of children over the age of 14 is required in matters concerning nationality in Romania.[198] Ukraine requires the consent of children over the age of 16.[199]

Proceedings concerning paternity

The legislation of some countries also gives children the right to initiate or be heard in proceedings concerning paternity. Danish law provides that children over the age of 12 must, as a rule, be heard in proceedings concerning their paternity, and considerable weight must be given to their views.[200] Younger children also may be heard in such proceedings, depending on an assessment of the child's maturity and other factors.

The Children's Act 2003 of Iceland provides that a child may initiate paternity proceedings as well as proceedings to invalidate recognition of paternity.[201] No age limit is specified.

The Children's Act of Norway contains a similar provision and also requires the consent of children over the age of 15 for proceedings to challenge paternity.[202] In Sweden, children are always considered a party to paternity proceedings, even though young children are represented in proceedings by their mother or other legal representative.[203] Children over the age of 15 who have sufficient judgement can be heard personally in proceedings to challenge paternity.[204]

In Tunisia, children do not have the right to change their name, but those aged 13 or older have the right to seek information about their parents.[205] The Paraguayan Code provides that children have the right to take legal action to investigate their origins.[206]

2.5 The child as witness in criminal proceedings

The views of child victims or witnesses have little relevance in criminal proceedings, as indicated in section 1. What is more relevant is the child's right to express his or her views regarding participation in proceedings as a witness and, if the accused is convicted, as to what sentence should be imposed. The most relevant question from the point of view of the authorities (and presumably of society) is whether the child can give evidence and, if so, what weight it will be given and what safeguards are in place to cushion the impact of the experience on the child. A separate question, of great importance from the child's point of view, is whether a child who is a victim of or witness to a crime may decide whether or not to give evidence in a criminal proceeding.

[196] Initial Report of Viet Nam, op. cit., para. 81(c).
[197] Third Report of Denmark, op. cit., para. 100.
[198] Second Report of Romania, op.cit., para. 109, citing Law No. 21/1991.
[199] Second Report of Ukraine, op. cit., para. 99.
[200] Third Report of Denmark, op. cit., para. 106.
[201] Law No. 76/2003, articles 10 and 21 available at the website of the Ministry of Justice, <eng.domsmalaraduneyti.is/laws-and-regulations/nr/916>, accessed 5 September 2007.
[202] Section 6. The law is available at the website of the Ministry of Children and Equality, <www.regjeringen.no/en/doc/Laws/Acts/The-Children-Act.html?id=448389>, accessed 5 September 2007.
[203] Second Report of Sweden, op. cit., para. 241.
[204] Ibid.
[205] Second Report of Tunisia, op. cit., paras 150–151.
[206] Article 18.

Safeguards for children

The question of safeguards for children who participate in criminal (and other) proceedings is addressed below. The sources consulted unfortunately provide little information on the 'right' of a child to decide not to give evidence, nor on the role of child victims and witnesses in juvenile justice proceedings. This section therefore focuses mainly on criteria concerning the participation of children as victims or witnesses in ordinary criminal proceedings.

In Finland, children aged 15 and older can be heard as witnesses in criminal proceedings. Courts have discretion to hear younger children, if their testimony is of major significance and participation will not have a detrimental effect on their development.[207] Children under the age of 10 are rarely heard, because of the presumption that they are easily influenced and not always clear about the distinction between imagination and reality.[208]

Children aged 15 and older also can testify in criminal proceedings in Sweden. There is no bar to summoning younger witnesses to testify in court, but this is rarely done because of the belief that "questioning in court can entail serious detriment to the child."[209] Great importance is attached to the opinion of the parent or guardian in deciding whether to summon a witness under the age of 15; in some cases medical advice is sought.[210] It is more common for a witness under the age of 15 years to be summoned to testify at a preliminary investigation, if doing so is deemed appropriate after giving due consideration to the child's degree of maturity and other relevant circumstances.

In Slovenia, children who have been victims of a crime can only participate directly in criminal proceedings if they have reached the age of 16; younger children must be represented by a guardian or other legal representative.[211]

In Tunisia, the age of discretion is 13 years; younger children cannot testify in criminal or civil legal proceedings, and the court has discretion to decide whether to allow older children to testify, taking into account the usefulness of the testimony and the risk of emotional and psychological trauma.[212]

Other countries, including Brazil, Canada, Italy, Japan, Paraguay, Portugal, Spain, Sudan and the United Kingdom, have no age limits concerning the participation of child witnesses in criminal proceedings.[213]

In the Philippines, there is a presumption that children are competent to give testimony; a hearing to determine competency must be held if the court finds substantial disagreement

[207] Third Report of Finland, op. cit., para. 133.
[208] Ibid., para. 132.
[209] Second Report of Sweden, op. cit., para.205; see also Third Report of Sweden, op. cit., paras 227, 230.
[210] Ibid.
[211] Second Report of Slovenia, op. cit., para. 87.
[212] Second Report of Tunisia, op. cit., paras 130, 143 and 152, citing article 156 of the Personal Status Code.
[213] Code of Criminal Procedure of Brazil, article 202 (in contrast, article 228 of the Civil Code establishes a presumption that children under the age of sixteen cannot testify); Canada Evidence Act, article 16.1; Second Report of Italy, op. cit., para. 93(l), citing article 196, para. 1 of the Code of Criminal Procedure; Second Report of Paraguay, CRC/C/65/Add.12, 1998, para. 207, citing the Code of Criminal Procedure; Initial Report of Portugal, op. cit., para. 20; Second Report of Spain, op. cit., para. 688; Initial Report of Sudan on the Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography, CRC/C/OPSC/SDN/1, 2006, para. 82, citing article 24 of the Burden of Proof Act of 1993; article 53 of the UK's Youth Justice and Criminal Evidence Act 1999.

regarding the ability of the child to perceive, remember, communicate, distinguish truth from falsehood, or appreciate the duty to tell the truth in court.[214]

Japan has no legislative standard concerning the age at which children may be heard as witnesses in criminal proceedings. In 2001, Japan reported that the main criterion for determining whether a child shall be heard, according to its jurisprudence, is the circumstances of the case, including the need for the child's testimony. A child as young as 44 months may be heard.[215]

The criteria for accepting the testimony of a child in Canada and the United Kingdom are that they are able to understand questions asked and the court is able to understand their answers. In Canada, there is a presumption that potential child witnesses meet this standard, while in the United Kingdom the burden of proving that the child satisfies these criteria, if the issue is raised, lies with the prosecution.[216]

Many former colonies of the United Kingdom, including Bangladesh, Fiji, India and South Africa, apply the 'tender years' rule or doctrine – any person who can understand the questions posed and give replies that can be understood by the court has the capacity to testify in legal proceedings.[217]

The way this principle is interpreted and applied varies greatly from one country to another. English jurisprudence recognizes the testimony of a child six years old as admissible in criminal proceedings.[218] Jurisprudence cited by a recent study by the Indian Law Commission indicates that this rule allows children as young as eight years of age to testify in court.[219] A leading Nigerian decision upheld the admission of testimony from children 10 years of age in a criminal case.[220] A Jamaican statute defines a 'person of tender years' as a child under the age of 14.[221]

Requirement for taking an oath

When younger children are allowed to give evidence in criminal matters, in many countries they do so without taking an oath.[222] Traditionally, statements made without oath were not

[214] Supreme Court Rule on the Examination of Child Witnesses (2000), section 6.
[215] Second Report of Japan, op. cit., para. 93, citing the Judgment of Tokyo District Court of 14 November 1973, *Hanrei-Zihou*, p. 24, No. 723. (The Criminal Procedure Code was amended in 2000, as further indicated below, to authorize measures designed to "mitigate the psychological and mental effects from which witnesses could suffer by testifying in courts.")
[216] Evidence Act, article 16.6; Youth Justice and Criminal Evidence Act, articles 53, 54–55.
[217] Second Report of Bangladesh, CRC/C/65/Add.22, 2001, para. 47(k) and Initial Report of Bangladesh, CRC/C/3/Add.38, 1992, para. 62, citing the Evidence Act 1872; Initial Report of Fiji, CRC/C/28/Add.7, 1996, para. 31; Initial Report of South Africa, CRC/C/51/Add.2, 1997, para. 61; Child Care and Protection Act of Jamaica, article 20.
[218] *R v. Z*: 1990(2) All E.R. 971.
[219] *Rameshwar v. State of Rajasthan*: AIR 1952 SC 54, cited in *Review of the Indian Evidence Act, 1872*, 185th Report of the Commission, 2003.
[220] Judgment of Agbaje, J.S.C in *Ngwuta Mbele v. The State*, SC 171/1989, 6 July 1990.
[221] Article 20(3) of the Child Care and Protection Act, 2004, available at the website of the Child Development Agency of Jamaica <www.cda.gov.jm/child_care_protection_act.php>.
[222] Ability to understand the significance of an oath as a prerequisite for testifying in a trial is another vestige of religious law in the legal systems of European countries and their former colonies. See McGough, L., *Child Witnesses: Fragile voices in the American legal system*, Yale University Press, New Haven, 1994, pp. 99–100.

sufficient to convict, without additional evidence.[223] In Romania, for example, testimony by children under the age of 14 in criminal trials must be corroborated by other evidence.[224]

This rule is now changing in some countries. In Canada and the United Kingdom witnesses under the age of 14 do not take an oath, but their testimony is treated as if made under oath.[225] In Nigeria, the Child Rights Act provides in general terms that the testimony of children is admissible in civil as well as criminal proceedings, and that the unsworn testimony of child witnesses shall be taken as if made under oath.[226]

In Sweden, witnesses under the age of 15 may not give sworn testimony.[227] In Italy children under the age of 14 do not take an oath and cannot be cross-examined.[228]

In Egypt and Libya, children over age 14 may testify under oath in criminal trials, and younger children may be heard without taking an oath.[229] In Brazil, witnesses under the age of 14 may testify in criminal proceedings without taking an oath.[230]

In the Republic of Korea, only persons aged 16 or older may testify under oath in criminal proceedings, but courts have discretion to allow younger children to testify in both criminal and civil proceedings. The criteria are whether the child is able to express himself or herself and is "physically and mentally strong enough to handle court proceedings."[231]

The right to refuse to testify

In Sweden witnesses under the age of 15 have the right to refuse to testify.[232] The Paraguayan Code of Criminal Procedure also recognizes the right of child witnesses to refuse to testify.[233]

The right to file a complaint

In many legal systems victims of certain crimes can file a criminal complaint or become a party to a prosecution initiated by the public prosecutor. In Italy, persons over the age of 14 can file a criminal complaint with or without parental consent.[234]

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[223] Ibid.
[224] Second Report of Romania, op. cit., para.53(m)
[225] Evidence Act, section 16.1 (as amended in 2005); Youth Justice and Criminal Evidence Act, articles 56(2) and 56(3).
[226] Article 160.
[227] Third Report of Sweden, op. cit., para. 138, citing the Cap. 36 section 13 of the Code of Judicial Procedure, and Second Report of Sweden, op. cit., para. 206 (a child may, however, "be forcibly conveyed to court" in civil proceedings, ibid., para. 206).
[228] Second Report of Italy, op. cit., para. 93(l).
[229] Second Report of Egypt, CRC/C/65/Add.9, 1998, para. 50, citing article 283 of the Code of Criminal Procedure; Second Report of Libya, CRC/C/93/Add.1, 2000, para. 32, citing article 256 of the Code of Criminal Procedure, and para. 97. (No information is available on the applicable criteria nor on how this discretion is exercised.)
[230] Article 208 of the Code of Criminal Procedure.
[231] Second Report of the Republic of Korea, op. cit., para. 39.
[232] Third Report of Sweden, op. cit., para. 138, Second Report of Sweden, op. cit., para. 206 (a child may, however, "be forcibly conveyed to court," para. 206).
[233] Second Report of Paraguay, op. cit., para. 207, citing the Code of Criminal Procedure.
[234] Second Report of Italy, op. cit., para. 93(m), citing article 125 of the Civil Code.

