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CHILD-FRIENDLY JUSTICE

Past, present and future

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Introduction

Child-friendly justice is now an established concept in European juvenile justice, used to articulate the extent to which children's rights are protected in judicial and other decision-making processes. The substance and language of child-friendly justice is associated with the Council of Europe's *Guidelines on Child-Friendly Justice*, a soft law instrument adopted by the Committee of Ministers in 2010. Building on international law, including the Convention on the Rights of the Child (CRC) and the case law of the European Court of Human Rights, the *Guidelines* were the first instrument to present, in a *holistic manner*, the key elements of the justice system from a children's rights perspective.¹ They are important because they set out in a practical way the obligations on states to protect children's rights in the juvenile justice system.

The aim of this chapter is to situate the *Guidelines on Child-Friendly Justice* within the context of contemporary juvenile justice. In this way, we will trace the recent history of child-friendly justice, explain the Guidelines adopted in 2010 and examine the implementation of the Guidelines with reference to recent EU studies that have sought to evaluate the extent to which child-friendly justice is observed in practice. Following the analysis of the current state of play, the chapter proceeds to assess critically the future direction of children's rights within juvenile justice and identifies some of the challenges that lie ahead.

Key principles of child-friendly justice

The *Guidelines on Child-Friendly Justice* (hereinafter: Guidelines)² provide the principles considered necessary to ensure that 'all rights of children' are fully respected, both in formal judicial proceedings and also in alternatives to such

proceedings.³ They deal with ‘the place and role, and the views, rights and needs of the child in [judicial and alternative] proceedings’⁴ and provide practical guidance for the 47 Council of Europe’s Member States to ‘give a place and voice to the child in justice at all stages of the procedures’.⁵

According to the Guidelines:

‘[C]hild-friendly justice’ refers to justice systems which guarantee the respect and the effective implementation of all children’s rights at the highest attainable level, bearing in mind the principles listed below and giving due consideration to the child’s level of maturity and understanding and the circumstances of the case. It is, in particular, justice that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.⁶

The concept of child-friendly justice has developed as a result of the emergence of international and European children’s rights law. Under international children’s rights law, children are recognised as bearers of human rights, entitled, among other things, to participate effectively in matters affecting them, including in criminal justice proceedings. ‘Effective participation’ is one of the core concepts underlying the Guidelines and finds its legal basis in the child’s right to be heard (art. 12 CRC) and right to a fair trial (art. 40 CRC and equivalent provision in international and regional human rights treaties, including art. 6 of the European Convention on Human Rights (ECHR)).

The European Court of Human Rights (hereinafter the European Court) has incorporated the child’s right to be heard in its case law under article 8 ECHR on the protection of private and family life. Particularly in cases concerning access and custody matters, international child abduction and child protection, the Court has recognised the right to be heard as part of the assessment of the best interests of the child (Kilkelly 2015: 193–195).⁷ In addition, the European Court has recognised the right to effective participation as part of the child’s right to a fair trial under article 6 ECHR (Kilkelly 2015: 197), a position that was later endorsed by the UN Committee on the Rights of the Child in its 10th General Comment on ‘Children’s Rights and Juvenile Justice’ (Kilkelly 2015: 193; United Nations, 2007). In its groundbreaking judgments *T v. UK* and *V v. UK* (i.e. the 1999 ‘Bulger case’), the European Court ruled, with explicit reference to article 40 of the CRC, that ‘It is essential that a child charged with an offence is dealt with in a manner which takes full account of his age, level of maturity and intellectual and emotional capacities, and that steps are taken to promote his ability to understand and participate in the proceedings’.⁸ The Court found that the two 11-year-old boys that stood trial for murdering a toddler, were unable to participate effectively and therefore had not received a fair trial. The court held that it was ‘highly unlikely’ that these boys:

would have felt sufficiently uninhibited, in the tense courtroom and under public scrutiny, to have consulted with [their lawyers] during the trial or, indeed, that, given [their] immaturity and [their] disturbed emotional state, [they] would have been capable outside the courtroom of cooperating with [their] lawyers and giving them information for the purposes of [their] defence.⁹

Later, the European Court ruled that the child's right to a fair trial does not require that s/he should 'understand or be capable of understanding every point of law or evidential detail,' but that "effective participation" in this context presupposes... a broad understanding of the nature of the trial process and of what is at stake... including the significance of any penalty which may be imposed'.¹⁰ In light of this, the Court also referred to the significance of the right to legal representation (see art. 6 (3) ECHR; see also art. 40 (2) CRC).¹¹

The UN Committee on the Rights of the Child (hereinafter the CRC Committee) has also recognised effective participation as an essential requirement for the right to a fair trial. In its General Comment No. 10, the CRC Committee states that:

[a] fair trial requires that the child... be able to effectively participate in the trial [and that as part of that the child] needs to comprehend the charges, and possible consequences and penalties, in order to direct the legal representative, to challenge witnesses, to provide an account of events, and to make appropriate decisions about evidence, testimony and the measure(s) to be imposed.

