

THE CONVENTION ON THE RIGHTS OF THE CHILD FROM THE PERSPECTIVE OF THE CHILD'S BEST INTEREST AND CHILDREN'S VIEWS

Jean Zermatten

Translated by Salomé Hangartner

Introduction:

Towards the rights of the child

Human rights versus the rights of the child

It is only very recently (just 60 years ago) that human rights entered the international juridical order in full force through the adoption of the Universal Declaration of Human Rights (UDHR) on 10 December 1948. This Declaration affirms that human rights are not only the rights attributed to citizens, but pertain to every person, each of whom is born free, with equal rights and in dignity. The existence of these rights, therefore, is not dependent on the goodwill of States, or tied to a person's nationality or citizenship status, but rather belong to all human beings by virtue of their humanity. And these rights are universal.

And what about the rights of the child? Does the UDHR, which is supposed to apply to all human beings, sufficiently answer the question as to whether or not a child is considered an individual in her/his entirety (and thus also possessing the full range of human rights), or whether

she/he is merely a "miniature adult" and therefore without the capacity to hold these rights? Let us not forget that at the time the Declaration was adopted, the child was still considered to be the "property" of her/his family and subject to unilateral parental decisions made on her/his behalf.

It is clear that the UDHR is neither specifically targeted towards the child nor establishes what we currently refer to as the rights of the child. The first text dedicated to children adopted by the United Nations was promulgated on 20 November 1959: the Declaration of the Rights of the Child, which served as a counterpart to the UDHR in relation to children. It referred to human rights and expressly stated that the child, due to her/his lack of physical and intellectual "maturity," needed special protection, particular care and specifically appropriate juridical protection.

The Declaration on the Rights of the Child was a general text that did not include any restricting consequences for State parties. To

remedy this gap in protection, the United Nations, at the instigation of Poland, began ten years of work to develop a convention on the specific rights of the child. This would form part of the totality of "human rights," while meeting the double challenge of protecting children and recognizing them as whole persons and therefore capable of undertaking action on issues that affects their lives. The result of this process was the Convention on the Rights of the Child, unanimously adopted by the United Nations General Assembly on 20 November 1989, and entered into force in 1990. The Convention has 193 States parties and is now the most widely ratified international human rights treaty.¹

From an interest in children to the child as the object of rights

The second half of the 20th century caused a rupture in the traditional concept of family in many Western countries. Prior to that time, the family was considered to be the basic cell and core of society. This social construction shifted to one based on a concept of individualism in which each human being is free and responsible and is not bound by, but rather chooses the social ties by which she/he chooses to be bound. Personal achievement and "happiness" have become the existential objectives of many societies. In such a context, the family has been transformed and the traditional understanding of authority vested in the head of the family has shifted to a new conception of parenthood or shared parental authority. In the same way, the marriage bond on which the family was based has evolved into one of a contractual nature, which has consequently led to a lost sense of "sacredness." Marriage is now often perceived of as a union entered into by one's own free will, based on objectives of personal accomplishment, and not

necessarily on the couple; a union which can be dissolved by mutual consent. The number of "démariages," (a famous expression coined by Irène Théry²), is testimony to this evolution.

This has also led to an important development in modes of communication between children and their parents, changing from an authoritarian parenting style to one that is more participatory and includes the children.

We might summarize the stages of the development of the rights of the child as follows: From a non-existing child without recognized rights, to the child as an object of interest that is submitted to education, then a member of an idealized family unit, we have reached a point in human rights law where the child is recognized as a whole person; an individual equal to other individuals with rights, guarantees, and protection that can be asserted. Yet the child is also seen as a person who is not always able to demand the fulfillment of these rights and must often rely on adults to act as their advocates. Based on this reasoning, a comprehensive juridical tool was established to assist in this process; the Convention on the Rights of the Child (CRC).

The Convention and its mechanisms

A small revolution

The CRC is frequently referred to as the convention of the 3 Ps; Provision, Protection, and Participation. The first two Ps are not new since in the historical development of the rights of the child, children were seen as evolving beings with material dependence on adults, requiring the provision of specific services, including protection of their rights in light of their vulnerability.

The CRC confirms this view of the child by extending benefits (services or goods), both

those contained in earlier texts (food, accommodation, education, health), or new ones such as identity (the right of a child to a name, nationality, and protection of this identity); as well as services focused on re-adaptation and social reintegration of children who have been victims of maltreatment.

The CRC also dedicates particular attention to the protection of children, including by taking up well-known principles such as protection from abuse, work,³ and sexual exploitation. It develops some of these principles and extends protection to new domains such as torture, the involvement of children in armed conflict, drug trafficking and consumption of narcotics, unjustified deprivation of freedom, and undue separation of the child from her/his family. In 2000, two optional protocols to the Convention were adopted to address the situation of children in armed conflict and the sexual exploitation, trafficking and use of children in pornography; both of which emphasize this protective aspect.⁴

Where the CRC upsets all convictions held by adults about children is in the realm of the third P: that of participation. It is here, where, in my opinion, the main advancements of this text reside. The concept of participation outlined in the CRC identifies a fundamental change in the status of the child who was previously only seen to be in need of services and protection. In contrast, although the Convention does not explicitly use the term participation, the well-known and oft-cited Article 12 of CRC recognizes the right of the child to not only express her/his views, but also to have these opinions be taken into account, and in accordance with her/his evolving capacities (Art. 5),⁵ to participate in any decisions which, in one way or another, might influence the child's life.