2.6 Legal and administrative procedures for protection of basic rights

Although the CRC does not expressly recognize the child's right to seek a remedy for acts violating his or her rights, the Committee on the Rights of the Child considers this right to be implicit.

Legal action through parents

The laws of many countries provide in general terms that all persons have a right to a legal remedy to protect their rights. But the traditional requirement that children take legal action through their parents or other legal representative often limits their access to such remedies.

The child rights Act adopted by Nigeria in 2003, for example, does not specifically recognize the right of children to be heard in legal and administrative proceedings, but does recognize children as subjects of the fundamental rights recognized by the federal Constitution. This includes the right to a fair hearing "in the determination of [one's] civil rights and obligations…"[235] In reality, however, children's access to judicial remedies is limited because they can only take legal action through their parents or other legal representative. Also, "Lodging of complaints and seeking redress before the court or other relevant authority without parental consent is not culturally acceptable…"[236]

In Libya, persons under the age of 18 can make complaints to administrative or criminal authorities, but they lack standing in legal proceedings and must be represented by a parent or adult guardian.[237]

Child's right to initiate legal action

A number of the countries covered by this study expressly recognize the child's right to initiate legal action for the protection of his or her rights. The Children's Act of South Africa recognizes in general terms the child's right of access to the courts and the right to receive assistance in bringing matters before the competent court.[238] It also contains a provision specifically recognizing the right of children to seek judicial remedy for violations or threatened violations of constitutionally recognized rights or the Act itself.[239]

In the Philippines, legislation on the rights of the child expressly authorizes children themselves to seek legal redress of the rights recognized therein.[240] The Romanian law on the rights of the child recognizes the child's right to personally make complaints regarding violations of his or her fundamental rights.[241]

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[235] Section 3 of the Act to Provide and Protect the Right of the Nigerian Child and Other Related Matters, 2003; section 36(1) of the Constitution. It should be noted that the Act is applicable in state courts only to the extent that the pertinent state legislature has ratified it.

[236] Second Report of Nigeria, op. cit., para. 53. (The Report adds that "It is therefore preferred that aggrieved parties exhaust other means of settlement before resorting to a court of law.")

[237] Second Report of Libya, op. cit., paras 33–34 and 98.

[238] Section 14, cited above.

[239] Section 15 ("(1)Anyone listed in this section has the right to approach a competent court, alleging that a right in the Bill of Rights or this Act has been infringed or threatened, and the court may grant appropriate relief, including a declaration of rights. (2) The persons who may approach a court, are: (a) A child who is affected by or involved in the matter to be adjudicated; …").

[240] Second Report of the Philippines, op. cit., paras 98 and 90, citing Republic Act 7610 on the Special Protection of Children against Child Abuse, Exploitation and Discrimination (section 27(a)).

[241] Law No. 272/2004 on the protection and promotion of the rights of the child, article 29(1).

Many of the children's codes adopted in Latin America recognize the right of children to take legal action to protect their rights. The Bolivian children's code recognizes, in broad general terms, children's right to access justice in all forums.[242] The Costa Rican children's code likewise recognizes the right of children to take legal action to seek a remedy for injuries suffered and to be represented for this purpose by a public attorney.[243]

The Ecuadorian code provides that children over the age of 12 "may personally take legal action for the protection of their rights…" Younger children may request assistance to protect their rights when action concerning their legal guardian is needed.[244] Children over the age of 15 have standing to request the courts to take action to protect their interests as a group or children in specific circumstances.[245]

Some of these codes also recognize a right to seek assistance. This may imply the right to initiate a legal or administrative proceeding, depending on the nature of the threat or risk and the kinds of measures in place for protection against it.[246] The Costa Rican children's code, for example, recognizes this right in the following terms:

> Persons under the age of majority shall have the right to seek shelter, help and advice when a threat to their rights entails a serious risk to their physical or spiritual health; and to receive, in accordance with the law, sufficient and timely assistance and protection from the competent authorities.[247]

The Guatemalan children's code recognizes the child's right to "seek help and bring to the attention of the competent authority any violation or risk of violation of any right, the authority being obliged to take appropriate action."[248] The Paraguayan code recognizes the right of children to personally request any public body or official to take action that is within their mandate or competence, and to receive a timely reply.[249]

The Children Act 1992 of Nepal recognizes the right of "every person" to initiate legal proceedings to seek enforcement of rights recognized by the Act.[250] However, other provisions indicate that only a parent or guardian may represent the child for this purpose. The Committee on the Rights of the Child expressed concern that the provisions of article 12 have not been fully incorporated into Nepalese legislation. It recommended amendment of the law to recognize the child's right to be heard and the duty to take her or his views into account during legal procedures.[251]

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[242] Article 213 ("El Estado garantiza a todo niño, niña y adolescente el acceso, en igualdad de condiciones, a la justicia en todas las instancias").
[243] Article 104 ("Se garantiza a las personas menores de edad el derecho a denunciar una acción cometida en su perjuicio y a ejercer, por medio del representante del Ministerio Público, las acciones civiles correspondientes").
[244] Article 65 (article 236 also recognizes the standing of children to bring action before the Cantonal Board for the Protection of Rights, an administrative body established by the code, and article 238 provides that every child able to express an opinion shall be heard by that body, in closed session, in matters concerning them).
[245] Article 265, referring to an "acción judicial … para la protección de los derechos colectivos y difusos de la niñez y adolescencia."
[246] Examples other than those cited in the text include article 28(f) of the Honduran code.
[247] Article 19.
[248] Article 17. (It also recognizes the right of adolescents serving a sentence to request the competent judge to review the execution of sentences; article 106(f).)
[249] Article 26.
[250] Article 20(1).
[251] Concluding Observations, CRC/C/15/Add.261, 2005, paras 39–40.

Judicial versus administrative remedies

In some countries, older children have the right to seek judicial remedies, while younger children have the right to turn to administrative bodies, which may initiate legal proceedings if they consider it appropriate. In Russia, for example, children of any age may make complaints to the competent administrative authorities concerning parents or other persons acting in loco parentis, and children over the age of 14 have the right to bring legal action before a court.[252] Article 13 of the Child Rights Law 2000 of Belarus likewise recognizes the right of children to file complaints with guardianship and care authorities or prosecutors about perceived violations of rights recognized by the CRC or by national law. It also recognizes the right of children over age 14 to bring such matters to the attention of the competent courts.

The right of children to seek protection of their rights by administrative authorities is rather more widely recognized. The comprehensive children's law adopted by Spain in 1996 recognizes the right of children to "receive from the public authorities adequate assistance in exercising effectively and guaranteeing respect for his rights." This includes the right to make complaints regarding violations of rights to the public prosecutor or the Ombudsman and to request protection or support from any public institution.[253]

In New Zealand, children have access to a variety of independent official bodies competent to examine complaints that their rights have been violated. These include the Commissioner for Children, the Human Rights Commission, the Health and Disability Commissioner, the Race Relations Conciliator, the Privacy Commissioner and the Ombudsman.[254]

Some countries have established specialized administrative procedures for children in specific contexts. Japan reports that children in correctional facilities have the right to request an interview to "make a statement" about conditions in the facility or their personal situation.[255] Rules adopted by Slovenia in 2000 require special police treatment of persons under the age of 18 and establish a complaints procedure.[256]

2.7 Proceedings concerning migration and refugee status

Issues concerning refugee and other migratory status are usually decided first in administrative proceedings. In addition to article 12.2, two articles of the Convention have a bearing on the immigration status of children: articles 22 and 10.

Article 22 recognizes the right of children who are seeking refugee status (often called asylum seekers) to appropriate protection and assistance in enjoying their rights under relevant international law. Foremost among those is the right to a determination as to whether the child is entitled to refugee status.[257] In 1997 the Council of Europe adopted guidelines on the treatment of unaccompanied minors that recognize the right of unaccompanied children to

[252] Second Report of Russian Federation, op. cit., para. 71(o).
[253] Organic Law No. 1/1996, op. cit., article 10 (our translation).
[254] Second Report of New Zealand, CRC/C/93/Add.4, 2001, para. 135.
[255] Second Report of Japan, op. cit., para. 151, citing article 9 of the Prison Law Enforcement Regulations. (They also have the right to express their views during the classification process upon admission; ibid.)
[256] Second Report of Slovenia, op. cit., para. 23.
[257] See article 14 of the Universal Declaration of Human Rights; Council of Europe Resolution of 20 June 1995 on minimum guarantees for asylum procedures, para. 23.

apply for refugee status.[258] However the guidelines indicate that States have discretion to establish an age limit below which a child's application must be made by a guardian or representative.[259]

Article 10, which concerns the reunification of family members living in different countries, also has implications for the right of children to be heard in immigration proceedings. Although this article refers expressly only to requests that a child or parent be allowed to enter a country (or leave their own country) for purposes of family reunification, experience suggests that no less important are hearings regarding the expulsion of foreign parents whose children have been born in a State that recognizes the children as nationals.[260]

Some countries have amended their law to recognize the right of children to be heard in immigration proceedings. The Aliens Act of Sweden was amended in 1997 to recognize the right of children to express their views, and the duty of the authorities to take their views into account, except where it would be "inappropriate" to do so.[261] In Finland the law has been amended to provide that children aged 12 or older shall be heard in such proceedings prior to a decision being made, unless it is regarded to be evidentially unnecessary.[262] Younger children also may be heard if they are so developed that their views deserve attention.[263]

Other countries have amended their law concerning child asylum seekers. In 2003, Danish legislation was amended to provide for interviews of unaccompanied asylum seekers aged 12 to 18 before determining whether to appoint a representative for purposes of refugee status proceedings. The exception is when such an interview would be detrimental to the child or have no importance for the case.[264] Unaccompanied asylum seekers under the age of 12 also must be interviewed if warranted by "the child's maturity and the circumstances of the case."[265]

