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CHILD PARTICIPATION IN FAMILY AND PROTECTION MATTERS:

AN AIMJF´S COLLABORATIVE RESEARCH

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CHILD PARTICIPATION IN FAMILY AND PROTECTION MATTERS: AIMJF´S COLLABORATIVE RESEARCH

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Abstract: The paper has an introductory section to briefly explain the role and commitment of the International Association of Youth and Family Judges and Magistrates (AIMJF/IAYFJM) on the improvement of the Justice System, the importance of a transnational judicial dialogue and the involvement of its members in a collaborative research on child participation in family and protection matters. The article presents a comparative analysis of the 35 national contributions in this research, offering a compendium of the data collected from each country, based on the issues specified in a common questionnaire. A general photo gallery of the spaces and ambiences where children are heard in Court and the questionnaire used in the research are attached to the paper.

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

1. Introduction. AIMJF´s collaborative research

AIMJF and its commitment on the improvement of the Justice System: the institutional context of the research as a transnational judicial dialogue

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The International Association of Youth and Family Judges and Magistrates (IAYFJM or AIMJF, for its acronym in French and Spanish) is an NGO (Non-Governmental Organisation) with consultative status at the Council of Europe and associated with UNO's Department of Public Information (DPI).

It represents worldwide efforts to establish links between judges from different countries but also with other international associations working in the youth and family protection sector.

AIMJF has a longstanding commitment towards the improvement of the Justice System in order to provide better conditions for a qualified attention to children based in a human rights approach, with particular attention to the involvement of the Association in the drafting process of the Convention on the Rights of the Child (UNITED NATIONS 2007)[2] and the development of the Guidelines on Children in Contact with the Justice System (AIMJF 2017).

AIMJF´s promotes research on international problems facing the operation of the courts and various laws relating to youth and family. The Association also develops training programs, such as world congresses, study tours in different countries, monthly webinars and discussion groups. Therefore, AIMJF is a key player promoting transnational judicial dialogue.

Transnational judicial dialogue is not only based on a shared history or legal tradition, nor on a formal treaty-based organizational structure or hierarchy, such as the Convention on the Rights of the Child, but as part of a common enterprise of a world judicial community, recognizing that not only comparative law, but also foreign judicial decisions and organizational structures are important resources for deliberations in domestic courts (WATERS 2005). Judicial dialogue "allows judges to be more conscious about the environment in which they operate, making them aware that they belong to an international legal community in which everyone contributes to the development of a global normative system in benefit of the human person" (MAC-GREGOR 2017)

The horizontal dialogue between courts of the same status is therefore important to elucidate issues at hand and to suggest new approaches to similar problems. If cultural and legal particularities about controversial legal questions or judicial structures may cause uncertainty among judges, international legal standards and *pro personae* principle (with more protective criteria than the international standard) (MAC-GREGOR 2017) are important tools to promote norm convergence in response to a perceived need for a single international legal norm on a particular issue (WATERS 2005).

This was the case with our topic: child participation in family and protection matters. In one of AIMJF´s webinar on this issue, in a comparative study between three countries (Québec/Canada, France and Italy)[3], significant differences were remarked, in spite of a relatively similar cultural context. Interested in identifying

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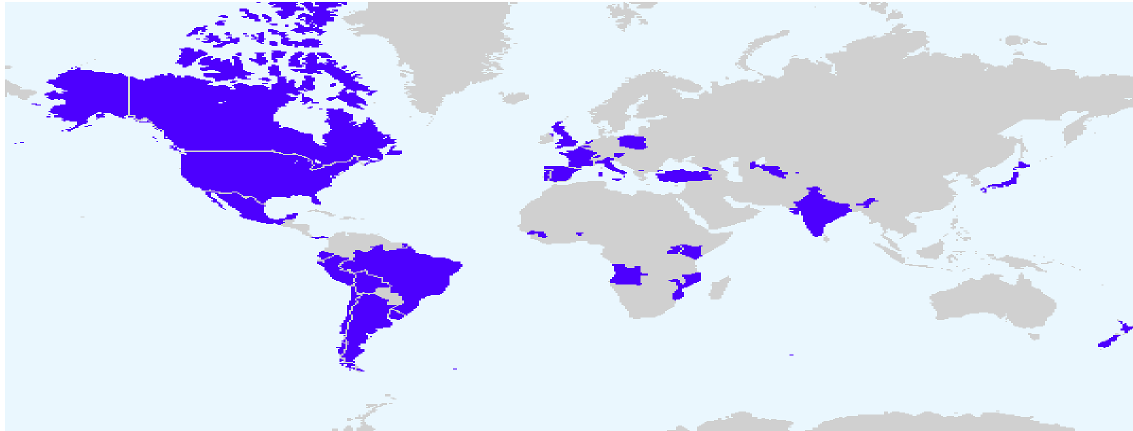
[2] All references made in this introduction are detailed in the next chapter.

[3] https://www.youtube.com/watch?v=HxANs3lQSn8&t=168s

similarities and discrepancies among countries, we suggested a AIMJF´s discussion group to realize a collaborative research on the subject, having in mind the same questions that guided the webinar´s discussion.

The national contributions to the research and its specificities

AIMJF has members in more than 60 countries, 35 countries[4] agreed to participate, as follows:



Africa	**Americas**	**Europe**	**Asia**	**Oceania**
Angola	Argentina	Austria	Georgia	New Zealand
Benin	Bolivia	Belgium	India	
Cape Verde	Brazil	England & Wales	Japan	
Guinea-Conacry	Canada	France	Turkey	
Kenya	Chile	Georgia	Uzbekistan	
Mozambique	Ecuador	Italy		
Uganda	Mexico	Netherlands		
	Panama	North Macedonia		
	Peru	Poland		
	United States	Portugal		

[4] Not all the respondents are members of the Association and some of them have been engaged due to my personal involvement and that of three members, to whom I thank for their special collaboration: Marta Pascual, AIMJF´s president, who helped with contacts in Latin-America; Ursina Weidkuhn, from Switzerland, who helped with the involvement of Benin, Turkey and Uzbekistan, and Renate Winter, who helped with the Austrian and Georgian participation.

Uruguay	Spain
	Switzerland
	Turkey

As a collaborative research, the contributions are very diverse regarding the professional background of each author. The majority are not researchers themselves, but professionals working in the field as judges, magistrates or lawyers. It is clear the diversity of style of each text, the length and the extension of detailed information from each country.

Remarkably, some of the texts do not address all the issues submitted to discussion. Some reasons may be speculated, including the lack of meaning due to cultural or legal differences, or even a certain selectivity in the answers by the respondent. Some other respondents, however, have brought other issues not specifically addressed in the questionnaires, showing a broader perspective to deal with our common topic.

This situation showed the specific challenge of building a comprehensive questionnaire flexible enough to address cultural diversity in an international comparative approach. It was not clear since the beginning how wide the members´ involvement and the degree of cultural diversity in the sample could be. In a different context, the questionnaire itself could and should have been tested prior to its diffusion to our members, searching for a better cultural and legal adequacy to such a wide range of participants.

Notwithstanding this possible limitation, the outcomes are rich and reveal the importance of continuing and further researching on the procedures and practices involving justice and children.

I thank each and all participants for this joint effort.

The structure of the document

The document is in several languages. AIMJF´s has three official languages, English, Spanish and French. The initial project included the possibility of translating the final document in the three languages. Some Portuguese speaking countries have made their contributions in their language and I would translate it into English.

However, due to the large participation of our members and partners, it was decided to publish the final document in the languages they were originally written, because the internet provides resources to translate all the information and translation would imply an excessive cost to our Association.

Therefore, I have prepared a compendium of the data as an introductory article, in English, to provide access to the general content of the research. In this analytical compendium, I have also tried to highlight the theoretical debate on the issues under discussion.

It is followed by a photo gallery of the spaces where children are heard, aiming to facilitate a comparative analysis of the existing diversity among the countries. It is a sample of the most important photos shared by the respondents and the complete national photo gallery is published in each national section.

The questionnaire is also shared, because some countries have not repeated the questions in their responses.

Finally, we have the information provided by each country.

2. Child participation in family and child-protection matters: an analytical compendium of the research´s outcomes.

2.1. The research´s scope: the right to be heard as a right to participate in the proceedings in family and protection matters

The research was concentrated on procedural aspects of the child hearing in two areas: family and child-protection matters.

Focused on the right to be heard, article 12 of the Convention assures to the child, who is capable of forming his or her own views, the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

In children´s rights, participation is a core element of the Convention. Considered as one of its four main principles (UNITED NATIONS 2009), participation symbolizes, more than any other value, the paradigm shift that has given to children a new social status: not as an object of protection anymore, based on their needs to a normal and healthy development, according to adults´ perspectives, but as right holders, whose capacities to make their claims should be strengthen by duty bearers while meeting their obligations (UNRISD 2016). Participation is not only a means to a purpose, not only a procedure, but a civil and political right of all children and, therefore, an objective in itself. As a prerogative, it will only be effective if opportunities are granted to impact the decision-making process in all matters that affect them (CROWLEY 1988).

Children´s rights and a specific Justice system for children are both historically very sensitive to international influences and influxes of values, principles, guidelines and legal guarantees (GARCÍA MENDEZ 1994; GARAPON 2020) and AIMJF itself embodies its expression.

Juvenile justice is the area in which the Convention has more incisively detailed procedural participation rights to express the emblematic perspective´s change of the new model of rights approach.

Although more visible, children´s contact with the Justice System goes farther beyond juvenile justice in the international arena and has progressively challenged it in a more comprehensive approach.

Child victims and witnesses are a clear example of a group whose challenges when in contact with the justice system were perceived as demanding international attention. The development of standards to grant them both procedural participation rights and substantive rights were a major concern in the UN Guidelines on justice in matters involving child victims and witnesses of crime (UNITED NATIONS 2005). As a consequence of this consensus, protocols on forensic interview have spread around the world, such as to NICHD (NICHD 2014) and to NCAC (NCAC 2019), showing how the international experience can and do impact transformations in children´s rights and in the Justice system.

However, the same development has not reached family and protection matters with the same intensity.

On the one hand, the usual distinction of regimes between public law (including criminal and child protection) and private law giving a more local emphasis on regulations, and, on the other hand, the respect of autonomy and privacy rights of families, also against the intrusive and controlling aspects of the Justice System, have not allowed the same progression of detailed consensus on standards regarding children´s procedural rights in family and child protection matters.

However, what was considered until recently a matter between parents or between the State and the parents, has gained a new perspective with the Convention on the Rights of the Child, with the recognition of independent, whilst interconnected, interest of the child, deserving a new role and status in those proceedings.

Therefore, AIMJF´s research intends to bring into light not only the trends and commonalities, but also the differences and limits of these cultural process in the international arena in order to provide conditions for a deeper analysis of possibilities to build new bridges, sharing knowledge and experiences and to allow further steps in advancing on procedural guarantees to children in both of these areas: family and civil aspects of child protection.

The importance of participation in all procedures, including in family and child protection cases, is widely recognized by several international legal instruments, the below mentioned among others:

- The Convention on the Rights of the Child
- The Convention on the Rights of Persons with Disabilities
- The African Charter on the Rights and Welfare of the Child

- The European Convention on the Exercise of Children´s Rights
- The European Convention on Contact concerning Children
- The European Convention on the Adoption of Children
- The Council of Europe Guidelines on Child-Friendly Justice
- Convention On The Civil Aspects Of International Child Abduction
- Convention On Protection Of Children And Co-Operation In Respect Of Intercountry Adoption
- UN Guidelines for the Alternative Care of Children
- Inter-American Convention On The International Return Of Children
- Inter-American Convention On Conflict Of Laws Concerning The Adoption Of Minors
- Council of Europe´s Regulation 2003/2201 on Jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility

Non-binding instruments should also be mentioned, such as:

- UN Approach to Justice for Children (GUIDANCE NOTE OF THE SECRETARY-GENERAL) (2008)[5]
- AIMJF´s Guidelines on Children in Contact with the Justice System
- Brasilia Regulations Regarding Access To Justice For Vulnerable People[6]
- Mercosur "Guidelines on adapted justice to children and adolescents"

2.2. Procedural aspects of the right to be heard in an international approach

The Committee´s General Comment 12 on the Right to Participation has established five steps for the implementation of the child´s right to be heard: preparation, with due information about the right itself and the impact of his/her view on the outcome; the hearing itself, enabling and encouraging, preferably under conditions of confidentiality; assessment of the capacity of the child, to give his/her views due weight; feedback about the weight given to the views of the child; and complaint procedures and remedies when the right to be heard and for their views to be given due weight is disregarded and violated (UNITED NATIONS 2009).

