



CHILD PARTICIPATION IN JUVENILE JUSTICE IN SOUTH AFRICA

National Report for AIMJF's Comparative and Collaborative Research.

La participación de los niños en la justicia juvenil en Sudáfrica.

Informe nacional para la investigación comparativa y colaborativa de la AIMJF

La participation des enfants à la justice juvénile en Afrique du Sud

Rapport national pour la recherche comparative et collaborative de l'AIMJF

Stanley Malematja,

Karabo Ozah

Morgan Courtenay

on behalf of the Centre for Child Law – South Africa

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

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

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

Introduction

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



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

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

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

Questionnaire

1. General description of the procedure and the system

1.1. What is the name of the Court in your country with jurisdiction for wrongful acts committed by children?

2

Child Justice Court.

Does the name vary among different regions of your Country?

No.

Does this Court also have jurisdiction for other matters?

No

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

12.

1.3. Until which age is a child subjected to the jurisdiction of the Youth Court?

18.

Does your legislation provide the possibility or possible obligation to treat a child under 18 as an adult?

No.

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

Yes.

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

- a. Arrest normally takes place because it is one of the recognised methods for securing court attendance by an accused child.*
- b. The accused child would then be processed at the police station. This includes confirming the child is indeed under the age of 18, whether they have a parent, guardian or care giver and whether they have previous convictions or pending charges.*
- c. Although the detention of a child in conflict with the law is permitted, it must however be implemented as measure of last resort. Depending on the severity of offence and other circumstances, a child in conflict with the law is charge and released into the care of a parent, guardian or caregiver.*
- d. After being charged and released, the child is provided with a date for court appearance in the Child Justice Court. At the first appearance, preliminary inquiry is conducted and the child is provided with a legal representative if they cannot afford a private lawyer.*
- e. During the preliminary inquiry and depending on the nature of the offence, the child may be diverted into an appropriate programme or community service appropriate to their age and level of development.*
- f. Proceedings are held in open court and a probation officer is appointed into the case to conduct a background investigation on the child and provide a report to the court. The report enables the court to make an appropriate finding in relation to sentencing if the child is found guilty.*

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

- a. After considering various factors such as the age of the child, nature and seriousness of the and interest of justice, the Prosecutor may decide to divert the child or refer to the matter for a preliminary inquiry.*
- b. In the preliminary, the views of the probation officer will be considered, a determination is made on whether the child can be diverted before making a plea and suitable diversion options are explored. The process is overseen by a Magistrate.*
- c. In essence, the opportunities which lie in the process include diversion.*

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

No.

2. Judicial hearing

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

Optional. A child has the right to remain silent. If the child elects to participate, then s/he and/or his/her legal representative may participate at all stages of the proceedings.

Is the child invited or summoned for the hearing?

A child's presence at a hearing is secured, initially, either by issuing a written notice, service of a summons, or by way of an arrest. A child would, thereafter, either be released on warning, released on bail, or remanded in detention. A child, if released, would have been verbally warned by the presiding officer to appear on a particular day for his/her further hearing.

2.2. Is this call to appear, irrespective of its modality, made together with parent/representative or does the child receive a separate invitation/summon?

A child accused of committing an offence but who has not been arrested may be brought before a court by the issuing of a written notice or the service a summons. The written notice and/or summons ought to be handed to the child in the presence of his/her parent/caregiver.

If Is it made in a child-friendly language?

No.

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

No.

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

No.

2.5. If children are brought by the police from places of detention, are they transported separately from adults?

Yes (in theory).

Do they have to wait in cells, if so under what conditions (e.g. single or group cells, separation from adults etc.)?

It is dependent on the infrastructure of the court. If held in a cell, it would be separate from adults.

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

It is dependent on the infrastructure of the court.

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

A courtroom. The courtroom, in most metropolitan areas, is a specifically designated courtroom that only entertains matters involving children. In instances where, however, the court is shared with adults, proceedings are held in camera.

