

# RETHINKIN: PARENTS & CHILDREN

## CHILDREN'S PROCEDURAL RIGHTS IN FAMILY CASES: A COMPARATIVE OVERVIEW

### *PLEA FOR A MINIMUM AGE & FOR MORE RESEARCH*

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# TREND & BASIS

- Trend: strengthening the procedural rights of minor children
- Basis: 12 CRC - The right of the child to be heard
  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.

# 12 CRC

- Paragraph 1:
  - The child who is capable of forming h/h own views
    - Every child: presumption that a child has the capacity (GC, sub 20)
  - Right to express views
    - In all matters affecting the child
  - Due weight to the views
    - In accordance with the age and maturity of the child
- Paragraph 2:
  - The opportunity to be heard in *any judicial proceedings* affecting the child

# 12 CRC

- General Comment on 12 CRC:
  - ‘participation’
    - ‘views taken into account and shape the outcome’ (sub 3)
    - ‘views expressed by children may add relevant perspectives and experience and should be considered in decision-making’ (sub 12)
    - ‘recommends (...) the opportunity to be heard directly in any proceedings’ (sub 35)
  - ‘no age limit’:
    - presumption of capacity of forming views (sub 20 and following)

# FUNCTION OF HEARING CHILDREN

- Participation vs Evidence
  - Participation: right of the child
    - Voice & Choice
    - Empowerment
    - Quality of decision making: which decision is in the best interest of the child? (3 CRC)
  - Evidence: for the benefit of the outcome of the procedure between the parents
    - Which parent wins the case?
- Trend: towards participation

# PARTICIPATION TREND IN EUROPE

- EHRM: shift from Evidence towards Participation
  - Sahin/Germany (2004): evidence
    - ‘As regards the issue of hearing the child in court, the Court observes as a general rule it is for the national courts to assess the evidence before them, including the means to ascertain the relevant facts’
  - M. en M./Croatia (2015): personal autonomy
    - ‘Right to personal autonomy’ (based on 8 ECHR)
    - ‘This circumscribed autonomy in case of children, which gradually increases with their evolving maturity, is exercised through their right to be consulted and heard’

# PROCEDURAL RIGHTS OF CHILDREN

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- Right to be heard
- Legal counsel and representation, e.g. guardian ad litem
- Access to court:
  - Right to initiate proceedings
  - Informal access to the judge
- Information and consultation. e.g.:
  - Access to documents in court file
  - Involvement parenting plan

# RIGHT TO BE HEARD: ISSUES

- Minimum age?
- Directly or indirectly?
- Environment:
  - judge in gown?;
  - in court room or in child friendly room or virtually?
- Confidentiality vs fair trial/equality of arms
- Feedback to the child



Child friendly room District Court Amsterdam



# CRC: NO AGE LIMIT

- General Comment on 12 CRC, sub 21:

The Committee emphasizes that article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in practice which would restrict the child's right to be heard

# COE: NO AGE LIMIT

- COE Guidelines on Child-Friendly Justice

Guideline IV.D.47:

A child should not be precluded from being heard solely on the basis of age. Whenever a child takes the initiative to be heard in a case that affects him or her, the judge should not, unless it is in the child's best interests, refuse to hear the child and should listen to his or her views and opinion on matters concerning him or her in the case.

Explanatory Memorandum, sub 34:

States are discouraged from introducing standardised age limits.

# EC: NO AGE LIMIT

- EC Policy Brief Children's involvement in judicial proceedings, p. 12:

The right to be heard should not be subject to any age limit or other arbitrary restrictions, either in law or in practice

# LEGAL COMPARATIVE OVERVIEW

No minimum age (e.g.): CZ, EE, HR, PL, UK-E&W

Minimum age (e.g.):

- 6 (NL-child abduction)
- 7 (FR-family cases)
- 8 (NL-pilot district court Amsterdam)
- 10 (BG, RO, EE-custody&visiting rights)
- 12 (BE, NL, UK-S; ES, FI-custody&visiting rights)
- 13 (FR-name change)
- 14 (DE, ES, PT, CY for boys!)
- 15 (FI)
- 16 (NL-maintenance, CY for girls!)

→ below minimum age: discretion of judge to hear younger children

# SEIN UND SOLLEN

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- International instruments and sources:
  - no age limit
- Domestic law:
  - several minimum ages: 6-16 years
  - EC Policy Brief 2015: 'MS have adopted a selective and inconsistent approach in this regard'

# AGE LIMIT: PROS & CONS

## Pro:

- Objectivity
- Legal certainty: initiative
- Practical and organizational reasons
- Efficiency, financial reasons?

## Contra:

- Rigid
- Arbitrary
- Presumption: every child is capable of forming and expressing views
- Burden of proof of capacity lies with younger child
- *Cf. COE Guidelines on Child-Friendly Justice, Expl.Mem., sub 95*



# SOME THOUGHTS FOR FURTHER DISCUSSION AND RESEARCH

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- Plea for minimum age
  - Minimum age seems to contribute to hearing children more often
  - Recommendation: more comparative, empirical-legal research on numbers of children heard in jurisdiction with or without age limit

# SOME THOUGHTS

## FOR FURTHER DISCUSSION AND RESEARCH

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- Towards a more uniform minimum age, and if so what age?
  - From 8 years: clear distinction between fact & fiction
  - Recommendations:
    - more multidisciplinary research on the capability of children to form and express their views;
    - more multidisciplinary research on the carrying capacity of younger children being heard by a judge;
    - More empirical-legal research on the financial and practical feasibility of hearing also younger children;
    - Environment: more discussion and research on the possibilities of virtually hearing younger children
      - cf. Susskind, *Tomorrow's Lawyers*





THANK YOU FOR YOUR  
ATTENTION!