

CHILD PARTICIPATION IN FAMILY AND CHILD PROTECTION MATTERS IN GEORGIA

Response from Georgian NGO

"Partnership for Human Rights"

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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 Georgia.

Key words: child participation; family law; child protection; children's rights; justice system; Georgia

Question:

1. By defining that a specific situation concerns the child, does he/she become a party to the proceedings?

Yes.

Following the Civil Procedure Code of Georgia Article (81.3): "Rights and statutory interests of minors aged 7-18, as well as of citizens declared as persons with limited legal capacity shall be protected in court by their parents, adoptive parents or caregivers. **Further, a court shall be obliged to engage in these cases the minors themselves.**"

Personal observation:

This value of this section is less appreciated in practice. The judge who enrolls the child as a party mostly does so because the law obliges. It's a rare practice to discuss what shall be the actual benefit of a child being enrolled with a party status during the hearing. We often observe that judges follow provisions concerning children by default. Judges stay passive and justify it with the adversarial principle.

2. Does he/she have the right to legal representation by a lawyer?

Yes.

Following Georgian Code of the Rights of the Child, Article 69: "To enable the exercise of the right of the child to justice, the State shall provide the following main guarantees: rights of the child to participate in administrative proceedings and court hearing proceedings directly and/or through a representative chosen by him/her in accordance with the procedures established by the legislation of Georgia".

Following Georgian Code of the Rights of the Child, Article 75 (1): "A child shall have the right to apply to an administrative body or a court directly or through his/her representative, to protect his/her rights and freedoms and/or to appeal any decision or action related to him/her."

Following the Civil Procedure Code of Georgia Article (81.4): "A minor who enjoys a statutory right to administer his/her property, conclude minor everyday transactions, etc. independently and on his/her own, shall have the right to protect his/her interests and statutory interests in a court, be a plaintiff, defendant or a third party. A court may, on a motion of a minor or on its own initiative, engage the minor's legal representative in the proceedings."

Following the Civil Procedure Code of Georgia Article (81.5): Rights and statutory interests of minors shall be protected in a court by their legal representatives – parents, adoptive parents, or guardians. A court may, on a motion of a legal representative, engage the minor in the proceedings."

Following the Article 75 (1) Georgian Code of the Rights of the Child: "A child shall have the right to apply to an administrative body or a court directly or through his/her representative, in order to protect his/her rights and freedoms and/or to appeal any decision or action related to him/her."

Personal Observation

The right to legal representation, in our practice, is one of the most vulnerable rights, if I may say so.

We often observe that lawyers representing children by law (belonging to free legal aid service, to State Care Agency) have not met with children before hearing. Even in the rare cases of meeting a child before the hearing, they do not

care about building a trust relationship. They know almost nothing about children's interests, hobbies, needs, life circumstances.

There was a case when the social Service Agency lawyer providing legal aid to a child under state care didn't know that the child had a severe health condition during the hearing. PHR was disputing the quality representation and had to inform the judge about this case.

There is a lack of understanding of the concepts: "best interest" driven and client-driven legal aid. It results in the fact that most of the lawyers consider their duty to override the child's perspective.

Lawyers providing legal aid do not have any guidelines to communicate with a child and to work with her/him; thus, they improvise and often violate the right to legal representation and access to justice and other fundamental rights under UN CRC.

The Bar Association does not consider a single case concerning a child's ethical representation. The books and learning materials about lawyer's ethics duty do not cover child-related issues, neither lawyers are provided any courses on that specific subject – consequently, we face the situation that ethics are ignored or not comprehended adequately at court-hearing as well as before.

3. Are there limits to the intervention of this lawyer in comparison with the other parties?

The limits of the lawyer's intervention representing a child are not defined either by the Code of the Rights of the Child or by the Law of Georgian on Lawyers. The Ethics Code of lawyers does not mention a child at all.

Personal Observation:

While practicing child rights litigation since 2016, I have never heard the discussion about that subject in any circumstances.

4. 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?

There is a conflict between two legislative acts:

The Code of the Rights of the Child provides a provision that obliges all legal and natural persons to be guided by the best interest of the child (Article 5.3): "It shall be a binding obligation for the legislative and executive authorities, the judiciary, and the public institutions and natural and legal persons of Georgia, to give priority to the best interests of the child when making decisions and/or to take any action in relation to the child."

Additionally Article 5.3 provides: "The State shall take all necessary measures to ensure that legislative and executive authorities, the judiciary, and the natural and legal persons of Georgia, **determine the best interests of the child** and make any mandatory assessment in accordance with the following fundamental criteria:

a) understanding the opinion of the child and considering the child's opinion in a proper manner;

b) protecting all other rights of the child, among them, ensuring the protection of dignity, free development, education, healthcare and social security, and protection against all forms of violence, and ensuring the equal treatment the child;

c) assessing and taking account of the psychological and physical well-being, and the legal, social and economic interests, of the child, through a multidisciplinary approach with specialists."