United Nations, 2007: para 46

The CRC Committee also underscores the significance of acknowledging that juvenile justice proceedings 'should be conducted in an atmosphere of understanding to allow the child to participate and to express herself/himself freely'.¹² Furthermore, in its General Comment No. 12 on the child's right to be heard, the CRC Committee elaborates by providing that '[a] child cannot be heard effectively where the environment is intimidating, hostile, insensitive or inappropriate for her or his age' (United Nations 2009: para 34). Proceedings must be accessible and child-appropriate, therefore, which also means that '[p]articular attention needs to be paid to the provision and delivery of child-friendly information, adequate support for self-advocacy, appropriately trained staff, design of court rooms, [and] clothing of judges and lawyers' (United Nations, 2009: para 34). The CRC Committee also emphasises the importance of conducting court and other hearings *in camera*, aimed at enabling the child to participate, and that "[e]xceptions to this rule should be very limited, clearly outlined in national legislation and guided by the best interests of the child" (United Nations 2009: para 61). Furthermore, the CRC Committee states that accessible information is essential for effective participation. In the context of juvenile justice this means that 'every child must be informed promptly and

directly about the charges against her or him in a language she or he understands, and also about the juvenile justice process and possible measures taken by the court' (United Nations, 2009: para 60).

In sum, the Guidelines build on the case law of the European Court of Human Rights and the General Comments of the CRC Committee and provide further guidance to Council of Europe's Member States on how to ensure that juvenile justice systems are child-friendly, that is: mindful of the child's right to be heard, her/his right to a fair trial and her/his related right to participate effectively. This necessarily includes: access to information; protection of private and family life; access to legal counsel and representation; avoiding undue delay; the provision of an appropriate environment in and around judicial proceedings (including after disposition); and child-specific training for professionals. Before reflecting more critically on the added value of the Guidelines, we will review the drafting of the Guidelines.

Drafting the *Guidelines on Child-Friendly Justice*: consultation with children and young people

In 2007, the European Ministers of Justice adopted Resolution No. 2 on child-friendly justice, thereby entrusting the competent bodies of the Council of Europe to prepare European Guidelines on Child-Friendly Justice. The Guidelines were drafted in close cooperation with the programme 'Building a Europe for and with Children', which made child-friendly justice one of the core pillars of the Council of Europe's Strategy on Children's Rights for 2009–2011. The drafting process was undertaken by a group of 17 specialists – set up for this precise purpose under the remit of the European Committee of Legal Co-operation (CDCJ) – comprising judges, lawyers, prosecutors, academics, psychologists, police officers, social workers and representatives of the governments of the member states. A wide range of observers, including representatives of leading international intergovernmental and non-governmental organisations such as the Children's Rights International Network (CRIN), Defence for Children International and the Children's Rights Alliance for England (CRAE) also contributed to this work. An independent scientific expert was appointed to the Committee (the former Flemish Commissioner for Children, Ms Ankie Vandekerckhove).

The drafting process took place over a period of two years during which time general principles were agreed and key issues identified. Initial discussion focused on the nature of the instrument being proposed and it is significant that there was insufficient support from States Parties to adopt the stronger of the Council of Europe's non-binding instruments – a 'Regulation' – and so the status of 'Guidelines' applied. It was accepted, as a general principle, that the Guidelines should not go beyond the standards already set out in international law and this undoubtedly limited the drafting process, while it also gave it a clear scope. Contentious issues included the age of criminal responsibility (the Guidelines simply repeat the CRC standard and

disregard the standpoint of the CRC Committee) (United Nations, 2007: para 32), children deprived of their liberty (agreement was reached to include a limited section on this issue) and the question of whether judges should be required to be subjected to police vetting. The participants were unable to agree over a requirement to have proceedings involving children determined by specialist courts and thus the Guidelines are limited to recommending that Member States should further explore this principle.

It was a significant innovation of the drafting of the Guidelines – under the auspices of the Council’s Children’s Rights Division – that the process was informed by the views of children consulted specifically for this process. Likely to be the first instance of children participating in the international law-making process, this consultation sought to ensure that the Guidelines themselves were underpinned by a rights-based process, taking children’s views and experiences of the justice system into account by means of a randomly administered survey of almost 3,800 young people from 25 Council of Europe countries. This data was enriched by a range of focus group discussions conducted with particularly vulnerable groups of children (including those in detention, refugee children and those whose relatives are in prison), and some national organisations submitted reports giving context to the consultation exercise and providing further information on the impact of the justice system on children. The consultation process was inevitably experimental, and while the data cannot be taken to be fully representative, it does provide an important insight into the experiences and perspectives of children and young people in respect of juvenile justice (Kilkelly, 2010).

