



CHILD PARTICIPATION IN JUVENILE JUSTICE IN AUSTRIA
National Report for AIMJF's Comparative and Collaborative Research.

La participación de los niños en la justicia juvenil en Austria.
Informe nacional para la investigación comparativa y colaborativa de la AIMJF

La participation des enfants à la justice juvénile en Autriche
Rapport national pour la recherche comparative et collaborative de l'AIMJF

Mag. Daniel Schmitzberger¹

Abstract: The paper is part of a collaborative research organized by the International Association of Youth and Family Judges and Magistrates (AIMJF/IAYFJM) on child participation in juvenile justice. The article explains the legal, institutional and procedural aspects of child participation in the Justice System in Austria.

Resumen: El documento es parte de una investigación colaborativa organizada por la Asociación Internacional de Juventud y Familia (AIMJF) sobre la participación de adolescentes en la justicia juvenil. El artículo explica los aspectos legales, institucionales y procesales de la participación infantil en el sistema de justicia en Austria.

Résumé : Le document fait partie d'une recherche collaborative organisée par l'Association Internationale des Magistrats de la Jeunesse et de la Famille (AIMJF) sur la participation des enfants à la justice juvénile. L'article explique des aspects légaux, institutionnels et procéduraux de la participation des enfants dans le système de justice en Autriche.

1

Introduction

The International Association of Youth and Family Judges and Magistrates (IAY-FJM or AIMJF, in the French and Spanish acronym) represents worldwide efforts to establish links between judges from different countries, promoting transnational judicial dialogue, in order to provide better conditions for a qualified attention to children based in a human rights approach.

¹ President of the specialized group of judges in youth justice. Judge in Vienna, Austria



To do so, AIMJF organizes research on international problems facing the operation of the courts and various laws relating to youth and family and training programs.

The aims of this research are to identify similarities and discrepancies among countries and to develop a cartography of how child participation in juvenile justice is organized worldwide.

This national report is based on a questionnaire prepared by AIMJF.

Questionnaire

1. General description of the procedure and the system

1.1. What is the name of the Court in your country with jurisdiction for wrongful acts committed by children? Does the name vary among different regions of your Country? Does this Court also have jurisdiction for other matters? Which one?

2

There is no special Court in Austria for wrongful acts committed by children anymore. Until 2003 there were special courts, specifically the “Jugendgerichtshof” in Vienna, which also had jurisdiction for family law to a certain extent. Since 2003 there are special departments in all the courts with specially trained judges, but they only have jurisdiction in criminal matters.

1.2. What is the minimum age of criminal responsibility (MACR)?

14

1.3. Until which age is a child subjected to the jurisdiction of the Youth Court? Does your legislation provide the possibility or possible obligation to treat a child under 18 as an adult? If yes, in which cases and in what way?

There are two categories, one are children from 14 until 17 and the other are young adults from the age of 18 until the 21st birthday. Both categories are subjected to the jurisdiction of the mentioned special departments. There is no possibility to treat a child under 18 or

under 21 as an (young) adult.

1.4. Does this Court maintain the jurisdiction regardless of age at the time of the judgment if the offense was committed before the age of 18?

Yes

1.5. Can you describe the general steps of the procedure?

Mostly at the same as the public prosecutor brings charges before the court, the “Jugendgerichtshilfe” is commissioned with surveys. The Jugendgerichtshilfe is an institution that investigates the circumstances of the accused on behalf of the court. Social workers and psychologists conduct an interview with the accused, his legal representatives, the youth welfare agency and other relevant persons. The result of these surveys is recorded in a written report and presented to the court in good time before the main hearing. This report also recommends court orders, which are considered necessary. This report allows the court to get a complete picture of the accused and is the greatest difference to the decision-making in an adult criminal trial.

Other than that, the procedure is the same as for adults. The public prosecutor's office files charges, the court sets a hearing date at which a verdict will be pronounced after all the evidence has been presented.

