Chapter 5

Article 12: The Right to Be Heard

Gerison Lansdown

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.

What Did Children Say?

‘Youth parliament or similar institutions representing all groups of children of the society and different ages should operate throughout the year and express their opinion to Ministers on all relevant draft laws. The same should happen with local authorities and all public agencies.’ (*Eastern Europe*)

‘Everyone working with children should be well educated and trained how to listen to children. Professionals should be trained to understand children also through their drawings.’ (*Eastern Europe*)

‘There would be social workers specifically trained and designated to support disabled youth, since those youth need more care in order to comfortably share their voice.’ (*Western Europe/Other*)

G. Lansdown (✉)
Carleton University, Ottawa, ON, Canada

Overview

Article 12 introduces a fundamentally new right into international human rights law. In recognition of children's lack of legal autonomy in decision-making, it provides that every child capable of forming a view must be assured the right to express that view and have it given due weight in accordance with age and maturity, including in judicial and administrative proceedings (UN Committee on the Rights of the Child, 2009, para. 1). In place of a traditional focus on children's lack of competence, it establishes an obligation to consider how to enable them to engage (van Bueren, 1998, p. 136). In other words, it transforms the status of the child from one of passive recipient of adult care and protection to one of active participation and agency.

This provision was introduced into the drafting process in 1981, and although it underwent multiple revisions relating to its scope and linkages with other provisions such as best interests and rights and responsibilities of parents, the final text was adopted with relatively little dispute (Office of the United Nations High Commissioner for Human Rights and Rädna Barnen (Society: Sweden), 2007, pp. 437–444). Importantly, the qualification relating to age and maturity applies only to the weight afforded the views expressed, and not the actual expression of views. Furthermore, while imposing an obligation on States Parties to consider the child's view, it does not pose any corresponding obligation on children to express one. It has been commonly conceptualised as participation and represents one of the fundamental values of the Convention, while posing one of its major challenges to prevailing attitudes towards children (Pais, 1997, p. 426).¹ The Committee has emphasised its significance as a means of political and civil engagement through which children can advocate for their rights and hold states accountable (2016, para. 24). Opportunities for accountability and redress have been further strengthened through the adoption of the third protocol to the Convention on a complaints procedure.²

The requirement that States Parties must 'assure to the child' the right to express views is a powerful formulation, placing a strong and unequivocal obligation to undertake the measures necessary to realise this right. This requires that the views of the child are solicited and that they are given due weight (UN Committee on the Rights of the Child, 2009, para. 19). The Committee has interpreted Article 12 as a substantive and a procedural right. Accordingly, it is both a free-standing right of the child and integral to the realisation of all rights (2006a, para. 2). Thus, to ensure implementation of the Convention, States Parties must ensure that children are enabled to express their views and that these views inform the actions undertaken by the state to give effect to child rights.

¹ Also see Kay Tisdall's *Children and Young People's Participation* (2015, p. 196).

² Optional Protocol to the Convention on the Rights of the Child on a communications procedure, adopted and opened for signature, ratification, and accession by General Assembly resolution A/RES/66/138 of 19 December 2011 and entered into force on 14 April 2014 (UN General Assembly, 2011).

Article 12, while closely aligned to Article 13, freedom of expression, is restricted to matters affecting the child, albeit this has been interpreted widely by the Committee. However, it goes further in imposing an obligation on States Parties to introduce the legal framework and mechanisms necessary to facilitate opportunities to express views, both individually and collectively, and thereby support the active involvement of the child in all actions affecting them, and to give due weight to those views once expressed.

Article 12 also needs to be understood alongside the other civil rights in the Convention, including Article 15, the right to freedom of association and assembly and Article 17, the right to information.

General Principles

Article 2 Article 12 asserts that every child capable of forming a view has the right to express that view. Accordingly, the Committee has emphasised the obligations of States to address discrimination to ensure the right of every child to be heard and participate in all matters affecting them on an equal basis with others. It has highlighted that customary attitudes and practices can serve to undermine and place limitations on the exercise of the right to be heard. It therefore encourages States Parties to undertake appropriate measures to raise awareness and educate communities as to the negative impact of such attitudes in order to achieve full implementation of the rights of every child (2009, paras. 75–76).

