CHRONICLE CHRONIQUE CRÓNICA

Contents

Editorial — Avril Calder

European Court of Human Rights (ECtHR) **Françoise Tulkens** former Judge and vice President of the ECtHR gave a speech last September to the Swiss Juvenile Justice Administration Society. I am delighted to be able to bring you an edited version of that speech illustrating the development of judicial thinking in the ECtHR through several cases involving minors that were adjudicated at the court. Judge Tulkens pertinently presents the issues in the order they arise in criminal proceedings.

The article refers to the possibility of collective actions bring brought on behalf of minors. You will remember that Optional Protocol 3 (OP3) articles in the last issue explained that such an approach was argued for and lost at the committee stages in the drafting of OP3.

Anne-Catherine Hatt*, a Swiss Juvenile Judge, speaking at the same conference usefully drew the attention of her colleagues to various Recommendations and Guidelines published by the Council of Europe ranging from the 1987 Recommendation on Social Response to Juvenile Delinquency to the 2010 Child Friendly Justice Guidelines.

If such guidelines were followed, there would be fewer cases taken to the ECtHR.

Children's evidence in legal proceedings

Cross examination of a child victim in a sexual abuse case heard in an English court in May 2013[1] was so aggressive that I decided to look at how evidence is obtained according to Criminal Procedure Codes (CrimPC) and Rules in different jurisdictions around the world.

North America

Lucie Rondeau*, a Judge in Quebec, summarises the judicial rules and practices that aim to allow children to exercise the right to be heard. This happens in an adversarial setting even though Quebec inherited a civil system from France. However, encouragingly, she writes that the law provides legal practitioners with the tools to reduce problems for child witnesses and that legal practitioners have developed ways of dealing well with children.

Two articles from America, one by **Prof. Gail S. Goodman, & Deborah Goldfarb** and the other by **Leonard Edwards*,** cover both academic research and legal ground. The first article reviews current research on the effects of cross-examination of children and notes it is not necessarily the best way to obtain truthful evidence from a child who has to face the alleged offender in court; rather cross examination may result in a degradation of the evidence.

Leonard Edwards* discusses the Confrontation Clause of the Sixth Amendment to the United States Constitution which demands a child's presence in a criminal court and reports how different cases have been addressed by the Supreme Court.

Europe

Adel Puk and Professor Penny Cooper describe intermediaries who are communication specialists actively helping a child victim or witness during both a police interview and a trial in England and Wales. They ensure that vulnerable witnesses are treated fairly and that a child is able to give accurate evidence and information.

From Germany we have two contributions. **Judge Sophie Ballestrem** outlines briefly and clearly the parameters for obtaining evidence from minors in both civil and criminal proceedings while **Hon Judge Verina Speckin** of Germany gives a comprehensive account of the legal structures pertaining to witnesses as set out in her country's CrimPC as well as explaining the importance of a lawyer for a child who may be the victim and only witness at a trial.

In Switzerland it is thought particularly important that a child is protected from a second victimisation caused by the criminal procedure so **Jungundwältin Anne-Catherine Hatt*** is able under, the Swiss CrimPC, to conduct interviews with a child in a special child-friendly room. If it is evident that this could be a serious psychological burden to the child, there are rules that come into play and have to be respected.

[1] *Guardian* Article May 19 2013 http://www.guardian.co.uk/law/2013/may/19/lawyers-oxford-abuse-ring

South America

The *Gesell Chamber* is also a special room where a child may be interviewed, in this case by a psychologist. A judge and lawyers watch the interview through a one way mirror and ask questions as the interview proceeds. **Judge Patricia Klentak*** of Argentina describes how it works.

Asia

In his report from Pakistan **Abdullah Khoso** as well as setting out guiding laws and reviewing High Court judgements includes interesting views from lawyers

Youth Court

Both Bangladesh and Macedonia have new Acts, both introduced in 2013. **Justice M. Imman Ali*** has kindly condensed his country's new Act while **Aleksandra Deanoska-Trendafilova** has written an overview of hers.

Both accounts bring out the main provisions of the respective Acts which reflect the recognition by States of their obligations to children under the Convention on the Rights of the Child and other international instruments. These are exciting times for both countries.

There is interesting news from the South Pacific. where Youth courts In the Cook Islands, as reported by journalist **Merita Wi-Kaitaia,** have been undergoing serious change aimed at bringing the community into the court process and reconnecting minors with their cultural roots. Presiding **Magistrate John Kenning** adds his comments and hopes for the new approach.

In addition, there is news that **Justice Vui Clarence Nelson** of the Supreme Court Samoa has been appointed to the Committee on the Rights of the Child. Judge Nelson has contributed to the Chronicle and through the affiliated South Pacific Council for Youth and Children's Courts (SPCYCC) takes a keen interest in our Association.

Congratulations Clarence!