Still, according to the Committee, "the child-hearing is a fundamental element to strengthen the place and value of children in society and should not

[5] https://www.unodc.org/pdf/criminal_justice/Guidance_Note_of_the_SG_UN_Approach_to_Justice_for_Children.pdf

[6] Adopted in 2008 in the Ibero-American Judicial Summit, which was also attended by the Ibero-American Association of Public Ministries (AIAMP in its Spanish acronym), the Inter-American Association of Public Defender Offices (AIDEF in its Spanish acronym), the Ibero-American Federation of Ombudsmen (FIO) and the Ibero-American Union of Lawyers' Societies and Associations (UIBA, in its Spanish acronym)

be a momentary act, but a constant and intense exchange between children and adults in various contexts and the General Comment also recognizes that this right implies the right to initiate a proceeding (§54), especially in cases of separation from parents and alternative care, when the status of legal party would imply several other rights.

The right to be heard is the core element of the right to participation and, therefore, of procedural due process (WASSERMAN 2004). Some kind of hearing is essential for fairness in the proceedings, both judicial or administrative (FRIENDLY 1975) in various legal traditions.

Therefore it was considered important, in this research on the right of the child to be heard, to understand the proximities and distances regarding the guarantees recognized to adults in general proceedings, including administrative, to have a standard to what is provided or not to children when they have the opportunity to be heard. Indeed, any analysis of a fair and adequate treatment of (children´s) rights demand a scale of values, an economy and principle of magnitude or grandeur to allow comparisons, rational and moral justification and, ultimately, a demand of equality (BOLTANSKI 2011), In fact, the right to be heard is considered a procedural guarantee and a fundamental right for every human being (Universal Declaration of Human Rights, article 10; International Covenant on Civil and Political Rights, art. 14) especially in criminal matters, but also to determine rights and obligations in a suit at law when a fundamental right is at stake. In researches with children, there was a perception by them that procedural safeguards were less often in civil proceedings (FRA 2017), showing the importance of a more focused approach in this area.

The right to be heard implies indeed other rights. The elements of a fair hearing are considered:

- an unbiased tribunal,
- notice of the proposed action and the grounds asserted for it (the right to be informed),
- the right to call witnesses, to know the evidences and to have decision based only on the evidence presented (the right to support their allegations by argument, however brief, and if needed, by proof, however informal, with the possibility to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal), varying the degree of the safeguard with the importance of the private interests affected,
- the right to legal counselling and the right to be heard by counsel,
- the right to having the statement recorded to grant judicial review,
- The right to judicial review (FRIENDLY 1975).

Within the Judiciary, the right to participation is therefore intrinsically correlated to access to justice. Liefaard, recalling the UN High Commissioner for Human Rights, remembers that access to justice for children could be defined as “the ability to obtain a just and timely remedy for violation of rights in national and

international norms and standards, including the CRC" with a clear correlation to the right to an effective remedy (LIEFAARD 2019). Granting the right to access to justice implies removing traditional barriers, such as procedural costs, location of and physical access to the courts, as well as empowering children to grant them legal capacity and legal assistance, including the right to initiate proceedings. Provision of information and adaptation to proceedings in a sensitive or child-friendly manner, involving changes in the ambiance, rituals, communication and clothing are also important elements to be considered.

2.3. Children and the family: a shared vision of family and child protection matters

Joining in the same research family and child protection matters could be arguable, since family law is considered as private law, whereas child protection is normally considered as public law.

However, beyond classifications within legal studies, we have preferred to keep the focus on the conflict within the family, as a shared experience in both fields, assuming that in all cases of family law (custody, separation and divorce) there is a conflict that causes impact on children, who wish to have a say in this moment (KELLY 2002). Therefore, whenever there is a familial conflict that could affect the child´s interest, irrespective of its degree, we have wanted to understand how the Justice System recognizes, promotes and enhances the child´s right to participation in the decision-making process.

In general terms, prevails in family law the autonomy and privacy rights of families and the consideration that normally the interests of the child are considered and better addressed by their parents than the court in case of divorce and separation. The prevalence of alternative conflict resolution is emblematic in family law proceedings to avoid the indeterminacy of all projective decision, such as custody (GARAPON 2010; 2020; MNOOKIN 1975) and therefore the Committee on the Rights of the Child considers very important to grant child participation even in mediation. However, as we have focused on participation in judicial settings, mediation would transcend the scope of the research, as it is not normally held within the courts, and would also involve the analysis of the different methodologies on the matter (PARKINSON 2014; KELLY 2002, BIRNBAUM 2011; BUSH 2012; VALDEBENITO 2021), impacting the manners child participates.

Therefore, focusing on conflicts that may involve judicial intervention, State intervention occurs in both areas. It´s widely recognized the impact children suffer when their parents divorce, especially in conflict custody cases (FREUD 1984; BOWLBY 1988; HUGHES JR 2009; HOLMES 2014; NUNES COSTA et al 2009). However, it is also recognized that children who were treated with respect and have had their opinions heard and recognized are able to deal better with divorce

or conflicts within the family and become able to negotiate changes, when needed (WILLIAMS 2004; HUGHES JR 2009).

In those cases, the breadth of discretion, the adequate protection of procedural safeguards and the standards for conflict resolution are disputable and, in spite of the diversity of conflict´s degree, it is recognized that overlapping application of family and civil child protection law is frequent (MNOOKIN 1975), especially when the dispute between adults may displace their focus from the child to their own personal interests, giving space to victimization of the child due to manipulation, psychological violence or, in those countries where it is recognized, to parental alienation. In terms of court´s jurisdiction, it is also frequent that the same court deals with both areas and, therefore, beyond the diversity of functions (private settlement or child protection), the place of the child in the family is at stake and the respect of their individual rights is an issue.

As such, we were trying to understand the pedagogical message and the responsiveness (BERRICK 2018) of the Justice Systems: either if there is an abrupt change in the role of the child in family proceedings, regarding those in civil child protection cases, or if there is a continuum of increasing involvement of the child in the proceedings, with an extra care in case of child protection, showing to the family and to the society in general that the voice of the child should always be considered in case of conflict.

We are also concerned with the legal and political impact of child participation in the procedures. According to Lansdown, consultation may be meaningless if the child is only involved once all realistic alternatives have been eliminated, therefore only in those situations of a more intense conflict (both in family and child protection matters), when the opportunities for children are more restrict. In these situations, where compulsory powers by adults are at stake, best interests of the child may be used as weapon in the armory of professionals to override the wishes and feelings of a child or parents' consent, with the additional danger that adults listen to children only when their views coincide with their own (LANSDOWN 1994);

A holistic approach is, therefore, very important to give a broader perspective on how children´s rights are dealt in the justice system, both in family and protection matters.

2.4. The structure of the research

The research was organized on the following topics:

- Legal status of children in the proceedings
- The right to legal representation by a lawyer, limits and ethical duties regarding the children´s views
- Procedural phases when the hearing takes place and limitations
- Opportunities for the child to bring other issues to court consideration
- Voluntary participation and consultation

- The modalities of hearing
- Interaction with other parties and due process safeguards
- Ambiance and clothing
- Communication procedures
- Weighing the child’s view
- Remedies, especially the right to appeal

All respondents were asked to attach to their contributions any kind of material important to consider the implementation and safeguarding of the right to participation, especially informative material for children, guidelines or protocols to be observed by judges and other professionals, and photos of their clothes and the places where the hearing takes place.

For each topic a brief picture of the main ideas raised by the literature aims to help understanding the differences in the sample.

2.5. Some theoretical disputes underlying procedural aspects of the research

Capacity is an organizing principle in the articulation of individual liberties and, for Federle, the modern debate over children´s rights cannot be anything but a debate about capacity (FEDERLE 1993). This is particularly true considering many aspects dealt in this research, such as the legal status of children, the nature of the legal representation assigned to children, even some procedural aspects regarding the modalities of hearing.

It is known the debate between Hart (HART 1955) and MacCormick (MACCORMICK 1982) on the nature of children´s rights, whether children´s rights are considered as the power to obligate another or as a protected interest. Considering rights as claim-rights or rights of recipience may cause embarrassment under the traditional difference between moral and natural rights or, in continental law, of personality rights and capacity to exercise the right, with the consequence of putting the child under the dependence of their parents or legal representative for any legal intervention. Even as protected interest, the risk is to consider rights as need or protection, also depending on some other for its satisfaction.

The mere affirmation that children are right holders is not enough to overcome this theoretical dispute, still clear in the conditioning of maturity evaluation to enlarge the possibilities of child participation. Capacity is therefore a central aspect of the debate and the conditioning of autonomy and maturity for exercising rights. Intersectional analysis of human rights movements show how critical theory has focused on the denaturalization of some cultural aspects that impair the social condition of women, persons with disabilities, racial or ethnical minorities and also children. In all these movements, capacity and autonomy is correlated to a language of hierarchy and status, of exclusion and inequality (FEDERLE 1993; FINEMAN 2008) and, more contemporary, criticized as a manifestation of ableism (SCURO 2018; NARIO-REDMOND 2018; PALACIOS

2008; MELO 2021). For many of these groups, the challenge involving participation is to accommodate notions of power, both structural and interpersonal and, when involving children, between them and adults, especially figures of authority (FEDERLE 1994).

The understanding of the impact of social structures and constructions on the possibility of participation to children and other vulnerable groups, in a intersectional perspective, bring together different approaches and strategies for empowering vulnerable people, to enable them to make their rights effective (MELO 2021), displacing the focus from individual limitations to the analysis of the social impairments that could and should be institutionally and structurally redressed (PALACIOS 2008; FINEMAN 2008;2010), aiming to overcome ethical, discursive and institutional violence (BUTLER 2016a;2016b; 2017).

The Justice System is an emblematic field to analyse these disputes. It is in this context where rights are more evidently at risk, because involved in legal conflicts, and the status of children in the procedure and the institutional supports provided for them evince how each society is taking their rights seriously, to use Dworkin´s expression.

This is especially the case in family and protection matters. Some authors, such as Therborn, consider indeed that it is in the field of family law and child protection where the evolution of children´s rights in a comparative and analytical study could be more clearly identified (THERBORN 1993). Major social changes are ascertained on the family structures and functions (BECK 1997; GIDDENS 1993; THERBORN 2004) and a new social status for and perception of children is also evinced in our societies (MAYALL 2006; WYNESS 2006; WOODHEAD 2003), in this case with a fundamental impact of the Convention on the rights of the child. Both movements pose a challenge for family law and child protection, and for the Justice System as a whole, to follow and reflect these new values.

This is especially important in bordering areas of family law and child protection, where the rights to personal integrity and health are at stake, such as the rights of intersex babies (GUIMARÃES JR 2014) and other critical situations, where a decision taken by adults could have longstanding impact in the body and psychological integrity of the child. In all these situations, the postponement, as much as possible, of all decisions that may affect children in a considerable way, and that could be considered illegitimate if taken by any other person, are recommended.

These considerations are therefore underlying many of the discussions on procedural aspects of child participation and, in a shorter approach, we will highlight some aspects of the theoretical dispute, aiming to keep open new possibilities and perspectives.

2.6. Children as parties in the proceedings

The first question addressed in the research deals with the role of children in the proceedings. When recognizing that a certain matter affects the child, therefore that there is a personal interest in the decision to be taken, what is the

nature of the child´s intervention? What is the legal status of the child within the proceeding?

The recognition of children as parties deals with the issue of:

- Capacity and differentiation of modalities of capacity
- Modalities of procedural intervention
- Modalities of provoking the legal system to have their rights protected
- In general, citizenship and political rights

Therefore, it is important to know the strategies adopted by the different countries to enable children to have, in some degree, their legal status recognized and how they are empowered.

According to the respondents, in 21 countries (58%), children in some measure are considered as parties, although in many of them just in some cases, mostly in child protection matters.