About the children and young people

The respondents ranged in age from a small number of children aged 5–10 years to the majority who were aged between 11 and 17 years, about half of whom were under 15 years. An almost even number of boys and girls completed the questionnaire. The majority of children who participated in the survey had some level of contact with the justice system in either its civil (usually education or public or private family law) or its criminal (juvenile justice) context.

The views of the children and young people: information about their rights

When asked about their need for information, a very high proportion of the children and young people surveyed wanted more information about their rights. When asked who they wanted that information from, the majority chose their parents or others in a position of trust. Youth workers, and – to a lesser extent – lawyers and teachers, featured strongly. When asked where they wanted to source this information, the internet was the most popular choice, with other media – notably television – featuring strongly along with community-based services,

including advertisements in health and social services offices, police stations and other public facilities. Schools were also identified as a good place to provide and promote information.

Obtaining justice

Children were asked whether they would tell someone if they were unhappy with how they were being treated. The majority said they would and parents, friends and siblings were identified overwhelmingly as the preferred confidantes. Virtually all other individuals/agencies – including official or public persons, health workers, teachers, youth/social workers, police officers and lawyers – were rarely identified, suggesting strongly that professional bodies do not always enjoy young people's trust. The two most common reasons for young people opting not to share their feelings were that they could handle the situation themselves or that they did not think that they would be believed and/or taken seriously.

Decisions made about the children and young people

Children were asked to identify what decisions had been made about them. They referred to decisions that had been made by judges, police officers or teachers in the areas of family law, including care, criminal law and education. A small majority of children reported being present when decisions had been taken about them but less than half said that they had been offered an explanation as to what would happen as a consequence of such decisions. Just over a third of the children and young people who completed the survey reported that they had been asked for their views and less than a third felt these views had been taken seriously. A third of the children and young people felt they had not been treated fairly. A significant majority reported that they had been supported through the process and about half explained that the decision had been made in a setting in which they felt safe and comfortable. When asked about what would have helped, the substantial majority of the children and young people referred to having someone who they trust to be present. Almost two thirds of the respondents said that they understood the decision made and a similar number reported that it had been explained to them. Children were asked who they would prefer to explain the decision to them and, in response, they identified a family member. Children and young people clearly valued direct explanations, preferably from the decision-maker him/herself. A large majority of children who responded considered it important to be heard, and an overwhelming number wanted to speak directly to the person making the decision, rather than having their views mediated or moderated by others.

When asked about the key principles that the Guidelines should embrace, children and young people placed particular emphasis on:

- being treated with respect;
- being listened to;

- being provided with explanations in language they understand, and
- receiving information about their rights.

Key themes

A number of key themes emerged from the analysis of the consultation with children and young people including a strong emphasis on the importance of family, a general mistrust of authority and a consistently expressed desire to be heard. The importance of family in the lives of children resonated loudly from the survey. Indeed, in every instance when children and young people were asked who they wanted to be present, who they would confide in and who they preferred to receive information and explanations from, they identified parents, siblings and friends above all others. In contrast, the survey revealed a distinct mistrust of authority on the part of the children and young people and those who expressed a view were critical of many officials – police, lawyers and others – for not treating them with respect, for failing to appreciate their particular needs as children and for not showing them empathy. As a related point, the survey made clear that children and young people want, sometimes desperately, to be heard; they want to receive information that they can understand, and they want to be supported to participate in decision-making processes that have a direct bearing on them.

Many of the concerns raised by the children and young people in the consultation found their way into the final version of the Guidelines. Although it would clearly have been preferable to have had children and young people directly involved in the drafting process, it is important that their views informed the end result, especially during the final stages of drafting.¹³ Changes were made to ensure that the Guidelines responded effectively to what the children and young people had communicated about their experiences of justice and, overall, a genuine effort was made to ensure that their views were taken into account in the detail, scope and content of the Guidelines. In particular, the views of children and young people supported the extent and manner in which the Guidelines recognise the right of children to be heard, to receive information about their rights, to have access to independent representation and to participate effectively in decisions that have a direct bearing on them. The wording in all relevant sections was strengthened in these respects with reference to the outcome of the consultation process. For example, the final version of the Guidelines requires judges to respect the right of *all children* to be heard in *all matters*, and they require that the means used to facilitate such are individually tailored to each child's understanding and ability to communicate and explicitly take into account the specific circumstances of each case. The weight attached to the consultation also ensured that adequate provision was made in the Guidelines for children and young people to receive feedback on the weight attached to their views and it strengthened an emphasis on the nature of support that children should be provided with before, during and after contact with the justice system. Particular consideration was given to the role of parents and other trusted adults in accordance with the preferences that children and young people

had articulated. Furthermore, the findings of the consultation provided support for the child's/young person's unequivocal right to access independent and effective complaints mechanisms at all stages of the justice system and for specialisation and comprehensive and ongoing training for all professionals who come into contact with children in the justice system. This was considered vital in order to address the lack of trust in authority that the children and young people had expressed throughout the consultation.