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

Yes.

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

No.

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

Hearings are usually mechanically recorded.

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

The child, his/her legal representative, his/her guardian/caregiver, the prosecutor and the magistrate.

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

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

No. This is generally provided to them by their legal representative. All children have the right and entitlement to be assisted by a legal representative (at State expense if required).

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

A legally qualified magistrate. A Judge hears the matter when it goes for automatic review in cases where a child is given a custodial sentence.

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

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

2.16.1. Does the judge wear a gown/wig during the hearing?

Gown.

Would it be different in a family court?

Yes.

And in a criminal court for adults?

No.

Can you please share a photo?

Proceedings are held in camera, it is therefore not possible to share a photograph of the proceedings.

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

Gowns.

2.16.3. Who else is allowed to attend the hearings?

Parent/Guardian/Caregiver of the child accused.

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

No.

2.16.5. When the child is deprived of liberty, does he/she wear regular clothing or a uniform?

Regular clothes.

What kind of security measures/measures of restraint may be adopted?

None.

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

It depends.

2.16.7. Does the child have to stand up?

If present in court before the magistrate enters, yes.

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

No,

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

No. Only when addressed by the magistrate.

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

If the child is not yet legally represented, his/her rights to remain silent and right to a legal representative are explained.

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

Only if he/she is giving evidence (testifying).

2.16.12. Who poses the questions to the child: judge, psychologist, any other?

It depends on the stage of the proceedings. It would usually be the magistrate, if s/he has a query. The legal representative of the child if leading his/her evidence. The prosecution, if cross-examining the child.

Does the child respond directly or via a third person, eg lawyer?

A general query from the magistrate will usually be answered by the child's legal representative. If the child is giving his/her testimony the child.

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

Yes. Unless he/she is under cross-examination.

2.16.14. Who is allowed to address the child?

It depends on the stage of the proceedings. It, ordinarily, would be limited to the magistrate though.

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

A social worker and/or psychologist would be appointed to make an assessment of the child for purposes of the various stages of the hearing. They are not, however, entitled to engage the child during the hearing. They are limited to presenting the evidence in their respective reports.

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

Yes.

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

It is structured but there is ample opportunity for all issues to be canvassed.

2.17.1. How would you characterize the tone of the dialogue and the general attitude of the hearing?

It is 'semi-formal'.

Must the child answer strictly to the questions or is he/she allowed to freely speak about what has happened?

It depends on the nature of the question. A child is entitled to explain his/her answer.

The interaction is focused on the wrongful act or, additionally, is it open to contextualize the child's behavior, his/her family condition, educational process, social experiences, and to express some aspects of his/her subjectivity?

The focus is on the acts alleged to have given rise to the criminal offence (the elements of the offence if you will). A child convicted of an offence will, in mitigation, be entitled to raise other issues that may have resulted in him/her committing the acts. A social worker would have also, and already at that stage, prepared a report focusing on these aspects.

2.17.2. Is it an occasion for the Judge to strictly give the opportunity for each party to speak, according to the rules, in order to take a decision, or a moment that enable some kind of less formal interaction with the child with some kind of feedback on the pros and cons of

his/her behavior as part of a negotiation of plea-bargaining, restorative justice or other alternative to the trial?

No.

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

No.

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

Yes.

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

a. In the event that a child receives a custodial sentence, he or she will be admitted at a centre designed under the Children's Act 38 of 2005 which is modelled as a care and protection system. The child will receive appropriate programmes which geared towards counselling and rehabilitation.

b. The availability of a probation officer and the its report also increases the child's opportunities in receiving psychosocial services. Depending on the report, a child may refer to counselling.

9

3. Generic questions concerning the improvement of Youth Courts

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

No.

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

I

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

No. South Africa's child justice system and framework is satisfactorily child-centered. Nevertheless, the system is found wanting on the lack of a specialised training for Magistrates

3.4. Any suggestions for improvement from your side?



No.