However, contrary to the Latin aphorism "*a maiori, ad minus*", in the majority of the countries what is valid in the most severe cases (child protection) (VAN IJZENDOORN 2009), is not valid for the less severe cases (family law cases).

Another very commonly referred situation is conflict of interests between the child and their parents. However, the questionnaire has not reached a clear picture on how it is determined if there is a conflict of interests or not, and especially if there is any kind of child participation in this procedure. Having in mind, as we will see, the lack of informative material for children in many countries, it seems that the recognition of existing conflict of interest is much more dependent on adult discretion than on the child´s perception and/or request.

In 38% of the sample (14 countries), children are not considered as parties.

It´s important to remark, however, some singularities in the answers. Interestingly, in one country, Switzerland, children are considered as involved third person (ZOGG 2017), which could be an accommodating or transitory position between the lack of recognition of a specific legal status and becoming a fully recognized party in the proceeding.

In a lesser level of these intermediate strategies, in the Netherlands children aged 12 or older have been granted the possibility of approaching the court informally and asking for a specific decision (regarding parental responsibilities after divorce and separation, and care and contact arrangements between a child and a parent).

The following chart presents a general perspective of the sample, with some remarks.

The child is recognized as party	**The child is not recognized as party**

Angola	Belgium (in family cases)
Argentina (according to the law, but, in practice, there are limits imposed by adults)	Benin
Austria (in some proceedings)	Cape Verde
Belgium (in child protection matters)	Canada (Ontario)
Bolivia	Mexico
Brazil: children are usually dependent of parental representation, but, both in case of conflict of interests (both in family and in child protection cases) or when there is a lack of representation (e.g. children in street situation or in alternative care), they are allowed to initiate and to intervene on their own.	Mozambique
Canada (Québec)	Netherlands (except for secure treatment placements via a child protection order (deprivation of liberty). But Dutch law provides children aged 12 or older with the possibility of approaching the court informally and asking for a specific decision (regarding parental responsibilities after divorce and separation, and care and contact arrangements between a child and a parent).
Chile	New Zealand (not in family proceedings)
Ecuador	Panama (always represented by their parents)
England & Wales (always in public law and, in private law proceedings, when the court considers it is in the best interest of the child to do so, in issues of significant difficulty", but should	Portugal (but interested in the proceeding with the right to participation)

only occur in the “minority of cases”.)	
France	Spain
Georgia	Switzerland (recognized as involved third person)
Guinea	Turkey
India	Uganda
Italy (in child protection cases)	
Japan (always, through their representatives, in some specific cases, on their own)	
Kenya	
Peru	
Poland	
Uruguay (in child protection cases)	
USA (Children are parties in proceedings for adoption, child welfare and juvenile delinquency cases. A child is not a party in custody and child support cases)	
Uzbekistan (the child has the right to apply for their protection to the guardianship and guardianship authority, and at the age of fourteen to the court.	

2.7. The right to legal representation by a lawyer, limits and ethical duties regarding the children´s views

The child´s participation is important for various reasons, because they have standpoints that are not the same as adults (CASHMORE & PARKINSON 2008), as “a modicum of control from which they would otherwise be excluded, a sense of validation of their feelings and experiences and their wishes, experience agency” (BERRICK 2018). Fundamentally, child´s participation is an assertion of a civil and political right (CROWLEY 1998) that enable the child to have his/her rights granted and, as such, it Is intrinsically correlated with the importance to

give due weight to the child´s views, impacting the decision-making process. According to Lundy´s “voice model”, participation aims to influence and the ability to have this impact is a main factor for considering child´s participation as effective (LUNDY 2007; WELTY & LUNDY 2013).

Within judicial context, the procedural right to be heard is essentially connected with the right to legal counsel (WASSERMAN 2004). Legal counsel is important to provide information, to overcome obstacles and to achieve a substantial and procedural equality in the proceeding as a condition to have a democratic decision-making process (CALAMANDREI 2019), including with special procedural facilities (TARTUCE 2012),

The majority of the countries in our sample, 26 out of 33 respondents, guarantee legal representation for children, at least in some circumstances as in case of conflict of interests. Research shows that children who were represented by lawyers generally spoke positively about their experiences (TISDALL 2004), although some other researches showed that lawyers were less supportive in civil than in criminal proceedings (FRA 2017).

Recognition of the right to specific legal representation	**Non-recognition of the right to specific legal representation**
Angola	Belgium (in family cases)
Argentina	Benin (but can be provided by the parents)
Austria (in case of conflict of interests)	Cape Verde (the interests of the child are safeguarded by district attorney)
Belgium (in child protection cases)	Mexico (children are represented by their parents or Public Ministry/district attorney)
Bolivia	Netherlands (only exception: secure treatment placements. In the event of a potential conflict of interests between the child and the parents a guardian *ad litem* can be appointed by the family court for matters relating to the care and upbringing of the child or the child’s property and in proceedings regarding legal parentage.)
Brazil (for child victims; formally recognized for child protection cases, but, in practice, arguable. The rights of the child are also safeguarded by the district attorney)	Panama

Canada – Ontario (over 12 years old in child protection proceedings when the best interests of the child (BIC) cannot be ascertained through other means)

Canada – Québec – over 8 -10 years old able to give mandate to a lawyer

Chile (guardian *ad litem*)

Ecuador

England & Wales (lawyer appointed by the Children´s Guardian)

France

Georgia

Guinea-Conakry

India (guardian *ad litem*)

Italy

Japan

Kenya

Mozambique – guardian *ad litem*

New Zealand (In family law proceedings, a Judge may appoint a lawyer to represent a child if there are concerns for the child's safety or well-being or if such an appointment is considered necessary. In every child protection cases a lawyer must be appointed to represent the child

Peru

Poland (in case of conflict of interests)

Portugal (normally the child´s interest is represented by the district attorney, but, in case of conflict of interests, a guardian *ad litem* is appointed)

Spain (in case of child victims)

Switzerland (If the parents submit different applications regarding allocation of parental responsibility;

Turkey (in case of conflict of interests, a guardian is appointed)

allocation of custody/residence; important questions concerning their personal relations with the child; sharing responsibilities for care; maintenance payments; If the child protection authority or one of the parents so requests; If the court has serious doubts about the parents' joint applications relating to the issues listed under the first line; or If the court is considering ordering protection measures for the child.

The child with discernment (power of judgement) can request that a representative shall be appointed; and in such a case, a representative must be appointed. Depending on the development of the child, discernment may be given at age ten; it should be assumed for a child of 12 years of age.

Uruguay

USA (each state makes its own rules regarding legal representation. It is common to appoint counsel in child welfare and adoption matters)

Uzbekistan

Importantly, when a lawyer is appointed to a child, the professional has equal powers as any other party in the proceeding (24 out of 26 respondents). In one country there are limits to the participation of legal representative and in another one the issue is not discussed.

Equal participation of child´s legal representation in comparison to other parties	Limits to the participation of child´s legal representation in comparison to other parties	Issue not discussed

Argentina	Austria (the lawyer cannot file complaints)	Georgia
Austria		
Belgium (in child protection cases)		
Brazil (although not specified in the law)		
Canada – Québec		
Chile		
Ecuador		
England & Wales		
France		
Guinea-Conakry		
India		
Italy		
Japan		
Kenya		
Mozambique		
New Zealand		
Peru		
Poland (guardian *ad litem*)		
Portugal		
Spain		
Switzerland		
Uruguay		
USA		
Uzbekistan		

The nature of the child legal representation is a reflex of at least four different conceptions: first, on the recognition that there may be conflict between the interests of the child and those of his/her parents, thus of the child´s own interests; second, on the overcoming of a zero sum pattern of conflict resolution

within the family members; third, on overcoming the discussion on capacity/will against interest theory to determine whether legal intervention should be or not client-directed or best interests-directed; and fourth, on the availability of a variety of means to address the child´s best interests, not depending solely on the professional responsible for supporting the child´s views and to make his/her voice heard.

A client-directed representation is clearer in terms of comparison to what happens in a relation between the attorney and an adult client (ELROD 2007; PEREIRA 2016): it is based on autonomy, which is facilitated by the attorney, involving duties of loyalty, partisanship and zealous advocacy (FEDERLE 1996). This perspective is still challenging for some when considering smaller children, in spite of recognition of children´s ability to express their views, even in smaller ages, including non-verbal communication (MILLER 2003; WALKER 2017; UNITED NATIONS 2009); and also the belief expressed by children that they are able to participate, according to researches (CASHMORE *et al.* 2008). Institutions such as the American Bar Association, with standards of practice for lawyers representing children in custody cases (ABA 2008), or the French Bar (ATTIAS 2011) suggest a client-centred approach. Recalling the theoretical children´s rights dispute mentioned above, it is based on a will theory or power to obligate another.

A best-interests attorney normally adopts a court-directed, supporting the court to determine the child´s best-interests. The child´s views and wishes are taken into consideration, but the professional is also responsible for an investigation to provide conditions to the court to make the best decision for the child. It is based on an interest theory of children´s rights.

A dual representation model is also reported in the literature (BERRICK 2018; ABA 2008) – and in our research -, granting an attorney to represent the child´s views and, especially in cases where the child´s views may not coincide with his or her best interests, either a best-interests attorney or guardian *ad litem* (JAMES *et al.* 2018; STÖTZEL *et al.* 2006), although there is a debate in some countries whether this figure should remain (ABA 2008).

Alternative theoretical approach suggests, on the one hand, that capacity and will theory challenge the possibility of children to exercise their rights and, therefore, to have legal representation. On the other hand, interest theory, although does not posit the same kind of problem, because rights are considered as protected interests, it may obviate moral conversation with the child and impoverish his or her right to participate. Both perspectives may lead to paternalistic interventions and, therefore, Federle suggests an empowerment perspective: if power structures the interactions between and among individuals and the state, it is power that permits an individual to assert a claim against another and it is power that permits the enforcement of that claim; it is through power that individuals are recognized by others as worthy and their objectives as having value, creating access by claiming the attention and respect of others

(FEDERLE 1996). And this approach is especially recommended in family and child protection cases (FEDERLE 1994).

It is also important to understand that granting legal counsel to the child does not mean that the child´s view will prevail. If there is a conflict of interests, it is up to the Judge to decide how to better adjudicate the cause, balancing all interests at stake, the child´s and the parent´s. The possibility to enhance the child´s view with legal counselling is not necessarily an invitation to litigation, but the possibility to broaden perspectives for consideration, eventually for negotiation and conciliation, much wider than merely with whom the child wants to live with.

Therefore, although the motto “the child has a voice, not a choice” may be important to elude the confusion between participation and autonomous decision (CASHMORE *et al.* 2008), it may also sound authoritarian, neither respectful nor empowering, because it is based solely on an adjudicative solution and a restrictive perception of what is at stake in family custody regulations or child protection matters. Subtleties of daily life are, sometimes, equally important as the decision with whom the child should remain. Therefore, there is always some space for choices and, in both family and child protection matters, the search for negotiation and mutual respectful commitment, rather than adjudication, is an expression of a search for acceptability of the decisions, an interiorization of the rules and an avoidance of the risk to decide based in projective, and potentially unrealistic perspectives of what could be better for the child in the future (GARAPON 2010). The recognition of the possibility of a collaborative approach during all the proceeding, rather than a preference for adjudication, would allow to increase the perception of different roles that child participation may have. In this sense, having in mind collaborative and dialogical approaches that grant child participation is important to understand alternative possibilities of judicial communication with children.

With this in mind, it is interesting to notice that in the majority of the countries the attorney should represent the views of the child (14 responses).

In 9 countries, the views of the child must direct the attorneys intervention, except if it is not in accordance with the best interests of the child.

In one country, the ethical commitment is geared to the court, who appoints the attorney for the child, and expects advice and recommendations based solely on what is in the best interests of the child.

Therefore, there seems to be a preponderance of a client-directed or empowering perspective on legal representation of children, as one can see below.