However, the Georgian Law on Lawyers provides, and the Ethics Code for Lawyers provides that client's opinion is the determining the performance of a lawyer:

Ethics Code for Lawyers adopted by Georgian Bar Association in 2006, April 15, (Article 8) provides: The lawyer starts professional work by agreeing with the client... The lawyer should conduct legal proceedings with the client's, his/her representative's guidance.

Georgian Law on Lawyers provides (Article 7): "A lawyer shall .. (b) not disseminate without the consent of the client, information that was obtained from the client in the course of the practice of the profession of lawyer."

Thus because there is a collision between two acts, different lawyers take a different route. We the PHR lawyers, believe that we should present the child's opinion and allow the court to determine the child's best interest.

Personal Observation

As mentioned before, lawyers and the court system fail to distinguish between the concepts of **best-interest-driven and client-opinion-driven litigation in child rights areas**. Moreover, when few child rights lawyers raise this issue, they face significant barriers. There is a practice of appointing psychologists to evaluate the validity and relevance of a child's opinion. This tool is applied not only by the courts but also by the State Care Agency (National Guardianship Organ). This harms the principle of child right to be heard because the psychologists usually discuss how irrelevant and invalid is the child's opinion on the subject that is not their duty. Consequently, the lawyers wishing to represent the child's interest based on her/his opinion are prevented from doing so.

5. How does the child participate in Court proceedings? Directly, in front of the judge, or through an intermediary, either the lawyer or another professional?

The child's right to participate and to be heard in court is ensured through following legal provisions:

The Georgian Code of the Rights of the Child (Article 8) provides:

"1. The child shall have the right to have his/her opinion heard when resolving any matter related to or affecting any of his/her rights and to have his/her opinion taken into account in accordance with the bests interests of the child.

2. The child shall have the right always to be heard when the child is willing to express his/her opinion, either directly, or by providing due support depending on individual needs, and in the form and by any means of communication desirable and permissible for the child.

3. The restriction of the right provided for by paragraph 1 of this article on the grounds of age, disability or other circumstances, shall be inadmissible.

4. The process of interviewing the child and the process of hearing the child's opinion shall be informative, voluntary, respectful, accountable, child-friendly, inclusive and safe, and shall be conducted by specialists appropriately trained in matters related to the child."

The Georgian Code of the Rights of the Child (Article 14.1) provides:

"The child shall have the right to freedom of expression. Moreover, the child shall have the right to have his/her opinion heard when making decisions related to the child and to have his/her opinion taken into account depending on the age and the mental and physical development of the child."

The Georgian Code of the Rights of the Child (Article 78) provides:

"1. During administrative procedures and court proceedings related to the child, the child shall be guaranteed the opportunity to express his/her opinion regarding the case at any stage of the hearing of the case.

2. The right of the child to have his/her opinion heard may not be prejudiced by reference to age or other circumstances. The child shall be given the opportunity to express his/her opinion in the desired form.

3. Appropriate conditions necessary to express his/her opinion shall be created for a child with disabilities.

4. The child shall express his/her opinion without the influence of an administrative body or other third parties.

5. The process of expressing his/her opinion by the child shall not take the form of an examination. It shall take place in a friendly environment in the form of free dialogue. The dialogue shall be supportive rather than contentious."

Personal Observation:

There are several patterns we observe of child participation:

1. some judges do not invite a child to hear his/her opinion even when the case refers to fundamental child rights. In such cases, they neither discuss the child's best interest in the judgment nor consider the child's opinion.

2. Another group of judges who do invite children on hearing; however, the process largely remains artificial. These judges mostly give the same questions to children:

"Which is your favorite subject at school?"

"Do you like to go to school?"

Children, as they express with their lawyers after hearing, become very frustrated in these settings. They share with us that the judge seemed to be uninterested in their opinion, and it was all for nothing.

3. Another group of judges do hear a child and do their best to learn their opinion. However, it is visible that they do not have adequate resources (there is only one courthouse adopted) and enough time, so even though they do their best, it's not enough to build a trust relationship with a child. However, this is the best practice we have because children usually notice that the judge is determined to hear them, so they help the court. Children themselves try to give answers that the judge is interested in. In such cases, the role of a child's lawyer is essential since we help our clients to feel safe. They trust us, and if they see we trust the court, they share their opinions with the court. So this practice works because some participants are in place (motivated judge and motivated child lawyer) that can compensate for the lack of resources.

