

CHILD PARTICIPATION IN FAMILY AND CHILD PROTECTION MATTERS IN BRAZIL

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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 family and protection matters. The article explains the legal, institutional and procedural aspects of child participation in the Justice System in Brazil.

Key words: child participation; family law; child protection; children´s rights; justice system; Brazil.

Before answering the questionnaire, it´s important to explain how the Justice System is structured in Brazil regarding family and child protection matters.

For custody and visitation issues, Family Courts are competent for decision.

In Brazil, there are four age categories for children: first infancy (a person below 6 years old); child (a person below 12 years old); adolescent (a persons between 12 and 18 years old) and youth (persons between 15 and 29 years old).

Children´s and Adolescents Courts have jurisdiction over:

I - judging the representations moved by the Office of the Attorney General for purposes of verification of the infraction attributed to the adolescent, applying the suitable measures;

II - granting remission, as a form of suspension or extinction of the (criminal) proceedings;

III - judging petitions for adoption and their incidents;

IV - judging civil suits founded upon individual, de facto or collective interests rebated to the child or adolescent, with due observance of the provision in art. 209;

V - judging suits consequent upon irregularities in assistance entities, applying the appropriate measures;

VI - applying administrative penalties in cases of infractions against norms of child or adolescent protection;

VII - judging cases remitted by the Council of Guardianship, applying appropriate measures.

In the cases of children or adolescents specified in art. 98 of the Child and Adolescent Statute¹ (whenever the rights recognized in law are threatened or violated: I - by act or omission of the society or State; II - by fault, omission or abuse on the part of parents or guardian; III - by reason of their conduct), the Children's Court has also jurisdiction over:

a) judging requests for custody and guardianship;

b) judging suits involving removal of paternal power, loss or modification of guardianship or custody;

c) providing authority or consent to marriage;

d) judging requests based on paternal or maternal disagreements, in relation to the exercise of paternal power;

e) granting emancipation in the absence of parents, according to the terms of the law;

f) designating a special guardian in cases of the presentation of claims or representation or other judicial or extrajudicial proceedings in which the interest of a child or adolescent is involved;

g) judging family support suits;

h) determining the cancellation, rectification and providing of birth and death certificates.

Collective actions, according to article 208 of the Statute, involve liability for violation of the rights ensured to the child and adolescent, in the case of the

¹ http://www.planalto.gov.br/ccivil_03/leis/l8069.htm

non-supply or irregular supply of the following, are governed by the provisions of the Law:

I - obligatory education;

II - specialized educational assistance for those bearing disabilities;

III - assistance in day-care and preschool facilities for children from zero to six years of age;

IV - regular night-time education, suited to the conditions of those being educated;

V - supplementary programs involving the supply of didactic-school material, transportation and health assistance to the person being education in the basic education system;

VI - social assistance service aimed at the protection of the family, maternity, childhood and adolescence, as well as support to those children and adolescents in need of such;

VII - access to health actions and services;

VIII - education and vocational training to those adolescents deprived of liberty.

IX – actions, services and orientation programs, support and social promotion of families to grant the exercise of the right to family and community life;

X- programs for the attention of adolescents during execution of socio-educative and protective measures

XI – integrated policies and programs in attention to child and adolescents victims and witnesses of violence

The cases specified in this article do not exclude from judicial protection other individual, de facto or collective interests that are specific to childhood and adolescence and are protected by the Constitution and by law.

Protection measures are considered both a civil and a criminal issue and Criminal Courts on Child and Adolescent victims exist, either as a strict specialized court or as a joint Court on Domestic Violence and on Child and Adolescent victims.

1. By defining that a specific situation concerns the child, does he/she become a party to the proceedings? Does he/she have the right to legal representation by a lawyer? Are there limits to the intervention of this lawyer in comparison with the other parties? The lawyer has an ethical duty to represent only the child's opinion, including cases where he/she does not consider the child's opinion in accordance with his or her best interests?

Children are party in all legal proceedings when their rights are threatened or violated and when legal provisions shall be granted in their own name.