Lawyer representing the child´s opinion	Lawyer representing the child´s opinion when in accordance to the child´s best interests	Lawyer representing the best interests	No legal provision on ethical duties
Angola	Austria (up to the Judge to decide whether the child´s opinion is in his/her best interest)	England & Wales (the Guardian has an obligation to consider and relay the child's wishes and feelings to the court as well as "give advice to the child as is appropriate having regard to that child's understanding". However, the Guardian's primary duty is towards the court and is to provide advice and recommendations to the court based solely on what is in the best interests of the child). The solicitor "must represent the child in accordance with instructions received from the children's guardian	Brazil (lawyers, although ongoing discussion among public defenders is raising the issue)
Argentina	Benin		Chile
Belgium	Brazil (district attorney intervenes in favour of the BIC,		Georgia

	considering his/her opinion)
Canada – Québec – for children over 8-10 years old	India
Ecuador	Mozambique
England & Wales (where the solicitor considers that the child wishes to give instructions when there is conflict with the Guardian and that the child is able to give instructions on her or his own, having regard to her or his understanding)	New Zealand
France	Spain
Guinea-Conakry	Switzerland
Italy	USA (Lawyers in child welfare and adoption cases advocate for the best interest of the child, but usually communicate the child's opinion to the judge. A second attorney may be appointed to directly represent the child where there is a conflict between the child's opinion and what the lawyer understands to be her or his best interest)
Japan	
Kenya	

Portugal

Uruguay

Uzbekistan

2.8. Voluntary participation and consultation

Participation is a right of the child, not a duty, therefore the Convention states that the child has the rights to express her or his views freely, i.e., according to the Committee on the Rights of the Child, without pressure and choosing whether or not she or he wants to exercise the right to be heard (UNITED NATIONS 2009).

How is the voluntary aspect of participation observed and granted in the judicial system? How does the Justice System consult children if they really want to participate? And under what kind of modality they want to be heard? If the right to be heard should be object of consultation, how could the Justice System avoid the risk of manipulation? What kind of measures are adopted to have a secure participation?

The research revealed that in the majority of the countries (24) participation is voluntary, but still in a considerable number of nations it is not the case. In 24 countries participation is theoretically voluntary, as some respondents expressed concern that, in practice, children are obliged to attend the court.

In 7 countries, participation is not voluntary, especially in child protection cases.

Voluntary participation	Not voluntary participation
Angola	Belgium (in child protection cases, if over 12 years old)
Argentina	Benin
Austria (not necessary agreement	Cape Verde
Belgium	India
Bolivia	Italy (over 12 years old)
Brazil	Panama (psychological assessment is compulsory)

Canada (Ontario & Québec)	Uganda
Chile	
Ecuador	
England & Wales	
France	
Georgia (but in practice they are obliged to attend)	
Guinea-Conakry	
Mozambique	
Netherlands	
Peru	
Poland	
Portugal	
Spain	
Switzerland	
Turkey	
Uruguay	
USA	
Uzbekistan	

However, if we consider who consults the child, one can see a great variety of responses. It is doubtful if the child, brought in front of an authority, will feel comfortable to express his or her unwillingness to continue the conversation. Therefore, it is important to know different strategies to enable better conditions for participation.

In 6 countries, the consultation is made by the Judge him/herself.

In 5 countries, it is the lawyer or the guardian ad litem who consults the child whether he or she wants to be heard or not by the Judge.

In 5 other countries, social workers or psychologists (both from the Judiciary or social services) are responsible for this consultation.

In 2 countries consultation is made by letter to the child and in one it is the district attorney who consults.

Judge	Guardian ad litem/ attorney	District attorney/public ministry	Letter	Social worker/psychologist	Not specified
Austria	Angola	Mozambique	Belgium	Bolivia	Canada
Bolivia	Argentina		Netherlands	Brazil	Ecuador
Brazil	Uruguay			England & Wales	Spain
Guinea-Conakry	USA			Mozambique	Turkey
Poland	Uzbekistan			Peru	
Switzerland					

To grant a free exercise of the right to be heard, it is important not only to provide an institutional context where he or she will feel comfortable and secure to understand the meaning and impact of the participation, but also that this consultation could be meaningful and comprehensive.

In the majority of the countries, there is no special procedure for approaching the child when consulted about the interest to participate (22 countries).

In 8 countries there is reference to some experiences on how to give some previous information to children about the system. Among these, in three countries an invitational letter is used.

This situation shows that, in spite of the recognition of voluntary participation, more could be done to provide children means to express their informed consent to participate.

According to Kilkelly, children ask for information before participating in court proceedings and expect that their parents and, secondly, other professionals such as teachers, youth workers or lawyers, could provide them with adequate information (KILKELLY 2010). According to Birnbaum´s research, children who met a Judge remember being asked whether they wanted to do this. This did not happen with the children who met a lawyer or a mental health professional (BIRNBAUM 2011).

Therefore, it is not impeditive that the consultation could be made by the Judge him/herself, but cautious should be observed on the impact of figures of authority in this moment. Research is also advisable to check if children really feel comfortable in this situation.

Research should be made about consultation by Judges and the impact on voluntary decision by children.

Existence of special consultation or summon procedures	**Inexistence of special consultation or summon procedures**
Argentina (booklet is delivered to the child explaining the procedure)	Angola
Austria (leaflet concerning legal assistance)	Benin
Belgium (invitational letter sent to the child, if aged 12 or over)	Bolivia
Brazil (informative material for children follows the summon in some parts of the country)	Canada
England & Wales (not a protocol, but resources on how to address the child)	Chile
Netherlands (invitational letter)	Ecuador
Spain (some experiences in the country)	France
Switzerland (invitational letter)	Georgia
	Guinea-Conakry
	India
	Italy
	Japan
	Kenya
	Mexico
	Mozambique
	Panama

Peru

Poland

Portugal

Turkey

Uganda

Uzbekistan

2.9. The hearing´s modalities

According to article 12 of the Convention on the Rights of the Child and General Committee, after deciding to be heard, the child will have to decide whether he or she wants to be heard directly or through a representative or appropriate body (UNITED NATIONS 2009), which has been known by a dual designation of direct and indirect participation.

However, practical conditions of hearing show subtleties in this subdivision.

A first concern was about the effective possibility of hearing by the judges themselves, the preferred modality of participation by children, according to researches with children (KILKELLY 2010; FRA 2017).

A clear majority of the countries (28) reveal that Judges do hear the children, although with some restrictive criteria.

However, it is also stated by many countries that the practice is not uniform in the countries, depending not only on a case-by-case analysis, but also on the (lack of) confidence of Judges to hear the children. In some countries, although it is possible for the child to be heard by the Judge, this is not often the case in practice. These remarks on lack of confidence and consequent merely occasional interviews with the child are confirmed by other researches made with those professionals (ATWOOD 2003).

Direct participation as main modality (in front of the Judge)	**Direct participation as secondary modality**	**Lack of clear legal rule on how to proceed**
Angola	Canada (Ontario)	Spain (possibility of direct participation, participation through their representatives,

		in a written document. Social and psychological assessments)
Argentina	England & Wales in two situations: to provide evidence at a hearing; b) in a *meeting with the judge or in a written correspondence between the judge and the child (*to allow the child to gain some understanding of what is going on, and to be reassured that the judge has understood him or her)	
Austria	Turkey	
Belgium	Uruguay	
Benin	USA	
Bolivia (as much as indirect participation)		
Brazil (as much as indirect participation)		
Cape Verde		
Canada -Québec		
Chile (in the courtroom or via Gessel chamber)		
Ecuador		
France		
Georgia		
Guinea-Conakry		
India		

Italy

Japan

Kenya

Mexico

Mozambique

Netherlands

Panama (for children over 14 yo)

Peru

Poland

Portugal

Switzerland

Uganda

Uzbekistan

The difficulties experienced by Judges to grant the possibility of direct participation are intrinsically connected with the lack of institutional support, mainly in two areas.

First of all, training.

AIMJF has also organized a smaller collaborative research on judicial training on children´s rights and there is indeed a great diversity of models and strategies and, in many circumstances, a clear lack of effective emphasis on the training and support for Judges to deal with children´s rights (MELO 2020).

With this in mind, and due to the Judges´ lack of confidence exposed in this research, international cooperation should also be considered, for the exchange of best practices in training.

A possible consequence of this context are the outcomes of researches with children and their perceptions of participation in family and protection matters: exclusion (or limited inclusion) in the decision-making process is referred to in a large proportion by children, thus revealing inadequacies in the interaction with Judges (CASHMORE 2008; KILKELLY 2010; BERRICK 2018; SCHRAMA et al. 2021). Those researches show the importance of attitude, of adequate manner of questioning by the professional who is conducting the hearing. Continuous research with children is therefore advisable.

Secondly, guidelines or protocols on how to communicate with children.

Although Judges are the professionals with whom children preferably want to communicate, there is a major concern about children being heard by them, because of this lack of training and preparation, especially in child interviewing skills, and the lack of knowledge about developmental differences in cognitive, language and emotional capacities (KELLY 2002; GOLDBERG 2011).

There is also a major concern on what kind of issues should be addressed when communicating with children, especially in custody cases, whether children should or not be explicitly asked about their personal preferences.

According to Kelly, because asking a child to make a decision is expected to cause anxiety, loyalty conflicts and fears of punitive consequences, this kind of question has always been considered inappropriate, suggesting indirect questions to gather information helpful to the court. However, in her opinion, indirect questions could not properly assist the professional in providing the information needed, leading to failure in consulting children about any relevant aspect of divorce decisions (KELLY 2002).

Therefore, in addition to training, guidelines or protocols may be important instrument to help judges make appropriate questions when hearing children.

Beyond this level of appropriateness of questioning, Federle suggests that an empowering interviewing method (as much as lawyering and counselling) is essential to overcome (and resist to) adult domination, manipulation or a strict consideration of capacity – and maturity – for the validation of the child´s views and wishes (FEDERLE 1996). According to Atwood´s research with Judges, the majority of those professionals were still attached to this standard (ATWOOD 2003).

The possibility of a collaborative interaction and communication with children, according to both Hart (HART 2007) and Shier (SHIER 2001), is dependent not only on critical theoretical assumptions, interviewing skills as a result of adequate training, protocols or guidelines, and changing attitudes towards children.

This research showed that in half of the countries (15 out of 31) there are some guidelines or protocols on how to communicate with children, although in many of them those guidelines are not specific for family proceedings, but related to child victims.

If there are some connections between the two situations (the need of rapport, of a free recall and expression by the child, the prevalence of open questions), forensic interview protocols were developed for the specific purpose of gathering evidence in criminal proceedings.

The use of forensic interview guidelines for child hearing in the context of family and child protection matters is revealing of two possibilities of considering the nature of child hearing in the proceedings: either as evidence gathering or as an opportunity for the child to bring his or her views to court consideration.

In the first case, the similarities with forensic interview are higher and justify the parallel standard observed by those countries that mentioned these protocols in a different context, such as family law and civil child protection matters. Some of the protocols or guidelines shared by the respondents are clearly geared towards considering child participation as a manner of gathering evidence.

However, the Committee on the Rights of the Child explicitly recommends the format of a talk (UNITED NATIONS 2009), consequently not the format of a testimony, showing that the nature of child participation, especially in family and civil child protection proceedings, is not the same of a child as a victim in criminal proceedings. Therefore, a different approach is required to allow children to express their feelings, give their view on the issue under discussion (GOUTTENOIRE 2006), and forensic interview protocols are not appropriate for this kind of hearing.

The limits of forensic interview protocols in family and child protection matters are also, and even more evident in those situations where the child consent is needed to fully validate an act, such as in adoption cases, or in those situations where the child has the right of veto, especially when involving health issues.

Once again, the theoretical disputes on children´s rights show their impact on procedural aspects, because the nature of the child hearing is dependent on the place and role recognized for children in the proceeding. The more equivalent in terms of rights is the child, the more approximative the approach to a party´s intervention should be.

Concerning the context in which the protocols were developed, it is important to remark some countries´ important efforts to elaborate their own guidelines (CHILE 2015; ITALY 2020).

It is also remarkable the fact that some countries´ guidelines or protocols for judicial use were not developed by the Judiciary, but by other institutions, such as Bar Association (WALKER 2013; CARL *et al.* 2005; AGULHAS *et al.* 2017), Unicef and its partners (MMI 2014), local institutions involved with children´s rights, or Judges Association, as reported by Austria. This context shows the importance of partnership between the Justice System and other organizations and the openness for improvement.