Article 12, however, should not be read in isolation as it derives from the "technical" function of the collection of the child's views and is linked to freedom of expression (Art. 13), freedom of opinion (Art. 14), freedom of association (Art. 15) and freedom of information (Art. 17).

This change in status, therefore, represents the most spectacular innovation of the CRC, as it introduces the concept that the child, through her/his development, and in accordance with the age and maturity of the child, may participate in the life of her/his family, school, training center and in the community in general. The child is no longer a passive being to be taken care of but is an active player in her/his life.

The basic mechanisms of the Convention

The Convention has a number of articles that establish general principles and others that outline substantive rights. For instance, Article 1 defines the notion of the child. This is a typical basic principle as it indicates who is a child and therefore who is to be governed by the Convention. It does not give access to any substantive right. On the other hand, Article 6 (right to life, survival, and development) constitutes a genuine substantive right: the right to live, to be protected in case of a disaster, and the right to benefit from the best possible development.

It is customary to say that Articles 2, 3, 6 and 12 are the basic building blocks of the Convention. Although it is true that Article 6 plays an important part in the CRC, I think there are three other articles which constitute the primary keys which make the locks turn in the CRC system:

Article 2: Non-discrimination

Article 3: The best interest of the child

Article 12: The child's view

These articles provide for procedural rights, i.e. the stages that need to be passed through in order to implement both the spirit and wording of the CRC to give full effect to the rights of the child. One may identify the procedural nature of these rights, however, two of them also include key substantive rights (Art. 2 refers to the right not to be discriminated against and Art. 12 refers to the right to express one's view).

Thus:

___ Without going in-depth into the issue of discrimination, that is, finding out if children are treated in the same way in identical circumstances, it would be difficult to determine the de facto enjoyment of rights by all children. The CRC is a universal instrument and must therefore be applicable in an equitable manner in all parts of the world and under all circumstances. As such, this equality cannot obviously be a mathematical equation.

___ The principle of the best interest of the child is the most procedural rule of the CRC as it requires that the decision-maker examine, in all decisions undertaken concerning a child, whether the proposed solution corresponds to the best interest of a child, if it is for the benefit of a collective group of children, and whether or not it promotes the harmonious development of the child/children in question.

___ Taking into account the views of the child is to be a compulsory element of national legislation, imposed on administrative and judicial branches of States parties to the CRC and, indeed even political authorities, in the sense that nothing can be decided on behalf of the

child without first seeking the views of her/him. In other words, it is insufficient to merely collect the views of the child. The content of those views must be taken seriously into account, "in accordance with the age and maturity of the child."

When we look at the inter-relationship between these three provisions – and that is precisely what the CRC sets out to do – we realize that we cannot speak of any substantive right of the Convention without probing the issue of discrimination, calling for the opinions of the child, and establishing the best interests of the child as a decision-making criterion. These three provisions, therefore, are the ones that enable the CRC to work effectively.

If there is a common principle to be found in all texts concerning human rights, it is certainly the principle of non-discrimination. As much has been written on this subject, particularly in relation to the rights of the child, I will not deal with this issue here. On the other hand, what I would like to develop in this article are the innovative principles established by the Convention: The best interest of the child and the views of the child.

The best interest of the child

The notion of the child's best interest (or the child's wellbeing) is an heir of the protectionist, or "welfare" movement and is well-known to all persons working in the area of children's rights. It is, however, a difficult concept to define and has been criticized on various grounds, ranging from arguments that it is an empty shell or vase that is filled as one sees fit.

But the notion of the best interest of the child is something new if we examine it in the context of the CRC as it is Article 3(1) which establishes this expression:

“In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.”

This provision must be seen as a specific rule (serving as the starting point when analyzing the impact of decisions concerning a child) and also as a general principle, contributing to a larger concept, namely the newly recognized status of the rights of the child. If Article 3 is analyzed in its entirety, it does not provide any particular explanation as to how it should be applied, does not lay down any specific obligations, nor mentions any precise rules. It instead establishes a principle:⁶ The child’s best interest shall be a primary consideration.

Function and characteristics

We may say that the notion of the child’s best interest is identified by the CRC, but it may also be found in the Hague Convention on international adoption⁷ which contains two “classic” measurements for ensuring the best interest of the child – inspection criterion and solution criterion.⁸

___ Inspection criterion: The best interest of the child serves to guarantee that the exercise of rights and obligations vis-à-vis children is correctly carried out.

___ Solution criterion: Appraising the child’s interest requires that those making decisions concerning children consider and evaluate all possible solutions in each case and give priority to one solution that is “in the child’s interest.”

The notion of the child’s best interest entails several characteristics:

1. Article 3(1) CRC does not constitute a particular right, nor any obligation, but rather establishes a principle of interpretation which must be applied in all forms of intervention concerning children.