In response to a study by the Children's Ombudsman of Sweden pointing out deficiencies in handling immigration cases involving children, the Migration Board adopted new guidelines on how to question children and what information should be sought from them.[266] Staff were trained, and the board of appeals appointed an expert on child rights.[267]

In Italy and Romania, children over the age of 14 can apply for asylum.[268] In Italy, the juvenile court assigns someone to represent the child in asylum proceedings.[269] In Romania, a staff member of the child protection agency or a person affiliated with a private organization and

[258] Resolution 97/C 221/03 of 26 June 1997; article 1 indicates that the guidelines apply to persons under the age of 18 who are not accompanied by a parent or other responsible adult and who do not have a European nationality, who are found in the territory of a European State or arrive at the border of a European State seeking entry.
[259] Ibid., article 4.
[260] The courts of at least two States parties to the CRC have adopted jurisprudence on this question, although their decisions rest on the best interests of the child more than the right to be heard. Decisions of the Supreme Court of Canada in *Baker v. Canada* and the High Court of Australia in *Minister of Immigration and Ethnic Affairs v. Teoh*, cited in *Law Reform and the Implementation of the Convention on the Rights of the Child*, op. cit.
[261] Third Report of Sweden, op. cit., para. 232, citing section 1a of chapter 11.
[262] Third Report of Finland, op. cit., para. 119, citing section 1(c) of the Aliens Act (537/1999).
[263] Ibid.
[264] Third Report of Denmark, op. cit., para. 101.
[265] Ibid.
[266] Third Report of Sweden, op. cit., para. 110, 198–199.
[267] Ibid., paras 110–111.
[268] Second Report of Italy, op. cit., para. 118; Second Report of Romania, op. cit., para. 74.
[269] Second Report of Italy, op. cit., para. 118.

having a graduate degree in law or social work should be appointed to assist the child in refugee status proceedings.[270] In Germany, foreigners of 16 years of age in principle possess the capacity to act in asylum proceedings.[271]

In the Netherlands in 2002, the competent authorities began to interview children aged 4 to 12 in asylum cases. Child rights organizations criticized lowering the age limit for interviews. They stated that "interviews do not sufficiently take into account the very young age of these children and the fact that they cannot comprehend the legal ramifications of their interview responses."[272]

In 2003 Belarus adopted new refugee legislation that recognizes the right of foreigners and stateless persons under age 18 unaccompanied by parents or a responsible guardian to apply for refugee status.[273] The child may be interviewed, and a guardian will be appointed to represent his or her interests for purposes of this proceeding.[274]

2.8 Emancipation and similar practices concerning older children

Many legal systems recognize the institution of emancipation, which gives persons under the age of majority some, but usually not all, of the legal capacities and responsibilities normally reserved for adults.[275] Emancipation may be a consequence of some other change in the status of the child, such as marriage, or may be recognized by legal action taken for this purpose. Traditionally, emancipation required the consent of the child and his or her parents or legal guardian.[276] One consequence of emancipation is greater capacity to participate in legal proceedings.

In Spain, children who are emancipated can appear in court.[277] Children between the ages of 16 and 18 can become emancipated for various reasons and by different procedures. Those who live independently of their parents with the consent of the latter are considered emancipated, without any formalities.[278] Children over the age of 16 can request a court to emancipate them without parental consent if the child's parents are separated or if the parent having custody marries a person who is not the child's other parent.[279] Children aged 14 to 18 who are married, which requires judicial approval, are automatically emancipated.[280]

[270] Law on child rights, op. cit., article 73(3).
[271] Second Report of Germany, op. cit., paras 119–120 citing section 12 of the law on asylum proceedings.
[272] Second Report of the Dutch NGO Coalition for Children's Rights, 2003, p. 17.
[273] Article 15, Law of the Republic of Belarus on Refugees N 178-Z. 18 July 2003, available online at the UN Refugee Agency, UNHCR, Refworld, <www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=3f82bd6a4>, accessed 17 October 2007.
[274] Ibid. (According to article 22, accompanied foreigners under age 18, i.e. those who arrive with an adult family member, are not to be interviewed because their status will depend on that of the adult family member.)
[275] Their powers over property are generally limited, they usually do not have political rights and, in some countries, the parents retain an obligation to support them.
[276] See e.g. *Lexique des termes juridiques*, 3rd edn, Dalloz, Paris, 1974, p. 144; *Emancipation in the United States*, Juvenile Law Center, Philadelphia, available at <www.jlc.org/index.php/factsheets/emancipationus>, accessed 10 March 2009.
[277] Second Report of Spain, op. cit., para. 432(j), citing article 323 of the Civil Code, and para. 458.
[278] Ibid., para. 432(d), citing article 319 of the Civil Code.
[279] Ibid., para. 432(a), citing article 320 of the Civil Code.
[280] Ibid., para. 431(a) citing articles 46 and 48 of the Civil Code.

In Belarus, children over age 16 who are employed or self-employed had a qualified right to become emancipated.[281] In 2000, the Child Rights Act recognized "the right [of children over the age of 14 years] to live independently as long as proper living conditions, financial support of the state or supervision by guardianship or care authorities are available."

In the Czech Republic, Portugal and the Republic of Korea, children aged 16 to 18 attain majority when they marry, which requires the consent of their parents or a court.[282] In the Netherlands, juvenile courts may issue a 'declaration of adulthood' to a mother aged at least 16 who wishes to raise her child, if this is found to be in the interests of both mother and child.[283] In Romania, girls aged 15 or older who marry acquire full legal rights.[284] In Slovenia, persons under the age of 18 who have become parents can request recognition of "full [legal] capacity."[285]

In many countries, older children acquire, or may acquire, certain legal capacities before reaching the age of full majority without a formal change of legal status. In Sweden, for example, children over the age of 16 control their own income. Those having an independent household may enter into the legal transactions normally required to manage the household and rear children belonging to it.[286]

In Iceland, children at age 16 attain "personal competence," which entails the right to decide on personal matters such as place of residence and place of work.[287] However, parents remain obliged to support them until the age of 18.

2.9 Proceedings concerning schools and residential facilities

The sources consulted contain little information on the child's right to be heard in administrative proceedings in schools, correctional facilities and other residential facilities, but the information available is worth summarizing briefly.

In Iceland, regulations recognize the right of primary school pupils to be heard in connection with being accused of breaching school rules.[288] The Law on General Education adopted by Georgia in 2005 recognizes the right of students (and their parents) to participate, personally or via a representative, in any hearing concerning the child and to ask for a hearing on any matter affecting the child.[289]

[281] Second Report of Belarus, op. cit., para. 50. (Judicial approval was required if the child's parents or guardian withheld consent.)
[282] Second Report of the Czech Republic, op. cit., para. 33 (in the Czech Republic the consent of a court is required and the consent of parents is not); Initial Report of Portugal, op. cit., para. 16; Second Report of Republic of Korea, op. cit., para. 37 (in Republic of Korea, only girls can marry before reaching the age of 18.)
[283] Initial Report of the Netherlands, CRC/C/51/Add.1, 1997, para. 14, citing article 253ha of Book 1 of the Civil Code, as amended in 1993.
[284] Second Report of Romania, op. cit., para. 53(a).
[285] Second Report of Slovenia, op. cit., para. 89, citing article 61 of the Non-Litigious Procedure Act.
[286] Second Report of Sweden, op. cit., paras 181 and 186. (However, they may enter into a contract of employment or a partnership only with the consent of their parent or guardian, and conduct a business only with the consent of the competent authorities; paras 182, 183 and 185.)
[287] Summary Record, CRC/C/SR.273, 1996, para. 20.
[288] Second Report of Iceland, op. cit., para. 130, citing Regulation No. 385/1996 on School Rules and Discipline in Primary Schools.
[289] Third Report of Georgia, CRC/C/GEO/3, 2007, paras 80–81.

The Ecuadorian children's code recognizes the right of students accused of a disciplinary infraction to defend themselves. The Costa Rican code recognizes the right of students to make formal complaints of physical, sexual or emotional abuse or corrupt practices in schools, as well as their right to be heard in disciplinary proceedings.[290]

Regarding disciplinary proceedings in correctional facilities, Japan reports that juveniles accused of an infraction have a right to be informed of the charges and to plead their case to the competent authorities, either in person or in writing.[291]

[290] Article 41 of the Ecuadorian code; articles 66(a), 67 and 68 of the Costa Rican code.
[291] Second Report of Japan, CRC/C/104/Add.2, 2001, para. 160.

3. CRITERIA FOR DETERMINING WHEN A CHILD WILL BE HEARD

Reports to the Committee on the Rights of the Child contain relatively little information on the reasons why States adopt age limits or other criteria defining the right of children to be heard in legal and administrative proceedings of different kinds.

A publication of the government of New Zealand indicates that the presumption that children under the age of seven "lack intelligence and judgment" and that those between the age of 7 and 12 or 14 lack "sufficient judgment to make rational choices" were inherited from Roman law, as incorporated into and perpetuated by common law.[292]

Religious law has influenced the age limits used in different legal systems, although in some parts of the world this influence is more clearly recognized than in others. Canon law, the ius commune of Europe throughout much of the Middle Ages, perpetuated the Roman law concept that children under the age of seven lack the ability to reason or take legal responsibility.[293] Canon law also establishes the age of majority as 18 years but recognizes capacity to testify in legal proceedings at the age of 14.[294] The continued use of these age limits in many European countries and their former colonies is no doubt a legacy of canon law.[295]

Islamic law recognizes three stages of childhood. As in canon law, it views children under the age of seven as lacking discretion; the age of discretion begins at seven years of age and ends at puberty; and the third stage begins at puberty and ends at full adulthood.[296]

Puberty is the threshold for many legal purposes under Islamic law, including the capacity to bear witness in legal proceedings.[297] Legislation often specifies the age at which puberty is reached, which frequently differs according to the sex of the child and also may vary according to the right or capacity in question.

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[292] 'Does Your Policy Need an Age Limit?', Ministry of Youth Affairs, 2001, p. 3, available at <www.myd.govt.nz/Publications/Rights/doesyourpolicyneedanagelimit2001.aspx>. (It also recommends that national authorities avoid the use of age limits unless they are more reasonable and cost-effective than other criteria; p. 4.)

[293] Canon 97§2, available at <www.vatican.va/archive>. Italian law still recognizes infants as a category of persons having no capacity to exercise any right directly. Georgia also reports that children under the age of seven are called 'infants' and have no legal capacity (Initial Report of Georgia, op. cit., para. 27). The Judicial Code of Panama indicates that persons under the age of seven have no capacity to testify in any legal matter. (article 907.3, available at the Information Exchange Network for Mutual Assistance in Criminal Matters and Extradition on the website of the Organization of American States <www.oas.org/juridico/mla/sp/pan/index.html>). Similarly, the Egyptian Civil Code provides that children under the age of seven lack discretion and hence have no capacity to exercise civil rights (article 45.2, see Yale University project Representing Children Worldwide, op. cit.).