It is also possible to find some valuable guidelines in the literature (CARL *et al.* 2015; BALA *et al.* 2013).

Existence of protocol or guideline on how to communicate with the child	**Non-existence of protocol or guideline on how to communicate with the child**

Argentina (protocol on how to hear child victims)	Angola
Austria (developed by the MoJ with the assistance of the judges association and experts)	Belgium
Bolivia (for social and psychological assessments, not for the Judge)	Benin (only the legal rules)
Brazil (for child victims, adopted as well, with modifications, in child protection cases)	Cape Verde
Chile	Canada -Ontario
Ecuador	France
England & Wales	Georgia
India (child victims)	Guinea-Conakry
Italy	Japan
Mexico	Kenya
Peru	Mozambique
Poland	Netherlands (In Dutch law, participation forms and methods of communication are not regulated. The four Courts of Appeal have developed a professional standard on 'child conversations'. District courts do not have such guidelines)
Portugal	New Zealand
Switzerland (in some parts of the country)	Spain (although there are some local practices in the country)
USA (Protocols can vary from one jurisdiction to another)	Turkey (but there is a consolidated practice on how to do it)
	Uzbekistan

2.10. Indirect participation

Indirect participation occurs when the child is heard through a representative or appropriate body. According to General Comment 12, children have the right do decide how they want to be heard (§35). In researches made with children, it is emphasized the importance to grant a diversity of possibilities to be heard, providing children choice, opportunity and availability (BIRNBAUM 2011).

In 9 countries, indirect participation is presented as the main modality of child participation in family and child protection matters, although in some of them as much as direct participation.

For the majority of the countries, indirect participation is a subsidiary modality.

Indirect participation as the main modality	**Indirect participation as subsidiary modality**	**Indirect participation not available**
Benin (social assessment or lawyer)	Angola (guardian *ad litem*)	
Bolivia (social and psychological assessment)	Argentina (Gesell camera, written statements)	
Brazil (as much as direct participation, through social and psychological assessment; videoconference – special testimony by forensic interviewer)	Austria (parents - if there is no conflict of interest or guardian *ad litem*; psychological assessment)	
England & Wales (case analysis by Family Court Advisors)	Belgium (lawyer or pedopsychiatric assessments)	
Japan (family court investigating officer conducts investigation)	Cape Verde (videoconference)	

Mozambique (guardian *ad litem*)	Canada (Ontario) represented by a lawyer
Panama (psychological assessment, for children below 14 years old)	Ecuador (psychological assessment; Gessel chamber)
Turkey (psychological assessment)	France –
Uruguay (psychosocial assessments or through their defender)	Georgia – psychological assessment
	India – psychological assessment, special educator
	Italy (psychological and pedagogical assessment or lawyer/guardian *ad litem*)
	Kenya (lawyer or psychological assessment)
	Mexico (psychological assessment or child´s assistant)
	Netherlands (a letter to the judge; social assessment by the child protection agency
	New Zealand (psychological reports/lawyers report)

Peru (lawyers report, psychological or social report)

Poland (psychological interview)

Portugal (social services report)

Spain (writing, social and psychological assessment)

Uganda (social inquiry)

USA (through a lawyer. Mental health professionals and social workers may also act as intermediaries)

Uzbekistan (through a professional, it can be a representative of the guardianship and guardianship body, a teacher or a psychologist, with the participation of which may be interviewed by a minor.)

Among the modalities of indirect participation, it is possible to see a clear preponderance of assessments by social workers, psychologists and pedopsychiatrics (25 countries).

As a second modality, the representation by the lawyers (8 countries), although, as we have already seen, legal representation is not always client-directed.

Videoconferencing and Gessel Camera is mentioned by 5 countries, mostly those who use forensic interview protocols.

Finally, written statements are mentioned as a possibility by 3 countries.

Parents	Guardian	Social or psychological/ psychiatric assessment	Lawyer	Letter/written statements	Gessel camera or videoconferencing
Austria	Austria	Austria	Benin	Argentina	Argentina
	Italy	Belgium	Belgium	The Netherlands	Brazil
	Mozambique	Benin	Canada	Spain	Cape Verde
		Bolivia	Kenya		Ecuador
		Brazil	New Zealand		Panama
		Ecuador	Peru		
		England & Wales	Uruguay		
		Georgia	USA		
		India			
		Italy			
		Japan			
		Kenya			
		Mexico			
		The Netherlands			
		New Zealand			
		Panama			
		Peru			
		Poland			
		Portugal			
		Spain			
		Turkey			
		Uganda			

Uruguay

USA

Uzbekistan

2.11. **In cases of direct participation, in what procedural phase does it take place?**

Child participation aims to offer the child an opportunity to be heard and to have his/her views duly considered and weighed in the decision-making process. Usually proceedings involve more than one decision that causes impact on the child´s life, normally an initial provisional decision and a final, after mediation or trial.

In 20 countries, children have the opportunity to participate in both occasions, in 10 countries there are more clear limits to child participation during proceedings, normally after hearing the parents and prior to the final decision.

In 3 countries, the issue is not specified in the law and no reference about the common practice has been shared.

Once more it is visible in this context the impact of different theories on children´s rights, children´s legal status, the right to legal representation and the legal nature of child´s participation.

On the one hand, if the child has not the right to be somehow heard and have a say in the procedural steps where decisions are taken, that may affect his or her life, the child´s right to participation is, in some measure, considered as less relevant than the adult´s right to be heard as an expression of procedural due process.

On the other hand, there is a legitimate concern over the stressful impact on children of an excessive consultation.

A fair balance point between an empowering and a protective attitude should be reached on a case-by-case analysis, taking into consideration the opinion and availability of the child him/herself. Once more, guidelines could be helpful to have standards to allow a more individualized approach, having in mind some general patterns and cautionary measures to avoid trauma. Continuous research is also, and always, advisable.

Participation whenever a provisional or	**Limited participation**	**Not specified in the law**

definitive decision has to be taken, at Judge´s discretion		
Angola	Belgium (in family cases)	Italy
Argentina	Cape Verde (when the Judge considers appropriate)	Japan
Austria (depending on judicial invitation and respecting the maximum of three)	Canada (Ontario and Québec)	Netherlands
Belgium (in child protection cases)	England & Wales (in case the participation is concerned with giving evidence, in fact-finding or final hearing, as necessary)	
Benin	India (maximum of three times)	
Bolivia	Mexico (one time)	
Brazil	Mozambique	
Chile	New Zealand (about the time of a hearing of the substantive issues.)	
Ecuador	Switzerland (after the parents hearing)	
England & Wales (in terms of the child meeting the judge, they may do so at any stage of the proceedings or even after it has concluded. No limit on how often Cafcass	Turkey (trial phase in urgent and compulsory situations, direct participation can be achieved by submitting a petition)	

officers can speak to the child. This should be tailored to the needs of the specific child)

France

Georgia

Guinea-Conakry

Netherlands

Peru

Portugal

Spain

Uganda

USA

Uzbekistan

2.12. **Opportunities for the child to bring issues beyond the merits of the case for judicial appreciation**

Normally, when the child is heard, the merits of the case are determined by the adult litigants. At which extent is the child allowed to bring questions beyond those limits? What is the impact of what the child express in a hearing in terms of judicial appreciation?

The question is important and has an intrinsic connection to the perceived nature of the child hearing.

If the child is giving testimony, he or she will be heard with a more focused approach to the issues discussed by the parties.

If the child is being heard to grant him or her an opportunity to express his or her views, feelings and wishes, it is possible that the child raises unexpected issues that could demand judicial appreciation.

How would this situation be dealt with in a family or child protection proceeding?

In 18 countries, children have the opportunity to bring new questions for judicial appreciation during the hearing, not limiting themselves to the issues addressed by their parents or other parties.

In 4 countries, the child participation is framed by the issues brought by their parents, but incidental proceedings are possible to address the topics raised by the child, if legally relevant.

Interestingly some countries mentioned that there is not a clear link between the child´s participation and the issues addressed, being the child invited to tell his/her history.

This situation brings another important aspect of the same problem. What is the legal relevance of what is expressed by the child, if not to influence the decision (remembering Purdy´s model)?

Two situations may be considered.

One regarding those countries that have intentionally organized different approaches for child hearing, some geared to have a legal impact on the decision, normally with children giving evidence, and some to grant the child an opportunity of contact with the judge to tell his or her story, with a more emotional and welcoming atmosphere.

Another situation criticized by Kelly (KELLY 2002): the circularity of some guidelines on how to communicate with the child, avoiding more direct questions about the relevant issues under discussion in the proceeding, leads to a failure in determining the child´s view and wishes, and make the hearing less expressive in procedural terms.

Once again it seems that the nature of child´s hearing is at stake as a consequence of the comprehension of children´s rights, the legal status of the child and the nature of legal representation for children.

Opportunity for children to bring new questions for appreciation	**Participation framed by the issues brought by the parents**
Angola	Argentina (the child may bring new questions, but the Judge´s decision is framed by the issues brought by the parties. However, incidental proceedings may be initiated if needed to respond to the child´s complaints)
Benin	Brazil (the child may bring new questions, but the Judge´s decision is framed by the issues brought by the parties. However, incidental proceedings may be initiated if needed to respond to the child´s complaints)
Bolivia	England & Wales (if the participation is to give evidence at a hearing, the questions will be tailored to the issues

	which the parties consider to be important and relevant aspects of the case)
Canada (children are invited to bring their history, not to speak about the facts)	
Cape Verde	
Chile	
Ecuador	
England & Wales (in a meeting with the Judge, the child is free to ask the judge any questions that they may have about the process and discuss anything that they wish about the case and the judge's role should be mostly that of a passive recipient of whatever communication the young person wishes to transmit)	
France	
Guinea-Conakry	
Mexico	
Mozambique	
Panama	
Peru	
Portugal	
Spain	
Switzerland	
Uruguay	
USA	

2.13. Who participates in the child-hearing?

In its General Comment #12, the Committee on the Rights of the Child prescribes that "a child should not be heard in open court, but under conditions of confidentiality" (§43). What is the extent of this restriction, considering that the

child is heard also in (high-level) conflict cases, supposedly having impact in the decision-making?

It is important to remember two basic conditions related to the right to be heard as a procedural due process guarantee: the right to know the evidences and to have decision based only on the evidence presented (the right to support his or her allegations by argument, however brief, and if needed, by proof, however informal, with the possibility to cross-examine witnesses, to inspect documents and to offer evidence in explanation or rebuttal), varying the degree of the safeguard with the importance of the private interests affected; and the right to have the statement recorded to grant judicial review (FRIENDLY 1975). This is valid for any party and common in various legal traditions (CABRAL 2005; FERRAND 2000; TARZIA 1981).

Once again, we are handling with implications of the child´s hearing´s nature, whether an evidence or an opportunity to have a say and, in this case, with or without legal impact in the decision.

In 7 countries, the judge hears the child in private, without the participation of any other professional.

In 27 countries other legal professionals are present to the hearing.

Among these, in 9 countries the lawyers of the other parties are in the room.

In 6 of these countries, the child defender, child guardian or the district attorney is present.

In 3 countries, in addition to the child defender, a child assistant or a social worker/psychologist is in the room.

In 2 countries, parties may also stay in the room.

Two countries mentioned that Gessel Chamber is used to grant the other parties the opportunity to follow the child´s hearing and in one this possibility is granted by a video-link.

In 1 country, the issue is not specified by law and no answer has been provided and mentioned the possibility of just a support person be present with the child and the judge.

With this scenario, it seems clearly that children are normally not heard in front of their parents.

When the child´s hearing is considered as evidence gathering, the use of forensic interview protocols and Gessel chamber (or videolink) follows an already well-established standard in criminal proceedings. The child is heard only by the interviewer and the remaining parties are allowed to follow it from distance.

The modality of child hearing in private is minority in the sample, but in accordance with article 6 of the European Convention on the Exercise of Children´s Rights[7].

