

CHILD PARTICIPATION IN FAMILY AND CHILD PROTECTION MATTERS IN TURKEY

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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 Turkey

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

By defining that such a 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?

- As per the Turkish Civil Code, the child does not become a party to the proceedings concerning the child, such as custody, alimony, establishment of personal relationship (access), establishment of paternity, revocation of paternity, permission to get married, which are included in the jurisdiction of family courts. Parents or trustees can initiate the proceedings. A social inquiry report (SIR) is obtained through a professional (expert).

The child does not have right to legal representation by a lawyer. However, if there is a dispute or conflict of interests between the party and the child, the child could be represented by a trustee, after a notification to the civil court of peace in order that the trustee represents the child. Even in such case, the child could not become a party to the proceedings.

As per article 124 of the Turkish Civil Code, men and women cannot marry unless they turn 17 years of age. As per articles 126 et seq. of the Turkish Civil

Code, this is subject to the permission of their legal representatives. As per article 128 of the Turkish Civil Code, after the judge hears the legal representative who does not permit the marriage without a justifiable reason, the judge may allow the applicant minor or interdicted person to get married upon his or her demand. Under this provision, I interpret that the child can apply to the court as a party in order for the revocation of such decision of his/her legal representative- who does not permit the marriage without a justifiable reason- and for the marriage to be allowed.

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?

The child is primarily represented on the basis of a social inquiry report (SIR) issued by a professional (expert). The child can directly participate in Court proceedings voluntarily, or if the expert deems it appropriate for the child to be heard directly by the judge, or if the judge deems that it is necessary to hear the child in the light of the contents of the file or the reports submitted. Direct participation is more common particularly by the children in the older age group. In recent years, the Supreme Court of Appeals has desisted from the opinion that the child must absolutely be heard by the judge at the hearing. The experts comprise of pedagogues (child development specialists), psychologists or social workers who work in the courthouse to undertake such tasks. Sometimes one of these experts prepares a report, and sometimes three experts jointly prepare a report. At this point, the participation of the child can be ensured in a judicial interview room (JIR) in order to observe the relationship between the child and the parent, or for a number of other reasons (such as safe interview etc.) .

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?

- For each direct participation, the opinion and consent of the child is obtained. Some parents may also adduce their children as witnesses. In such

case, it is notified that the child has the right to refuse to testify by law and that the child has the right not to reply on the matters which he/she does not want to answer. If he/she declares his/her direct participation request through the SIR, or in another way, or to the judge, the participation of the parties is ordered by means of summons.

There are no materials specially prepared for children with regard to their participation. However, at the discretion of the judge, such materials may be obtained in the light of the expert opinion, depending on the age group of the children.

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 it is doubtful whether the child really wants to express his/her own thoughts, an SIR and also a situation assessment report (SAR) can be obtained by applying the 'consultancy measure'. Likewise, if necessary, reports can be requested from the departments of universities that are specialized in this field.

Particularly in recent years, children can also express themselves in their natural environment, without ensuring direct participation (in the courtroom) through judicial interview rooms (JIR) and/or through experts.

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?

The participation takes place at the hearings which represent the trial phase. However, in urgent and compulsory situations, direct participation can be achieved by submitting a petition. At this point, the limit can be the age of discernment. Although there is no age limit stipulated in the law, as per the consistent jurisprudence of the Supreme Court, it is decisive for taking the opinions of those who are 8 years of age and over. The child usually sets the

limits for being consulted. If the child once again states that he/she does not want to express his/her opinion, it is no longer resorted to ask his/her opinion. The child himself/herself may ask other questions. They can be assessed through the filter of the expert and the judge.

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?

- Unfortunately, courtrooms do not contain an appearance that the child can easily express himself/herself. Although there are no clear provisions on this, I and many family judge colleagues take off the robes, descend from the bench and sit on a chair at the same level as the child, and thus an attempt is made to receive the child's opinion by also ensuring the expert's participation, depending on the age and perception level of the child.

Even though it is possible to prepare the child by the expert in the judge's room beforehand, and then to go to the courtroom, and even though care is taken to ensure that the child does not make a statement in the presence of the parties, some Regional Courts of Justice judgments order that the child must absolutely be heard in the courtroom with the participation of the parties. However, the judge has the power to hear the child alone, considering the best interests of the child. Therefore, it would be more appropriate to hear children in judicial interview rooms (JIR). This is because, while the child is heard in a judicial interview room (JIR), the child is not in the court environment, questions of the parties and of the judge are transmitted to the expert via headphones and asked by means of the expert. By this way, the child feels safe and comfortable.

However, these rooms are reserved mostly for the use of the criminal courts and the rights of the victims; and since they are not only allocated to family courts, they are inadequate and it is not possible to use them at the desired frequency and level. It is necessary to eliminate this deficiency and to pave the way for hearing children, with the participation of the parties, without entering the courtroom and under the supervision of family court experts appointed for and staffed to the family court only.