Article 3 The determination of the best interests of the child needs to be informed by the views of the child. Thus, whereas the best interests of the child is the objective to be achieved, the participation of the child is a means through which those interests can be assessed and understood.

Article 6 Child participation serves as a process that promotes the full development of the child's personality and evolving capacities consistent with Article 6.

Articles Related or Linked to Article 12

As Article 12 has been identified by the Committee on the Rights of the Child as a General Principle, as well as a human right, its application needs to be considered in the realisation of all other rights. However, the concept of participation as exemplified in Article 12 is closely linked with:

- **Article 13**, freedom of expression
- **Article 14**, freedom of thought, conscience, and religion
- **Article 15**, freedom of association and assembly
- **Article 16**, right to privacy

- **Article 17**, access to information
- **Article 40**, fair trial guarantees of Article 40(2)b)
- **Optional Protocol to the Convention on the Rights of the Child on a communications procedure**

Relevant Instruments

International Covenant on Civil and Political Rights (1966), Article 19

UN Convention on the Rights of Persons with Disabilities (2006), Articles 4 (3) and 7

African Charter on the Rights and Welfare of the Child (1990), Article 4 (2)

Guidelines of the Committee of Ministers of the Council of Europe on child friendly justice (2010)

Recommendation of the Committee of Ministers of the Council of Europe on the participation of children and young people under the age of 18 (2012).

Attributes

Attribute One: The Right to Be Heard

Interpretation of the right to express views has been elaborated by the Committee in its Day of General Discussion on Article 12, and in General Comment no. 12:

Every Child Capable of Forming His or Her Own Views The Committee emphasises that this formulation must not be interpreted as a limitation on children but represents an obligation for States Parties to assess the capacity of a child to form an autonomous opinion to the greatest extent possible (2009, para. 20). States Parties should presume capacity rather than require the child to demonstrate it. The Committee discourages States Parties from introducing age limits on the exercise of this right, underlining that very young children can form views even if unable to articulate them verbally (2006b, para. 14).

The onus rests with States Parties to facilitate the expression of views, including for children with disabilities and minority, indigenous, and migrant children (UN Committee on the Rights of the Child, 2009, para. 21). Furthermore, children have the right to express views affecting them as individuals, for example, in health care, family life, education, or child protection and also at a broader level on issues affecting them as a group or constituency.

Express Those Views Freely Children must be aware of their right under Article 12 to express their views, and therefore States Parties must adopt measures to provide them with this information (UN Committee on the Rights of the Child, 2003, para. 26, 2004, para. 22). Furthermore, to ensure the free expression of views,

children must be enabled to participate without coercion or pressure and in environments in which they feel safe and respected (UN Committee on the Rights of the Child, 2009, paras. 22–25).

In All Matters Affecting the Child During the drafting process, proposals to restrict the expression of views to specific issues were rejected in favour of a formulation entitling children to express view on all matters affecting them (Office of the United Nations High Commissioner for Human Rights and Rättsutskottet (Society: Sweden), 2007, pp. 437–444). In practice, the Committee supports a broad interpretation of matters, including issues not directly addressed in the Convention. For example, it highlights the importance of children’s participation in respect of child protection, emergency situations, national, and international settings, and in the development of prevention strategies, and play and recreational activities, as well as all settings in which children are based.

Due Weight Given to Views in Accordance with Age and Maturity It is not sufficient to facilitate the expression of views; it is also necessary to give them serious consideration (UN Committee on the Rights of the Child, 2009, para. 28). While there is no restriction on the right to express views other than the capacity to form them, the weight afforded to those views must take account of the age and maturity of the child. Significantly, this provision recognises that it is not appropriate to use age alone as a determinant of levels of understanding, with multiple factors influencing capacity in this regard, including cultural expectations, levels of support, individual factors, experience, and provision of information (Lansdown, 2005, p. 41; UN Committee on the Rights of the Child, 2009, para. 29). The Committee emphasises that recognition must be afforded to children’s increasing levels of responsibility for matters affecting them as they acquire capacities (UN Committee on the Rights of the Child, 2012, para. 85).