[294] Canons 98§1 and 1550§1.

[295] The Initial Report of South Africa, for example, states that under the common law then still in force "'childhood' is divided into three age categories. Under 7 years, a child is known as an infans"; "Under the age of 7 years, the child has no legal capacity to act: his or her guardian must act on his or her behalf"; "At the attainment of puberty (12 for girls and 14 for boys), another milestone is reached. From 21 years, the minor achieves majority" (Initial Report, op. cit., paras 52 and 53). In Viet Nam, children under the age of six have no civil capacity (Second Report of Viet Nam, CRC/C/65/Add.20, 2000, para. 49a, citing the articles 22–23 of the Civil Code).

[296] Bahnassi, A. F., 'Criminal Responsibility in Islamic Law', in C. Bassioni, ed., *The Islamic Criminal Justice System*, Oceana, New York, 1982, p. 192.

[297] Ibn Abi Zayd al-Qayrawani, Abd-Allah, *Compendio de Derecho Islámico* [*Risãla fi-l-Fiqh*], trans. J. Riosalido, Trotta, Madrid, 1993; cap. XXXVIII, para. 139. (However, the Malikite school accepts the testimony of children in cases of violence against a child; 'Derecho Comparado', in ibid., p. 227.)

In some countries, however, puberty is equated with attainment of adulthood, even if some capacities (in particular regarding ownership of property) may not be exercised until later in life. The Second Report of the Sudan to the Committee on the Rights of the Child states that "Childhood is thus the period between birth and puberty," adding that "The maturity which signals the end of childhood is attained when an individual becomes fully rational and discerning [*mumayyaz*] and acquires intellectual, mental and physical maturity."[298] The age at which a child acquires mental and intellectual maturity is "a subject on which jurists hold differing views and on which other positive laws are also at variance."[299] An Iranian jurist indicates that mental maturity means "prudential judgement" in the management of one's financial affairs.[300]

The Child Rights Law of Yemen illustrates this ambiguity as to the definition of childhood: article 2 of the law defines children as "every human being below the age of 18 years unless majority is attained earlier." But article 59 defines 15 as the age at which the child "enjoys full mental ability and is fully competent to exercise his civil rights," and article 60 defines minors as persons under the age of 15.[301]

The Committee expressed concern that the law "does not fully reflect the principles and provisions of the Convention, e.g. regarding the definition of the child…"[302] It also expressed concern because "the definition of the child is unclear under Sudanese law and is not in conformity with the principles and provisions of the Convention. For example, minimum ages may be determined by arbitrary criteria, such as puberty, and discriminate between girls and boys, and in some cases are too low…"[303]

The extent to which legislation reflects Islamic law or the legal traditions of colonial powers varies considerably from one country to another,[304] as does the willingness of the authorities to modify legislation to bring it into compliance with international human rights standards. Morocco's Second Report to the Committee, for example, states that "the present orientation of the national legislation is to take into consideration the developments in western society and to take appropriate measures to secure the basic principles of human rights..."[305]

Some standards concerning the child's right to have his or her views taken into account appear designed to protect social, cultural or economic values that are incompatible with the principles underlying the Convention. In Italy, for example, the consent of 'legitimate' children is required to bring an 'illegitimate' child into the family by recognition of paternity, but consent is not required for the adoption of a child unrelated by blood.[306]

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[298] Second Report of Sudan, CRC/C/65/Add.17, 1999, paras 29–30.
[299] Ibid., para. 30.
[300] The Nobel laureate S. Ebadi, *The Rights of the Child: A study on legal aspects of child rights in Iran*, UNICEF, Teheran, 1994, p. 24.
[301] Third Report of Yemen, op. cit., para. 27, and Report to the Committee on the Rights of the Child by the Yemen National NGOs Coalition For Child Rights Care, 2003, p. 14.
[302] Concluding Observations: Yemen, CRC/C/15/Add.267, 2005, para. 14; see also para. 30.
[303] Concluding Observations: Sudan, CRC/C/15/Add.190, 2002, para. 24.
[304] One author, writing in 1996, concluded that only three countries, Iran, Saudi Arabia and Sudan, "fully recognize the Shari'ah as the official law of the land"; Irshad Abdal-Haqq, *Islamic Law: An overview of its origin and elements*, *Journal of Islamic Law and Culture* 7 (2002, reprinted from 1996), pp. 68–69, cited by Raisch, M. R., 'Religious Legal Systems: A brief guide to research and its role in comparative law', <www.nyulawglobal.org/globalex/Religious_Legal_Systems.htm>.
[305] Second Report of Morocco, op. cit., para. 168.
[306] Second Report of Italy, op. cit., para. 114.

In most States, the criteria used for determining whether a child has the right to participate in legal and administrative proceedings appear to be based mainly on tradition or practical experience. In a report to the Committee, Lebanon is one of the few States to mention criteria based on child development research.[307] Lebanon's reports recognize that existing standards are based primarily on religious law and social traditions, but the country maintains that these age limits "are close to one another and to the stages into which childhood is divided by psychologists, education experts and sociologists."[308]

Many States indicate that age limits restricting the right of children to be heard in judicial and administrative proceedings have been adopted to protect children from experiences that can be harmful and contrary to their best interests.[309] A Danish report indicates that the obligation to hear children in certain legal and administrative proceedings is conditional because "particularly in respect of young children, it is important not to expose the child to situations which the child cannot understand or in which the child has no background to make a decision." In a few situations the child will thus not be heard due to the child's immaturity or the nature of the case. In such cases, it has to be assessed specifically whether hearing the child or young person is significantly contrary to his or her interests.[310]

Other states indicate that age limits have been adopted because of a presumption that children below a certain age will not have sufficient comprehension of the issues at stake or that the information they can be expected to contribute will be of little relevance. Finland, for example, reports that children under the age of 10 are rarely heard in criminal cases, because of the presumption that they are easily influenced and because the border between imagination and reality is not always clear to them.[311]

In fact, some reports point out that very young children cannot be expected to have or to express views on the subjects of legal or administrative proceedings. Denmark, for example, has stated that "Paternity cases are usually decided immediately after a child's birth, and it is therefore rarely relevant to take account of the child's views."[312]

While some countries – especially those that have amended age limits during the last decade – maintain that their legislation is compatible with article 12.2, others freely recognize that the diverse age limits accumulated in the law over the centuries have little logical basis and need to be updated and rationalized. For example, an Italian report to the Committee on the Rights of the Child calls existing standards "very fragmentary, incoherent and, at times, contradictory." It concludes that "a revision of the current laws is necessary in order to base them on more rational and uniform criteria."[313]

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[307] Second Report of Lebanon, CRC/C/70/Add.8, 1998, paras 3, 12 and 60–67.

[308] Ibid., para. 96. The Committee's Concluding Observations on the report expressed concern about the different age limits in religious law having consequences for matters such as custody and guardianship (CRC/C/15/Add.169, 2002, paras 9–10). Lebanon's Third Report indicated that it recognized the application of different age limits that depend on the religious community to which the child belongs as a contradiction between national law and the CRC (CRC/C/129/Add.7, 2004, paras 98, 110).

[309] See e.g. the Written Reply of India, p. 48; Hodgkin, Rachel and Peter Newell, *Implementation Handbook for the Convention on the Rights of the Child*, UNICEF, Geneva, 2002.

[310] Third Report of Denmark, op. cit., para. 103.

[311] Third Report of Finland, op. cit., para. 132.

[312] Third Report of Denmark, op. cit., para. 105.

[313] Second Report of Italy, op. cit., paras 94 and112.

While some reports to the Committee reveal an inclination to reduce or simplify the diversity of age limits concerning children's legal competencies, other States take a different view. Iceland, for example, has stated that recognition of different ages "for the enjoyment of rights and protection must be regarded as allowed in some cases in order to ensure a gradual increase in the rights of children as they grow and develop."[314]

[314] Second Report of Iceland, op. cit., para. 109.

4. APPLICATION OF LAWS IN PRACTICE

> ….little documented, qualitative information is available about 'listening to children's views' in judicial proceedings or placement in 'alternative care'…
>
> Second Report of India, CRC/C/93/Add.5, 2003, para. 271

To analyze whether different ways of regulating the right to be heard are compatible with article 12.2, it is useful to understand how they work in practice. This is especially the case with regard to age limits that establish presumptions rather than inflexible criteria, and criteria that are based wholly on factors other than age, such as maturity and the best interests of the child. Reports to the Committee on the Rights of the Child contain some information on this subject, although not enough to come to definite conclusions.

Danish statistics indicate that in 2003 concerned children were heard in about one fifth of all cases regarding contact with divorced parents.[315] Nearly half of children over the age of eight were heard.[316] An independent 2004 study of "complex" custody cases found that only one quarter of the concerned children had been given an opportunity to express their views. The study concluded that "the family law system is hesitant in deciding what importance to attach to the points of view of young children."[317]

Another independent study carried out in Denmark found that only 54 per cent of children aged 7 to 11 placed in alternative care were offered an interview as part of the case processing.[318] According to the law in force at that time, children under the age of 12 did not have a right to be heard, but information about their views was to be taken into account "to the extent warranted by the maturity of the child and the nature of the case."[319] However, the main reasons for not interviewing children were not those recognized by the law, but rather the heavy workload of social workers and their "lack of confidence" about interviewing children.[320]

Finland reported that "a minor does not often have an actual opportunity of taking part in the treatment of matters affecting him or her. When disputes over maintenance or visits or the best interests of the child in child welfare are discussed, small children are very easily left to play only a minor role."[321] This was attributed to the fact that the responsible authorities "do not have the required skills and time to hear and interpret correctly the child's feelings."[322]

In Iceland, a 1998 survey of children involved in child welfare cases concluded that child welfare committees sought information from approximately 30 per cent of the children assisted that year.[323] A representative was appointed for the child in 0.01 per cent of the cases.[324]

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[315] National Council for Children, 'Report to the UN Committee on the Rights of the Child, Supplementary Report to Denmark's 3rd Periodic Report', 2005, para. 47. (The report also indicated that "Importance was attached to the child's opinion in 68% of the cases as regards overall contact arrangements," although the indicators on which this conclusion is based are not identified.)
[316] 46 per cent, ibid.
[317] Ibid., para. 45, citing a study by Offesen, Mai Heide, 'Contact in the Best Interest of the Child', SFI 04/05.
[318] Ibid., para. 65, citing a study by Hestback, Anne-Dorthe, 'When Children and Young People Are Placed: A study of local authority practice in placement cases', SFI, Copenhagen, 1997.
[319] Initial Report of Denmark, CRC/C/8/Add.8, 1993, para .64, citing article 124a of the Social Assistance Act.
[320] Ibid., para. 66.
[321] Third Report of Finland, op. cit., para. 135.
[322] Ibid., op. cit., para. 127.
[323] Second Report of Iceland, op. cit., para. 126.
[324] Ibid.