Critiquing the Guidelines

Before examining the (potential) impact of the Guidelines alongside the challenges concerning their implementation, we will briefly reflect on their content and their legal status (see also, Liefwaard, 2016). Earlier we touched upon the drafting process in which the Member States decided that the Guidelines should not extend beyond the standards already set out in international law. Indeed, the Guidelines are rather weak at certain points or do not really add anything new. This is especially true for the minimum age of criminal responsibility – which compared to the position taken by the CRC Committee (United Nations, 2007: paras 30–35) could even be regarded as a setback – and the absence of a strong case being made for the provision of specialised courts. In addition, the references to deprivation of liberty do not really extend the reach or depth of existing international standards but simply reproduce existing provisions such as Article 37(b) and 37(c) CRC. It is nevertheless significant that the Guidelines reconfirm that the deprivation of liberty may only be used as a measure of last resort and for the shortest appropriate period of time, and that children deprived of their liberty are entitled to human rights protections, specifically in light of their vulnerability.

Indeed, the particular vulnerabilities of children in juvenile justice systems have been recognised under international children's rights law, including the case law of the European Court. It requires that children are protected against the imposition of (additional) hardship and are treated in a manner that respects their human rights and dignity. In addition, the Guidelines provide further direction on both the protection and participation that should be afforded to children and young people before, during and after judicial proceedings. With regard to children's involvement with the police, for example, the Guidelines recommend that Member States should ensure that '[w]henver a child is apprehended by the police, the child should be informed in a manner and in language that is appropriate to his or her age and level of understanding of the reason for which he or she has been taken into custody'.¹⁴ The Guidelines also provide that children and young people in conflict with the law should be given access to a lawyer and the opportunity to contact parents or someone whom they trust.¹⁵ Parents should in principle be informed about the arrest of their child and the reasons behind it, and they should be invited to come to the police station.¹⁶ The Guidelines further provide that a child in police custody should not be questioned 'except in the presence of a lawyer or one of the child's parents or, if no parent is available, another person whom the child

trusts'.¹⁷ Stimulated by the case law of the European Court of Human Rights,¹⁸ the Guidelines are also more concrete than the CRC (art. 40 (2)) and related standards such as the Beijing Rules, when it comes to access to a lawyer and the presence of a lawyer during police interrogations. At the same time, however, the Guidelines are not clear on, and are even silent on, some important issues.

First, the Guidelines refer to other forms of assistance, such as parental support, while the relevance of legal assistance for children in this particular phase of the criminal justice system should not be underestimated. The CRC Committee states that the person assisting the child 'must have sufficient knowledge and understanding of the various legal aspects of the process of juvenile justice' (United Nations, 2007: para 49). The assistance or presence of parents (or other caretakers) should be seen as a right *additional to*, rather than *instead of* or an *alternative to*, the right to legal representation. Parents have an important role to play in supporting the child emotionally and their involvement can also contribute to the effectiveness of the response to the child's offending (United Nations, 2007: paras 54–58); an approach that is in line with how important family is for children, based on the consultation of children mentioned earlier. However, this should not be taken to mean that children have to choose between parental support and the support of a lawyer.

Second, the child's right to waive legal counsel is also overlooked in the Guidelines. Although the European Court leaves open the possibility for children to waive their right to legal assistance, children have an interest in *mandatory* legal assistance, particularly in juvenile justice proceedings when the child faces police interrogation and questioning (Liefwaard and Van den Brink, 2014). International consensus on this issue appears currently to be out of reach. For instance, although the European Commission's proposal for the new EU Directive originally included mandatory legal assistance, this condition did not make it into the final version of the instrument. The adopted text of the EU Directive on procedural safeguards for children in criminal proceedings (hereinafter the EU Directive)¹⁹ leaves room for States Parties *not to provide* for legal counsel if this is regarded as disproportionate. In addition, it does not explicitly provide that legal assistance is mandatory. This appears to be at odds with article 37(d) CRC which provides for the child's right to legal *and* other appropriate assistance.