2. The concept of the child’s best interest is an undetermined juridical concept which must be further defined through practice and should be thus defined according to rules of application in the national context. Precedents, based on case law, will also provide applicable solutions for individual or collective situations (groups of children).

3. The criterion of the child’s best interest is relative with respect to time and space: Time because it depends on scientific findings related to a child at a particular point in time, and space because this criterion must take into account the prevailing standards prevailing in a country or region. As a result, the criterion of the child’s best interest is evolutionary.

4. The criterion of the child’s interest is subjective on two levels.⁹ “To begin with, it is connected to a collective subjectivity” which a particular society, at a given moment in its history, imagines to be the child’s interest: For instance, education of the child under one religion or another, or the prohibition of “excesses” of a religious practice.

The child’s interest is also marked by a personal subjectivity manifested in:

___ Subjectivity of the parents: what parent will not claim that she/he consistently acts in the best interest of the child, although she/he may be acting out of personal considerations? (As divorce judges know all too well.)

___ Subjectivity of the child: when the child's opinion or wishes are taken into account, the child's interest cannot simply be reduced to the views held by the parents which do not necessarily correspond to the view held by the child.

___ Subjectivity of the judge or the administrative authority: This subjectivity (or at any rate, the risk of subjectivity) may be strong, even when the decision is argued to be based on a "scientific" analysis of the situation.

The potentially hazardous consequences of these and other subjectivities for the child's interest show the adaptability, wealth, and weaknesses of this criterion. Let us say in its defense that the criterion has the advantage of being broad, flexible, and adaptable (relative to the time and space) to different cultural, socio-economic, and juridical systems. It can be applied everywhere for the benefit of all.

Objectification of the criterion?

Certainly it could be useful to have this criterion defined in more detail, or further elaborated by rules of application, selected in function of the different domains where the best interest of the child must be considered. Hence, numerous attempts have been made to more accurately define, elaborate or "objectify" the notion of the child's best interest. In the United Kingdom, judges must take the best interest of the child into account, as decreed in the Children's Act of 1984 which referred to:¹⁰

- ___ the opinion of the child;
- ___ her/his physical, emotional and educational needs;
- ___ the impact of change on the child;
- ___ the child's age, sex, and personality;

- ___ the injuries she/he has already suffered or runs the risk of incurring; and
- ___ the possibility/capacity of each parent to respond to the child's needs.

In this type of measurement, it is crucial to objectify the notion, to grasp its contours, to eliminate the risks of making an erroneous assessment, and to give security both to judges and to those before the court. Of course, these attempts are less than perfect; yet they set the benchmarks on a particularly sensitive path.

Moreover, the Convention's monitoring body, the Committee on the Rights of the Child, feels that it is also necessary to supplement the notion of the child's interest with foreseeability, that is, taking the child's best interest into account in the present, while also considering the foreseeable evolution of the situation for the concerned parties. This seems particularly relevant in a field such as childhood where situations can change quickly and decisions that seem immediately critical may not be appropriate in the future.

In addition, it seems indispensable that in these matters, where the rights of the child may conflict with other rights, that is, where the human, relational, economic, and other stakes are considerable, the decision may be subject to revision.

Necessarily a higher interest?

It has sometimes been said that the child's best interest means that the rights of the child must necessarily prevail as they supersede the rights of other persons or entities (i.e. parents, the State) in cases of conflict. This is an erroneous concept: The child's rights should not be conceived as above all other rights. The international community sought to avoid this situ-

ation, because in such a case, this would be positive discrimination of one human group, children, over others, i.e. women, physically impaired persons, soldiers, workers, etc. In our opinion, this misunderstanding often arises from translation of the expression “best interest” from *intérêt supérieur* (higher interest) in French. When reading the text to the end of the sentence, it is evident that this notion of best interest is not established as an absolute, higher rule. The text says “shall be a primary consideration” and not the primary consideration. The adjective superior (in French) evidently must be considered as a declarative superlative and not one which refers to a restricted reach.

To conclude, let us add the following element: In cases of doubt when attempting to determine the best interest of the child that may be in conflict with other interests, let us recognize that this non-objective notion cannot be clarified by clear or objective elements and therefore must be considered in light of the opposite notion of the “lesser of two evils.” The question as to “How to cause the least possible damage?” then replaces the child’s “higher” interest. Is this more objective? Perhaps not, but this cautious application of the principle would have the advantage of being less dangerous.

Does the child’s best interest have political content?

What is highly interesting in Article 3(1) is the element of the sentence which reads “or legislative bodies.” This addition, which was absent from the draft text of 1981,¹¹ is of capital importance. It means that whenever national, regional, cantonal, or municipal governments draw up a law, they must verify that the rights of children are taken into account and that their interest is preserved. It is therefore, with the in-

clusion of these two words (legislative bodies), that the political or macro-social dimension is introduced into the Convention. The best interest of the child thereby takes on a new function in that it serves to establish what is and what is not good for the child in any legislative program. The best interest of the child is enlightening politics! Isn’t that also a revolution?