In Sweden, a survey of child welfare cases covering 1999 to 2001 concluded that children were interviewed "to a much greater extent today than was shown by the surveys conducted in the mid-1990s." But "documentation of … the children's attitudes towards the matters raised in the inquiries … only occurred in about half of these cases" and "there was little evidence on record of the child's attitude having influenced the final decision."[325] The study also detected substantial differences in practice of different municipalities.[326]

The conclusion that emerges most clearly from these few but very relevant studies is that more research is needed on why children are and why they are not listened to or given an opportunity to present their views; the correlation between being heard and factors such as the adoption of new legal standards or administrative guidelines or the training of personnel; and the actual impact of measures taken to give more children a voice in legal and administrative proceedings.

Some of the reports submitted by NGOs to the Committee on the Rights of the Child indicate generally that limited effect has resulted from efforts to ensure the right of children to be heard in legal and administrative proceedings. A Japanese NGO coalition observed that most of the steps taken by the authorities have been in the form of guidelines or instructions rather than laws, and they have had little impact on practice.[327] In Italy, the NGO Working Group on the CRC expressed the view that "there is no practice of 'listening to children', regardless of the level of competence of the individual child" and that laws that require children's views to be taken into account in legal or administrative proceedings "are often disregarded."[328] A Polish NGO also commented that the views of children are not sufficiently taken into account in legal and administrative proceedings, notwithstanding positive changes in relevant legislation.[329]

The quality of services provided by those who represent children in legal or administrative proceedings also leaves much to be desired in some countries. An NGO report from the Czech Republic indicates that children often receive insufficient information about proceedings in which they participate; the social workers who represent them are not sufficiently independent; representation is a mere formality; and the expert opinions offered to the court are unprofessional.[330]

A separate but related issue concerns improvements in infrastructure needed to make legal and administrative procedures more child sensitive. These include construction of special facilities for hearings involving children, and installation of equipment to record testimony prior to trial or allow children to participate in trials via closed circuit video. In Sri Lanka, for example, legislation allowing videotaped evidence to be used at trial was adopted in 1999, but by 2003 only one centre for producing such evidence had been set up.[331]

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[325] Third Report of Sweden, op. cit., para. 225.
[326] Ibid., para. 217.
[327] Committee for NGO Reporting on the Convention on the Rights of the Child, 'NGO Report on the Second Periodic Report of Japan', 2003, p. 7.
[328] Gruppo di lavoro per la Convenzione sui diritti dell infanzia e dell'adolescenza, 'The Rights of Children in Italy: Perspectives in the third sector, supplementary report', 2003, p. 12.
[329] Helsinki Foundation for Human Rights, 'Alternative Report to the Republic of Poland's Report on the Realisation of the Convention on the Rights of the Child for the Period 1993–1998', 2002, p. 4.
[330] 'Comments on the Second Periodical Report of the Czech Republic on the Implementation of the Convention on the Rights of the Child, with the Support of the International Federation of Human Rights and Environmental Law Service', 2002, p. 7.
[331] CRC/C/SR.872, 2003, para. 15; Second Report of Sri Lanka, CRC/C/70/Add.17, 2000, para. 54.

A survey of Belgian children confirms the general situation described above. Two of the most important conclusions reached were:

- "We think that decisions are often taken without our knowledge. We want more say, and have more of a feeling that we are really being listened to by our adviser, our lawyer or the judge in the juvenile court. At present, our opinion is too often sought via our lawyer. We can answer for ourselves."

- "We also find it unfortunate that if our opinion is sought, it is not really taken into account sufficiently. We sometimes have the feeling that juvenile court judges only ask our opinion because it is a requirement, but that they do not actually listen to what we have to say."[332]

[332] Survey carried out by the Ministry of Justice and UNICEF National Committee, 'That's My Opinion. What do you think? First report by children and young people living in Belgium for the Committee on the Rights of the Child', UNICEF Brussels, 2002, p. 22.

5. CHILD-SENSITIVE PROCEEDINGS

> When our opinion is sought, this is often done in the wrong way. Too many difficult questions are asked, we don't really understand the questions or too many different people ask us the same questions.
>
> It is often not easy for us to talk about problems at home. The person who interviews us must be familiar with our social environment and trust us.
>
> Belgian children[333]

5.1 General

Legal procedures designed to provide children with an opportunity to defend or vindicate their rights should be "child-sensitive," according to the Committee on the Rights of the Child.[334] This term, according to the UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, "denotes an approach that balances the child's right to protection and that takes into account the child's individual needs and views." Several international instruments applicable to different types of proceedings refer to the characteristics or requirements that make legal or administrative proceedings child sensitive. They can be summarized as follows:

- Questioning or speaking with the child in an environment in which he or she feels secure and comfortable and, whenever possible, without the presence of any person whose presence may intimidate or unduly influence the child;[335]
- Using language that the child can easily understand;[336]
- Avoiding repeated questioning;[337]
- Informing the child about the nature of the proceedings, his or her rights and possible role in them, and the timing, progress and outcome of the proceedings;[338]
- Avoiding unnecessary delay; [339]
- Providing appropriate support services throughout the legal process;[340]
- Providing the child with opportunities to make known his or her views about the process and participation in it, and taking those views duly into account;[341]
- Respecting at all times the child's dignity and, to the extent possible, privacy.[342]

[333] Survey, 'That's My Opinion', op. cit.
[334] General Comment No. 5, para. 24, op. cit.
[335] See Guidelines 14 and 30(d).
[336] Guideline 14.
[337] Guidelines 31(a), 23.
[338] See e.g. article 8.1(b) of the Optional Protocol; Guidelines 19–20 and 30(b).
[339] See e.g. article 8.1(g) of the Optional Protocol, Guideline 30(c).
[340] See e.g. article 8.1(d) of the Optional Protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography, Guidelines 16 and 22.
[341] Guideline 21.
[342] Guidelines 10–13, 16 and 26–29.

In many countries, civil and criminal trials concerning children are closed to the public, or hearings in which a child testifies are closed to the public even if the trial is not.[343] This rule is designed to protect the child's right to privacy as well as to help create a less intimidating environment. It is recognized in different forms by international human rights instruments.[344]

The importance of training judges, prosecutors and other judicial staff is also recognized by international instruments, and many reports indicate that training programmes have been established or carried out.[345] In some countries, laws or regulations have been adopted requiring appropriate training for personnel who interview children in the context of legal or administrative investigations and proceedings.[346]

5.2 Civil proceedings

The South African Children's Act provides that "The children's court hearings must, as far as is practicable, be held in a room which … is furnished and designed in a manner aimed at putting children at ease."[347] The process "must be designed to avoid adversarial procedures and include rules concerning … appropriate questioning techniques for … children…"[348] Children who are parties or witnesses shall be questioned through an intermediary, if the court finds that this is in their best interest, and the court has broad discretion to admit into evidence written reports by medical practitioners, psychologists, social workers and other professionals who have examined or interviewed the child prior to trial.[349] The court also has broad discretion to order any person to leave a hearing if it believes that his or her presence is not in the best interests of a child who is present.[350]

In 2000, the Supreme Court of the Philippines adopted a Rule on the Examination of Child Witnesses designed to encourage children to testify in judicial proceedings and minimize the potential for trauma resulting from their participation.[351] The Rule authorizes testimony by closed circuit video link.[352]

Slovenian legislation provides that in cases involving the care and education of children, children who are not parties to the action may be heard informally by the presiding judge, outside the courtroom and in the presence of a person of the child's choice.[353] The records of the interview may be kept confidential, if the judge considers that to be in the best interests of

[343] See e.g. Third Report of Sweden, op. cit., para. 231, citing chapter 5, section 1 of the Code of Judicial Procedure; article 258 of the Children's Code of Ecuador, op. cit.; article 126 of the Costa Rican Children's Code, op. cit.

[344] See e.g. article 14.1 of the Covenant; Guideline 28, Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime, and, more generally, article 8.1(e) of the Optional Protocol to the CRC on Sale of Children, Child Prostitution and Child Pornography, and Rule 8.1 of the UN Beijing Rules.

[345] See e.g. part XV of the Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime and Rules 6.3 and 22 of the Beijing Rules; Second Report of Germany, op. cit., paras 340–341; Third Report of Denmark, op. cit., para. 104; Third Report of Sweden, op. cit., paras 106–109 and 186; Second Report of the Philippines, op. cit., paras 21, 43, 62 and 121.

[346] Third Report of Sweden, op. cit., paras 104, 106–109.

[347] Subsection 42(8)(a).

[348] Subsection 52(2).

[349] Subsections 61(2) and 63(1).

[350] Subsection 60(2).

[351] Second Report of the Philippines, op. cit., paras 19(b) and 97.

[352] Ibid., para. 98, citing the Supreme Court Rules on Examination of a Child Witness.

[353] Second Report of Slovenia, op. cit., paras 85–86; article 410 of the Civil Procedure Act, op. cit. (See above for the criteria for being heard and for participating as a party in such proceedings.)

the child.[354] In Finland children may be heard outside the courtroom, for example in the judge's room, to provide a friendlier environment.[355]

The Romanian law on the rights of the child provides that when children are removed from their home due to an imminent risk of abuse or neglect, the child's statement may be videotaped, with the assistance of a child psychologist, if the child consents.[356] If a court decides that a child's direct testimony is necessary, the testimony must be given in the judge's office, in the presence of a psychologist after the child has been prepared for the experience.[357]

The Costa Rican children's code provides that children shall be heard and their views and versions of the facts shall be taken into account in every trial or other proceeding arising under the code.[358] It also provides that the child may be accompanied by a social worker, psychologist or other person who enjoys the child's confidence, that proceedings must be simple and proceed without delay, and that the judge must explain clearly the significance of each thing done in the child's presence and the meaning and reasons for every decision taken.[359] The Nicaraguan Code contains a similar provision regarding the duty of judges to give adolescents clear and accurate information about all aspects of the proceedings; failure to do so renders the proceeding null.[360]

Several of the children's codes adopted by Latin American countries call for establishment of specialized, child-sensitive children's courts. The Ecuadorian code provides that children testifying in children's courts shall do so without taking an oath, in principle in the presence of a parent or other person of confidence.[361] Testimony is to be given in closed court, in an environment that respects the child's privacy and emotional integrity; questions incompatible with that environment must be disallowed.[362] The parties may be present if the judge concludes that their presence is compatible with the best interests of the child.[363]

The Bolivian code obliges the State to establish specialized children's courts in which proceedings are expeditious and children are treated "with the respect that they deserve as persons who are the subjects of rights."[364]

The children's code of Honduras contains an unusual provision calling for legal proceedings to have a positive impact on the child in so far as possible:

> Legal and administrative proceedings concerning children shall have an educational and informative function, enabling the child to be informed, in keeping with his or her age and maturity, about the meaning of each stage of the proceeding and the decisions taken, in order that he or she appreciates his or her value as a human being and be able to develop with the responsibility corresponding to his or her age.[365]

[354] Ibid
[355] Third Report of Finland, para. 130.
[356] Article 95(1) and (2).
[357] Ibid, article 95(3).
[358] Article 107.
[359] Ibid. The Guatemalan children's code contains similar provisions in article 116(c)–(f).
[360] Article 101(e), concerning proceedings against adolescents accused of an offence.
[361] Article 258.
[362] Ibid.
[363] Ibid.
[364] Articles 214–215.
[365] Article 87.