1.6. What are the opportunities for the child hearing in the whole proceeding?

The accused has the opportunity to testify comprehensively in court about the offense and is questioned there in detail about it. The accused is questioned in detail at the Jugendgerichtshilfe about other circumstances. The report of the Jugendgerichtshilfe is read in court and the accused can comment on this.

1.7. Are there differences on how to proceed according to the age or other criteria? Please specify.

There are no differences in this regard.

2. Judicial hearing

2.1. Is it mandatory for the child to participate in the hearing or is it optional? Is the child invited or summoned for the hearing?

It is mandatory. For adults exists the possibility under certain circumstances to hold the main hearing without the accused present, but this possibility is explicitly excluded for children and also young adults. So the child is summoned.

2.2. Is this call to appear, irrespective of its modality, made together with parent/representative or does the child receive a separate invitation/summon? Is it made in a child-friendly language? Can you please add a copy of this document?

The child receives a separate summon. It is not really in a child-friendly language, but all summons are in easy sentences, so there is no special language used for the summons for children. A copy of a summon for children can be find as attachment 1.

2.3. Are there separate entrances and accesses for the child and other persons (professionals, victims and witnesses) to the room where the child is heard?

No

2.4. Is there a specific waiting room assigned to the child, separated from other people (especially victim and witnesses of the same case; any adults)? Can you share a photo of this place, if any?

No

2.5. If children are brought by the police from places of detention, are they transported separately from adults? Do they have to wait in cells, if so under what conditions (e.g. single or group cells, separation from adults etc.)?

Those accused who are held in pre-trial detention are usually in detention in the courthouses prison, which is usually in the same building. If there is a transport necessary, it is separately from adults.

2.6. Is there some space where the child and his/her support persons can meet confidentially before and after the hearing?

There is no specific space for that.

2.7. Where does the hearing occur? In the courtroom, chambers, in another room (if so please specify)? If various options apply, which situation will determine the difference in the approach?

The hearing occurs in the courtroom, there are no exceptions from that.

2.8. Are there differences in terms of accommodation between the hearing environment in comparison with a family (or child protection, or child victim/witness) hearing environment?

Yes, in other hearings the environment is more “private”, in the sense of smaller rooms with less people, especially without the public present.

2.9. Are there differences regarding the hearing room in comparison with a regular criminal courtroom (for adults)?

No

2.10. Are hearings sound or video recorded? Does such option exist?

Only as an aid for the preparation of the written protocol of the hearing.

2.11. Who must, may, may not take part in the judicial hearing? If there are differences according to the situation, please specify.

Apart from the judge and the public prosecutor there has to be a defense attorney present, if the accused is under the age of 18. The legal representatives of an accused under the age of 18 get an invitation and they are recommended to come. The main hearing is public, so anybody may come as a spectator.

2.12. Can you please share a photo of the hearing room, specifying where each person sits? (or provide a drawing of photo not possible)



On the far end of the picture in the chair in the middle sits the judge, on his/her side behind the monitor the recording clerk. Also beside the judge are the lay judges, if it is a case, where there are such. On the left side or the right side from the judge's point of view sits the public prosecutor. On the right side or the left side from the judge's point of view sits the defense attorney. In the middle sits the accused, who takes a seat in front of the defense attorney on the wooden bench, after his/her interrogation is over. Then the witnesses take a seat in the middle. The wooden chairs in the front of the picture are for other participants and the public.

6

2.13. Is there any informative material for children to explain who will attend and how the hearing will be held? Can you please share it/them?

There is no such material to my knowledge.

2.14. Who normally hears the child in juvenile justice proceedings? Is it the Judge or other professional? If it is another professional, does the child have the right to be heard by the Judge? In which circumstances?

It is always the Judge.

2.15. Are there guidelines or a protocol on how to interact with the child? Can you please share it/them? Do those interacting with the child receive specific training on this?

There are no guidelines or a protocol. There is a legal provision, that states, that the judges and public prosecutors to be entrusted with juvenile criminal matters in all instances as well as district attorneys must have the necessary pedagogical understanding and appropriate knowledge in the fields of social work, psychology, psychiatry and criminology. The legal provision also states, that the Federal Minister of Justice must ensure that further training that meets these criteria is offered. In this sense, a multi-unit course is offered, which is followed by almost all judges and prosecutors who are entrusted with juvenile criminal matters.