Third, the Guidelines are silent concerning the audiovisual recording of interrogations even though it is widely recognised that such practice can protect a child against ill treatment and/or infringements of her/his right to a fair trial (including her/his right to participate effectively). The EU Directive does provide for audiovisual recording, although it also leaves room for departing from such practice, for example in cases where a lawyer is present or a child is not deprived of her/his liberty.²⁰

Another relevant phase of the juvenile justice system concerns the participation of children in court.²¹ The Guidelines highlight the importance of the right of the child to have a lawyer in her or his own name, the right to avoid undue delay and the right to conduct proceedings in a 'child-friendly' manner, including the use of

appropriate language and information. Children who are tried in court should be enabled to participate effectively, which also assumes that professionals are trained and specialist. This not only includes child-sensitivity, but also skills in how to converse with children (Rap, 2013). As far as information is concerned, the Guidelines provide that 'children should be provided with all necessary information on how to effectively use the right to be heard'.²² The Guidelines do not elaborate on access to case files but, as stated, the right to a fair trial requires that the accused has a broad understanding of the nature of the trial process and of what is at stake²³ and that the child's lawyer has an important role to play in providing information. The Guidelines do provide that '[j]udgments and court rulings (...) should be duly reasoned and explained to [children] in language that [they] can understand'. This enables children to understand the impact of their participation on the decision-making process and it confirms the standpoint of the CRC Committee, which considers feedback to the child 'a guarantee that the views of the child are not only heard as a formality, but are taken seriously' (United Nations, 2009: para 45). Again the Guidelines leave open some critical issues, such as free legal aid (United Nations, 2007: para 49), the involvement of parents in court, which might be regarded as an important precondition of effective participation (United Nations, 2007: paras 46–54) and the right to be present during the trial.

In summary, the Guidelines provide some firm direction on the protection and participation of children and young people in contact with juvenile justice systems in Europe, although they appear, at times, to oscillate *between* the principles of protection and participation (Liefwaard, 2016). A greater concern, however, is that the Guidelines are insufficiently comprehensive in crucial places. This might relate to their broad scope (covering all forms of justice proceedings), which necessitates a minimum standard that applies across civil, criminal and administrative proceedings in which children are involved. If the Guidelines had focused exclusively on juvenile justice proceedings, greater specificity would probably have been possible. Notwithstanding their limitations, however, the Guidelines serve to clarify many procedural issues, which assist States Parties in understanding and implementing key requirements of the protection *and* the effective participation of children and young people who are in conflict with the law.

Legal status of the Guidelines

A further key issue concerns the relatively weak *legal status* of the Guidelines, which raises the question of why States Parties should be concerned about their implementation, given that they are not legally binding. Yet, there are a number of reasons why Member States should take them seriously. First, they build on notions and specific provisions that can be found in legally binding instruments, in particular the UN Convention on the Rights of the Child and the case law of the European Court. Second, some of the key provisions have been incorporated into new EU legislation, which forces, at least EU Member States that are bound by this directive, to implement these within three years. Third, it is interesting to note

that the European Court uses the Guidelines as a key point of reference (Liefwaard, 2016: 914).²⁴ To date, this has only once directly affected the position of children in the juvenile justice system.²⁵ However, the case law on children in civil justice proceedings shows that the Guidelines form a relevant set of guidelines for the European Court when interpreting the provisions of the ECHR.

Overall, it is important that the Guidelines aim to provide a *common European standard* within the otherwise diverse context that characterises juvenile justice systems across the 47 Council of Europe Member States and can render the human rights of children and young people in conflict with the law vulnerable to violation (Goldson and Muncie 2012).

Implementing child-friendly justice

One of the interesting developments following on from the adoption of the Guidelines by the Council of Europe has been the collaboration that has emerged and consolidated with the European Union in implementing the Guidelines. In its 2011 *EU Agenda for the Rights of the Child*, the European Commission outlined several action points to help make justice systems more child-friendly, in light of the fact that it is an area 'of high practical relevance where the EU has, under the Treaties, competences to turn the rights of the child into reality by means of EU legislation' (European Commission, 2011).

In particular, the European Commission and the European Fundamental Rights Agency have undertaken and funded research to establish, in different ways, the extent to which the Guidelines on child-friendly justice have been implemented in the EU Member States. For example, the Commission commissioned a data collection study of law and policy in the 28 Member states of the European Union. Around the same time, the EU's Fundamental Rights Agency also undertook a study of the experiences and perspectives of professionals on child-friendly justice in ten EU Member States, with a focus on civil and criminal judicial proceedings, in which children participate as victims, witnesses or interested parties (EU Agency for Fundamental Rights 2015).²⁶ Together, these studies help to clarify the gap between the Guidelines and their implementation, while they might also help to support more effective implementation by sharing best practice between Member States and deepening consensus around the key aspects of the Guidelines. The following section addresses the contribution that the first EU study has made to our understanding of the implementation of the Guidelines in the juvenile justice sphere. The Fundamental Rights Agency study is not addressed here given that its focus centres child victims and witnesses in criminal proceedings.