India's National Charter for Children (2003) states "All matters and procedures relating to children, viz. judicial, administrative, educational or social, should be child friendly. All procedures laid down under the juvenile justice system for children in conflict with law and for children in need of special care and protection shall also be child friendly."[366] The charter is not law, however, and in 2004 the Committee on the Rights of the Child concluded with regret that "there are virtually no legal provisions guaranteeing children's participation in civil proceedings affecting their rights and well-being."[367]

Box 5.1: Procedures of Goa's children's court

In all dealings with children, the Children's Court shall follow the following guidelines:

(a) Child victims/witnesses are informed of their role in regard to court proceedings;
(b) Their views are allowed to be heard and respected;
(c) Inconvenience to them is minimized and their privacy is respected;
(d) Delays in the proceedings are reduced;
(e) Aggressive questioning or cross examination of child victims is avoided and the same, if necessary, is done through the judge;
(f) Provisions are made for trials in camera;
(g) The identity of the child is protected;
(h) Child victims are prepared for the judicial process and prosecution of alleged abusers is not rushed if a child is not ready to go to court;
(i) The investigator ascertains the need for medical examination of the child victim, and when examination is undertaken, ensures that multiple re-examination is avoided;
(j) The medical examination should be conducted in the presence of the parent/guardian and social worker/counsellor as far as possible;
(k) The child's testimony should be recorded in the presence of a social worker/counsellor as early as possible after the abusive incident with other witnesses at hand;
(l) Adequate translation/interpretation and translators/interpreters who are sensitive to children's needs should be provided wherever needed;
(m) In case of a mentally challenged child, the competent service provider should depose on behalf of the child;
(n) The special needs of the child victims/witnesses should be catered for. These should include the following:
    (i) Enable children to familiarize themselves with the court surroundings;
    (ii) Inform children of the different roles of the key persons at court, such as the judge, the defence lawyer and the prosecutor;
    (iii) Inform the court of the special needs of children in general and of the individual children in specific cases;
    (iv) Help children be comfortable in the proceedings;
    (v) Encourage questionings to be short and clear so as not to confuse child witnesses;
    (vi) Permit children below eight years of age to respond to leading questions facilitated by a social worker.

Source: Goa Children's Act 2003 (Goa Act 18 of 2003).

[366] Para. 22.
[367] CRC/C/15/Add.228, 2004, para. 36; see also CRC/C/15/Add.115, 2000, para. 34.

However, the Indian state of Goa has adopted a comprehensive law on children that contains a detailed prescription regarding the procedures to be applied in the Children's Court (see box 5.1).[368]

5.3 Protection of child victims

Various countries have introduced measures to make the legal process less intimidating for children. These include use of pretrial statements at trial, use of videotaped testimony, questioning by judges and experts instead of lawyers, and the presence of a support person.

One of the most important changes introduced by many countries to protect child victims is allowing the use of pretrial statements by children as evidence at trial. In criminal proceedings, reconciling measures designed to protect child witnesses with the rights of the accused poses a greater challenge than in proceedings where the child's views or testimony will not affect the criminal responsibility of others.

In Finland, video or audio recordings of pretrial statements by children under 15 years of age can be used in court as evidence, provided that the accused is given the opportunity to pose questions to the child.[369] In Sweden video recording of questioning conducted during the preliminary investigation has become standard practice in trials of persons accused of offences against children.[370] Canadian legislation was amended to allow child victims or witnesses to be heard by video link or from behind a screen in any kind of criminal proceeding, not only those involving sexual offences and other violent offences.[371] Recordings of the testimony of a child made before trial are admissible as evidence only if the witness affirms the accuracy of the recording during trial.[372]

Scotland's Vulnerable Witnesses Act of 2004 protects all witnesses under the age of 16, as well as vulnerable persons over that age.[373] A request by a child witness to testify by video link or from behind a screen must be granted, unless the court concludes that the risk of prejudice to the trial from these measures significantly outweighs the risk to the child witness of testifying in person.[374] (This rule applies in civil as well as criminal proceedings.[375]) In trials for violent offences, witnesses under age 12 may not be questioned by the accused, subject to the same exception.[376] The new legislation also allows recorded statements made prior to trial to be used

[368] The Children's Court was established in December 2004.
[369] Third Report of Finland, op. cit., para. 131, citing the Act on the Amendment of the Code of Judicial Procedure (360/2003).
[370] Third Report of Sweden, op. cit., para. 230.
[371] Section 486.2 of the Criminal Code, as amended in 2005. (The amendment also gave courts broader discretion to hold hearings behind closed doors to protect the interests of child witnesses in any kind of criminal proceeding, not just those involving sexual abuse or violent offences; section 486.1.)
[372] Section 715.1 of the Criminal Code.
[373] Third and Fourth Report of the United Kingdom, CRC/C/GBR/4, 2008, para. 37; an official summary of the Act is available at <www.opsi.gov.uk/legislation/scotland/en2004/2004en03.htm>. (The Act applies to persons over the age of 16 whose capacity to provide evidence is affected by mental disability, fear or distress; sections 11 and 271.)
[374] Section 271A.
[375] Sections 13 and 19.
[376] Section 6.

as evidence without requiring that the witness confirm the statement during trial. It also allows child witnesses to testify with the assistance of a support person.[377]

In 2000, Belgian law was amended to allow videotaped testimony prior to trial by child victims of certain crimes, including sexual offences, kidnapping, physical abuse and withholding of food.[378] The law also authorizes child victims to participate in criminal trials by video.[379] In Cyprus, legislation on domestic violence adopted in 2000 provides for victims' testimony to be presented by closed circuit television and the use of screens to shield victims who testify in court.[380] Legislation adopted the following year gives courts discretion to use these measures whenever a child testifies.[381]

In Jordan, legislation was amended in 2003 to allow the use of closed circuit television or video recording of pretrial testimony in criminal proceedings, when considered necessary to protect witnesses under age 18.[382] In Japan, the Criminal Procedure Code was amended in 2000 to allow the use of screens or closed circuit video during trial.[383] Sri Lanka adopted legislation allowing videotaped evidence to be admitted in trials for child abuse.[384]

The Guatemalan children's code recognizes the "right not to be re-victimized by confrontation with the perpetrator at any stage of the proceeding." The authorities must prevent repeated or persistent questioning of children, as far as possible, and arrange for their testimony to be given just once, at the most decisive part of the proceedings.[385]

Costa Rican legislation adopted in 2004 provides in general terms that direct contact between the child victim and the accused offender must be avoided, through the use of technology or any other means available.[386] Qualified psychologists, psychiatrists or medical personnel must provide child victims with as much support as the presiding judge considers necessary, and the professional assigned to a child victim must advise the court as to how to avoid or diminish the risks to the child's psychological health from the proceedings.[387]

In Argentina, the federal Code of Criminal Procedure was amended in 2004 to provide that child witnesses or victims under the age of 16 may not be questioned by the court or by the prosecution or defence in proceedings concerning crimes against the person. They may be interviewed by a child psychologist whose report may be received into evidence.[388] The court may allow the parties to witness the interview through a video or audio link or other technology

[377] Section 271M and A, respectively. (Child witnesses may also testify with the aid of support persons in civil proceedings; section 22.)
[378] 'Loi relative à la protection pénale des mineurs', Ministry of Justice press release cited by the website Juriste, <www.juriscope.org> accessed 24 September 2007.
[379] Ibid.
[380] Written Reply of Cyprus, 2003, p. 37, citing sections 10–13 of the Violence in the Family (Prevention and Protection of Victims) Law of 2000 (Law 119(I)/2000).
[381] Ibid., pp .63–64, citing the Protection of Witnesses Law of 2001 (Law 95(1)/2001).
[382] Written Reply of Jordan, para. 11, citing Act No. 76/2003, adding a new third paragraph to article 158 of the Code of Criminal Procedure, and CRC/C/SR.1188, para. 29.
[383] Second Report of Japan, op. cit., paras 93 and 495, citing an amendment to the Code of Criminal Procedure and the Law for the Inquest of Prosecution which was enacted on 12 May 2000.
[384] Second Report of Sri Lanka, op. cit., para. 86, citing the Evidence (Special Provisions) Act, No. 32 of 1999.
[385] Articles 116(k) and 125.
[386] Children's code, article 127.
[387] Ibid., article 121.
[388] Act 25.852, article 250 Bis (a) and (c) of the Code, as amended.

shielding the witness from contact with them.[389] These measures may be applied to the benefit of witnesses aged 16 to 18, on recommendation of a medical practitioner.[390]

The Jamaican Child Care and Protection Act allows child victims of sexual offences and crimes of violence to be interviewed out of court and a written record of their statement to be used as evidence, if a medical practitioner informs the court that testifying in court would pose a "serious risk to the life or health of the child" – a demanding standard.[391]

A related change in the procedures of many countries is to allow the judge or an impartial expert to ask questions formulated by the defence when questioning a child is necessary to respect the rights of the defendant.[392] In Sweden, the defence counsel may listen to pretrial interrogation without being physically present and may pose questions through the person questioning the child.[393] In Finland, the court has discretion to decide that questions formulated by the opposing party be asked by the judge rather than counsel. It also provides for the hearing to take place in a place other than the courtroom if necessary, and the child has the right to a support person if needed.[394]

In Portugal, when children under age 16 testify in criminal proceedings, questions may only be posed by the presiding judge. Prosecutors or defence attorneys may not question the child witness directly, but may indicate to the judge the questions they would like him or her to ask.[395] In Georgia, an accused may be ordered to leave the courtroom while a child testifies; the accused is simply informed of the content of the child's testimony after returning to court.[396] Children under the age of 16 may leave the courtroom after testifying.[397]

Italian practice is similar, but applies to children regardless of their age.[398] In addition, Italian judges may be assisted in questioning a child witness by a member of the child's family or expert in child psychology.[399] In the prosecution of sexual offences, children may testify outside the courtroom, or the child's testimony may be replaced by the use of evidence obtained prior to trial.[400] The legal definition of certain offences against children also was modified to avoid the need for testimony about bodily penetration.[401]

In Sweden, the Preliminary Investigation Ordinance contains a number of provisions (sections 15–19) designed to make this stage of criminal proceedings child sensitive. Interrogations must be conducted by a person with the appropriate skills, and questions must not enter into greater detail than the circumstances demand.[402] Children under 15 may not be obliged to attend a hearing for more than three hours unless their presence is considered to be of special

