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## **Introduction: a critical review of access to justice for children**

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## INTRODUCTION

### A Critical Review of Access to Justice for Children

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and Caroline SIFFREIN-BLANC

Following the adoption of the Convention on the Rights of the Child (CRC) in 1989, it is no longer possible to exclude children from addressing the justice issues that affect them. They are recognized as having the right to express themselves on matters that concern them, in all proceedings in which they have an interest. Thirty years on, how far have we come? Are the rights that are recognized effective? How are they implemented? What purposes do they serve? Is justice child-friendly? Are children to be found in the justice system? Now is the time for a critical review.

Children's access to justice suffers from the ailments affecting access to justice for all, such as involving a lack of information, cost, the shortcomings of legal aid, the complexity of the steps and formalities, the slow pace of proceedings, etc. In addition, children encounter difficulties linked to their specificities. In thinking about justice, no priority is given to adapting it to them. Conceived for adults, applied by adults, the judicial system does not primarily offer justice adapted to the differences that distinguish children from adults.

Over the last decade we nevertheless see initiatives emerging at the international level that question this situation. Prominent among these have been the Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (2010),<sup>1</sup> the Report of the United Nations High Commissioner for Human Rights (2013),<sup>2</sup> and General Comment No. 12

<sup>1</sup> Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice (2010), <<https://rm.coe.int/16804b92f6>>.

<sup>2</sup> UN High Commissioner for Human Rights, (2013), Access to justice for children: report of the United Nations High Commissioner for Human Rights, [16.12.2013], Doc. UN A/HRC/25/35.

of the Committee on the Rights of the Child, on the right of the child to be heard (2009).<sup>3</sup> These texts highlight the paths to be followed to improve the effectiveness of children's right to access the justice system. However, it is also necessary that States decide to make this a concrete priority.

An inter-university partnership was formed in 2017 to reflect on those issues. It brings together researchers from the University of Ottawa in Canada, the University of Leiden in the Netherlands, the Catholic University of Louvain in Belgium, and the Universities of Bordeaux and Aix-Marseille in France. The partnership was possible thanks to a grant from the Social Sciences and Humanities Research Council of Canada (SSHRC).<sup>4</sup> Within a networked logic of collaborative effort, the research teams decided to emphasize children's access to and participation in justice, within the proceedings that fall under 'child protection'.<sup>5</sup> The choice of this research field is explained in particular by the limited number of works addressing access to justice for children in this field. The research on access to justice has, until now, chiefly concentrated on children within the criminal justice system. Nevertheless, every day many more children are confronted with child protection proceedings.

The common feature of the research conducted in each country is Article 12 of the CRC, which provides as follows:

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.<sup>6</sup>

<sup>3</sup> Committee on the Rights of the Child, General Comment No. 12 [2009]: The right of the child to be heard, [20.07.2009], UN Doc. CRC/C/GC/12.

<sup>4</sup> In addition to the grant from SSHRC, we acknowledge a contribution by the Embassy of France in Canada towards the translation of contributions from French to English. This term will be used in the contributions for uniformity, while recognizing that

<sup>5</sup> different terminology may be used in different countries.

<sup>6</sup> Convention on the Rights of the Child, General Assembly Resolution 44/25 of 20.11.1989, entry into force 02.09.1990, Article 12.

The objective of the research was twofold: first, to discover the concrete mechanisms used in each State to implement children's right to be heard and to participate in the justice system. Subsequently, to take an interest in the viewpoint and experience of the concerned parties on listening to and participation of children in the field of child protection, including those of professionals and children.

To this end, in each of the four countries the teams undertook qualitative research studies, primarily using interview techniques or the administration of questionnaires. The respondents included – depending on the teams – magistrates, social workers, lawyers specialized in defending minors, and young adults and/or children. While the legislative and judicial mechanisms may at times be very different, and while the research methods and the target population were not identical in the work of each team, it is interesting to note that generally speaking, the results converge with regard to the obstacles to full effectiveness of children's rights to express themselves freely on issues that concern them in the field of child protection, as highlighted below.

The research findings were presented during a conference organized by the Interdisciplinary Research Laboratory on the Rights of the Child (IRLRC) of the University of Ottawa. Faced with the restrictions imposed by the COVID-19 pandemic, it was planned for May 2020 but postponed to 20 and 27 May 2021, and held by videoconference.