Attribute Two: Right to Be Heard in All Judicial and Administrative Proceedings Directly or Through a Representative

Paragraph 2 must be implemented for all relevant judicial and administrative proceedings affecting the child without limitations. It extends to proceedings initiated by the child, such as complaints against ill-treatment and school exclusion appeals, and those initiated by others which affect the child, such as parental separation or adoption, child protection or criminal proceedings, and immigration hearings (UN Committee on the Rights of the Child, 2009, paras. 32–33). States Parties must introduce legislative measures to require all such proceedings to explain how children’s views have been taken into consideration.

Paragraph 2 also makes clear that the child’s views must be heard within any proceeding, whether directly, or through a representative on behalf of the child. This

principle should not be confused with the obligation in Article 3 to ensure that the best interests of the child are a primary consideration in all matters affecting the child. A representative for the child must transmit the child's views correctly (UN Committee on the Rights of the Child, 2009, para. 36). The final section of paragraph 2, requiring that systems for hearing the child's voice must be in accordance with procedural rules of national law, was included to stress the need for national law to include specific references to allow for the implementation of this right. It should not be interpreted as a means of allowing weak national laws to undermine full enjoyment of the child's right to be heard. Such an interpretation would be contrary to Article 4 of the Convention (Pais, 1997, p. 429).

Attribute Three: Access to Redress and Complaints Procedures

Integral to the right to express views is the right to access complaints procedures and mechanisms for redress when rights are violated. They must be accessible, safe, and effective in providing remedies for rights violations, and children must be assured that using them will not expose them to risk of violence or punishment. States Parties should establish national human rights institutions for children with a broad mandate and, in particular, powers to consider individual complaints and investigations, including those submitted directly or on behalf of children (UN Committee on the Rights of the Child, 2002). Where a child has exhausted all avenues of complaint without successful resolution, a complaint can be made by an individual child, a group of children, or someone acting on their behalf, to the Committee on the Right of the Child under the 3rd Optional Protocol (UN General Assembly, 2011).

Attribute Four: Legislative and Administrative Measures to Implement Article 12

The Committee urges States Parties take action through education, training, and public campaigns to address traditional and paternalistic attitudes that mitigate against the realisation of Article 12, with particular attention to the situation of girls (UN Committee on the Rights of the Child, 2006c, para. 28, 2017, para. 17). It encourages States Parties to support initiatives to create forums where children can elaborate their views including school councils, child clubs, and children's parliaments.³

Action is also needed, including through legislation and regulations, to establish the right to be heard in all settings, and to ensure the right to be heard in the development, implementation, and monitoring of all laws, policies, and programmes

³See, for example, Concluding Observations: Spain (2018, para. 17(f)).

relating to children and implemented at all levels, from the family to schools and community, and in all institutions involving children (UN Committee on the Rights of the Child, 2006d, para. 25, 2009, para. 27). Furthermore, the Convention on the Rights of Persons with Disabilities (Article 4 (3)) explicitly demands that children with disabilities, through their representative organisations, must be consulted in the development and implementation of all legislation and policies affecting them.