Children and Adolescents have legal capacity, but not the capacity to exercise some rights, depending on representation by their parents until they reach 16 years old or assistance, until they reach 18 years old, according to the form of civil or procedural legislation.

In family proceedings, children are the main party in alimony proceedings.

Children and adolescents are considered as parties in all proceedings to grant their social, economic, cultural and civil rights, such as their right to education (for instance to grant access to creche or pre-school due to refusal of admission or enrollment in a school close to the child's home), health (to grant public support to receive highly costly medicines or treatments not provided regularly by public services), social assistance (when some social benefit is due to their specific condition).

In these cases, they are either represented or assisted by their parents.

In custody and visitation proceedings, children and adolescents are not considered as parties and they have no legal representation. However, judicial authority shall provide a guardian *ad litem* to the child or adolescent whenever the interests of the child or adolescent collide with those of his/her parents or guardian. The guardian *ad litem* is normally a lawyer.

In civil child-protection proceedings, the situation theoretically is the same. However, in most of these cases, there may have collision of interests and Judges may provide legal representation for children.

This occurs mostly when it is at stake the provision of alternative care for children. In these situations, according to article Art. 141 of the Child and Adolescent Statute, “access of every child or adolescent to the Office of the Public Defender, Office of the Attorney General and Judiciary Branch, through any of its organs, is ensured”.

Gratuitous legal assistance is rendered to those in need of the same through the public defender or appointed lawyer. Judicial proceedings under the jurisdiction of the Child and Adolescent’s Court (both for child-protection and juvenile matters) are exempt from costs and fees, with the exception of the case of litigations brought out of bad faith.

In criminal proceedings, it is ensured by law legal assistance to every child and adolescent victim, irrespective of the existence of collision of interests². The intervention of the public defender aims to protect children from institutional violence, from threats during the proceeding and to grant social rights, such as (mental) health or social assistance services.

In all cases where the child has legal assistance, there is no limit for the intervention of legal professionals in comparison to other parties.

The law is not clear, however, on ethical duties when public defenders or lawyers represent the child at court. There is a prevailing understanding in the country that the duty is to inform, orientate and represent the expressed interest of the child. As the district attorney (Public Ministry) has a duty to intervene in all proceedings where the rights of a child are at stake, both in family and child protection cases, there is the understanding that the district attorney intervenes based on the best interests of the child and there is a need of a professional to

² <https://presrepublica.jusbrasil.com.br/legislacao/446167142/lei-13431-17>

intervene in favour of what the child himself or herself believes it is in his/her best interests.

2. How does the child participate in Court proceedings? Directly, in front of the judge, or through an intermediary, either the lawyer or another professional? If it is another professional, can you identify it and specify its responsibilities, please?

According to article 100, single paragraph, subparagraph 11, every child has the right to information of their rights, the reasons why legal intervention has been taken and the form of the proceedings, irrespective of age. A 2016 Act on first infancy (children below 6 years old) also grants the right to participation to children in this early age³. According to subparagraph 12 of the Child and Adolescent's Act, "Every child and adolescent, in separate or with their parents or a person nominated by the child in his or her support, have the right to be heard and to participate in all acts and in the decision making regarding all measures to promote or protect their rights. Their opinion shall also be duly taken into consideration by the competent authority.

This is a general principle for all protective measures, which shall observe the pedagogical needs of the child, giving preference to those that have the objective of strengthening family and community bonds.

The law also states in article 28 that placement in a foster family will be accomplished through custody, guardianship or adoption, independently of the legal situation of the child or adolescent according to the terms of this Law (article 28, paragraph 1 and 2) that, whenever possible, the child or adolescent will be previously heard by interprofessional staff, respecting their stage of development and the degree of understanding of the measures and its implications. His opinion will be duly considered.

³ http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2016/lei/l13257.htm

In case of adolescents (persons over 12 years old and below 18 years old), placement in foster family is conditioned by his consent, taken in a hearing presided by a Judge.

It's more frequent that children and adolescents are heard by the Judge in child protection than in family proceedings. When the child is in alternative care, it is very frequent that all children, irrespective of their age, have some contact with the Judge.