6. If it is another professional, can you identify it and specify its responsibilities, please?

The child can be presented before the court by herself/himself, by the parent (legal representative), by the lawyer, and by the procedural representative. However, there is no clear division of responsibilities among these representatives. So each of them acts in its way, often without consultations among them.

ECtHR strongly criticizes the procedural representation that is provided by the State Guardianship body (LEPL Agency for State Care and Assistance for the (Statutory) Victims of Human Trafficking):

Nt.S. and others v. Georgia (71776/12):

"Para. 74. The Government claimed that the children had been both involved and heard in the domestic proceedings via the representative assigned to them by the SSA (see paragraph 62 above). The court notes that on January 12 2010 the Tbilisi City Court did indeed request the appointment under Article 1200 of the Civil Code of Georgia of a representative for the boys. However, it has certain reservations as to the specific role this representative played in the course of the domestic proceedings. Thus, it appears from the case file that the SSA became formally involved in the proceedings only from the appeal stage

onwards (see paragraph 19 above), skipping – for unknown reasons – the full examination of the case at first instance. After its involvement in the appeal proceedings, the SSA and its relevant regional branch enjoyed the status of an "interested party" (see paragraph 23 above). The Code of Civil Procedure, however, does not make any provision for the status of an "interested party" and/or its ensuing procedural rights. Hence, it remains unclear how the SSA could have effectively represented the children's interests while lacking a formal procedural role in the case. This leads the court to its second area of concern.

75. The SSA and its relevant regional branch were designated to represent the children's interests under Article 1200 § 2 of the Civil Code. But it remains ambiguous what this type of representation exactly implies. Neither the Civil Code of Procedure nor the SSA-related legislation spells out the functions and powers of the representative appointed under the above scheme. In practice, throughout a period of rather more than the two years that the proceedings lasted, the various representatives of the SSA met the boys only a few times, with the sole purpose of drafting several reports on the boys' living conditions and their emotional state of mind. No regular or frequent contact was maintained in order to monitor the boys and to establish trustworthy relationship with them.

77. The Court does not see how the SSA's drafting of several reports and attending court hearings without the requisite status could be classified as constituting adequate and meaningful representation, as outlined *inter alia* in the above-mentioned international standards."

7. 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 child's participation is voluntary because it is not obligatory by the law. However, in practice, we, the child lawyers, permanently face requests from the court to bring the child (even against her/his will) in the courtroom. Many judges

have understood the provision of child participation as their power to request a child to come to the court. Often, the involvement of the lawyer representing a child is not deemed satisfactory, and the child is forced to appear in court.

If the child has a lawyer, the lawyer consults the child; however, children are often not aware of their right to have a lawyer and to have free legal consultations.

Currently, there are no institutional protocols in place that would guide the legal practice of providing legal aid and legal consultations to a child. Currently, there is only a small number of informational material prepared by NGO Partnership for Human Rights, but that is far not enough (Material is mainly in English, so it's less useful for the international audience).

Personal Observation:

The role of other professionals in practice is as vague as in theory. There is no unified practice and a conduct code that is very harmful to child rights litigation.

8. 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?

The representative can act on behalf of a child if there are doubts about what a child wants that the judge orders psychological evaluation. However, since psychology as a profession is not regulated, and currently there are no protocols created for that purpose, we face huge problems with that case. Often, psychologists use techniques that are not evidence-based and create many uncertainties that consequently damage a child's interest.

Personal Observation:

Unfortunately, we have observed harmful practices when children (three siblings) didn't want to come to court; the judge made a threat to visit their school and meet them there against their will. So children had to go to court against their will. This has caused significant trauma to all children.

9. 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? 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?

There is no restriction with the procedural phase once the child is a plaintiff. However, there are certain limitations of child participation concerning certain legal proceedings. e.g.:

In case of the administrative, legal proceedings regarding the elimination of violence against women an/or Domestic violence, protection of and assistance to victims of violence, Administrative Procedural Code of Georgia (Article 21¹²) provides: ". During administrative legal proceedings regarding an appeal against protection or restraining order, questioning a minor (getting explanations from a minor) – a domestic violence victim in the presence of a parent (parents) being the presumed perpetrator/legal representative (representatives), shall be unacceptable. The presence of a parent/legal representative at the interrogation (questioning) of a minor, if there is doubt concerning his/her (their) impartiality deriving from the nature of the relations between the perpetrator family member and the parent/legal representative, or due to any other conflict of interest, shall also be unacceptable, as well as providing him/her (them) with or forwarding to them the testimony (transcript of interrogation, explanations) given by the minor".