The view of the child in procedures

Notion

The word of the child, the views of the child, the opinion of the child: Each of these expressions establishes a new perspective on the role of the child who, as stated above, is now understood to be capable of participation and not simply a passive actor in issues affecting her/his life. Article 12 of the Convention indicates:

- “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.”

This article imposes on States the obligation to hear children in all decisions concerning them. This is not a wish, recommendation, or suggestion. It is an obligation which few national court judgments have taken into account – far from it. Certainly, it is a substantive right which recognizes that when the child fulfills the conditions of age and maturity, she/he has a right to

demand that she/he be heard. In Switzerland, this principle has been recognized (through a direct application of Art. 12) by the Federal Tribunal.¹²

If we refer to the output of the Committee on the Rights of the Child (i.e. Concluding Observations and General Recommendations) it is clear that the opinion of the child is an element that must be taken into account when establishing the best interest of the child. We can say that hearing the child and the national-level examination in concreto of contemplated solutions concerning the child are the two constituent elements needed to give full effect to protecting the child's interest. Clearly, there is a parallel between the child's interest and hearing the views of the child.

The obligation imposed on the State is premised on recognizing the right of the child to express her/his opinion. This is a fundamental right pertaining to the child her/himself. In view of Article 12, there is no doubt that the child that fulfills the conditions of maturity can demand the exercise of this right. The onus is then on the State to facilitate a way to hear the child's voice.

The obverse of this right is the option granted to the child to refuse to exercise the right to express her/his opinion, be it explicitly, for instance, by refusing to appear before the court after having been summoned, by clearly indicating that she/he does not intend to express her/his opinion if she/he appeared, or by remaining silent before the decision-maker (an option most frequently chosen by adolescents).

Scope of application

Is it essential for the child to be heard in each and every decision? Article 12(2) refers to judicial and administrative proceedings and is a

very general concept which, in our opinion, pertains to all interventions made with regard to children. We shall try to analyze this in the following paragraphs.

What about the obligations assigned to parents? If read literally, Article 12 should not be interpreted as interfering in the parental sphere (family decisions), as it does not specifically refer to the obligations of parents. Jurists frequently argue that this was not an omission but a deliberate act undertaken by the drafters of the Convention, because it is not possible to impose such an obligation on the parents, or to impose a sanction where it has not been fulfilled. Only States parties, through their established authorities, can fulfil such an obligation and, above all, can be reproached for failing to act. Hence, only States parties are responsible for fulfilling this obligation.

Even so, we feel that in family problems or conflicts, the same principle (hearing the view of the child) might play a part in reaching a more appropriate decision. In our opinion, the Convention drafters, out of respect for the principles established in Articles 5 and 18 (principle of parental responsibility), did not wish to explicitly address the responsibility of parents on this issue. This, however, does not detract in any way from the principle of taking note of the child's view. The spirit of the Convention implies that this ought to happen naturally. I believe that this does in fact happen quite naturally in many families and that even when an adult does not ask for it, a child of the 21st century will say whatever she/he has to say, albeit sometimes in a very resonant manner!

Conditions

Firstly, the exercise of taking note of the child's view is tied to the condition that the issue at

hand should be related to the interest of the child. In legal and administrative proceedings, this basic condition cannot always be met. The child's sphere of interest must be understood in its widest sense, both in terms of the present and the future. On the other hand, any decision that is unrelated to the interest of the child obviously nullifies this obligation imposed on the State.

Secondly, the child must be capable of discernment. The child does not necessarily need to be knowledgeable about all the details of the matter that concerns her/him, but that she/he be able to form their own opinion concerning the topic. Thus, the first question to be asked is whether or not the child understands what is being discussed.

The CRC does not establish a specific age at which a child has achieved discernment and as such, the age when a child should be heard varies by country, region, and legal system. For example, in a number of countries, it is commonly believed that it is not possible to truly hear a child who is under 16 years of age¹³ (this is generally tied to the value attributed to a child's testimony, in particular in criminal law). In other countries, this age limit has been set at 12 years of age,¹⁴ while others have established a limit of 10 years of age.¹⁵ These limits also vary according to the legal domain in question (matrimonial law, adoption, or social security law). Still more States parties have not adopted legislation on this matter for various reasons, including a perception that the child has no say in the matter, that the child can be heard at any age and that a minimum age limit is unnecessary, or because they prefer to leave it to the discretion of the court or other legislating authorities.¹⁶

A recent decree by the Federal Tribunal of Switzerland in June 2005¹⁷ established that

the judiciary could hear a child from the age of 6 years in divorce proceedings. In the case in question, a mother was opposed to having her two daughters, born in 1996 and 1997 respectively, (i.e., 6 and 7 years of age at the time of the tribunal order), heard in a custody hearing due to their age and the inconsistency of their declarations. The Federal Tribunal decided otherwise, noting that:

___ the right to be heard is a personal right of the child (cons.1.1(2));

___ hearing the child is an obligation imposed on the judiciary;

___ in this particular case, the revision of the divorce law entered into force on 1.1.2000 obliges the judge to hear the view of the child (cons. 1.1(3));