Part of the literature emphasizes some perplexities or paradoxes in this kind of hearing: limited possibility to obtain accurate insight into the reasons for the children´s feelings and preferences; the hearing in private may be prejudicial to one or both other parties; inconsistency with the appearance of justice in western tradition; change in the judicial role, becoming a participant in the evidence gathering process in disaccord with common-law tradition (GOLDBERG 2011). There is also a perception by legal professionals that leaving the child alone with the judge express a poor practice (FRA 2015). For this reasons, some authors do not advise judges to be alone with the child, suggesting that the child´s attorney or guardian *ad litem* should be present at the hearing (BALA 2013).

With this in mind, and in respect to due process, some authors recommend that, at least, this kind of hearing should be transcribed (ATWOOD 2003) or recorded, in order to give a summary to the parents (BALA et al. 2013), granting protection to the children of all those aspects that could interfere in the relationship with their parents.

Another approach regarding the hearing in private suggests that the procedure has a specific nature, outside the structure of the principle of contradiction (of due process) (PEREIRA 2018), and the paradox of Strasbourg Convention is to hear the child in court, without bringing the child to court. Due to the child´s specific procedural rights, he or she assumes a different position regarding his or her parents and therefore the hearing would mean the exercise of a personality´s right before a provision is adopted. The hearing should be considered the occasion for the child to express him or herself in front of the Judge, bringing to the authority, who will decide in his/her interest, his/her aspirations, his/her subjectivity (SERGIO 2019).

Some elements of a broader perspective conflict, between either an empowering or a protective approach, can be found in this debate.

If the child hearing means the passage from an approach that considers the child as object of protective measures or source of evidence to another, as right holder, one can see these various modalities as a response to a call for specific

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[7] "Article 6. In proceedings affecting a child, the judicial authority, before taking a decision, shall: a) consider whether it has sufficient information at its disposal in order to take a decision in the best interests of the child and, where necessary, it shall obtain further information, in particular from the holders of parental responsibilities; b) in a case where the child is considered by internal law as having sufficient understanding: – ensure that the child has received all relevant information; – consult the child in person in appropriate cases, if necessary privately, itself or through other persons or bodies, in a manner appropriate to his or her understanding, unless this would be manifestly contrary to the best interests of the child ;c)– allow the child to express his or her views; c) give due weight to the views expressed by the child".

proceedings, specific attitudes and approaches. Some authors suggests a soft justice system, a dialogical justice, involving and talking to the involved persons, to reach a collaborative solution, with the child´s participation (PAZÈ 2019; PEREIRA 2018). It represents a move from a culture of adjudication to a culture of collaborative pacification, with the involvement of the parties and a more proactive participation of the judge him/herself (WATANABE 2019; MITIDIERO 2011). The procedure aims not only to correctly adjudicate the cause, pronouncing the applicable law to the facts brought under judicial consideration, in a hierarchical structure, but to allow cooperation between the parties, in a more symmetrical and cooperative relationship with the Judiciary (BAUR 1976; MITIDIERO 2011). With the emergence of new family patterns, new social and cultural status for children, new kind of conflicts, including collective ones, new attitudes within the Judiciary, such as managerial judges, emerge in various legal backgrounds and traditions (RESNIK 1983; VITORELLI 2019), as a quest to achieve a fair solution and legitimacy of judicial provisions (PEREZ RAGONE 2005), in the context of a participative democracy (MITIDIERO 2011).

According to Garapon, if justice is based on rituals for its legitimacy, democracy is the enemy of symbols, and a struggle for justice does not encompass a struggle against whatever ritual – and this is a reason for his criticism on immediacy, such as private hearings, without being a third in the relationship between partis -, but a struggle for more truthful rituals, that may express a shared destiny in a new symbolic organization. And this is the challenge of democracy (GARAPON 2010).

More than in any other aspect, the challenge to build a more specific procedure to grant children´s rights, mainly the right to participation, is dependent on a continuous transnational judicial dialogue that may balance at least three basic aspects: the safety and spontaneity of the child while being heard, the influence of the child´s participation in the decision to be taken and the procedural rights of other parties.

Tait, based on a different approach, analyses the intrinsic link between buildings and rituals, including closeness or openness, and political regimes of authority and, in contrast to Garapon, he believes that symbolism and space are amenable to rational intervention and reform, and the courts should be re-configured to embody more fully the will of the sovereign people. Focusing on the interaction rituals within small groups, based on Goffman´s theory, he believes that, instead of a grand approach of rituals, emphasis should be placed in a more subtle manner, in everyday aspects of human behaviour, which can be remarked more evidently in family and child protection courts. For this reason, a comparison between courts in different legal systems, and the strangeness that may arise, may allow issues to be identified that are not visible in an examination of a single jurisdiction (TAIT 2001).

This seems to be especially the case of private hearings, calling for a deeper reflection on what is at stake and at what cost.

Private hearing with the Judge	Hearing with the presence of other legal professionals	Judge and support person with the child	Not specified in the law
Austria (in case of children below 14 years old)	Angola -Judge and Guardian *ad litem*	England & Waled (in the meetings with the Judge, the child should not be seen by the judge alone, but it does not specify who else should be in the room. Normally Cafcass officer)	Japan
Belgium (in family cases)	Argentina – Judge, child´s defender and social worker		
Benin	Austria (for children over 14years old)		
Ecuador (occasionally with a psychologist)	Belgium (in child protection cases: Judge, child, representatives, and lawyers)		
France (the judge decides either to hear the child alone or with social worker, parents and/or lawyers	Bolivia (Judge, parties and social worker or psychologist		
Netherlands	Brazil (judges, district attorneys, lawyers, but not the		

	parents. Occasionally, psychologists. Legal professionals may participate via video-link)
Switzerland	Cape Verde (Judge, district attorney, lawyers)
	Canada (Ontario) – If admitted, it will take place with the presence of lawyer and a support person
	Chile – guardian *ad litem* and technical assistant
	England & Wales (when giving evidence, all parties and representatives)
	Georgia (lawyers, bailiff, judge, and clerk)
	Guinea-Conakry (Judge, lawyers, social workers)
	India (with screens or video-link)
	Italy (with the child´s lawyer). Parties have the right to make questions or arguments previously to the hearing
	Kenya (Members and officers of the

court; Parties, their advocates)

Mexico (Judge, district attorney and child´s assistant)

Mozambique (Judge, guardian *ad litem*, child´s representative)

New Zealand (in family law cases, with the child´s lawyer)

Peru (other professionals remain in a separate room, following the hearing through video-link)

Poland (Gessel chamber)

Portugal (district attorney)

Spain (with district attorney or, in case of using Gessel chamber, with parties barristers)

Turkey

Uganda

Uruguay (Judge, child´s defender, parties´ attorneys)

USA (Participants generally include the child, the lawyers, social workers or probation officers, parents, the judge

	and courtroom staff.	
	Uzbekistan (although in some cases, based on the situation and psychological state of the child, the participants of the process can temporarily be removed from the courtroom to make the child feel comfortable)	

2.14. Who makes the questions to the child?

The research showed a majority of countries where the child is heard in the presence of other persons. It was important to identify who interacts with the child, making the questions in this context.

There is a major incidence of a judicial prominence in conducting the hearing.

In 28 countries it is the Judge who interacts with the child.

Forensic interviewers are mentioned in 4 countries. In 2, the lawyers make the questions when the child gives evidence.

It is an interesting outcome, considering some criticism on the lack of ability by judges to interview children. In spite of all limitations, Judges still do prefer, or are entitled to conduct the act.

Judge	**Legal professionals**	**Other professionals**
Angola	Canada (Ontario and Québec) – lawyer (but it is rare that the child comes to court). The Judge may also question.	Argentina (forensic interviewer in case of victims)

Argentina	England & Wales (any of the parties or their representatives may ask the child questions when giving evidence)	Chile – forensic interviewer
Austria		Panama (psychologists)
Belgium		Spain (forensic interviewer, when in Gessel chamber)
Benin		
Bolivia		
Brazil		
Cape Verde		
Chile -		
France		
Georgia		
Guinea-Conakry		
India		
Italy		
Kenya		
Mexico		
Mozambique		
Netherlands		
New Zealand		
Peru		
Poland		
Portugal		
Spain		
Switzerland		
Uganda		
USA		

Uzbekistan

2.16. Interaction by other persons/parties

As we have seen, in the majority of the countries, other persons are with the judge and the child during the hearing. If the judge is the professional who presides and conducts the hearing, respondents were asked to explain if the remaining persons were also entitled to make questions to the child in a subsidiary way.

The research reveals that in case the interview is conducted by the Judge, there is some kind of interaction by other parties, who may be entitled to make questions to the child in 22 countries.

However, in 6 countries, other parties are not entitled to make questions.

The issue is once again important when conciliating the specific needs and rights of the child with the rights of the other parties, safeguarding procedural due process. The close or open nature of the child´s hearing, in a comparative perspective, may have an impact whether and in which extent the Judge is or is not allowed to take the child´s view into consideration and, therefore, the effective influence of the child´s view in the decision.

Possibility of other professionals to make questions to the child	**Non-possibility of questions by other professionals**
Angola (guardian *ad litem*)	Chile
Argentina (in family proceedings, conducted directly by the Judge, child defender and social worker; in case of child victim, through forensic interviewer)	France (except if the Judge authorizes)
Austria (it is the duty of the judge to decide if a question can be addressed to a child in his/her best interest)	Netherlands
Belgium (Public Ministry/district attorney)	New Zealand (except if the child gives evidence, but seldom)
Benin (if question is made to the Judge)	Portugal
Bolivia (with psychologist assistance)	Switzerland
Brazil (district attorney, lawyers)	

Cape Verde (district attorney and lawyers, occasionally)

Canada – Ontario – lawyer representing the child

Chile – Judge

Georgia – lawyers, parties, social worker and psychologists.

Guinea-Conakry

India

Italy (previously to the hearing)

Mexico (district attorney and psychologist)

Mozambique (at judicial discretion)

Peru

Spain (district attorney)

Turkey (lawyers)

Uganda (All persons involved in the case are allowed to ask questions directly)

USA

Uzbekistan (The presiding judge (court), the prosecutor, the lawyer and other participants in the process have the right to ask questions directly to the child)

2.17. Criteria for considering the child´s opinion in the decision-making

The Convention on the rights of the child states that the child who is capable of forming his or her own views has the right to express those views freely, the views of the child being given due weight in accordance with the age and maturity of the child.

According to General Comment 12, “The Committee emphasizes that article 12 imposes no age limit on the right of the child to express her or his views, and discourages States parties from introducing age limits either in law or in

practice which would restrict the child's right to be heard…. the child is able to form views from the youngest age, even when she or he may be unable to express them verbally. Consequently, full implementation of article 12 requires recognition of, and respect for, non-verbal forms of communication… Second, it is not necessary that the child has comprehensive knowledge of all aspects of the matter affecting her or him, but that she or he has sufficient understanding to be capable of appropriately forming her or his own views on the matter" (§ 21).

According to the respondents, however, there is a variety of criteria to give due weight to the child´s views and researches with legal professionals show that there is little evidence of official standard to define maturity (FRA 2015).

In 10 countries, the child´s views are considered when in accordance to the child´s best interests.

In 10 countries, age and maturity are both considered by the Judge.

In 6, only maturity, without any reference to age, is a criteria for giving weight to the child´s view.

In 6 countries, no specific criteria is mentioned in the law.

In 1 country, age is the only criteria taken into account to have the child´s view in mind.

Child´s views considered when in accordance to the child´s best interests	**Age**	**Age and Maturity**	**Maturity (with no consideration of age)**	**Inexistence of specific rule**
Angola	Angola	Argentina	Austria	Benin
Benin		Belgium	England & Wales The child's views are one factor to be balanced among other considerations and there is no statutory guidance on the weight that should be accorded to	Cape Verde

		the child's views in particular.	
Canada – Ontario (as part of the analysis of the BIC and security)	Brazil (the right to participation is a general principle, but above 12 years old it is a duty to hear the child	France	Georgia
Ecuador	Chile	Peru (capacity is presumed	Italy
Kenya	Guinea-Conakry	Spain	Japan
Mexico	India	Uzbekistan	Netherlands
Mozambique	New Zealand		
Portugal	Poland		
Turkey	Switzerland		
Uganda	USA		

When age is mentioned, in 7 countries 12 years old is the standard. In 3 countries, 10 years old and in another group of 3 countries, 13 years old

Six other countries mentioned ages: 7, 8, 9, 10, 14 and 15 years old, as allowing one representative.