Child-friendly justice: implementation in law and policy

In 2012, the European Commission carried out a study to collect data on children's involvement in criminal, civil and administrative judicial proceedings in all 28 EU Member States for the years 2008–2010 (European Commission, 2014). Although

the study was very broad in scope, its findings include important information as to the progress being made in the implementation of child-friendly justice in juvenile justice proceedings. This study was summarised in a brief for policy makers (Kennan and Kilkelly, 2015) which distilled the findings from a substantial volume of data collected under a range of headings.²⁷ From the perspective of the criminal process and juvenile justice, serious shortcomings in securing child-friendly justice in the law and policy of EU Member States were identified in the following areas: adapting proceedings in 'child-friendly' forms; the specialisation and training of sentencers and other juvenile justice professionals; avoiding delay; access to information; facilitating the child's right to be heard; the provision of legal representation and the child's right to privacy.

In terms of the access by the child defendant to adapted ('child-friendly') proceedings, the study found that 20 EU jurisdictions have specialist juvenile or youth courts that deal with cases in the area of juvenile justice. Some of these specialist courts consist of courtrooms that are physically separated from adult courts, whereas others are ordinary courts that are adapted to the needs of children, including through the involvement of specialist judges. However, gaps exist in the remit or jurisdiction of these specialist courts, suggesting less than universal acceptance of the youth court model (Kennan and Kilkelly, 2015: 4). This is pertinent given that the Guidelines fall short of requiring the establishment of a specialist youth court to deal with child defendants, limiting provision to a recommendation that States Parties should further develop the concept of specialised courts.²⁸ Specialisation in other parts of the criminal/juvenile justice system (among the police, prosecution services and lawyers), was also found to be underdeveloped across Member States although there is also some good practice in the 14 Member States which were found to have established special units within their police forces to deal with child suspects/offenders and/or child victims and witnesses (Kennan and Kilkelly, 2015: 4). A small number of Member States were also found to have introduced specialisation among prosecutors and defence lawyers working with children and young people involved in criminal proceedings, including the provision of training on children's rights and needs (Kennan and Kilkelly, 2015).

Although several Member States have introduced mandatory training programmes for the key professional groups working with, or for, children within the juvenile justice system – including judges, police officers, prosecutors, defence counsel and/or social workers – such programmes are still unavailable in many jurisdictions (Kennan and Kilkelly, 2015: 25). Moreover, while continuous and ongoing training is available in some Member States for criminal/juvenile justice professionals, in most cases participation in training is voluntary and the training is provided on an *ad hoc* basis rather than as part of a structured, systematic and ongoing process of professional development (Kennan and Kilkelly 2015: 25).

While the content of the training provided to judges and prosecutors varies across countries, there is frequently an emphasis on child psychology and child welfare, in addition to the legal aspects of child-friendly justice (Kennan and Kilkelly, 2015: 26). The training that police officers receive often has a more practical orientation,

focusing in particular on how to communicate with children. For example, in a number of Member States it covers child-friendly interview techniques, including the use of audiovisual equipment and in some Member States it covers aspects of child psychology, social policy, legal issues and forensic science.

In the majority of jurisdictions, there is a legal obligation to avoid undue delay in the handling of cases involving children. Most Member States have additional safeguards in place aimed at ensuring that criminal proceedings involving children are dealt with as quickly as possible. Some Member States have imposed legislative time limits on the court process, for example imposing a maximum time limit for cases involving child suspects to get to trial (Kennan and Kilkelly, 2015: 5). Only a small number of Member States provide guidance to judicial authorities on how to implement the duty to avoid undue delay in practice, however, and even when such guidance is available, it is usually general rather than specific to children (Kennan and Kilkelly, 2015: 6).

Almost all Member States have statutory provisions recognising the right of child suspects/offenders to receive information about their rights, although the scope of information provided varies across Member States (Kennan and Kilkelly 2015: 8). No states have a legislative requirement to ensure that child suspects/offenders receive information adapted to their needs, or in a child-friendly format, and in some jurisdictions, the absence of rules or procedures governing what information is to be provided, and in what form, means that practice on the ground may vary significantly (Kennan and Kilkelly 2015: 8). Although all Member States provide child suspects/offenders involved in criminal judicial proceedings with an express right to be heard, the scope of this right varies widely across Member States with conditions and exceptions applying in many cases (Kennan and Kilkelly 2015: 11). Child suspects/offenders who do not speak or understand the language of the procedure also have the right to interpretation and translation in criminal/juvenile justice proceedings in most, but surprisingly not all, Member States (Kennan and Kilkelly, 2015: 13).

