

Nigel William Annual Lecture

Given by Professor Jaap Doek, Chairperson of the United Nations Committee on the Rights of the Child, at NICCY Offices on 30th August 2006

Article 12 and the Child's Right to Participation

1. Introduction

It is a great honour for me to give this first annual lecture in memory of Nigel Williams and his huge contribution to the implementation of children's rights as the first Northern Ireland Commissioner for children and young persons. In his foreword to the corporate plan 2005-2008 Nigel said that one of the key areas of the work of the NICCY is actively listening to children and young people by being alongside them, hearing their concerns and promoting their rights. Having your say is one of the priorities that should underpin everything NICCY does. In the light of these views of Nigel it is quite appropriate that this lecture to honour Nigel's work is devoted to art.12 CRC and child participation. An additional reason is the fact that the annual day of general discussion of the Committee on the Rights of the Child is just over two weeks (Sept. 15, 2006), will focus on exactly this topic with the view to inform the Committee for the recently started work to draft a \General Comment on art.12 and child participation.

2. Art. 12 CRC and child participation

I assume that everybody present here knows article 12 CRC and that its content is associated with or even seen as the legal basis for child participation although article 12 does not contain any explicit reference to participation. So I will limit myself to some observations regarding the critical aspects of the content of article 12, focusing first on the (rather) general provision of par. 1 followed by some comments to par. 2 and its focus on judicial and administrative proceedings. In addition I will make some observations on why this article is associated with child participation and what other, if any, arguments can be based on the CRC in support of the right to participation of the child.



2a. The general rule (art. 12. par. 1)

Par. 1 of article 12 is quite generous in its acknowledgement of the right of the child to express her/his views freely by stating that this right applies “in all matters affecting the child”. The qualification: “affecting the child” should be interpreted in a broad manner. This means that the right recognised in article 12 is not limited to matters that directly and/or explicitly affect an individual child. For example: the right to express her/his views for development and implementation of policies or programmes that affect a specific category of children is not limited to the children belonging to this category but also to all other children. Furthermore: the right to express views freely should also be respected and implemented in matters that may be partly or indirectly affecting the child. Think e.g. of urbanisation or city/town development plans or measures regarding public transportation. Finally: all matters encompass both public and private settings. The right to express views freely therefore do apply to settings like institutions in which children are living (children’s homes, juvenile detention facilities etc.), the work place, the community, the school and the (foster/adoption) family.

The right to express views freely is limited to children who are capable of forming their views. There are not specific and hard criteria for measuring the child’s capability in this regard. In other words: much is left to the interpretation – and thus: discretion – of individuals who should provide the child with an effective opportunity to exercise this right.

But the Committee has made clear, most recently in its General Comment No. 7 (2004) on Implementing child’s rights in Early Childhood, that also the (very) young child has a capability to form her/his own views. The fact that a young child cannot yet use the conventional ways of communication (spoken and/or written forms) does not mean that such child does not have views and feelings nor that it cannot express these views. But respecting the right of the (very) young child to express her/his views requires a special attention and sensibility from parents and the various professionals who work for/with very young children.

The capability to form your own views is a dynamic matter. Not one in terms of you have it or you don’t. It is one of the developing capacities of a child that should be taken into account when the child is provided with appropriate guidance and direction for the exercise of her/his right. This implies that the capability to express views should also be measured/assessed in relation to the nature of the matter that affects the child. Some of these matters can be of a complexity that requires experiences/information/analytic skills that a (very) young child does not have.



But the ongoing challenge for everybody working for/with children is to assume not too quickly that the child does not have any capability to form her/his own views.

For the forming of views it is very important and often crucial that the child is given the information relevant for the matter about which he/she wants to express views. In this regard a link can and should be made to article 13 recognising the child's right to freedom of expression. This right includes the freedom to seek, receive and impart information and ideas of all kind. Although there are differences between the right to freedom of expression and the right to express your views freely, I don't see why the latter should not include the right to seek information and I also like to refer to article 17 CRC and the child's right of access to information.

But the specific nature of the right to express your views in combination with the requirement that these views are given due weight entails in my opinion the obligation of adults and organisations to actively provide the child with the information relevant for forming views. This should be done in a manner that takes into account the child's age and maturity and therefore can be in an oral and/or written form and should be, when necessary, in Braille, sign-language or even drawings.