This conference was also an opportunity to compare the research results with the work of other researchers from eight different countries working on questions in connection with children's access to and participation in the justice system, in areas other than child protection, and/or on specific thematic areas. Divided into four sessions, with each introduced by a plenary presentation, the conference took the form of discussions between researchers. The plenary presentations addressed: the risks of perverse effects from the participation of children in the justice system (Thierry Moreau); examination of the growing international effort for child-friendly justice (Ursula Kilkelly); access to justice for children in Canada (Nicholas Bala); and the paths to overcome hurdles and become more inclusive (Ton Liefwaard). The topics addressed during the panel discussions bore on: the parties involved in the justice system; international justice; civil and criminal proceedings; the institutions that have a role in justice for children; particular attention to specific groups of children; as well as systemic barriers to children's access to justice. The conference conclusions, presented by Adeline Gouttenoire, offered concrete suggestions for the effective implementation of Article 12 of the CRC.

This book reflects many topics that were discussed during the conference. It is divided into four parts. The first part offers a synopsis of the results of the research carried out in the context of the partnership. The two following parts contain the contributions of the other researchers who contributed during the conference: the second examines the voice and place of children within various proceedings, and the third addresses obstacles to access to justice, and methods, and projects facilitating it. The fourth part offers thoughts and conclusions that open the way to future research efforts and to action for the benefit of children.

Part I begins with the contribution of *Adeline Gouttenoire* and *Caroline Siffrein-Blanc*. Through a questionnaire and individual meetings, the research team collected the opinions of various professionals (magistrates, lawyers, children's aid staff) with regard to the application of Article 12 of the Convention on the Rights of the Child in the area of child protection. The responses obtained and the interviews held made it possible to bring to light different professional practices and visions on the issue of hearing the child in child protection. The contribution aims to put into perspective the theoretical statements and practical viewpoints of the professionals on the implementation and effective enjoyment of children's right to be heard. The professionals' disagreements, which are sometimes very pronounced, illustrate the extent to which the subject is both stirring and complex. *Mariëlle Bruning* and her colleagues *Daisy Smeets* and *Apollonia Bolscher* undertook a similar research project in the Netherlands. After setting out the state of the law, this multidisciplinary research team shares with us the experiences and opinions of the professionals, collected through questionnaires and interviews with judges, lawyers, social workers, guardians *ad litem*, and staff of the child and youth law centres. The experiences of the youth and their parents are likewise included, based on questionnaires. This setting in context of numerous opinions emphasizes the contrasts that cut across the practice of the hearing of the child, and especially how the various actors experience this. One of the main conclusions is the importance of direct hearing by the judge, as underlined by the young people. The authors conclude with a series of suggestions aimed at improving implementation of the right of the child to participate in family and protection proceedings. In Belgium, *Coline Moreau* and *Thierry Moreau* conducted semi-structured interviews with young people who have had experience in child protection proceedings. The research objective was to spotlight realities present but unnoticed in application of Article 12 of the CRC. The research findings question the methods implemented for the hearing of young people. Just like in the research

undertaken in the Netherlands, young people have a view of their hearing that is different from that of the professionals and of their parents. Even though the adults recognize the importance of hearing children as a way of taking in their views, the young people do not feel listened to, and indicate that the presence of the parents is inhibiting. The research of *Mona Paré* in Quebec, Canada, was undertaken with judges of the juvenile court, social workers representing the Director of Youth Protection, and children who have had experience in court. The research aimed to set out on the one hand the scope and form of children's participation in the proceedings, and on the other hand to assess the risks and benefits of children's presence in court. She also questions the pertinence of formal testimony as a means of hearing children. This research highlights that practice is not always clearly framed by the law, and that professionals' attitudes are very diverse with regard to the participation of children in judicial proceedings. She concludes with suggestions to improve current practices, for children to have greater opportunities for participation and to be more respectful of their rights.

Despite the differences in terms of methods, these research efforts allow us to draw useful comparisons between the various legal systems regarding children's place within the justice system. The research highlights in particular differences in relation to the conditions under which children get access to justice (as a full-fledged party, through hearing or giving testimony), the age from which the child may enter the courtroom in their own right, the place and duties of the child's lawyer, etc. A comparison of legislation alone is insufficient, as is demonstrated by this research. Listening to the professionals is an absolutely necessary complement, as is listening to the children, especially as it makes it possible to bring to the fore a different approach to the aims of hearing children and the implementation methods to be promoted.