References

- Lansdown, G. (2005). *The evolving capacities of the child*. UNICEF Innocenti Research Centre. Office of the United Nations High Commissioner for Human Rights & Rätts Barnen (Society: Sweden). (2007). *Legislative history of the Convention on the Rights of the Child*. United Nations. <https://digitallibrary.un.org/record/602462?ln=en>
- Pais, M. S. (1997). The Convention on the Rights of the Child. In *Manual on human rights reporting under six major international human rights instruments HR/PUB/91/1 (Rev.1)* (pp. 393–505). OHCHR. Accessed May 16, 2020, from <https://www.refworld.org/docid/428085252.html>.
- UN Committee on the Rights of the Child. (2002, November 15). *General comment no. 2 (2002) The role of independent national human rights institutions in the promotion and protection of the rights of the child, CRC/GC/2002/2*. Accessed October 12, 2020, from <https://digitallibrary.un.org/record/490983?ln=en>.
- UN Committee on the Rights of the Child. (2003, January 31). *Concluding observations: Iceland, CRC/C/15/Add.203*. Accessed October 12, 2020, from <https://digitallibrary.un.org/record/497804?ln=en>.
- UN Committee on the Rights of the Child. (2004, June 30). *Concluding observations: France, CRC/C/15/Add.240*. Accessed October 12, 2020, from <https://digitallibrary.un.org/record/536574?ln=en>.
- UN Committee on the Rights of the Child. (2006a). *Day of general discussion: The right of the child to be heard*. Accessed October 12, 2020, from <https://www.ohchr.org/EN/HRBodies/CRC/Pages/DiscussionDays.aspx>.
- UN Committee on the Rights of the Child. (2006b, September 20). *General comment no. 7 (2005) Implementing child rights in early childhood, CRC/C/GC/7/Rev.1*. Accessed October 12, 2020, from <https://digitallibrary.un.org/record/584854?ln=en>.
- UN Committee on the Rights of the Child. (2006c, June 8). *Concluding observations: Mexico, CRC/C/MEX/CO/3*. <https://digitallibrary.un.org/record/582289?ln=en>
- UN Committee on the Rights of the Child. (2006d, March 17). *Concluding observations: Hungary, CRC/C/HUN/CO/2*. Accessed October 11, 2020, from <https://digitallibrary.un.org/record/575773?ln=en>.
- UN Committee on the Rights of the Child. (2009, February 12). *General comment no. 11 (2009), Indigenous children and their rights under the Convention, CRC/C/GC/11*. Accessed October 24, 2020, from <https://digitallibrary.un.org/record/648790?ln=en>.
- UN Committee on the Rights of the Child. (2012, October 16). *Concluding observations: Namibia, CRC/C/NAM/CO/2-3*. Accessed October 12, 2020, from <https://digitallibrary.un.org/record/736633?ln=en>.
- UN Committee on the Rights of the Child. (2016, December 6). *General comment no. 20 (2016) on the implementation of the rights of the child during adolescence, CRC/C/GC/20*. Accessed October 12, 2020, from <https://digitallibrary.un.org/record/855544?ln=en>.

- UN Committee on the Rights of the Child. (2017, February 28). *Concluding observations: Guatemala, CRC/C/GTM/5-6*. Accessed October 12, 2020, from <https://digitallibrary.un.org/record/536574?ln=en>.
- UN Committee on the Rights of the Child. (2018, March 5). *Concluding observations: Spain, CRC/C/ESP/CO/5-6*. Accessed October 11, 2020, from <https://digitallibrary.un.org/record/1476613?ln=en>.
- UN General Assembly. (2011, December 19). *Optional protocol to the Convention on the Rights of the Child on a communications procedure, A/RES/66/138*. Accessed October 12, 2020, from <https://digitallibrary.un.org/record/720587?ln=en>.
- van Bueren, G. (1998). *The international law on the rights of the child*. Brill Nijhoff. Accessed September 22, 2020, from <https://brill.com/view/title/10563>.

Open Access This chapter is licensed under the terms of the Creative Commons Attribution 4.0 International License (<http://creativecommons.org/licenses/by/4.0/>), which permits use, sharing, adaptation, distribution and reproduction in any medium or format, as long as you give appropriate credit to the original author(s) and the source, provide a link to the Creative Commons license and indicate if changes were made.

The images or other third party material in this chapter are included in the chapter's Creative Commons license, unless indicated otherwise in a credit line to the material. If material is not included in the chapter's Creative Commons license and your intended use is not permitted by statutory regulation or exceeds the permitted use, you will need to obtain permission directly from the copyright holder.