The informed views of the child should be given due weight in accordance with the age and maturity of the child. This is another rule in art.12 para. 1 that requires an interpretation by adults who are supposed to give due weight to the child's views, an interpretation with quite some room for discretion. It is likely that the weight given is not only related to the age and maturity of the child but also to the kind of matter about which the child expressed views.

For instance: the views of (even) a young child regarding the duration of a trip to the zoo will most likely be given considerable weight and much less weight when it concerns (the timing of) a desirable/necessary medical intervention/surgery.

Given the risk of too much discretion it is very important that those in the position to give due weight to the views of the child assume a certain level of accountability. This means that the child should be given orally and/or in writing (in a child sensitive and appropriate manner) an explanation of weight given to the child's views, particularly when a decision or action, about which the child has expressed views, does not reflect any impact these views and/or goes against the views of the child.



By now it should be clear that the implementation of the right enshrined in art. 12 CRC is not an easy thing *inter alia* because it should result in significant changes in our daily/routine communication with children.

The States Parties to the CRC have committed themselves to assure to the child the right to express her/his views freely. The question is: how can and/or should States do this? The answer to this question depends most likely very much on the specific setting in which the right is implemented and the matter it concerns. But there are some general remarks possible - "shall assure the child" is a phrase that implies not only a passive attitude (= not interfering with the exercise of the right), but also an active policy focussing on facilitating, promoting and supporting activities meant to respect and implement the right of the child to express views freely.

In all matters affecting children which fall under the authority of the national or regional (state, province) government the term "shall assure" means that the involved governmental organ (division, department etc.) or individual civil servant has to take the necessary measures to provide the child with an adequate opportunity to express her/his views. Unfortunately, the experience so far (derived from the States Parties' reports) is that these opportunities are either very limited if given at all. We have still a long way to go before we are at a point that governments systematically provide children with opportunities to express their views on all governmental matters affecting children.

I think that a child commissioner/ombudsperson can and should play an active role – as stated in Nigel's foreword to the 2005-2008 plan – to increase/strengthen the awareness within governmental circles that children have the right to express their views and to provide very concrete advice and assistance on how to organise proper opportunities for the exercise of this right. NGO should also be involved in these efforts e.g. by providing information about good practices they have developed.

In addition the States should issue regulations and guidelines for the effectiveness of the exercise of the right of article 12 for schools, institutions and services either established by the State or provided with State subsidy or support. These regulations/guidelines should also be made applicable to services/facilities for children which are not depending on State subsidy e.g. via a system of licensing which requires that certain standards are met including on the implementation of article 12 (and other provision in the CRC). The child's right to express views should also be respected and implemented in the family setting. The prime responsibility in this regard lies with the parents, with the note that they have the right + duty to provide the child with



appropriate direction and guidance for the exercise by the child of her/his right to express views. This should be done in a manner consistent with the child's evolving capacities (art. 5 CRC). This means inter alia that parents should encourage the child to express in a gradually increasing number of matters and that they should give increasing weight to the views of the child. The role of the State is limited to awareness raising and educational campaigns. In addition the State should make sure that e.g. in parenting classes supported by the government specific attention should be given to the implementation of article 12 CRC. It should be acknowledged that the State has a very limited possibility to enforce the implementation of the right of the child to express views in the family setting. Given the room for interpretation and discretion inherent to the implementation of article 12 CRC, it will be very difficult to impossible to conclude that the practice in the family is such a violation of article 12 CRC, that (forced) intervention is justifiable.

2b. the right to be heard (art. 12 par. 2 CRC)

From the drafting process it is not clear what exactly the reasons were for this separate paragraph.

- "For the purpose" links par. 2 with par. 1 and it means inter alia that the opportunity mentioned should be provided to a child capable of forming her/his own views. It is left to the people who make the decisions in judicial and administrative proceedings to decide about this capability. If they are of the opinion that this capability is lacking, there is no need (obligation) to provide for the opportunity to be heard. Many States have set on or more minimum ages for the right to be heard. This not only reduces discretionary powers e.g. of judges but also provides a certainty, a specific claim for the child: from a certain age he must be given the opportunity to express her/his views. The downside is that judges and others in these proceedings may exclude all children under that minimum age from the right to be heard. It is therefore necessary to provide for an explicit rule that a judge should hear the child under the minimum age if he/she is capable of forming her/his views. The argument that judges and others shall in practice and despite this rule not hear the child under the minimum age is self-defeating. Because if this argument is valid it would mean that in a system without any kind of minimum age many judges and other officials may consider only children of a rather old age (e.g. 16 and above) as being capable of forming views. In this regard I like to suggest that minimum ages could vary depending on the nature of the proceedings. In the reports of States Parties we have found minimum ages of 12, 10 and even 7.