2.16. Can you please describe the ritual? (Some guiding questions are below)

2.16.1. Does the judge wear a gown/wig during the hearing? Would it be different in a family court? And in a criminal court for adults? Can you please share a photo?

The judge wears a gown, no wig. It would be different in a family court, where the judge usually does not wear his gown. A picture of the gown is seen below.



7

2.16.2. Does the prosecutor and the defense attorney have to wear a gown or to use special clothes?

The prosecutor always wears a gown, which looks like the gown of the judge, only the hem is red instead of purple. The defense attorney can wear a gown, which has a black hem, but usually he does not wear it.

2.16.3. Who else is allowed to attend the hearings?



The hearings are public, so everybody is allowed to attend.

2.16.4. Are there cloth restrictions for the child, his/her parents or non-legal professionals to enter in the hearing room?

No

2.16.5. When the child is deprived of liberty, does he/she wear regular clothing or a uniform? What kind of security measures/measures of restraint may be adopted? Is their use regulated by law (if so, please share provision)? Would it be visible for any attendee that the child is deprived of liberty?

He/She wears regular clothing and is brought in by a prison guard. Apart from the prison guard present it would not be visible for any attendee that the child is deprived of liberty. An accused adult would wear handcuffs from the prison to the courtroom, but there are no handcuffs used on children. If the child is brought in from another prison, the prison guard also wears no uniform.

8

2.16.6. Is the judge/decision maker in the hearing room when the child enters?

Yes

2.16.7. Does the child have to stand up?

No. In general the accused and everybody else has to stand up, when the jury/lay judges is/are sworn in and when the verdict is announced.

2.16.8. Does someone have to allow the child (or others attendees) to sit down?

No

2.16.9. Does the child have to remain standing during the hearing?

No

2.16.10. Is there any kind of solemn speech or specific information/explanations provided to the child before he/she has the opportunity to speak? What is it said at this moment?

The legal provisions state, that the judge has to warn the accused to pay attention to the

charges to be presented and to the course of the trial. After the prosecutor presented the charges, the legal provisions state: *“The accused is then questioned by the judge about the contents of the indictment. If the accused responds to the indictment by declaring that he is not guilty, the judge shall inform him that he is entitled to counter the indictment with a coherent statement of the facts and, after citing each individual piece of evidence, to make his observations thereon.”* In practice, the accused is also again reminded of his right to remain silent and often that a confession is an important mitigating factor.

2.16.11. Does the child have to make any kind of commitment or swear an oath before speaking?

No

2.16.12. Who poses the questions to the child: judge, psychologist, any other? Does the child respond directly or via a third person, eg lawyer?

The judge poses the questions and the child responds directly.

2.16.13. Is the child allowed to consult his/her defense attorney or his/her family during the hearing?

The legal provisions state: *“The accused may consult with his defense attorney during the main hearing, but may not discuss the answers to individual questions.”* The child has no right to consult with his/her family during the main hearing.

2.16.14. Who is allowed to address the child? Only the judge, both the judge and the parties (prosecutor and defense attorney) or just the parties (prosecutor and defense attorney)? Is there an order of who interacts with the child?

Both the judge and the parties address the child, first the judge, then the prosecutor, then the defense attorney.

2.16.15. If other professionals (such as social workers or probation officers) are attending the hearing, what is their role? Are they allowed to speak to the child?

The probation officer reports on the course of the care and comments on whether the probation should be revoked. In practice there is always a written report from the probation officer, which is read and the probation officer is questioned, if there are any

additions. There are no other professionals attending.

2.16.16. If some professional presents a report during the hearing, is the child allowed to interfere or correct the information or conclusions?

Yes

2.17. Do you consider that the hearing is structured in a formal way or is it more open to a dialogical interaction with the child?

It is structured in a formal way with the judge conducting the hearing and deciding whose turn it is to speak.