___ the reasons for waiving such a hearing are limited to very young children or situations where it threatens the physical or mental health of the child (cons.1.3 and 1.3.1);

___ in the absence of a lower threshold set by law or comment in the message accompanying the law (cons. 1.2), the age of six years seems to be an acceptable limit (cons. 1.2.3);

___ under certain circumstances it is possible to proceed even with children below six years of age, in particular, if there are siblings and the youngest of the siblings is below this limit (cons. 1.2.3, in fine),

___ the purpose of the hearing is also to allow the child to receive information;

___ hearing young children is not necessarily an element of decisive proof, but enables the deciding authority to obtain a personal impression of the situation and to find appropriate solutions (cons. 1.2.2(2)); and

___ the court decision should be taken as a guideline (cons. 1.2.3).

The limit established in this decision must be interpreted in relative terms wherein it is up to each authority to decide, on a case-by-case basis, whether or not the very young child can be heard in a useful and opportune way. The minimum six-year-age limit is therefore not mandatory in all proceedings.

Thirdly, the child must be able to express her/himself freely.

The expression "freely" means that the child must be able to express her/his own opinion without restriction, and not the opinion of another person as a result of pressure or influence.

Freely also refers to how the child's opinion should be obtained. From the experience of the Committee on the Rights of the Child, State parties do not seem to have developed highly elaborate legal provisions to facilitate a hearing of the child's view. The CRC does not provide details or directives for the establishment of administrative or judicial procedures. It is obvious that the States parties must develop appropriate parameters for this purpose, taking into account the individual situation of each child, offering a climate of benevolence in which the child feels secure. This will not always be evident because the decision-maker who is hearing the child (or the intermediary) will be an adult necessarily leading to a hierarchical relationship (top to bottom), which may be detrimental to this climate of trust. Judges try to minimize this negative effect by hearing the children in private hearings in chambers, taking only informal notes. In rare cases, these hearings will take place in the courtroom, but in the absence of the other parties. It is not clear if similar steps are taken to build an environment of trust in administrative proceedings where rules are sometimes less codified.

At the European Court of Human Rights on the other hand, a decision was reached that it would be excessive to systematically require children to be heard in the court and should be left to the discretion of the judge. Nevertheless, it concluded that any child involved in proceedings entered into by one of her/his parents must be heard in a suitable frame of reference.¹⁸ The chosen method must also be appropriate to the child's age and the nature of the matter.

Another important issue is determining the number of times a child can be questioned. It is well-known that hearing the child is, indeed, a very difficult exercise, which is not neutral for the person hearing the child, or for the child her/himself. The risks of secondary victimization of child victims (specifically in hearings for sexual abuse) have been widely documented. The CRC does not address this question and instead leaves regulation to the discretion of national bodies. In Switzerland, for instance, a new provision was introduced into the Federal Act on Assistance to the Victims of Violations (LAVI)¹⁹ (Art. 10(c)), which sought to protect child victims during criminal proceedings by imposing a rule that, on principle, the child must not be subjected to more than two hearings. Article 10(c)(3), moreover, specifies that a second hearing will only be organized if the parties have been unable to fully exercise their rights in the first hearing, if it is deemed essential to following the course of the investigation or to safeguard the child's interest. The supporting message justified the new provision by indicating that an interrogation focused on the circumstances of the alleged crime may have a traumatizing effect on the child victim; a "secondary victimization" which is often as serious, or slightly less so, than that suffered at the time of the violation.²⁰

Who may hear the view of the child?

On this question, Article 12(2) is more articulate than on the previous matters noted above, and mentions various possibilities:

- ___ direct hearing by the judicial or administrative authority (in other words, by a judge or the headmaster of a school, for instance); or
- ___ through the medium of a representative or an appropriate body.

In the second example, the authority will designate a person who will be responsible for undertaking this hearing. In most cases, this task of seeking the child's view will be entrusted to a specialist (psychologist, psychiatrist, teacher, person of trust). In such instances, the hearing will usually take place outside the tribunal, in a professional setting or other suitable environment. Special surroundings will be offered to the children in order that they may feel at ease. Many techniques may be used, in particular audio or video recordings, or the presence of a judge behind a two-way mirror. Some courts have social or psychological services directly linked to the tribunals, enabling them to call upon trusted professionals on short notice.

The style of hearing will also depend on the importance, difficulty and stakes of the case, the child's age, problems specific to a child, potential consequences (alienation), as well as the training/preparation/sensitivity of the judge or professional who will make a final decision.

Whenever possible, direct hearing of the child ought to have priority for the authority making the decision. The final opinion will undoubtedly be different if there has been direct contact with the child rather than through an intermediary, including written reports – regardless of how comprehensive they may be.

A major challenge is training of the magistrate or other decision-makers. In most countries, magistrates are not sufficiently prepared for, or dread, this task. They may fear direct confrontation with the child; are afraid of not knowing how to talk to the child or that they may upset the child. It is not easy to improvise as a "listener" in such matters and this operation calls for considerable sensitivity, empathy, and tact (or "feeling").