But if one does not want to introduce minimum ages the challenge is to set rules/criteria to prevent that in judicial and administrative proceedings a majority of children are de facto not heard; - given the text of para. 2 (“judicial proceedings”) this provision would also be applicable in criminal proceedings. But if the child is the defendant in a criminal procedure (because he is accused of having been in conflict with the law) it is obvious – given the international standards of art. 40 CRC + Beijing Rules – that the right to be heard in such cases does not depend on an assessment (by a judge or somebody else) of the capability of this child to express her/his views. The simple fact that he/she is considered to have the capacity to stand trial implies that he/she is capable of forming her/his views. In addition the nature of the criminal procedure does not allow/permit that the child-defendant is heard via a representative or an appropriate body.

In this regard some remarks about children who are heard as witnesses either in a criminal or in a civil procedure. First: the child witness of a crime does not have a right to be heard in a procedure against the (alleged) perpetrator. It is the defendant or the prosecutor who can call on somebody to give a testimony in court as a witness. In some countries the judge can decide whether it is necessary to call on a child as witness. In addition: it is obvious that in general the child as witness should not be heard via a representative or an appropriate body. But for very young children it should be possible to be interviewed by a specialist without the need to testify in court. Secondly: there are elaborated UN Guidelines on Justice in Matters involving Child Victims and Witnesses of Crime approved by ECOSOC (Resolution 2005/20).

- the right to be heard is of particular importance in all kinds of family law procedures (custody, visitation, adoption, child abduction, child maintenance) and in cases of child protection (procedures based on civil and/or administrative law). The national law can give specific rules for the cases or conditions in which the child should/can be heard via a representative or an appropriate body. Whoever that is, the most important requirement is that this person or body must be independent vis à vis the matter under discussion and not related to the interest of one or another party in the process. Think e.g. of legal guardians or guardians ad litem). Finally I think it is inherent to the right to be heard (in judicial or administrative proceedings) that the law provides legal remedies in case the decision goes against the views expressed by the child. In other words: the right to appeal is a “natural” consequence of the right to be heard if not only because it enhances/strengthens the accountability of decision making individuals/bodies with regard to the degree to which they have given due weight to the views of the child.



2c. child participation

As said before, child participation is mentioned as an important element or a consequence of the right enshrined in article 12 CRC. But in my opinion the right to express your views does not necessarily imply the right to participate if participation is understood as (minimally) an active involvement in the discussions/negotiations concerning a matter affecting the child and in the related discussion making process. One can respect the right to express views and give those views due weight without such active child participation. Article 12 CRC does not mention anything that equals participation; but it does not mean that participation is unknown in the CRC. There are three articles in the CRC that explicitly refer to participation:

- art.9, para 2 states that in proceedings related to the separation a child from her/his parent (s) "all interested parties shall be given an opportunity to participate in the proceedings and make their views known"; it goes without saying that the child is one of the interested parties and it should be noted that participation and expressing views are here closely linked;
- art. 23 recognizes that a disabled child "should enjoy a full and decent life in conditions which (...) facilitate the child's active participation in the community". This participation is apparently seen as an integral part of "a full and decent life". I fail to see why the enjoyment of a full and decent life should be limited to disabled children;
- art. 31 recognizes the right of the child (...) to participate freely in cultural life and the arts and requires that States Parties shall respect the right of the child to participate fully in cultural and artistic life. The CRC does not contain any provision that makes us to believe that participation of children and young persons should be limited to cultural or artistic activities. In that regard I also like to refer to art. 40 (1) CRC. This article contains as one of the goals of the administration of juvenile justice that the child assumes a constructive role in society. But it is also clear that the concept of child participation although having some solid legal grounds in the CRC, is left to States Parties for further elaboration and its practical implementation.

There is a wealth of information regarding child participation in various settings. Good practices have been reported and guidelines developed. One of the challenges for the coming year is to further elaborate and make concrete from the CRC perspective what child participation should mean. It should result in solidly anchoring of child participation in the CRC and in constructive guidelines for actions.

In these efforts we will miss Nigel William.