2.17.1. How would you characterize the tone of the dialogue and the general attitude of the hearing? Must the child answer strictly to the questions or is he/she allowed to freely speak about what has happened? The interaction is focused on the wrongful act or, additionally, is it open to contextualize the child's behavior, his/her family condition, educational process, social experiences, and to express some aspects of his/her subjectivity? What promotes such dialogue, what hampers it, in your opinion?

The child is allowed to freely speak about what has happened, as mentioned before he/she is entitled to counter the indictment with a coherent statement of the facts. The interaction in the main hearing is focused on the wrongful act, but additionally the mentioned written report of the Jugendgerichtshilfe gives the judge an understanding of the background of the child. In this way there is the context. This division between the hearing at the Jugendgerichtshilfe and the main hearing is beneficial, because the formality of criminal proceedings is an important factor in safeguarding fundamental rights, but at the same time the formality is the biggest obstacle to research about the background of the accused.

2.17.2. Is it an occasion for the Judge to strictly give the opportunity for each party to speak, according to the rules, in order to take a decision, or a moment that enable some kind of less formal interaction with the child with some kind of feedback on the pros and cons of his/her behavior as part of a negotiation of plea-bargaining, restorative justice or other alternative to the trial?

Plea-bargaining is not a possibility in Austria, but there are some ways the hearing does not have to end with a verdict. The law provides under certain circumstances the

possibility for the accused to agree to a moderated out-of-court settlement or community hours for example. If such an opportunity arises, the formality can be dropped a little. However, the accused must always explicitly agree to such a procedure.

2.17.3. Is the Judge or any other professional allowed to make any recommendation on how the child should behave?

Yes

2.18. Does the child have, during the hearing, the same legal and procedural guarantees and safeguards as an adult? What are the differences?

Yes, there are not really differences. The maximum length of pre-trial detention is shorter.

2.19. What special protections are available to prevent trauma to the child (because of the nature of a hearing) which are not available in regular criminal court for adults??

The court may order that a juvenile accused has to leave the courtroom during individual discussions in the main hearing, which are likely to have a negative impact on him. Publicity at the main hearing can be excluded ex officio or upon request if this is necessary in the interests of the young person.

11

3. Generic questions concerning the improvement of Youth Courts

3.1. In your country, do the judges, prosecutors and defense attorneys benefit from specific initial and continue training on children's rights in juvenile justice and specifically on child hearing in this setting?

As stated above, there is a legal provision, that the judges and public prosecutors to be entrusted with juvenile criminal matters in all instances as well as district attorneys must have the necessary pedagogical understanding and appropriate knowledge in the fields of social work, psychology, psychiatry and criminology. The legal provision also states, that the Federal Minister of Justice must ensure that further training that meets these criteria is offered. Such an obligation on the minister by the legislature is unique, but of course the formulation is open for interpretation, which training is sufficient.

Unfortunately, there are no defense attorneys specialized in juvenile justice. Even worse

is, that the defense attorneys are in most cases legal aid lawyers paid by the state, because in most cases neither the children nor their families can afford a lawyer. In the Austrian system every registered lawyer has to do legal aid, so the accused gets a lawyer, but it could be that this lawyer is mainly doing corporate law for example. That's manageable for adult criminal cases, but for children there should be a system which ensures, that the lawyer provided is specialized in juvenile justice.

3.2. Anything else you would like to add on this topic?

No

3.3. Any reform proposals in progress on any of the above issues?

A European Union directive was recently implemented to guarantee that every child is represented by a defense attorney at every main hearing. In addition, a child who has been arrested for a criminal offense may only be questioned in the presence of a defense lawyer. The child cannot waive this right. To ensure short detentions, a system of on-call defense lawyers has been set up, which ensures that a lawyer can attend an interrogation within hours.

3.4. Any suggestions for improvement from your side?

As mentioned, a system, where children are provided with legal aid lawyers, who are specialized in juvenile justice would be a big improvement. Unfortunately this is very difficult to implement in the Austrian system of legal aid lawyers.