Age criteria in national laws

7	8	9	10	11	12	13	14	15
France (age in which children normally begin to	Turkey (for participation)	Poland (to be heard)	Angola	Chile	Belgium	Argentina (legal presumption)	Austria	Japan

be heard)					
		Benin	Brazil	France (age in which children are able to decide with whom they want to live)	Panama
		Georgia	Canada - Ontario	Poland (when limited legal capacity is reached)	
			Ecuador		
			Italy		
			Switzerland		
			Uganda		

Regarding the criteria to decide whether the view of the child is or not mature, there is no clear picture in research outcomes.

Some respondents mentioned the importance of the child´s views when in accordance with the child´s best interest (11 countries), another relevant group referred to the importance of the views by themselves (9 countries) and in 4 countries, according to psychological criteria of maturity.

Relevant to consider child´s opinion in all decisions	**If in accordance with the child´s best interest**	**Dependent on the maturity of the child**
Argentina	Angola	France
Austria	Benin	Georgia
Belgium	Canada	Guinea-Conakry
Brazil	Ecuador	USA
Chile	England & Wales	
New Zealand	Italy	
Peru	Kenya	
Poland	Mexico	
Switzerland	Mozambique	

Uganda

Uzbekistan

2.17. The child and the decision: context of the decision rendering, communication procedures, protocols

According to General Comment 12, “Since the child enjoys the right that her or his views are given due weight, the decision maker has to inform the child of the outcome of the process and explain how her or his views were considered. The feedback is a guarantee that the views of the child are not only heard as a formality, but are taken seriously. The information may prompt the child to insist, agree or make another proposal or, in the case of a judicial or administrative procedure, file an appeal or a complaint.” (§45). According to researches with legal professionals, however, information of court decision is the weakest element related to child participation (FRA 2015).

It is possible to identify several steps to fulfil the right to be informed of the decision and to have adequate feedback about it.

A first concern relates to the context of the decision rendering.

In many jurisdictions, orality and immediacy are basic procedural principles, with the decision being rendered soon after the hearings. In this context, what are the measures adopted by the courts regarding children? Do they remain in the courtroom? What happens if the child wants to stay in the room?

In the majority of the countries, the decision is not taken in front of the child (21 countries), but in 12 countries, if the child wants to and at judicial discretion, it is possible that the child remains in the room.

In 6 countries it is mentioned that the child remains in the room when the decision is announced.

Decision making in front of the child	Decision making not in front of the child	Possibility of the child remaining on the courtroom if asked and at judicial discretion
Belgium (in child protection cases)	Angola	Angola
Bolivia	Argentina	Austria (the decision can be taken in the presence of the child but usually the judge will keep the child in the room only as long as necessary

		procedurally. If the child wants to, he/she can stay if his/her best interests are not against)
Canada – Québec	Belgium (in family cases)	Benin
France	Brazil	Brazil (if asked by the child and if the Judge considers that it will not affect the best interests of the child)
Netherlands (Sometimes on simple child protection proceedings)	Cape Verde	Cape Verde (if asked by the child and if the Judge considers that it will not affect the best interests of the child)
Uzbekistan	Canada -Ontario (but if present in court, they are not asked to leave)	Ecuador (not the rule)
	Chile	India
	Ecuador	Japan
	England & Wales	New Zealand
	Georgia	Turkey
	Guinea-Conakry	Uruguay
	Italy	USA (The child may stay, but is not required to be present, for other types of cases)
	Kenya	
	Mexico	
	Mozambique	
	Panama	
	Poland	
	Portugal	
	Spain	

Switzerland

Uganda

Who communicates the decision to the child?

Feedback is a second important aspect to be considered, especially in this context of predominant absence of the child from the courtroom when the decision is rendered.

Is there any kind of regulation on providing feedback to the child? Who is responsible for that action?

In 19 countries, the Judge has the role of communicating the decision to the child.

In 7 countries, the parents or the lawyers or guardian *ad litem* communicate the decision.

No provision on the issue was mentioned by 4 countries and in 3 of them other professionals, such as social workers or psychologists, are responsible for this communication.

Therefore, it is possible to remark an important lack of specific attention on feedback providing. If the parents are involved in the conflict, there is no guarantee that they will provide sufficient information to the child. As stated above, if family conflicts cause negative impact on children, it is due to the lack of involvement and hearing of the child in the decision-making proceedings (WILLIAMS 2010). If the Justice System leaves to the family the task of communicating the proceedings outcomes to the child, it is to be expected that the child´s right will not be adequately safeguarded.

Judge	Parents	Lawyer/Guardian ad litem	Other professionals	No provision
Argentina	Angola	Argentina	England & Wales (Cafcass officer or their representative)	Cape Verde
Austria	Belgium (in	Chile	Italy (social workers, in case there´s	Canada

	family cases)		no lawyer representing the child)	
Belgium (in child protection cases)	Brazil	India	Panama (psychologist)	Georgia
Benin	Cape Verde	Italy (if there is an appointed lawyer)		Mexico
Bolivia	Poland	Mozambique		
Brazil (in child protection cases, if present at the hearing)	Spain	New Zealand		
Canada - Québec	Turkey	Uruguay		
Ecuador				
France				
Guinea-Conakry				
Japan				
Kenya				
Netherlands (when the decision is made in front of the Judge. Sometimes ‘child friendly decisions’ are prepared for the child in plain language.				
Peru (child friendly decision in two sheets, in plain language)				
Portugal				
Switzerland				
USA (if present)				

Uzbekistan

Protocols on how to communicate the decision to the child

As we have seen, in the majority of the countries the Judge is responsible for communicating the child the proceedings´ outcomes. A clear feedback, with the information about the weight given to the child´s views, is recommended by the Committee on the rights of the child (General Comment 12, § 45). This communication implies language adaptation.

Judicial rituals and legal language are a barrier to the understanding of what happened in a hearing, also on access to justice, limiting the possibilities of complaints, remedies and redress. Improving access to justice is a way of empowering children, also through a better communication approach. It is important to consider not only the challenges of age and maturity, but also, in an intersectional approach, with a perspective to gender (UNODC 2014), disabilities (UNITED NATIONS 2020), race (RICE *et al.*2019), among others.

Some strategies are suggested in the literature: a more effective use of legal instruments that enforce children´s rights; decision grounding on appropriate and trustful evidence; enhancement of child participation in all proceedings; all decisions written in a careful and respectful manner adapted to children´s understanding, using child-friendly structure and style. A very commented example is Judge Peter Jackson´s letter to a child, using a direct and simplified language, in which emotion and reason interact, reaching the children in the most appropriate way (JOHNSTONE 2021).

However, although there is an increasing concern on procedural accommodation in the literature, with protocols and good examples of attitude changes, there is no such a movement in practical terms among the countries that participated in the research.

With the exception of 2 countries, there is no protocol or guidelines on how to communicate the decision to the child.

Existence of protocols/guidelines on how to communicate the decision to the child	**Non-existence of protocols/guidelines on how to communicate the decision to the child**
Peru	Angola
Switzerland (notice of the decision is given to the child who	Argentina (but there are good practices recognized, with clear

is at least 14 years old, letter written by the Judge)	language for the child´s understanding)
	Austria
	Belgium
	Benin
	Bolivia
	Brazil
	Cape Verde
	Canada – Ontario and Québec
	Ecuador
	England & Wales (but experiences of Judges writing letters to the child in a friendly manner or child-friendly judgements)
	France
	Georgia
	Guinea-Conakry
	India
	Japan
	Kenya
	Mexico
	Mozambique
	Netherlands
	New Zealand
	Panama
	Poland
	Portugal
	Spain
	Turkey
	Uzbekistan

2.18. Decision clarification and the right to appeal

Another important step with regard to providing feedback to the child on his/her participation is the possibility of clarification.

As we have already seen, in the majority of the countries, children are not present during decision rendering, it is mostly the judge who, in theory – but not assured that this occurs really in practice – communicates the decision to the child, without clear protocol and with an additional challenge of a communication barrier, due to the use of technical terms or a language pattern not familiar to the child, besides the possibility of gender, race and disabilities bias.

Therefore, it is very likely that the child needs clarification of the outcomes of the proceeding.

Among the respondents, 21 countries mentioned the theoretical possibility of clarification granted to the child, in a direct interaction with the judge, if he or she does not understand some aspect, although many respondents mentioned that this situation would be rare.

In 6 countries, there is no possibility of clarification or there are no rules on the issue.

This picture reveals serious challenges for the child to effectively understand the content of the decision.

Possibility of clarification of the decision´s rationale	**Non-possibility (or inexistence of rules) of clarification of the decision´s rationale**
Angola	Belgium
Argentina	Canada (Ontario)
Austria	Georgia
Benin	India
Bolivia	Japan
Brazil	New Zealand
Cape Verde (if the child	
Canada - Québec	
Ecuador	
England & Wales	
France	

Guinea-Conakry

Kenya

Mozambique

Poland (no personal contact, but possibility of writing letters to the Judge)

Portugal (through the lawyer, social worker or informal request)

Spain (rare)

Switzerland

Turkey

USA (A child who is present in the courtroom can speak to the judge. A child who is not present may communicate with the judge in writing or request a meeting in chambers)

Uzbekistan

Decisions´ review

It is a corollary of the right to participation that the child be granted the possibility of communication and clarification and it is important to grant the child the right to appeal.

According to the Committee on the Rights of the Child, "Legislation is needed to provide children with complaint procedures and remedies when their right to be heard and for their views to be given due weight is disregarded and violated…. If the right of the child to be heard is breached with regard to judicial and administrative proceedings (art. 12, para. 2), the child must have access to appeals and complaints procedures which provide remedies for rights violations. Complaints procedures must provide reliable mechanisms to ensure that children are confident that using them will not expose them to risk of violence or punishment" (General Comment 12, §§46 & 47).

Although all the challenges children face to get to know the proceedings outcome in an adequate and understandable manner, with the exception of 6 countries, all respondents informed that the child could challenge the decision by means of an appeal.

Recognition of the right to appeal	Non-recognition of the right to appeal
Angola	Belgium (in family cases)
Argentina	Benin
Austria (if over 14 years old)	Cape Verde (although theoretically allowed)
Belgium (only in child protection cases)	Netherlands (not independently, only via parents/ guardian or guardian *ad litem*. One exception: secure treatment placements)
Bolivia	Poland
Brazil	Turkey
Canada – Ontario and Québec	
Chile	
Ecuador	
England & Wales (when the child is a party in the proceedings)	
France	
Guinea-Conakry	
India	
Japan	
Kenya	
Mexico (through their representatives)	
Mozambique (guardian *ad litem* or legal representative-parents)	
New Zealand	
Panama	
Peru	
Portugal	
Spain	
Switzerland	

Uganda

USA

Uzbekistan

2.19. The hearing´s space, ambience and court dressing

According to Garapon, the first approach to Justice is neither intellectual nor moral, but architectural and symbolic (GARAPON 2010). There is an increasing interest on the correlation between the spaces of Justice and access to Justice. An adequate protection and promotion of access to rights, liberties and procedural safeguards are dependent on the nature and quality of the judicial spaces. Both internal and external appropriateness of these spaces, regarding both citizen participation and the practice of legal professionals, reflect power relationships conditioning accessibility, participation, and inclusion of the most vulnerable persons of a given society. The spaces of Justice are a form of communication: the monumentality (AFHJ 1992) or simplicity of the buildings; the geographical distance or proximity to the communities; the recognition and identification of diversity; the structural organization of the internal spaces, inviting to consent or to hierarchical adjudication, all these situations express modalities of authority and of power, based on participation or coercion and subjection…(BRANCO 2015).

The idea of a proximity justice, based in horizontality and participation, in contrast with a traditional approach based on institutionalization, hierarchy, the ideal of submission to the law inherent to adjudication (COMMAILLE 2000; 2013) reveals that there are many non-verbal social and psychological messages in the Justice spaces as a whole.