A number of Member States have introduced measures to ensure that children involved in criminal judicial/juvenile justice proceedings are interviewed by the police or judicial authorities in a manner which is adapted to their needs. Such measures include providing support to prepare children for interviews; having trained officials conduct interviews; having a specialised professional (e.g. a psychologist) present at, and/or participate in, interviews; video-recording interviews; the use of child-friendly language and questions; limiting the number and length of interviews; and allowing the child to be accompanied by a person of trust (e.g. parent/guardian) (Kennan and Kilkelly, 2015: 13).

While these are positive measures that are consistent with the Guidelines, the application of these safeguards is often limited in scope or discretionary in nature. For instance, the measures are sometimes optional or conditional on the age of the child, her/his role in the proceedings and/or the type of offence (Kennan and Kilkelly, 2015: 13). According to data collected during the study, the right of child suspects to legal representation is recognised in all EU Member States and this right

extends to all phases of the proceedings in the majority of jurisdictions, with some exceptions where it applies during the investigation phase only. In the majority of Member States the law imposes a legal obligation on the police (or other relevant authorities) to inform children who have been apprehended of their right to a lawyer. Child suspects are provided with defence counsel on a mandatory basis in 23 Member States although where mandatory defence exists, its application can be dependent on the seriousness of the charge and in some cases on the age of the child (Kennan and Kilkelly, 2015: 14). The right of child suspects to apply for legal aid exists in almost all Member States, but although this represents progress in the implementation of child-friendly justice, the provision of legal aid is subject to various conditions in different Member States (e.g. means test or depending on the seriousness of the charge) (Kennan and Kilkelly, 2015: 15).

Child suspects/offenders have a general right to privacy at a statutory level in all Member States (Kennan and Kilkelly, 2015: 17) although the approach adopted to hearing court proceedings in private varies widely across Member States – some permit exceptions to the rule while others decide this on a case-by-case basis (Kennan and Kilkelly, 2015: 19). Third-party access to children's criminal records is restricted in all States where this information is recorded, and most Member States automatically delete the criminal records after a specific period of time has elapsed, although the time period may depend on the type of offence, the sentence given and/or whether the child reoffended (Kennan and Kilkelly, 2015: 17).

Overall, the European Commission's study has helped to clarify the extent to which the key elements of child-friendly justice are provided for in law and policy across the EU Member States. Some good practice is clearly evident in all areas although considerable differences remain between and within Member States. The study highlights that although there is increasing provision for children's rights, in reality children and young people have few unconditional entitlements as subjects in the criminal/juvenile justice process as discretion and caveats have a diluting effect. Perhaps most significantly, the study indicates that it is the most vulnerable children who face particular obstacles in accessing justice that is child-friendly and this, combined with the mainstreaming of approaches to child-friendly justice, remain significant challenges into the future.

Analysis, conclusions, future directions and challenges

This chapter has aimed to examine the concept of child-friendly justice by means of an analysis of the drafting, content and implementation of the Guidelines on Child-Friendly Justice. In doing so, we have drawn attention to the important concept of child-friendly justice, which embraces the children's rights in the juvenile justice system. Although it is important that the Guidelines were informed by the experiences and perspectives of children and young people, their weak legal standing and limitations in terms of what they add to existing international law have perhaps served to constrain what might have otherwise been greater ambition for the Guidelines. At the same time, the focus on the

procedural rights of children and young people is an important reminder that fair trial and due process matters are vital and have led to the Guidelines' appeal to regions beyond Europe.

At the same time, the Guidelines compromise areas crucial for children's fair trial rights, including the mandatory right to a lawyer and the right to be tried in specialist courts. It is significant that the more recently developed EU Directive does not support these rights either and thus, although the Guidelines reflect an emerging legal framework focused on the procedural rights of children in conflict with the law – also relevant for informal proceedings, such as diversion – consensus is not yet complete. Similarly, the failure to achieve consensus in Europe on the minimum age of criminal responsibility is a disappointment and this points to an important future area for reform.