How much value is to be attributed to the child's opinion?

It is difficult to answer this question in absolute or abstract terms. Each child is a distinct case and the value and weight to be given to her/his opinion will depend on her/his age, maturity, development; her/his understanding of the situation; the consequences she/he will necessarily suffer; her/his dependence on the persons around her/him; who is involved in the decision to be made; what is the child's capacity to express abstract ideas or valid assessments; how much the child trusts the adult hearing her/his view, etc. In all family conflicts; in criminal proceedings where the child's testimony is essential; where she/he is accusing someone of a criminal act; or in any administrative procedure where a decision will have significant consequences (i.e. relating to expulsion from school or other disciplinary procedures, decisions concerning asylum, etc.), the environment is not neutral and conflicts of interest will abound.

What seems to be the core element on which the decision will rest is the child's maturity, in other words her/his capacity to express her/himself in a reasonable, sincere, and objective manner on difficult and delicate matters. The age of the child is therefore only one element to be taken into account. Some children

are mature at an early age and able to express a valid opinion. Others develop more slowly and may have difficulty expressing themselves, even in non-verbal ways. So there are, in addition to the age of the child, other elements to be taken into account, in particular, the child's capacity to understand the problem at hand and her/his capacity of forming her/his own opinion.²¹

It is therefore quite difficult to reach a clear and objective verdict based on the opinion of a child, all the more so when a judge has not seen the child face-to-face. Moreover, justice has recourse to expert opinions on the development of the child to determine the child's capacity for discernment or to so-called credibility tests,²² that is, expert opinions on the value of the child's statements under particular circumstances. Expert opinions are not judgments of the child, but are an assessment of the conditions surrounding the hearing of the child's view and the likelihood that the view expressed is authentic.

The scope of the child's view

While the judge or the decision-making authority must hear the child systematically, with the exception of very young children, Article 12 does not provide guidance on what the scope of this opinion should be, but only notes that such views must be taken into account. Clearly, this is a vague concept.

The States parties are likewise reluctant to decide on the weight that should be given to the child's view in proceedings. The scope will, of course, change in accordance with the variables mentioned above (i.e. age, maturity of the child, nature of the case etc.). The judge, however, is not bound by this view and the weight attributed to the child's view will depend on the context and other elements of the case in

question. The child's view is therefore generally considered to be one component of a case and not the decisive element of proof. The same is true when applying Article 3(1) of the CRC: The child's interest is often one of many potentially competing interests which must be weighed in relation to other interests.

The child's view: Building the future

In order to ensure that the decision-making processes which involve the child proceed in a constructive manner, 4 phases are proposed:

- 1. phase:** Informing the child: why is she/he being heard;
- 2. phase:** Noting of the child's opinion under the conditions described above;
- 3. phase:** Decision-making process, exclusive competence of the adults; and
- 4. phase:** Application of the decision, information may be conveyed to the child concerning how their view has been used (this phase is often avoided).

The impact of the child's participation in this whole process is potentially beneficial because it renders her/him an active player in the decision; strengthens the child's capacity of communicating with adults (bond between generations); contributes to her/his understanding of the systems of social life; fosters her/his confidence in her/his own voice; strengthens the child's resistance, self-reliance, resilience, and therefore serves as a form of self-protection, providing the child with skills that could be used to demand full enjoyment of her/his rights. Participation is, without doubt, an indispensable passage in the child's enjoyment of the rights of the child.

Let us never forget one of the key points in this issue: That the child has a right to be informed of her/his situation. The time when the child is being heard, either directly or via an intermediary, is the appropriate time to inform that child of her/his real situation, the stakes, the demands of the parents, the potential consequences and her/his rights. In my view, this right to be informed is essential when the child is being heard, and must be an integral part of the hearing. It might also be said that once the child has been informed, it may no longer be necessary or opportune to have a more detailed hearing.

On the other hand, what must be absolutely avoided is holding the child responsible for making the final decision. There are a number of situations, particularly in family cases (relating to divorce, custody, visitation rights, parental kidnapping of children), where adults are tempted to make the child choose. Therefore, in the questioning phase, the approach must be rigorous and specialized and undertaken with sufficient empathy to enable the child to freely express her/his view on the situation without pressure or coercion. The question of choice must remain exclusively within the competence and responsibility of the decision-making authority (judge, mediators, headmaster of a school, head of a protective service, or other intermediaries).

Does the child always state the truth?

This question leads us into a controversial debate where psychologists, psychiatrists, and legal experts have vastly divergent points of view which are frequently supported by their "disciples." Based on my courtroom experiences, I would argue that the statement that "the child always tells the truth" is as wrong as the one that claims "children always lie."