[389] Ibid., article 250 Bis (d)
[390] Ibid., article 250 Ter.
[391] Child Care and Protection Act 2004, op. cit., section 18.
[392] The right to cross-examine witnesses is, of course, a basic element of the defendant's right to a fair trial under international human rights law. See e.g. article 14.3(e) of the International Covenant on Civil and Political Rights.
[393] Third Report of Sweden, op. cit., para. 230.
[394] Third Report of Finland, op. cit., paras 130, 133.
[395] Initial Report of Portugal, op. cit., para. 20, citing article 349 of the Code of Criminal Procedure.
[396] Initial Report of Georgia, op. cit., para. 48. (The Report calls this measure "exceptional".)
[397] Ibid.
[398] Second Report of Italy, op. cit., para. 117.
[399] Ibid.
[400] Ibid.
[401] Ibid., para. 315.
[402] Third Report of Sweden, op. cit., para. 227.

importance to the investigation. They must be accompanied by a parent or legal custodian, unless this could prejudice the investigation.[403] A time limit of three months was established for completing preliminary investigations of crimes against children.[404] The Swedish Migration Board has guidelines intended to make its proceedings child sensitive.[405]

In the United Kingdom, legislation adopted in 1999 recognizes a series of measures that may be authorized to facilitate the testimony of witnesses under the age of 17. The views of the child must be taken into account, however, in deciding whether such measures will be authorized, and the court must state the reasons for its decision to authorize, deny or modify them.[406] The measures include allowing the use of videotaped testimony; allowing the witness to testify via video link or from behind a screen; allowing the witness to testify in closed court; restrictions on the introduction of evidence regarding the victim's prior sexual behaviour; allowing the witness to use communication aids; and the wearing of street clothing (rather than traditional court garb) by the judge, prosecutor and defence attorney.[407]

In Sri Lanka, procedures were modified to avoid the need for a pretrial hearing in cases of statutory rape, in order to reduce delays and free victims from testifying twice.[408]

Some countries also recognize the right of child witnesses to receive support from an acquaintance or a person appointed by the court. In the United Kingdom, support persons may help witnesses under the age of 17 communicate with the court.[409] In Canada, a person chosen by the witness may remain close to the witness while he or she testifies, unless the court finds that the presence of the support person would interfere with the proper administration of justice.[410]

In the Philippines, rules concerning handling of child abuse cases require the appointment of a guardian ad litem for victims. Their role is to monitor the progress of the case, explain all proceedings to the child and attend all proceedings in which the child participates, as well as to advise the prosecutor as to the child's ability to cooperate as a witness and advise the judge as to the child's ability to understand the proceedings.[411]

In Georgia, the teacher of a child under 14 must attend proceedings in which the child testifies and may, with the permission of the court, ask the child questions.[412] Russian legislation also provides that teachers must be present when children under 14 are questioned in court.[413] In Ukraine child witnesses may only be questioned in legal proceedings in the presence of a

[403] Ibid., paras 180 and 227.
[404] Ibid., para. 105.
[405] Ibid., para. 233.
[406] Youth Justice and Criminal Justice Act, 1999, available at <www.opsi.gov.uk/Acts/acts1999/ukpga_19990023_en_3#pt2-ch1-pb1-l1g16>, articles 16(4), 19(3) and 20(5).
[407] Ibid., articles 23–27, 30 and 41.
[408] Second Report of Sri Lanka, op. cit., para. 81 citing the Judicature (Amendment) Act, No. 27 of 1998 (statutory rape is the crime of sexual intercourse with a person under the age of consent; the procedure eliminated is the "non-summary inquiry").
[409] Youth Justice and Criminal Justice Act, 1999, op. cit., article 29.
[410] Section 486.1(1) of the Criminal Code.
[411] Second Report of the Philippines, op. cit., para. 259, citing section 19 of the Rules and Regulations on the Reporting and Investigation of Child Abuse Cases pursuant to section 32 of RA 7610.
[412] Initial Report of Georgia, para. 48. (The same measure is discretional for children over the age of 14, and for the child's parents or guardian.)
[413] Second Report of Russian Federation, op. cit., para. 71(n).

teacher or close relative.[414] Child witnesses may not be present during trial, except when called upon to testify.[415]

In Slovenia, legislation adopted in 1998 provides that children who have been victims of a crime must be represented throughout proceedings against an accused offender.[416] The pretrial testimony is read out during trial; victims under the age of 15 may not testify in court, but questions posed by the defence may be answered in a private interview outside the courtroom.[417]

New Japanese legislation requires that victims receive special attention and assistance, especially during criminal investigation and trial.[418] When child victims of sexual offences testify, they may be accompanied by a person whose presence will help ease the mental and psychological burden.[419]

The Indonesian Child Protection Law recognized the right of child victims not to be identified publicly, and their right to information about the development of the legal process.[420]

5.4 Mediation

Another way to make legal procedures more sensitive to children's needs is to allow resolution of disputes through mediation or other non-judicial procedures. The South African Children Act authorizes children's courts to order a pretrial conference for purposes of mediation, to hold a family group conference to seek a solution to the problem before the court, or to refer the matter for mediation by "any appropriate lay forum, including a traditional authority."[421] Cases concerning child abuse, including sexual abuse, are excluded from referrals for mediation.[422]

Some Latin American countries have also adopted legislation concerning mediation in cases involving children. In Paraguay, exploring the feasibility of mediation (*conciliación*) is an obligatory stage of proceedings before the specialized children's courts.[423] In Costa Rica, mediation is not allowed in cases concerning domestic violence or other crimes against the child or suspension or loss of parental authority.[424] A proposed settlement must be agreed to by the child's representative and the child if he or she is over age 12.[425] Under the Honduran children's code, mediation is obligatory in cases involving juvenile offenders.[426]

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[414] Second Report of Ukraine, op. cit., para. 99.
[415] Ibid. (unless the court deems their presence essential).
[416] Second Report of Slovenia, op. cit., para. 88.
[417] Ibid.
[418] Second Report of Japan, op. cit., para. 494 citing the 1999 Law on Punishing Acts related to Child Prostitution and Child Pornography, and on Protecting Children.
[419] Ibid., para. 495, citing the Law amending the Code of Criminal Procedure and the Law for the Inquest of Prosecution of 12 May 2000.
[420] Article 64. (This article also recognizes their right to "physical, mental and social safety guarantees.")
[421] Sections 69–71, respectively.
[422] Sections 69 and 71.
[423] Paraguayan children's code, article 174.
[424] Costa Rican children's code, op. cit., article 155 (nor does it proceed in cases involving "unrenouncable rights").
[425] Ibid., article 158 (children of any age have the right to be present, to be accompanied by a support person and to be heard personally; article 157).
[426] Article 226.

6. LEGAL AND OTHER ASSISTANCE

A growing number of countries recognize children's right to legal assistance or representation in legal or administrative proceedings, although often within relatively narrow parameters or subject to discretionary criteria.

South Africa elevated the child's right to legal assistance in civil matters to the status of a constitutional right, as indicated above. The Children Act 2005 provides that "Where a child involved in a matter before the children's court is not represented by a legal representative, and the court is of the opinion that it would be in the best interests of the child to have legal representation, the court must refer the matter to the Legal Aid Board…"[427] The Office of the Family Advocate assists children in making their views heard in proceedings concerning family law matters.[428]

One of the most generous guarantees of legal assistance in civil matters is found in the Child Rights Act adopted by Nigeria in 2003. Article 155 provides that "A child has the right to be represented by a legal practitioner and to free legal aid in the hearing and determination of any matter concerning the child in the [Family] Court." In New Zealand, appointment of counsel for the child is mandatory in proceedings under the Children, Young Persons and Their Families Act 1989.[429]

In Sweden, children are entitled to personal legal representation in certain cases, under the Care of Young Persons (Special Measures) Act and the Aliens Act. In criminal proceedings involving a child victim, the authorities are required to consider whether the child needs personal legal representation. This service is available free of charge in connection with certain types of crimes.[430]

In Denmark, there is a presumption that all children over the age of 12 have the right to be heard in cases concerning placement, but only children over the age of 15 are entitled to free legal assistance in such proceedings.[431]

In Belgium children are entitled to legal assistance in certain kinds of proceedings, but a report by the Flemish Children's Rights Commissioner to the Committee on the Rights of the Child points out that there is no right to legal assistance in order to initiate legal proceedings.[432]

In the Netherlands, the Ministry of Justice stopped funding children's law centres in 2006 because it was felt that ordinary legal aid and advice centres had acquired sufficient expertise to provide information and advice to children.[433] Some children's law centres continue to receive support from local governments.

In Belarus the Law on the Rights of the Child adopted in 2000 recognizes the right of children aged 14 and older to obtain legal aid to protect their rights and freedoms in matters concerning

[427] Section 55 (NB: This section was not yet in force as of November 2007).
[428] Initial Report of South Africa, op. cit., paras 49, 130.
[429] Second Report of New Zealand, op. cit., para. 134.
[430] Second Report of Sweden, op. cit., para. 203.
[431] National Council for Children, 'Report to the UN Committee', op. cit., paras 67–68.
[432] Report of the Children's Rights Commissioner, Flemish Community (Belgium) regarding the Second Report of Belgium, 2001, p. 13.
[433] CRC/C/NLD/3, undated and unedited, p. 16.

public bodies or private persons. The law expressly provides that the parent's consent is not required.[434]

The Romanian law on the rights of the child recognizes the child's right to legal assistance in challenging residential placement orders.[435] In Ukraine a lawyer's involvement is mandatory from the moment when proceedings are instituted, and legal services may be provided at the State's expense if the parents cannot afford them.[436] The new Civil Procedure Act of Slovenia provides for the appointment of a representative for "socially-at-risk parties."[437]

In the Czech Republic, where social workers are responsible for representing children in legal proceedings, the Government recognizes that there are too few to "perform preventive, curative and punitive functions…" It cites an NGO report indicating that such social workers "are not always fully qualified to represent children's rights [and] are not, nor can they be, a fully qualified adversary to the other side's attorney."[438]

[434] Article 13.
[435] Article 57.
[436] Second Report of Ukraine, op. cit., para. 54.
[437] Second Report of Slovenia, op. cit., para. 12.
[438] Second Report of the Czech Republic, op. cit., paras 74 and 80.

7. FINDINGS AND RECOMMENDATIONS

7.1 Findings

1. The right of children to have their views taken into account in legal and administrative proceedings is overshadowed by the attention given to the child's right to participate in the family, community and society at large.[439] Given that it touches on so many areas of the child's life, the right to be heard in a legal or administrative proceeding is, in principle, relevant for any child who believes that his or her rights have been denied or violated. Estimating the number or percentage of children for whom this right has direct personal relevance at some point would be impossible. The mere fact that in many societies one third to one half of all children live in single-parent or 'reconstituted' families suggests that its relevance for children is often underestimated.[440]

2. The right of children to express opinions in legal and administrative proceedings should not be viewed narrowly. The capacity of children to give evidence and their capacity to initiate legal action to defend their rights are no less important. Other closely related issues include the right of children to be heard in informal proceedings intended to resolve conflicts or problems. These include mediation or pretrial conferences or voluntary agreements on matters such as custody or placement in care, and the child's capacity to take legal action that may not require participation in an actual proceeding. The latter is particularly relevant for a number of issues concerning adolescent parents and their children, such as recognizing paternity, giving consent to adoption and entering into custody and maintenance agreements.