Part II is devoted to research efforts that have to do with the participation of children in other kinds of proceedings, beyond child protection. The contribution of *Blandine Mallevaey* deals with French family law, emphasizing the differences between whether proceedings concerning the child have or have not been brought before a family court judge. The author demonstrates the difference between access to justice and the right to participate. Since the child is not a party to the family proceedings, they are deprived of all access to the family court judge, in the absence of a proceeding already brought before them.<sup>7</sup> On the other

<sup>7</sup> They/them are used instead of he and she throughout this book as gender inclusive pronouns.

hand, if an action is initiated, the right to participate in the proceedings is recognized via the mechanism of hearing them in court. Nevertheless, the author criticizes the various obstacles to such access to the judge. *Rachel Birnbaum* and *Nicholas Bala* present the results of their research over the course of several years, bearing on children's participation in family proceedings in the various provinces of Canada, which have laws and practices that vary in this area. The authors assess the advantages and disadvantages of the various methods for children's participation in these proceedings. They likewise note the obstacles that children encounter, in a quasi-systematic way, in the various systems. Their research demonstrates that children want to be involved in decision-making that concerns them.

The contribution of *Philippe Bonfils* addresses the place of children's views in criminal proceedings in France. The author explains that access to criminal justice for minors appears different depending on whether we consider minors as perpetrators of offences or as victims. Regarding child offenders, the issue is that of knowing how criminal justice will take account of their specificity – in particular with the adoption of a Minors' Code. In the case of minors who are victims, the issue is that of allowing minors to have their voices heard, notwithstanding their age, their legal incapacity, and the trauma resulting from the infraction. Whether involving juvenile offenders or victims, the author describes improvements in French law that allow for adaptation and better access to children. With a more critical stance, *Deborah McMillan*, the Commissioner for Children and Young People for the Bailiwick of Jersey, examines the legislative provisions and attitudes of the professionals on this Channel Island in relation to youth criminal justice. The author's professional experience and research lead her to conclude that the legislation, as well as structural and cultural elements, prevent the application of a justice adapted to minors who are in conflict with the law. There is thus a lack of compliance with the CRC.

The contribution of *Jean-Frédéric Hübsch* is interesting in that it deals with the participation of children in a conflict resolution process outside judicial proceedings, examining the place of children in administrative procedures involving school discipline in the province of Ontario in Canada. He shows the lack of procedural guarantees recognized for children in the disciplinary proceedings and then addresses alternative processes that could replace these disciplinary proceedings, looking to improve respect for the child's right to equity and to promote discipline of a new kind.

*Ursula Kilkelly* examines children's access to international justice. She demonstrates that, even though the Guidelines adopted by the Council

of Europe constitute a tool that was conceived in the first instance to be implemented in domestic law, they are also very useful at the international level. Nevertheless, she finds that international justice is still not widely accessible to children. Among the numerous barriers to overcome are children's lack of knowledge of their rights, a shortfall in training of law professionals, and the rule of the exhaustion of domestic remedies for international complaints about children's rights. In this context, the author regrets the lack of effectiveness and the mismatch between international remedies and the specificities of children.

Part III invites a more specific examination of obstacles to children's access to justice and of certain avenues for solution. Two contributions deal with particular challenges that children encounter in countries in transition in access to justice. *Kamel Khiari* questions the official national statements and positions that proclaim children's right to access to justice in these States. He underlines the formal character of these texts, and their ineffectiveness. He points out a series of difficulties for developing countries that may prevent or hinder children's access to and participation in justice, and researches avenues for a solution that might be brought to bear on them. In turn, *Eléazar Michel Nkoué* offers a concrete example of this type of difficulty by depicting the situation for children's access to justice in Cameroon, where several legal instruments have been adopted providing measures for access to the justice system for minors. He nevertheless demonstrates that the effectiveness of these instruments is lacking, at least for part of the population – namely indigenous people. They are marginalized and face great challenges in accessing justice. According to the author, the problems are not so much of a legal and technical nature, but of an anthropological, socio-political, and economic nature.