The role of the adult

Clearly, primary responsibility lies with adults whenever a child is called to give her/his view, bear witness or express her/his opinion on a decision that concerns her/his life. I believe that the adult's role in assessing the validity of the child's statement is decisive and that in each case, adults as parties in the procedure (judicial or administrative) have three levels:

___ the parent/parents: It is in proceedings where parents are involved (separation, divorce, visitation rights, kidnapping, incest, abuse) that pressure may be exerted and loyalty conflicts arise;

___ the decision-maker (judge, director or listener): This person has the difficult task of creating an environment of trust to hear the view of the child and must act in accordance with a clear protocol in successive stages²³ in order to find out the truth. "The problem consists in hearing the child and being ahead of him/her just enough, while refraining from superimposing one's adult expressions and one's own fantasies."²⁴

___ third party: The person that might be affected by the hearing (due to allegations of abuse, maltreatment, etc.) who may attempt to use the rights of defense to impress the child and make her/him change her/his testimony, to have the child retract her/his statements by using legal or psychological means to make her/him doubt her/his testimony, or worse, to "victimize" the child a second time.

In my opinion, the adult has another, very important responsibility, namely, what to do with the child's statements, not only when making the decision, but also after the child has made her/his deposition. More specifically, what aid

should be given to the child, in accordance with the effect of the child's statements on her/himself and on the other parties concerned? As a rule, the act of giving evidence in a court case will not be neutral and may have serious consequences for the child's future. It is, therefore, not sufficient to merely hear the child's view and to attribute it appropriate weight. One must also be concerned with the effects of the hearing. The CRC does not mention anything about this aspect of the child's statements. For me, this is a logical consequence of the decision-maker's intervention. The integration of help, support, and advice to these children ought to be an integral part of the process and the preparatory training given to professionals working in this field.

Finally, after the decision has been made, the child ought to be informed of the decision that has been taken and the role that the child's statement played in the process, specifically whether the child's arguments were taken into account or not and why. If a child is to abide by a decision, it needs to be explained to her/him. I feel that this practice is not sufficiently widespread and that often sentences, ordinances, or other administrative decisions are made known to the adults in a case, but rarely to children.

The child's view in the community

If hearing the view of the child in legal and administrative proceedings is more or less well organized, what is the role of the child with respect to public life?

Participation?

Can Article 12 of the CRC be interpreted differently, and can we really speak of participation by the child in public/political life?

To begin, let us state that there can be no question about political rights granted to children, such as expressing one's view by voting or participating in an election. In most States, the minimum voting age is 18 years, or older in some cases, although a number of countries speak of lowering this minimum to 16 years of age. Generally speaking, then, it is clear that children have no political rights *per se*.

How can they participate in community life?

A verbatim reading of Article 12 does not provide that the child has a right to participate in the life of the town. In fact, Article 12 limits the application of hearing the view of the child to "all matters affecting the child" with a direct tie between the subject being discussed and the child. If this appears to be only valid for the type of proceedings outlined above, (cf. item IV, litt c above), we must not forget that Article 12 must be read in relation to Article 13 which provides for the right of the child to freedom of expression, that is, freedom to give her/his opinion on "ideas of all kinds."

Moreover, the right to express one's opinion is tied to the realization that the child has the right to access quality information originating from different sources (Art. 17). The right of expression is thus a double-sided one relating both to receiving and disseminating information.

One can also see that Article 12 is linked to Article 15 which grants to the child, or children, the right to freedom of association and to peaceful assembly and thus to playing a role which largely expands the one elaborated by judicial and administrative authorities in verbatim readings of Article 12.

If there were a need for further argumentation, we might refer to General Comment No. 5 of the Committee on the Rights of the Child.

This commentary on the measures of general application of the Convention²⁵ recommended the following in paragraph 12 (comment to Art. 12):

“Associating the children to the decision-making process by the public authorities is a positive task to which, according to the Committee, the States adhere more and more. There is all the more good reason to assure that the authorities and Parliament respect the child’s opinion who has not yet attained full age because the States having lowered the voting age to below 18 years are rare ... Although it is easy to give the impression that children are heard, attributing the desired weight to their opinions, however, requires a genuine change. The hearing of children must not be considered as an objective in itself, but rather a means for the States to assure that the interaction with the children and their actions in the latter’s favor be more focused on the application of the rights of the child.”

Consequently, if Article 12 is read in its wider meaning, it clearly answers the question concerning the child’s participation in public life, even though, as I previously stated, the Convention does not explicitly use the word “participation.” I believe that the State ought to hear children (collective) whenever a project is initiated that may be of interest to them. If we see it in parallel with the best interest of the child, we will notice that Article 3(1) speaks of the obligation of legislative bodies to take into account the child’s best interest when legislation is being adopted.

Is hearing the views of the children not one means of taking account of their best interest? It cannot be disputed that children often have something to say about large societal projects if we examine past efforts of States to in-

clude them in public (and political) life, including through youth parliaments, consultations, organized fora, wireless broadcasts, TV, newspapers targeted towards children etc. We may take the example of the Children’s World Summit organized in New York City in May 2002, where for the first time, in addition, children have actively participated in the “junior” summits accompanying the yearly G8 meeting.²⁶

A recent article by sociologist Michel Fize²⁷ highlighted the needs of adolescents, which included among them the need for responsibility: “The child must be taught this exercise (of responsibility) quite soon. As an adolescent, she/he must take her/his place in the community, think things over alongside her/his seniors, to invent a fairer, more equitable society, showing solidarity, for the child suffers most from social uselessness; young people get the impression that they are ‘rejects,’ so their intelligence is always unused.” Therefore, make them responsible by having them participate.