A standard courtroom view:



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 no such protocol or guide for family court judges.

Considering the situation of the child, the room can be evacuated when necessary, and sometimes parties and attorneys are also taken out of the room in order to prepare the child and make him/her feel safe, and the judge sits in front of the child without the robe and then, following a mutual welcome and acquaintance phase using an affectionate style of expression, the interview starts with daily questions such as questions about his/her school, the games he/she plays, the things he/she loves and likes and how he/she spends a day and then, the child is told why he/she is here, and that he/she will not talk about the issues he/she does not want, and that his/her opinion here does not mean not to love one of his/her parents, and the child is asked questions about which one of his/her parents he/she wants to live with, how often he/she wants to meet the other

parent; and if necessary depending on his/her age, questions about why he/she makes such choice.

In cases where the parents or the parties are taken out of the room, after the child's statement is recorded by the clerk and is read aloud to the child and the court makes the child read his/her statement, the child is reminded that he/she may modify it or remove it from the text if he/she finds an annoying expression in the statement. Particularly when children under 14 years of age are heard, the court's expert is also present in the courtroom. The parties are reminded not to ask annoying or judgmental questions to the child, and it is not allowed to ask such questions. Before the child is heard, it is ensured that the parties declare to the court in the absence of the child the matters they would like to ask the child and that these matters are asked to the child in an appropriate language after they are passed through the expert's filter.

In the event that children are heard as witnesses, procedural rules are applied, and care is taken to hear the child usually as the single witness, after all witnesses are heard. Likewise, after the witness testimony, it is also asked who the child wants to live with and what kind of personal relationship he/she wants to have.

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?

- If the child is a witness, before the child is heard as a witness, the parties or their attorneys are reminded of the position and age of the child and are requested to ask questions accordingly. In case the parties or their attorneys ask questions that would embarrass the child and violate his/her rights, it is explained that the best interests of the child are what should always be primarily considered by the judge. The attorneys can directly ask questions to the child, and the parties can ask their questions through the judge. In hearings in which particularly children between the ages of 14 and 18 are heard as witnesses; when questions are asked to the child, the party against whom an opinion is expressed may show minor reactions from time to time. In this case, it is also reminded not to react to the child who is stuck in a difficult situation.

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

-Only the decisions regarding custody or change of personal relations or increase of child support can be taken in the presence of the child. In lawsuits of divorce, care is taken to render decisions generally in sessions where the child is absent; however, in cases where a divorce decision needs to be rendered in front of the child, albeit in a small number, the child can be taken out of the courtroom, sometimes on request and sometimes ex officio.

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?

-Under articles 3 and 6 of the United Nations Convention on the Rights of the Child, in the actions concerning children, the child has the right to be consulted and to express his/her opinion. Weight should be given to the opinion that the child will express if it does not obviously contradict his/her interests. Therefore, pursuant to article 5 of the Law No. 4787 on the Establishment, Duties and Trial Procedures of Family Courts, in hearing children in discernment age and asking about their choices by the courts, the experts, comprised of a psychologist, a pedagogue and a social worker, should carry out an examination upon the court's order and then, the court should render its decision depending on the result stated in the report to be issued by these experts. The opinion that the child will expresses is decisive, as long as it does not obviously contradict his/her interests. Generally, children starting from 8 years of age are heard, and their opinions are received. In practice, maturity (discernment) is reported by SIR. Then, depending on this report, this issue is assessed in SAR when necessary.

Even though article 5 of the Law No. 4787 prescribes that psychologists, pedagogues and social workers shall serve within each family court, with the Presidential Decree No. 63 on the Support of Victims of Crime, family courts' experts were removed from their courts and gathered under one roof and withdrawn from their own fields. Consequently, since article 5 of the Law No. 4787 becomes inapplicable on a de facto basis and thus, making it difficult for family

court judges to reach their experts, a situation has arisen to the detriment of the children.

A target time is also set for lawsuits of custody; however, when there are situations requiring receipt of consultancy for the child, the failure to receive consultancy services from the relevant units due to the target time also creates a situation to the detriment of the child. In addition, family consultancy and relevant sub-committees are very weak; behaviors that negatively affect the child may be exhibited, without taking the child's personal development into consideration and without considering the fact that the child is an individual.

As a result, the judge reaches a conclusion entirely depending on his/her professional experience, observations, and special sensitivity.

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?

- Children are represented in Court by their legal representatives (mother-father, parents, guardians, and trustees), other than exceptional cases. Decisions are rendered in the face of the legal representatives. However, in the decision phase, if the child is present at the hearing, the decision can be declared by considering his/her age and level of knowledge. When necessary, it is informed how the answers to the questions of the child are included in the decision. There is no circumstance that would require preventing the child from speaking with the judge.

Does the child have the right to appeal the decision?

The child who does not have the capacity to stand as a party in the proceedings may appeal the decision through his/her legal representatives.