3. Most of the countries covered by this study have taken some steps to expand the right of children to be heard in legal and/or administrative proceedings, but in most cases the steps are limited in scope. No State covered by this study appears to have taken sufficient action to protect and ensure this important right.

4. Only a few States have elevated the child's right to be heard to constitutional rank, and none of the constitutional provisions identified in this study refer specifically to the right to be heard in legal proceedings. Much of the law reform undertaken has been narrowly targeted and concerns family law, child protection and children who are victims of crimes. Some broader reforms have been made through the amendment of codes of civil procedure, family codes or judicial codes. As a rule, however, the only legislation that recognizes this right in broad, general terms applicable to all legal and administrative proceedings is children's codes and comprehensive child rights laws.

5. Many of the countries studied have carried out training to inform judicial and other relevant personnel about the right to be heard in legal and administrative proceedings and to help develop the skills needed to facilitate the participation of children in such proceedings.

[439] This can be seen in the attention given to this right in reports of States to the Committee on the Rights of the Child, in the Concluding Observations adopted by the Committee and in the legislation concerning children adopted by States parties.

[440] This prevalence of these kinds of families implies that issues such as custody, visitation and recognition of paternity, in which children in principle have a right to be heard, are relevant for a large percentage of the child population.

6. A considerable number of countries throughout the world report investments in infrastructure, such as separate rooms for interviewing children and facilities for recording interviews. But few report substantial investments in human resources, especially in developing the capacity to ensure that all children involved in legal or administrative proceedings or who wish to take legal action have access to competent professional or at least paraprofessional assistance and support.

7. A small number of States have undertaken studies that quantify the extent to which children are actually heard and their views taken into account. Such studies also address the apparent reasons for shortcomings. In a few countries, the views of children on this issue have been collected and analysed.

8. In many countries, age limits play a role in regulating children's right to be heard in legal and administrative proceedings. In most such cases, the age limits vary with the nature of the proceeding.

9. The countries covered by this study can be divided into three groups in terms of the age at which children are allowed to be heard in legal proceedings. The first group, representing a few countries of the study, recognizes a broad, general rule that children below a certain age may not be heard in legal proceedings. Where such a rule exists, the age is usually seven. In a second group of countries, the legislation contains no age-based threshold for the right to be heard in legal proceedings. Lower age limits based on jurisprudence or regulations usually exist, however. In the countries covered, the limits range from as low as 6 to as high as 14 years. In a third group of countries, children above a certain age must be heard, and courts and administrative bodies have discretion to hear younger children if they are considered mature enough. In child protection proceedings, 6 is the lowest age identified in this study at which children must be heard; the highest is 15. The ages of 10 and 12 are common in both child protection proceedings and family law proceedings.

10. Some countries also have adopted or modified age-based thresholds for children in refugee status proceedings. Most such thresholds in the countries studied range from 12 to 16 years of age. The practice of interviewing children as young as four in one country has been criticized on the grounds that such youngsters cannot be expected to give consistently reliable information.

11. When courts or administrative bodies have discretion to determine whether or not to hear a child, the criterion most often applied is whether the child is capable of forming his or her own views on the matter before the court. In some countries, the criterion of ability to express one's views in such a manner that they can be understood also applies.

12. The risk to the child is also taken into account in most countries, but the way it is defined and assessed varies considerably. In one country, for example, there is a strong presumption that children under the age of 15 should not be allowed to testify at trial because of the risks to the child. In another country child victims of sexual offences can be excused from testifying only if a medical practitioner declares that testifying would pose a "serious risk to the life or health" of the child.

13. The relevance of the child's views for the decision to be taken is also a factor in some countries, especially Nordic countries. In some countries, the child's views are heard in certain kinds of proceedings only if parents disagree on some matter affecting the child.

14. Although the sources reviewed in the preparation of this study contain few references to surveys of the participation of children in legal proceedings, those cited indicate that when courts have discretion to determine whether to hear a child, the percentage of children who are heard is typically less than half.

15. In an effort to ensure that discretion to hear children is exercised appropriately, some countries have adopted a requirement that the court or administrative body taking such a decision must state the relevant reasons. The effectiveness of this safeguard has not been demonstrated, however.

16. Many countries report having taken measures designed to reduce the adverse consequences of giving testimony in criminal proceedings for children who are victims of crimes. Some of the most important include changes in legislation to allow pretrial or out-of-court statements to be used as evidence; changes in legislation regarding the probative value of testimony by children;[441] allowing children to participate in proceedings via closed circuit video or from behind a screen; and recognizing children's right to the assistance of a person who explains the proceedings and provides the child with support.

17. The legislation of many countries also allows children to take legal action in certain areas. In most instances, this right is limited to children over a certain age, which is often as low as 10 years.

18. A growing number of countries recognize children's standing to challenge custody orders, initiate action for recognition of paternity or seek placement in alternative care.

19. The capacity of children to take legal action to defend their basic rights and freedoms also is recognized by a growing number of countries, especially those that have adopted a comprehensive children's law or children's code. Some such laws do not establish any age threshold for the exercise of this right, although it seems certain that for younger children it would be exercised not by the child personally but by his or her representative.

20. In many countries children not only have a right to be heard and to have their views taken into account; their views are binding for certain purposes. In most instances, the law specifies an age at which the child's consent is required. Legal provisions of this kind, which go further than the requirements of article 12.2, are most common with regard to matters concerning custody and identity, such as adoption, change of name or nationality, custody of children of separated or divorced parents and the return of children in alternative care to parental custody. The age limits recognized for these purposes are generally 10 to 14 years, although in one country the consent of children as young as 7 is required for adoption and in a few countries age limits of 15 or 16 are used for this purpose.[442]

21. Many countries have adopted legislation recognizing the right of children to legal assistance or legal representation in specific circumstances, particularly in family law, but also in exercising the right to a remedy for violations of their basic rights. In a few countries, children involved in certain kinds of legal proceedings must be represented by a legal practitioner. Unfortunately, the sources used in the preparation of this study contained no data on the functioning of legal assistance programmes for children.

[441] That is, its value or weight as evidence.
[442] Some even lower age limits exist for consent to name changes.

7.2 Recommendations

The following recommendations, and the practices identified in box 7.1, emerge from this review as steps to improve the realization of the child's right to be heard in judicial and administrative proceedings.

1. The Committee on the Rights of the Child should pay greater attention to the right of children to be heard and to have their views taken into account in legal and administrative proceedings, in its written questions, Concluding Observations and General Comments.

2. Although many countries have not yet paid sufficient attention to the need to reform laws and procedures to bring them into conformity with article 12.2 of the Convention on the Rights of the Child, many have taken important steps in some areas. The reforms required to enhance enjoyment of this right depend, to a significant extent, on other characteristics of the legal system as they affect children. Moreover, little information is presently available on the impact of the reforms made in various countries on questions such as how courts exercise discretion to allow younger children to be heard, the weight given to the views or testimony of younger children when they are heard and the extent to which measures designed to make participation in legal or administrative 'child-sensitive' proceedings alter the child's perception of this experience. It is therefore necessary to proceed with care in making recommendations as to the kinds of reforms that should be undertaken.

3. Guidelines concerning the right of children to participate in legal and administrative proceedings should take into account the reasons for the child's participation (as an affected party, witness, victim, etc.), the nature of the participation (to express views or give evidence) and the foreseeable consequences of participation for the child. This will depend in large part on the nature of the proceeding and the issues at stake.

4. The views of the child should always be taken into account in determining the best interests of the child in all legal and administrative proceedings in which the interests of the child are a relevant consideration, subject to only four conditions:

    a. That the child is able to form views on the matter under consideration;
    b. That methods are available that will allow the court or administrative body to reliably ascertain the views of the child;
    c. That child's participation would not be incompatible with his or her best interests;
    d. That the child understands what is involved (the options he or she has and their possible consequences) and wishes to make his or her views known.

5. Despite wide agreement that children's participation in legal and administrative proceedings can be traumatic, whether they are expressing their views or giving evidence, considerable progress has been made in developing modalities of participation that reduce the risks for the child without sacrificing the rights of other parties to the proceedings. Consequently, States should make concerted efforts to develop such child-sensitive methods. To the extent that norms limiting children's participation are based on the potential for risk to the child, States should also consider the availability and impact of such methods in reviewing – and, if appropriate, revising – the criteria for children's participation in such proceedings.

6. Every child old enough to form the opinion that one of his or her basic rights has been violated should have the right to bring the matter to the attention of competent administrative or judicial authorities, the right to any assistance necessary to ensure prompt clarification of the matter and, in the event of a finding that his or her rights have been denied or infringed, the right to an appropriate and effective remedy.

7. Every child able to form views on a matter affecting him or her who does not wish to express those views personally during a legal or administrative proceeding, or whose right to express views in person is not recognized, should have an opportunity to have them conveyed accurately to the competent authority through a legal representative.

8. Additional research is needed to identify best practices in this important area.

Box 7.1: Positive practices for realization of children's right to be heard

- Recognize the right of children of all ages to have personal and confidential access to administrative authorities such as child welfare services or children's ombudsmen;
- Recognize the right of children over a certain age to personally take legal action for the defense of their basic rights and freedoms;
- Require the consent of children over a certain age, or those who have sufficient understanding and maturity, to participate in certain legal actions affecting their right to identity and custody;
- Recognize the right of adolescent parents to have their views and their capacity to take legal action regarding their children taken into account, subject to safeguards to guarantee respect for the best interests of their children;
- Pass legislation allowing pretrial statements by child victims of crime to be used as evidence;
- Pass legislation allowing children to testify during criminal proceedings without having direct contact with the accused (such as via video link);
- Pass legislation providing that legal or administrative proceedings concerning children be given priority and carried out without delay;
- Create informal, child-friendly environments for hearing the views or testimony of children;
- Establish standards requiring that children be informed in advance, in a clear and objective manner, of the purpose of proceedings in which they may participate, the possible consequences of such proceedings, their options regarding participation and, if they do participate, the significance of what happens during the proceeding;
- Establish standards allowing children who participate in legal or administrative proceedings to be assisted and supported by a professional or paraprofessional support person or other person who enjoys their confidence;
- Pass legislation and develop programmes providing children with access to legal assistance;
- Recognize the child's right to be heard in proceedings designed to resolve legal matters affecting the child without adjudication;
- Recognize students' right to be heard in disciplinary proceedings and to initiate administrative proceedings for the protection of their rights.