Forms²⁸

The best known form of children’s participation, which is also quite widespread at the communal, cantonal, and federal levels in Switzerland, is the Youth Parliament.²⁹ The goals of such institutions are to prepare children for the future exercise of their political rights; to improve their knowledge of the political system of their country/region/town; to develop their skills in managing public affairs; in short, to become responsible future citizens. The question to be asked is whether or not these bodies will be driven by the children or if they are merely the product of adults or simply an exercise for appearance.

There are other popular forms of youth participation fora, such as youth associations or

youth clubs. These examples are widespread in Nepal,³⁰ where, according to its State party report presented to the Committee on the Rights of the Child in 2005: "... there are more than 1500 children's clubs and groups established throughout the country providing the children an opportunity to express their views on matters concerning themselves, their family, community institutions, schools, in all forums from the Village Development Committees at the local level to district and national levels."

In addition, it is certainly within the realm of schools to encourage child participation, where highly developed forms of participation exist, including "Class Councils," pilot organizations of schooling institutions, editing Charters of educational establishments, student associations, or representation in parent-teacher associations.

Do we know of any examples where children are involved in the consultation process for the drafting of national-level legislation (i. e. relating to education, health, the environment, public security) or else in the elaboration of action plans, in particular, with regard to the Convention? We have to admit that, at least in our country of Switzerland, there is very little to be said on this matter. Children are occasionally represented (or heard through other parties), but rarely are they heard by community, cantonal, or federal legislators.

With regard to the situation in Switzerland, the UNICEF-Suisse study "Giving Children a Voice"³¹ is worthy of note. This study, carried out under the academic management of the Pedagogic Institute of the University of Zurich, was sent to 12,872 children and adolescents from all over Switzerland who answered a very detailed questionnaire.

The study concluded that children and adolescents living in Switzerland are interested in expressing their opinion on all issues concerning them; "... They have ideas concerning their participation in the thinking, the discussions, and the decision-making. They are committed to children's rights in Switzerland and are interested in the evolution of the community in general. It also turns out that – in their view – the possibilities of their participation are substantial in the family (48%), less so in school (39%), and essentially non-existent in the community (7%)."³² It will be of interest to hear examples of children's participation in Switzerland.³³

And as for the child in the community? She/he already has a place there, but for the moment, it is a limited one. Children must be given the opportunity to express themselves freely and more frequently, and the favorable conditions necessary to bring this about must be created.

Conclusion

Having been in existence for 18 years, the Convention on the Rights of the Child ought to be well-known and fully implemented at the national level by now in order to ensure respect for the child as a whole person. This statement is, unfortunately, only partially true, both from the point of view of knowledge about the rights of the child as well as with regard to its application. The cases of rights violation come more easily to mind than the cases of good practice.

Taking into account the child's best interest and hearing the child's view are compulsory steps that must be taken by all those who have a role in deciding on the child's future in legal proceedings. But in the opinion of the Committee, this must also take place in the private life of the child (in the family) and equally so in public life (for instance, in school), not

to mention in politics. It is essential to consider the child as a person who needs to be educated, cared for, loved and protected, as well as someone deserving of instruction on how to exercise their rights to participate as a partner with adults; a person with equal dignity and rights like all other persons.

Bringing this about is our responsibility as adults. There is, however, a long stretch of road still to be covered as the rights of the child, in their participative form, have yet to become normal practice.

Sion, July 2007

EDITORS

Jean Zermatten was born in 1948, in Sion, Switzerland;



he is married and is the father of two children. He studied law at the University of Fribourg and was appointed to Clerk, then Judge “ad hoc” at the Youth Court for criminal matters in Fribourg (Switzer-

land). From 1980 to 2005, he acted as President and Dean of the Juvenile Court of the Canton of Valais (Switzerland). In 2005, he was elected as a member of the UN Committee for the Rights of the Child. He is currently Vice-Chair of this Treaty Body. In 1994, Jean Zermatten founded the International Institute for the Rights of the Child (IDE), located in Sion. In 2002, he initiated and launched the Executive Master of the Rights of the Child, in collaboration with the University of Fribourg and the Institut Universitaire Kurt Bösch. He assumed different responsibilities at the national and international levels, in particular: 1994–1998 as President of the International Association of Magistrates for Youth and Family (IAMYF); 1984–1990 as President of the Swiss Society for Criminal Law for Juveniles. He wrote several articles in Swiss or foreign journals on Criminal Law related to Juvenile Justice, Children’s Rights, Drug Addiction, etc.; he has edited books on the same topics (see www.childsrighs.org) and is the author of “Tribunal des Mineurs. Le petit tailleur et autres histoires de galère,” Editions Saint-Augustin, Saint-Maurice, 2002, “Les droits de l’Enfant, 12 contes pour ne pas s’endormir,” Editions Saint-Augustin, Saint-Maurice, 2004. He was lecturer at the University of Fribourg, gives numerous training courses at the national or international levels, and is an expert on juvenile matters.