Judges are responsible for the reevaluation of the child situation in alternative care every three months, with special hearings, normally in the services (not in the Court) every six months. As Judges are also responsible for the inspection of the services (shelters) – among other institutions, such as social services, Public Ministry (District Attorney) -, contacts with children are held in more informal settings.

A third manner of participation has been established by the 13.431/2017 Act on a systemic approach to grant the rights of the child and adolescent victim or witness. The special testimony procedure, although prepared for criminal proceedings, has being used in family and child protection proceedings as well. It consists on a hearing made by one member of the interprofessional staff, but simultaneously watched by the leal professionals, with the possibility of intermediate questions, when needed.

Interprofessional staff are composed by psychologists and social workers. In some States, they are part of regular auxiliary services of the Judiciary, in some others they are hired for each intervention.

When the child belongs to traditional people and communities⁴, previous consultation of these communities is mandatory as well the intervention of

⁴ According to Decree 6040/2007, there are 28 traditional people and communities recognized by Law in Brazil, such as indigenous, Roma, quilombolas (communities formed by former enslaved people who refugeed in hinterland of the country, in defended areas): http://www.planalto.gov.br/ccivil_03/_ato2007-2010/2007/decreto/d6040.htm

anthropologists, according to ILO Convention 169, Resolution 287 of the National Council of Justice⁵ and Resolution 230 of the National Council of Public Ministry⁶

According to article 151 of the Child and Adolescent Statute, “among the other responsibilities reserved to it by local legislation, the interprofessional staff will also be responsible for supplying written subsidiary information by means of reports, presented either orally or at hearings, as well as for performing the tasks of counselling, orientation, channelling, prevention and others, and all of this is to be done under direct subordination to the judicial authority with the guaranty of free expression of technical opinions.”

3. If the participation is direct, is it voluntary? In this case, who consults the child if and how he/she wants to participate? Are there any institutional protocols on how to do that? Are there any informative materials specially prepared for children about its participation? Can you share it with our members?

The participation of the child should be voluntary according to the law, both in indirect (through interprofessional staff) or direct manner (in a hearing presided by a Judge). Even in criminal proceedings, children have the right not to appear in court and to deny giving testimony.

In order to identify the wishes of the child, the consultation is usually made by the interprofessional staff. Normally children come to court, where the interprofessional staff work, for information about the procedure, their rights, the measures that may be applied in the proceeding and the manners children may participate. In this occasion, children may express their wishes about the forms they want or do not want to participate. At the same time, there is an evaluation of the occurrence of intimidation or interference by a third person that should be brought under consideration of the judicial authority. It is also possible that the child is consulted directly by the Judge.

⁵ <https://atos.cnj.jus.br/atos/detalhar/2959>

⁶ https://www.cnmp.mp.br/portal/images/noticias/2021/junho/resolucao_230_povos_indigenas.pdf

The State of São Paulo's Court of Justice has developed two materials to be shared with the parents and the child when they receive a notification to come to court. The bailiff is the person specially trained to deliver these documents. The intention of these documents is to lessen anxiety of the children between the moment they receive the notification and the time they'll receive clarification and orientation about their rights and the procedure.

The first one has been developed for child and adolescent who are victims and witnesses. It's a letter explaining to the parents, in very basic terms, how will be the procedure with the child and a story book for the child. All material is developed both in print and in video format, with audio and sign language. Here is the link to the documents: the video for the children (<https://www.youtube.com/watch?v=gMpFMmtSrxE&feature=youtu.be>) and for the parents (<https://www.youtube.com/watch?v=nHCH07I5AZk>).

Another material has also been prepared for children in civil child-protection proceedings, explaining both the interprofessional interview and the hearing by the Judges (<https://www.tjsp.jus.br/Download/Comunicacao/Marketing/JusticaCriançasLivreto.pdf>)

4. If the child does not want to participate directly, what alternatives are there in your country to ensure indirect participation? If there are doubts about what the child really wants or if his/her opinion is really expressed, what's the solution in your country?