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Finally, I should be glad to receive further articles on children's evidence in legal proceedings to add to the contents of this edition and

I should also like to hear from members who would like to contribute articles on the *'voice of the child' in Family Proceedings Courts* for that edition.

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The case-law of the European Court of Human Rights concerning criminal juvenile justice

Judge Françoise Tulkens

Introduction

1. Juvenile criminal justice is a topic of growing importance and which, more than any other, calls for proper responses. An inappropriate criminal reaction may well put a young person's future at risk and contribute even more to feelings of insecurity. In this paper, I shall examine the contribution made by the jurisprudence of the European Court of Human Rights which directly affects minors in contact with the criminal justice system. I shall simply present this jurisprudence departing from the provisions of the European Convention on Human Rights, keeping in mind the chronological order of the criminal intervention, from its earliest stages to the point where sentences and measures are enforced.

I Context

2. Here I will not go into the nature, scope, possibilities and limitations of the different international texts (general or targeted) that children and young people can and must employ at both international and regional level. This has been dealt with elsewhere. It is interesting to note, however, that the European Union is also developing a European strategy on the rights of the child based in particular on Article 24 of the Charter of Fundamental Rights, which recognises children's rights. Where fundamental rights are concerned, I believe that one approach does not exhaust the whole subject and that complementarities and synergies must be created between the different instruments.

3. Where children's rights are concerned, the European Convention on Human Rights possesses two characteristics that distinguish it from other instruments that protect fundamental rights.

Firstly, unlike the United Nations Convention on the Rights of the Child, the 1950 European Convention on Human Rights has no provision relating specifically to children and young people, even if some rights, such as, for example, the right to education apply particularly to children. On the other hand, Article 1 of the Convention provides that states "shall secure" – and not "undertake to secure" as in most international treaties – to "everyone" the rights and freedoms defined therein. Children's rights are therefore human rights, and children are fully entitled to human rights.

Secondly, the supervision machinery set up by the Convention to ensure compliance with states' commitments under the Convention takes the form of a fully judicial body, the European Court of Human Rights. In line with Article 1 of the Convention, Article 34 provides that the Court may receive applications from "any person" claiming to be the victim of a violation of the rights set forth therein.

So there is no distinction in the text between men and women, foreigners and nationals, adults and minors: a child not of full age may apply directly to Court. Let us not forget that the Court also deals with interstate applications, that is, cases where a state refers to the Court an alleged breach of the provisions of the Convention by another state. Little use is made of this possibility in general, and no doubt even less where children's rights are concerned, but it is useful sometimes to reactivate dormant provisions.

4. While it is important to restate the principle that everyone may apply to the European Court of Human Rights, we must avoid the fiction that children and young people can exercise fundamental rights in the same way as adults. As with many vulnerable categories, access to justice and, *a fortiori*, international justice is not a straightforward matter. There are legal as well as economic, social and cultural obstacles. It is precisely in this regard that proposals and suggestions will have to be made to ensure that children's enjoyment of the rights safeguarded by the Convention is concrete and effective, and not purely theoretical. In this connection, the Court could or should possibly take a closer look at the possibility of accepting in some cases collective actions which would enable associations or groups not directly affected by the alleged violation to speak, as it were, on behalf of those who have no voice[1]. More technically, the requirement that cases can only be brought before the Court once domestic remedies have been exhausted may in some cases represent an obstacle to minors being able to apply to the Court if they lack legal capacity in their own legal system.

In keeping with its case-law, the Court might therefore consider the possibility, in some situations, of waiving this condition for admissibility of applications. All these questions warrant consideration and in-depth study.

5. Where general principles are concerned, the following should be stressed: one of the golden rules guiding and aiding the European Court's interpretative work is that the Convention is a living instrument which must adapt to the realities of the society in which we live. This is why the Court is obliged to adopt an open, dynamic, finalist and teleological method of interpretation, which may seem surprising, but which is essential. As Ricoeur put it, "the meaning of a text is not behind the text but in front of it"[2]. In this connection, the development, alongside negative obligations, of positive obligations upon states and the horizontal application of the Convention, extending to and including relations between individuals, have played an important role in the field of children's rights. As we shall see, the same applies to the extension of procedural safeguards. Moreover, it is interesting to observe, in both domestic and international law, that significant changes or innovations in justice systems often originate in the juvenile courts. It is as if this were a more open and more flexible area allowing new approaches to develop.

[1] An application *Center of Legal Resources, on behalf of Valentin Câmpeanu v. Romania* is currently pending before the Grand Chamber. It concerns in particular the death in a psychiatric hospital of a young man of Roma origin who was HIV positive and severely mentally disabled. The application had been lodged on his behalf by a non-governmental organisation.