There is no quantitative limit on the consultations with the child. The child is not limited to raise certain questions. There is no regulation guiding this process.

10. 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 office? Who is present in the courtroom/cabinet? How are the people dressed? Can you present a photo of such an atmosphere?

There is only one child-friendly courtroom in the system that is far not enough. In most cases, children participate in hearing in regular courtrooms, where sometimes child lawyers are not provided enough chairs to sit. There are usually children, lawyers, bailiff, judge, and clerk present at the hearing. In certain instances, a judge is not current and communicates with the child from another courtroom (where the defendant and the defense team is) through a computer screen that is very inconvenient for the child.

Personal Observation:

The courthouses are very poor and unfriendly to children. Children face barriers for using restrooms, there is no still drinking available, the chairs are not adapted to child height, children usually cannot observe meaningfully, and in some case, we, the child rights lawyers, are not allowed to communicate with our client children and the bailiff is ordered by the judge to keep us separate.

11. 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?

No there is no protocol of such kind. We, PHR lawyers, follow international protocols at our initiative, but other parties and the court doesn't share our approach, so children suffer due to the absence of such protocol.

12. 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?

The party asks the questions, judge, psychologist, social worker - everyone. The defense lawyers often apply defense strategies that traumatize children and make them feel guilty. They ask questions: "do you want your beloved father to go to jail because of your testimony?". We, the child rights lawyers, try to oject questions, but judges do not always agree. There is no safeguard to protect children from re-victimization in this process. We filed

several complaints against judges who didn't protect children from re-traumatization on the hearing, but there is no decision from the High Council of Justice so long. Neither is there any decision from the Georgian Bar Association on this matter because the Lawyer's Ethics Code doesn't have any single provision about a child as a client or in any other status.

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

If the child is a part of the administrative/civil case, there is no restriction for her/him to attend the announcement of the decision.

14. Are there any special rules about considering 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?

There is no special rule for considering the child's opinion in the context of the decision. One can not predict how/if the judge takes into consideration at all. Some judgments fully omit the child's position. There are no age criteria. The psychologists assess the maturity, but there is no guideline for that and the assessments vary based on the individual approach of the psychologist. According to the recent decision of the Ombudsman, who represents the National Human Rights Institute, the largest national forensic bureau considers that children below 10 years cannot have their own viewpoint at all¹:

"On July 20, 2020, the Public Defender of Georgia addressed the Minister of Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of Georgia, and the Head of the Levan Samkharauli National Forensics Bureau with a general proposal relating to the prevention of age-based discriminatory practices during forensic psychiatric and complex psychiatric-psychological examinations.

¹ <https://ombudsman.ge/eng/skhva-nishani/zogadi-tsinadadeba-10-tslamde-bavshvebis-mimart-asakis-nishnit-diskriminatsiuli-praktikis-taobaze>

A motive for the examination of the case was the statement of Sapari (a non-commercial legal entity), according to which, they identified several cases when the Forensics Bureau did not evaluate the information obtained during the several-hour questioning of juvenile witnesses under the age of 10.

After summarizing the factual circumstances of the case and the obtained statistical information, the Public Defender concluded that the results of the above examination of children under the age of 10 were similar to each other, as it had not been established in any of the cases studied since 2017 that during the forensic psychiatric and complex psychiatric-psychological examination, the child under 10 could correctly perceive, remember or convey important circumstances of the case. In addition, the relevant legal act does not establish a different rule for the questioning of juveniles.

The Public Defender explained that children under the age of 10 need to be treated differently from people over the age of 10, depending on their mental maturity. The fact that there are no special guidelines for conducting forensic psychiatric or complex psychiatric-psychological examination of juveniles at this stage puts minors under the age of 10 in an unequal position. Such a practice constitutes discriminatory treatment on the ground of age, as the existing general rule has a negative impact on children under 10.

Therefore, the Public Defender addressed the Ministry of Internally Displaced Persons from the Occupied Territories, Labour, Health and Social Affairs of Georgia with a general proposal to develop special guidelines and regulations at the normative level for conducting forensic psychiatric and complex psychiatric-psychological examination of juveniles under 10 and those aged between the ages of 10 and 18. The Public Defender also addressed the Levan Samkharauli National Forensics Bureau with a general proposal to take into account the best interests and needs of juveniles in the process of conducting forensic psychiatric and complex psychiatric-psychological examinations and evaluating the examination results, as well as to assess each case on the basis of individual and factual circumstances and characteristics. "

15. 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 is no protocol to communicate a decision to the child. The child rights lawyers speak it in a child-friendly way, but since child lawyers have no clear obligations towards children, in many cases, children might not learn about the decision at all.

No provision would allow a child to speak with the judge after the decision is announced.