If the child does not want to participate directly, he or she may participate either via interviews with the interprofessional staff or via special testimony procedures, in the interprofessional room and connected by video-link with the courtroom.

Regarding doubts about the wishes and feelings of the child, it depends on the context in which he or she has been heard. In a direct participation or semi-direct, with video-link, questions can be addressed to the child.

There is, of course, a limit to the questions. The Judge has to analyze the appropriateness of the question; whether the child does not understand the question and rephrase it, or if the child does not want to answer and then respect the right to silence.

When the child is interviewed by the interprofessional staff, this intervention is considered an expert evaluation. As such, all parties may submit previously to the intervention the issues they wish to see addressed. These questions are analyzed by the Judge, who decides if they are appropriate or not. After the interview, the interprofessional staff has to submit a report to the Judge. If any of the approved questions has not been addressed or fully answered, there may be an order to clarification. This is all ruled in the Code of Civil Procedure (article 464 et seq.)⁷

5. In cases of direct participation, in what procedural phase does it take place? Is there a quantitative limit on consultation with the child? The child participates in this delimitation? How?

The child, theoretically, has the right to participate whenever a substantial decision affecting his or her life shall be taken.

Normally, there are two basic moments in which the participation is recommended: in an initial hearing to appreciate a preliminary injunction plea. After this moment, the parties will submit their arguments and another hearing will be held to hear testimonies. In this moment, before the final decision of the case, the child may be heard one more time, if he or she wishes, to share his or her views.

If there is any kind of incident that demands an injunction, if necessary the Judge may appoint another hearing.

⁷ http://www.planalto.gov.br/ccivil_03/_ato2015-2018/2015/lei/l13105.htm

6. When the opportunity to participate in the child is offered, what is the extent of options available to the child? I mean, should the child be limited to the aspects considered important by the adults or can the child bring other questions and possibilities?

When the child is heard, this moment should not be limited to the issues brought by the parties to judicial consideration. Open questions should always be addressed to the child to understand what could be his or her perspectives about the situation involving the child and the family,

However, according to procedural law, the Judge is adscripted to the issues brought by the parties. If the child brings a situation to the Judge's consideration and this situation is not comprised in the terms of the issues brought by the parties, there are at least three possible solutions: a) the Judge consider that the plea is not well-founded, if the maintenance of *status quo* attends better the best interests of the child, or b) the Judge may either appoint a special defender for the child to bring suit and grant the right under consideration or c) the Judge may also notify the district attorney for other kind of actions, if a public intervention is needed, normally when the violation of social and economic rights are at stake.

7. How is the courtroom where participation takes place? And the formalities of the child's participation in front of the judge? Is the participation taking place in the regular courtroom or in the chambers? Who is present in the courtroom/cabinet? How are the people dressed? Can you present a photo of such an atmosphere?

There is a relative liberty for Judges to organize the Courtroom, because they always sit in the same Court as long as they wish. There are some common features, two tables in T form, the Judge sitting in the horizontal table and the parties in the vertical one. Besides the Judge, sits a clerk. Witnesses or parties, including the child, sit in front of the clerk and the Judge.

All hearings are held in the Courtroom, not in chambers. There are several Judges, especially in Child Protection courts, who organize the courtroom in a child-friendly manner, with sofas, toys, pictures.

If the Judge considers appropriate, the Judge can sit with the child on the sofa or the child can come and sit beside the Judges, in the horizontal line of the T, in a special chair provided for him or her. It depends on the child and the perception of the Judge, how the child will feel better and safer.

The ambience is not formal. The Judge may open the door of the courtroom for the child to invite him or her to come. The Judge introduces himself and the other people in the courtroom.

If the Judge is a man, normally he dresses business attire. If the Judge is a woman, a formal cloth, with no specific rule, normally a dress, but it is not necessary. Judges don't use a gown in family and child protection proceedings. In first instance, gowns are seldom, even in criminal courts. Gowns are used only in jury trials, when an adult is accused of homicide. Lawyers and district attorney dress as like the Judges.