According to Mulcahy, "each time a section of floor is raised, a barrier installed or a segregated circulation route added, it has the potential to create insiders and outsiders, empowered and disempowered participants in a space ostensibly labelled 'public' in which the intricacies of civil liberties and participatory democracy are played out". For the Australian professor, "public buildings can both inspire and degrade those within them, they can calm or oppress. The spatial configurations of the courthouse and courtroom can confer prestige or dignity to those who use them or serve to undermine their credibility. Legal architecture can associate law with tradition and conservatism or can equally well symbolise a commitment to change and innovation. Courthouses can act as memorials to the past as well as reflecting aspirations for the future" (MULCAHY 2011).

Therefore, it is impossible to analyse the ambience where the child hearing is held without having in mind the whole space of justice. Court design is

intrinsically connected to both access to justice and the procedural and substantial due process.

Regarding family and child protection matters, court design is particularly important, because it involves situations of great social conflict and emotional fragility, where law and justice are called to compensate inequalities and vulnerabilities and where social and cultural (structural) changes are more perceptible. Therefore, a law and a justice aiming to promote citizenship, substantial equality, humanity in a new democratic project, based on an ethics of care or of empowerment should take in special consideration the spaces of justice for all citizens, but especially for children and other vulnerable groups (BRANCO 2013).

The research was not focused on the whole of spaces for justice, but only on those where specifically children are heard. However, all respondents were asked to share photos of the courts, courtrooms and other spaces especially created for children, which provides some inputs on how the values presiding the Justice System are reflected, expressing a more traditional or renovated design and political ideals.

Analysing the setting where the hearing is held, there is a slight preponderance of hearings in chambers or judge´s office in comparison to the use of regular courtrooms: 16 countries. According to researches with children, there is a preference for chambers or small rooms for the hearing (FRA 2017).

In 14 countries the child is heard in the regular courtroom.

However, it is not self-evident that the courtroom is a more formal space than the chambers. Respondents have shared photos of their courtrooms and there are considerable differences regarding the formality of those spaces, including some examples of proximity justice in very unusual settings.

In 4 countries it is not specified where the child should be heard and the decision remains at judicial discretion.

Interestingly, 2 countries referred the possibility of hearing the child outside the court, either in their houses or in shelters, services for children or other public spaces.

Courtroom	**Chambers**	**Not specified or at judicial discretion**	**Outside the court**
Angola	Argentina (but it may occur as well in the	England & Wales (it can be	Austria (exceptionally,

	regular courtroom)	held in either the courtroom or the judge's office)	where the child lives)
Austria (during trial. Exceptionally, for preliminary information, in chambers)	Belgium (in family cases)	Guinea-Conakry (it can be held in either the courtroom or the judge's office)	Brazil (in shelters, in child protection cases; in spaces occupied by children in street situation; in public spaces in case of collective actions)
Belgium (in child protection cases, during trial)	Benin	Japan	
Brazil (the courtroom is normally informal, it looks like a chamber in other countries and may be adapted for children)	Bolivia	USA (The judge has discretion to decide how to proceed. The judge may conduct an informal interview with the child in chambers, or formally interview the child in the courtroom)	
Cape Verde	Canada (Ontario), if participation is		

	admitted, which is rare
Canada - Québec	Ecuador
Chile (or Gessel chamber)	France
Georgia	Italy
India (with screens or video-link to protect the child)	Mexico
Kenya	Mozambique
New Zealand	Netherlands: often in a separate child-friendly room, but sometimes in chambers or in the courtroom (without the other parties).
Spain	Peru (judicial chamber or Gessel chamber)
Turkey	Poland
Uruguay	Portugal
	Switzerland
	Uganda

Court dressing formalities

Court dressing, as much as the spaces of justice, has a longstanding history as a symbolic expression of the nature of political power. The changes in the court dressing along history reveal the changes on political structures and the place of judges in the political and social hierarchy (BOEDELS 1992; GAULME *et al.* 2012), therefore a certain perspective of power relationships within the institution. An increase in informality is correlated to changing approaches on conflict resolution, more focused on participation and conciliation than in adjudication, therefore horizontality instead of hierarchy and verticality.

This context is especially important for child hearing. The more formal, the greater may be the psychological barriers for children to feel comfortable and safe to participate.

The research reveals this sensitiveness to a better accommodation of children´s needs.

Regarding the dressing formalities, in the majority of the countries business attire is predominant among Judges (24 countries).

In 5 countries, Judges use formal dressing (gown) when hearing the child, and in 3 it is not specified in the law and respondents have not informed how it occurs in practice.

Formal dressing (gown)	Informal dressing (business attire)	Not specified in the law
Belgium (during trial, when the hearing is held in the courtroom)	Angola	India
Canada - Québec	Argentina	Japan
Guinea-Conakry (during trial, when the hearing is held in the courtroom)	Austria	Kenya
Mexico	Belgium (when the hearing is held in chambers)	
Portugal	Benin	
	Brazil (business attire)	
	Chile	
	Ecuador	
	England & Wales (business attire)	
	France	
	Guinea-Conakry (when in chambers)	
	Italy	
	Mozambique	
	Netherlands	
	New Zealand	

Peru

Poland

Spain

Switzerland

Turkey

Uganda

Uruguay

USA

Uzbekistan

2.20. Concluding remarks

1. None of the answers have reached unanimity, showing that all the issues are still in development, expressing that some theoretical and political challenges should be addressed in an ongoing transnational judicial dialogue.
2. It is important for a fair and adequate treatment of (children´s) rights to have a scale of values, an economy and principle of magnitude or grandeur to allow comparisons, rational and moral justification and, ultimately, a demand of equality. The consideration of child participation in civil proceedings as a procedural guarantee, besides other aspects and perspectives, may allow clearer comparisons to the safeguards conferred to adults and the reasons why differences are established.
3. In most of the countries, there is limited recognition of children as equal legal parties. This lack of recognition undermines the child´s position in legal proceedings with a clear impact in making his/her views duly considered in decision-making and also on procedural safeguards.
4. In spite of recognizing conflict of interests as a possibility to enable an autonomous legal status in judicial proceedings, it is still to be understood how conflict of interests are identified and recognized. Clearer criteria and child consultation should be considered.
5. Legal counseling and representation are therefore, of great importance, irrespective of existing or not conflict of interests.
6. The need to address the child´s best interest should not prevent the child from having a client-directed and empowering legal counseling. The research shows a diversity of possibilities to support the court in reaching a fair decision, taking into consideration what is best for the child.

7. There is a lack of guidelines or protocols on how to consult children whether they want or not to participate and, in case of an affirmative answer, how would he/she prefer to do it. In many countries children are consulted by the Judge, at the moment of the hearing. Some good examples of informative material and consultation mechanisms could be shared and spread in the international arena. Research should also be emphasized to analyse the best context for this kind of consultation.

8. In contrast to other areas of child rights, where more detailed guidelines have reached international consensus, in family and child protection matters there is a lack of guidance on how to hear the child.

9. The lack of a clear protocol on how to hear the children does not allow a clear understanding of the scope, range and extension of the issues addressed during the hearing. However, it is clear that some theoretical, cultural and political disputes are at stake in some approaches, showing that child hearing is not a neutral act, and a rights-based approach should prevail in defining the methods and scopes of the procedure.

10. Child hearing is dependent not only on critical theoretical assumptions, but also on interviewing skills as a result of adequate training, protocols or guidelines and changing attitudes towards children. Family and civil child protection matters should be object of a more focused attention on guidelines and researches.

11. International cooperation and the support from other institutions, including the academy, may provide the courts with important tools to improve child hearing in family and child protection matters.

12. The research shows that different kinds of direct child hearing take place in family and child protection matters, which influences the organization of this procedural act.

13. According to the practices related in the research, there is a variety of possibilities of child participation in family and civil child protection matters:

    13.1. Children may have a more proactive participation, with the status of legal party or interested person with specific and autonomous legal representation and procedural rights;
    13.2. Children may be consulted about the issues discussed in the proceedings (consultation);
    13.3. Children may have an opportunity to have a meeting with the judge just to bring their history, without no clear intentionality of the hearing regarding the proceedings (the judge is in a more passive attitude, just open to the child´s inputs);
    13.4. Children may give evidence, with a major concern of due process guarantees for other parties.

14. These modalities have an impact on who is present during the hearing, but also on how influential child participation will be in the decision-making

process and in the manner the Judge will consider and weigh the child´s views.

15. Children have the right, not the duty, to participate, but conditions to decide if and how he/she would like to take part in the proceeding should be improved, both in terms of consultation and information provided to children.

16. The research shows as well the importance of flexibility and new (technological) resources to provide conditions for children to participate, but, at the same time, to safeguard the rights of other parties and, in some extent, to be part of this procedural act.

17. Regarding the decision, there are still major differences on how to weigh the child´s views. It still seems to persist a conditioned consideration of the child´s views only when they are in accordance to what is supposed to be in his/her best interests, in the adults´ perspective.

18. Age limits are still used as a reference in many countries. If age limits give certainty to the child to be granted the opportunity to be heard, irrespective of any other consideration, they may undermine the possibility of younger children to be heard.

19. The relative absence of clear criteria to define maturity seems as well to be a challenge for a more substantial participation of children. A critical understanding of the impact of ableism in children´s rights and a wider openness to supportive mechanisms in procedural accommodations already used for other groups of (vulnerable) people may amplify the opportunities for child participation.

20. Many countries report a lack of care in the communication of the decision, with the risk of ineffectiveness to exercise the right to appeal or the right to challenge the decision (for instance, when the decision communication is left to the parents and no legal representation is granted).

21. Court design, the ambience and court dressing are not secondary aspects of the child hearing. These contexts communicate symbolically power-related messages that will impact due process, accessibility to the law and to justice.

22. Identification and sharing of best practices is vital for a continuous transnational judicial dialogue.

23. Continuous research is also fundamental to understand:

    23.1. critical procedural aspects to better balance the right to family life and privacy and the rights of the child within the family,
    23.2. the modalities of child hearing and its meaning and influence regarding the decision-making process,

23.3. the limits of legal intervention in name of the best interests of the child, having in mind the intrusive and controlling history of justice in family and social life.

24. It is also important to have in mind not only the individual but also the social rights of children in the context of the justice system.

25. In many countries where collective actions are recognized by law, there could be (and there is) collective participation of children when their rights are at stake.

26. It is vital to have the individual and collective participation of children in the researches (designing, participating as researchers, discussing the outcomes) and in the design, implementation and monitoring of judicial policies.

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3. GENERAL PHOTO GALLERY OF THE SPACES AND AMBIENCES WHERE CHILDREN ARE HEARD IN COURT

All countries were asked to share photos of the ambiances where children are heard in Court. After each national information, all the supplementary material are displayed, including the photos.

In order to give a comparative perspective of all ambiances, we have organized all the photos together in this section, in alphabetical order.

Argentina – Family Courtroom

Austria

Courtroom

room for interaction with children

Benin

Regular Courtroom

Chambers/Judge´s office

Brazil

Family court

Family court

Brazil - some examples of (Family) Court itinerancy

Cape Verde –Courtroom

Canada - Québec

Chile – Gessel Chamber

Ecuador

England & Wales

France

India - videolink

Italy

Office for hearing the children in protection matters

Room for childhearing (videolink)

Japan

Interview room (child)

Interview room (teenager)

Mexico

The Netherlands

New Zealand

Chambers

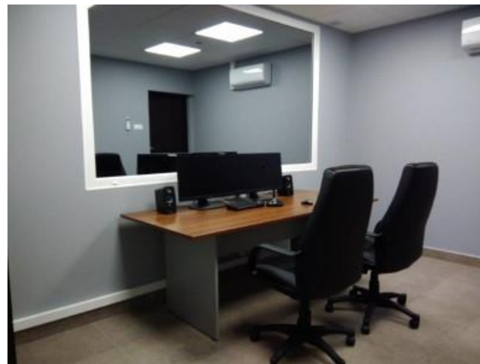
Courtroom

North Macedonia

Panama

Peru – Gessel chamber and room for Family meeting

Poland



Portugal

Courtroom

Chambers

Spain

Switzerland – Judge´s office

Turkey

Uganda

Uruguay - Courtroom

USA

4. THE QUESTIONNAIRE

CHILD PARTICIPATION IN FAMILY AND CHILD PROTECTION MATTERS

1. By defining that a specific situation concerns the child, does he/she becomes 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?

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?

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?

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?

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?

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?

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?

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?

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?

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

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?

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?

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