The fact that the Guidelines are not legally binding may hamper their practical impact in Member States but there are ways in which they might also be given added effect. Their use in the European Court of Human Rights is one such way to give them 'teeth', while courts should also be encouraged strongly to implement them at national level. Just as the Guidelines have led to positive collaboration between the Council of Europe and the European Union, there is potential too for them to be given further attention by the UN treaty-monitoring bodies, especially the Committee on the Rights of the Child. Several years on from their adoption by the Committee of Ministers in 2010, there appears to be a growing sense of their importance at a practical level. Challenges in their implementation remain but now that the diversity in standing practices among many countries within the Council of Europe has at least been mapped it enables practices to be closely monitored. Overall, the Guidelines underscore the significance of treating children in conflict with the law with the respect to which they are entitled. This has the potential to ultimately contribute to juvenile justice systems that are more just and, informed by children's own demand for respect, more likely to be effective.

Notes

- 1 Of course, the Guidelines were not the first instrument to set out the rights of children in the justice system. These standards can be found in the range of human rights treaties and non-binding recommendations from United Nations and Council of Europe treaties dealing with the right to fair trial and deprivation of liberty.
- 2 Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice 1, 13 (2010), available at: www.coe.int/childjustice, (accessed 15 December 2016).
- 3 Guidelines, supra note 2, First Part, ch. I, at para. 1.
- 4 Guidelines, supra note 2, First Part, ch. I at para. 3.
- 5 Guidelines, supra note 2, Second Part, ch. 'Structure and Content', at para. 16.
- 6 Guidelines, supra note 2, First Part, ch. II under. c.
- 7 See e.g.: ECtHR, 3 September 2015, appl. no. 10161/13 (*M & M. v. Croatia*).
- 8 ECtHR (GC), 16 December 1999, appl.no. 24724/94 (*T v. UK*), para. 84.
- 9 ECtHR (GC), 16 December 1999, appl.no. 24724/94 (*T v. UK*), para. 88.
- 10 ECtHR, 15 June 2004, appl. no. 60958/00 (*S.C. v. UK*), para. 29.
- 11 See also ECtHR, 20 January 2009, appl. no. 70337/01 (*Güveç v. Turkey*).

- 12 See also: The United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules") (1985): rule 14. Available at: www.ohchr.org (accessed 15 December 2016).
- 13 Ursula Kilkelly co-ordinated the administration of the survey and presented the analysis to the drafting committee. She was also present during finalisation of the Guidelines to ensure that the perspectives of children and young people were represented during the process.
- 14 Guidelines, supra note 2, First Part, ch. IV, at para. 28.
- 15 Ibid.
- 16 Guidelines, supra note 2, First Part, ch. IV, at para. 29; See also: CRC Committee 2007, supra note 14, para. 54.
- 17 Guidelines, supra note 2, First Part, ch. IV, at para. 30.
- 18 ECtHR, 27 November 2008, appl. no. 36391/02 (*Salduz v. Turkey*); ECtHR, 11 December 2008, appl. no. 4268/04 (*Panovits v. Cyprus*).
- 19 European Parliament legislative resolution (2016), 'on the proposal for a directive of the European Parliament and of the Council on procedural safeguards for children suspected or accused in criminal proceedings', Brussels: 2013/0408 (COD) (Adopted Text). Online. Available <http://data.consilium.europa.eu/doc/document/PE-2-2016-INIT/en/pdf> (accessed 15 December 2016).
- 20 Ibid. at para. 42, p. 17.
- 21 There are of course other relevant phases of the juvenile justice process such as the post-conviction phase, but it goes beyond the scope of this chapter to address them all.
- 22 Guidelines, supra note 2, First Part, ch. IV, at para. 48.
- 23 ECtHR, 9 July 2000, appl. no. 60958/00 (*S.C. v. UK*).
- 24 See furthermore recent case law: ECtHR (GC), 23 March 2016, appl. no. 47152/06 (*Blokhin v. Russia*), at paras. 80, 170 and 203; ECtHR, 3 September 2015, appl. no. 10161/13 (*M & M. v. Croatia*), at para. 102; ECtHR, 29 April 2014, appl. no. 60092/12 (*Z.J. v. Lithuania*), at para. 73 and 104; ECtHR, 17 July 2012, appl. no. 64791/10 (*M.D. and others v. Malta*), at para. 38.
- 25 ECtHR (GC) 23 March 2016, appl. no. 47152/06 (*Blokhin/Russia*), at paras. 170 and 203.
- 26 In 2017, the Fundamental Rights Agency published another study on child-friendly justice in which perspectives and experiences of children involved in judicial proceedings as victims, witnesses or parties in nine EU Member States are presented (EU Agency for Fundamental Rights, 2017). This study has not been included in this chapter.
- 27 These were: access to adapted proceedings; right to information and advice; right to be heard; right to representation; right to protection of privacy; the best interests of the child; multidisciplinary cooperation; training of professionals; monitoring mechanisms; and access to remedies.
- 28 Guidelines, supra note 2, First Part, ch. IV.

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