Normally, when a child is heard, the Judge, the district attorney and the lawyers are in the courtroom, but not the parties. If needed, a support person may come with the child, but this is not common.

According to the law, all lawyers have the right to be present at the hearing.

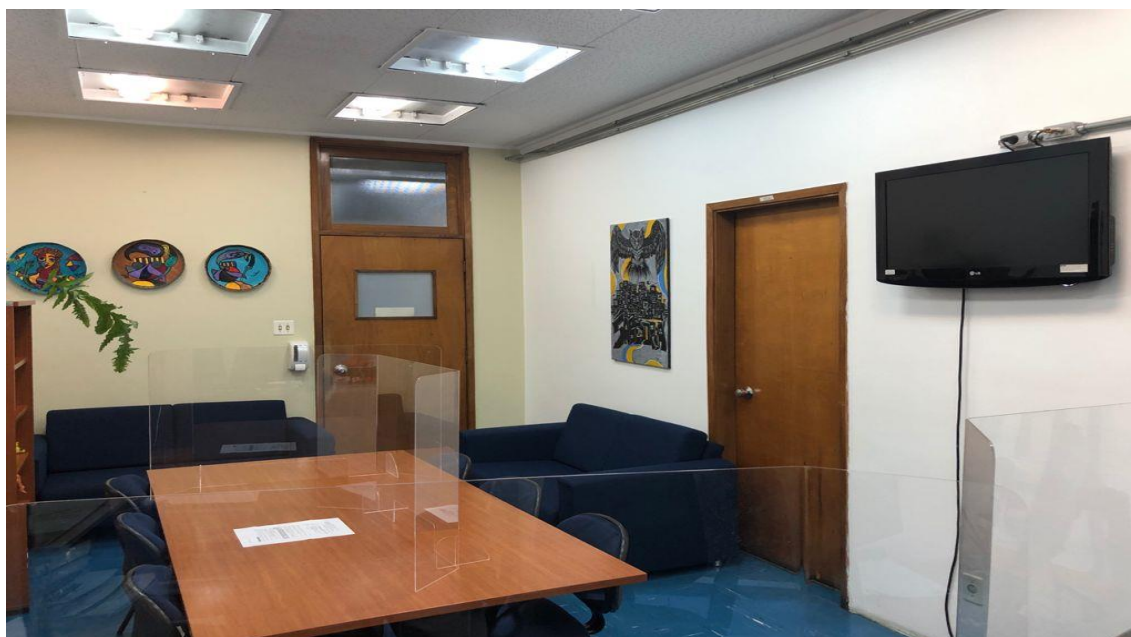
All hearings are videotaped and recorded; all files are digital. Privacy is granted by the system, with controlled access to the records.

Here are some photos of my courtroom (Criminal and Civil Child-Protection and Juvenile Justice Court). Additional photos of a Family Court can be seen in the attachment below.



The paintings were made by adolescents in a program for community services: they reflect on some topics, discussing them in group and then depict it in graffiti. In this room there is a depiction of justice and of wisdom.

The acrylic protection is due to COVID-19 pandemic, normally they are not at place.



The TV is to follow video-link hearings held in the interprofessional room.

8. Is there a protocol on how to address questions to the child in family and child protection issues? Who developed it? Can you share it with our members? If there is not, how do you do it?

There is a protocol developed for child testimony in criminal proceedings that is used as well as basic rules for all hearings involving children (https://childhood.org.br/childhood/publicacao/protocolo_entrevista_WEB.pdf)

This protocol has been developed by the National Council of Justice, in partnership with Unicef, Childhood Brazil – an NGO focusing on child violence - and with the support of the American National Children’s Advocacy Center.

These rules are based in rapport building, information about rules, the procedure and its impact on the matters affecting the child, open questions

regarding the opinion of the child on this issue, his or her wishes and feelings. Afterwards, clarification questions may be made by the Judge and the parties (lawyers and district attorney).

9. Who is allowed to ask questions the child? Are the questions asked directly by the party or are they intermediated by the judge? What are the concerns adopted by the judge to avoid questions that may embarrass or violate the rights of the child? How does the debate unfold around the regularity of questions if the child is present in the atmosphere?