Several contributions examine methods and projects that could advance or improve children's access to justice and their participation in the process. *Marine Braun* demonstrates that a variety of communication techniques may be conducive to taking children's opinions into consideration. As she sees it, it behooves the professionals to challenge themselves and to get training in these new techniques, inasmuch as the children teach us that they are dissatisfied with communication with the adults in the judicial arena. These various techniques are about more than verbal exchange between the child and the adult, bearing also on the attitude of the adult towards the child, which includes respect, empathy, and trust in the child's opinions. *Caterina Tempesta* looks particularly at the role played by the child's lawyer, which, she argues, is crucial. Lawyers appear as an interface between the child and the adult world. At the end of

a critical analysis of the legal methods through which children's opinions gain access to the court (guardian *ad litem*, *amicus curiae*, advocate) the author considers that legal representation by a lawyer is the most appropriate model for fostering the effective participation of children in family court proceedings, and is the most respectful of the rights of the child. The contribution of *Malika Saher* bears on a particular population category made up of children who attend a Community Social Pediatrics Centre. She collected the accounts by the latter of their experiences in connection with the courts, in the context of youth protection proceedings. One of the strong points of social pediatrics lies in the working method, which is centred on the needs, interests and fundamental rights of children from vulnerable backgrounds. The children are considered experts in their situations, and bearers of solutions guiding the doctors, social workers, lawyer mediators, and therapists in their work. It is noted that they are equipped with their rights, and realize their capacity to have a positive effect on their situation and their environment. The collaborative authoring of the contribution – together with children – provides a perfect example of this. The contribution of *Fanny Jolicoeur* presents a new way of giving children a voice. Her research focuses on children who are seldom heard: indigenous children. She presents a participatory research method for questioning indigenous youth on their views of the child's best interests: *Photovoice*. By asking the children to express their vision of the best interests of the child – by means of taking photos and making comments on them – the researcher brings to the fore aspects of reality to which verbal exchange gains access only with great difficulty. The method would thus make it possible to implement participatory research that looks to provide a route to access to justice for indigenous children.

Lastly, in Part IV, the contribution of *Thierry Moreau* appears as a counterpoint. It cautions to the risks of abuses and of negative effects of children's access to the justice system. If taking children's opinions into consideration is unquestionably an advance, one also has to wonder about the aims that it serves. There is a next stage beyond the rights of the child that translates into demands and responsibilities weighing on the adult in the way they act when they allow the child to become an actor in the judicial arena. Finally, the conclusion presented by *Adeline Gouttenoire* recognizes the diversity of implementation of children's participatory rights, which is necessary given the different types of procedures. Yet, she recognizes certain constant features that allow for general recommendations, and concludes with a call for harmonization of practices.

Whether involving investigations undertaken by the researchers from the network, or contributions from the other participants, all highlight that there is still a long way to go to make the child a full-fledged subject of justice. Indeed, one cannot focus solely on the legal instruments. How they are implemented is at least as decisive. And yet, it needs to be well noted that while numerous legal instruments today guarantee the rights of the child, the justice systems – judicial or otherwise – have been designed and implemented with an adult logic. Legal instruments have properly introduced some adaptations to children, but they remain designed and built in accordance with a justice system meant for adults. Law systems have not yet made the Copernican Revolution breakthrough that would consist in thinking and applying justice starting from children, who – let us recall – are at the only life stage that all human beings experience. This book demonstrates that a movement is nevertheless taking shape in this sense, even though it is very far from having been completed. Increasingly, professionals working in the justice system sense the interest in putting children at the heart of the justice process, and adapting the latter to the differences that distinguish them from adults – whether the distinguishing factors are common to all children, or particular to certain categories of them. Many contributions have underscored the responsibility of the adult world in this regard, particularly in its manner of applying the legal instruments, which represent merely a doorway that opens onto a field to invest with new practices. The challenge is before us, since, as the adage reminds us, actions speak louder than words. Let us hope that this publication may contribute to keeping the fire burning in the boiler of the train travelling towards a truly child-friendly justice. We owe it to children. In the time of the pandemic and of the many ecological, social, and economic challenges, it is necessary to support our children in a new approach. Ignoring this necessity will leave children with a wasted legacy that will hardly serve as a basis for a more respectful world for everyone.