Questions normally are made by the Judge. If the lawyers and district attorney have questions, they are intermediated by the Judge. The Judge normally remember the lawyers and the district attorney what will be the procedure of the hearing, with rapport, information and orientation, open questions and clarification and, before the hearing, should search to know what are the concerns of the parties and the issues they would like to see addressed. If there is information about any situation of concern – suggested by interprofessional staff who normally has already had contact with the child -, the Judge will remember lawyers and district attorney about this situation. This precautions normally avoid any kind of embarrassment to the child.

10. Is the decision taken in front of the child? If the child wants to, can he/she stay in the room?

In Brazil, there is a prevalence of orality in all proceedings. Normally the decisions should be taken in the hearing, after testimonies and oral arguments of the parties and district attorney. After being heard, the child gets out of the courtroom, but may remain in the building. There is a normally a playroom or a toy library for children. After the decision is taken, the Judge may call the child and explain the decision. This is not a rule, but it is a practice.

It is not recommended that the child stays in the room, but the Judge may dialogue with the child about that and analyze if it is appropriate and to which limit, depending on the case.

In some situations, when the Judge tries to reach an agreement between the parties, depending on the issues discussed, the behavior of the parents, the age and the degree of maturity of the child, he or she may remain in the Courtroom and take part in the negotiation.

11. Are there any special rules about the consideration of the child's opinion in the context of the reasons for the decision? What's the weight given to the child's opinion? Is it the age a criteria? Which one? If the child's degree of maturity is taken into account, how is this maturity assessed? By whom? What are the criteria considered?

As it has been said previously, according to article 100, single paragraph, subparagraph 12, every child and adolescent, in separate or with their parents or a person nominated by the child in his or her support, have the right to be heard and to participate in all acts and in the decision making regarding all measures to promote or protect their rights. Their opinion shall also be duly taken into consideration by the competent authority.

This is a general principle for all protective measures, which shall observe the pedagogical needs of the child, giving preference to those that have the objective of strengthening family and community bonds.

The law also states in article 28 that placement in a foster family will be effected through custody, guardianship or adoption, independently of the legal situation of the child or adolescent according to the terms of this Law (article 28, paragraph 1 and 2) that, whenever possible, the child or adolescent will be previously heard by interprofessional staff, respecting their stage of development and the degree of understanding of the measures and its implications. His opinion will be duly considered.

In case of an adolescent (a person over 12 years old and below 18 years old), placement in foster family is conditioned by his or her consent, taken in a hearing presided by a Judge. The judge is therefore not allowed to place the adolescent in a foster family or to be adopted without his or her consent.

For other decisions, there is this age standard, that should be considered, but the best interest of the adolescent may be analysed in a more comprehensive manner.

The Judge should mention in the decision what is the child's opinion and take it into consideration.

12. How is the decision communicated to the child? Are there any protocols for this communication? If the child has doubts or questions, is he/she allowed to speak with the judge? How do you do that?

There are no protocols for this communication. As said before, after being heard, the child gets out of the courtroom but may remain in the building, there is normally a playroom or a toy library for children. After the decision is taken, the Judge may call the child and explain the decision. This is not a rule, but it's a practice. In this situation, the child is allowed to speak with the Judge and doubts and questions may be solved, but the decision will not be changed.

13. Does the child have the right to appeal the decision?

Yes, the child has the right to appeal if he or she has a lawyer or public defender. He or she may apply for one if desired and in case of collision of interests.

SUPPLEMENTARY MATERIAL

PHOTO GALLERY OF A FAMILY COURT

Brazil

Family court



Family court



Brazil - some examples of (Family) Court
itinerancy



Photos of the supervised parental visitation center, under responsibility of
a Family Court in São Paulo City





BOOKLET ON CHILD PARTICIPATION IN PROTECTION MATTERS
FOR CHILDREN: Justice and the children.

<https://www.tjsp.jus.br/Download/Comunicacao/Marketing/JusticaCrianca/sLivreto.pdf>