[2] P. Ricoeur, *Du texte à l'action. Essais d'herméneutiques II*, Seuil, Paris, 1986, p. 116

II Right to life

6. The right to life, guaranteed by Article 2 of the European Convention of Human Rights, is an absolute, non-derogable right, not subject to any exception.

Death in custody

7. The *H.Y. and Hü.Y. v Turkey* judgment of 6 October 2005 concerned the death of a minor after he had been placed in custody and transferred to a military hospital. The Court considered that the applicants' allegations that their son had died after being tortured by the security forces were not based on concrete and verifiable facts. It held that there had been no violation of Article 2 under its substantive limb but found a violation of Article 2 under its procedural limb: owing to the lack of thoroughness with which the investigation had been conducted, it had not been possible to establish with a higher degree of certainty the cause of the cranial trauma that had resulted in the death[3].

Suicide in prison

8. Generally speaking, suicide of detainees in prison is a growing source of concern and is intolerable. This concern is even greater in the case of minors. In the *Coşelav v. Turkey* judgment of 9 October 2012, the Court found a violation of the right to life regarding a juvenile's suicide in an adult prison. The Court found that the Turkish authorities had not only been indifferent to the applicants' son's grave psychological problems, even threatening him with disciplinary sanctions for previous suicide attempts, but had been responsible for a deterioration of his state of mind by detaining him in a prison with adults without providing any medical or specialist care, thus leading to his suicide[4].

III Prohibition of torture and inhuman or degrading treatment or punishment

9. Article 3 of the European Convention on Human Rights, which prohibits torture and inhuman or degrading treatment or punishment, also enshrines an absolute, non-derogable right to which no exceptions are allowed under any circumstances whatsoever. In 1999, in the *Selmouni v. France* judgment which concerned acts referred to by the Court as torture, the Court expressed a general principle of interpretation: "the increasingly high standard being required in the area of the protection of human rights and fundamental liberties correspondingly and inevitably requires greater firmness in assessing breaches of the fundamental values of democratic societies"[5]. Furthermore, it is an established fact that, in assessing the seriousness of the treatment that has been inflicted, the Court takes account of the victims' personal characteristics, and particularly their age. Lastly, in the case of minors deprived of their liberty, the reports drawn up by the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment should also be taken into account and carefully examined. These reports, based on the committee's on-the-spot visits, raise in a particularly pertinent way the serious problems posed by the detention of minors.

Police violence

10. I will limit myself to the most important judgments. The *Assenov and Others v. Bulgaria* judgment of 28 October 1998 is a landmark judgment as far as procedural obligations are concerned. The applicant was a minor aged 14 when he was arrested and taken into police custody.

[3] ECtHR, *H.Y. and Hü.Y. v. Turkey* judgement of 6 October 2005, § 116 and §§ 128-129. See also the *Anguelova v Bulgaria* judgement of 13 June 2002, §§ 130 and 146.

[4] ECtHR, *Coşelav v. Turkey* judgment of 9 October 2012, §§ 56-70.

[5] ECtHR (GC), *Selmouni v. France* judgment of 28 July 1999, § 101 *in fine*.

On the merits, the Court considered that it was impossible to establish on the basis of the available evidence whether or not the applicant's injuries had been caused by the police as he alleged[6]. On the other hand, where an individual raises an arguable claim to have been ill-treated in breach of Article 3, the Court continued, that provision read in conjunction with Article 1 requires by implication that there should be an effective official investigation. So the Court held that there had been a procedural breach of Article 3 in the instant case based on the lack of an effective investigation[7].

11. In the *Bati and Others v. Turkey* judgment of 3 June 2004 the Court found a violation of the Convention in a situation where ill-treatments had been inflicted on young prisoners and a pregnant woman while in police custody. In the Court's view, this particularly violent and painful treatment harming not only the applicants' physical integrity but also their mental integrity had been intentionally meted out to them by agents of the State in the performance of their duties, with the aim of extracting a confession or information about the offences of which they were suspected. Taken as a whole and bearing in mind their duration and the aim pursued, these violent acts had been particularly serious and cruel and had been capable of causing "severe" pain and suffering. They had therefore amounted to torture[8].

12. The *Okkali v. Turkey* judgment of 17 October 2006 gave the Court the opportunity for further development of its case-law relating to the state's positive obligations in criminal proceedings against persons responsible for violations of Article 3 of the Convention against prosecuted minors. In the instant case, the applicant was a boy aged 12 who had suffered ill-treatment in a police station. His complaint resulted in the police officers receiving minimum sentences, with a stay of execution. Furthermore, his action for damages was dismissed as being time-barred. The Court considered that, as a minor, the applicant should have enjoyed greater protection and that the authorities had failed to take account of his particular vulnerability. Moreover, the proceedings had resulted in impunity for persons who had committed acts in breach of the absolute prohibition laid down in Article 3. In applying and interpreting national legislation, the judges had used their discretion to lessen the consequences of an extremely serious unlawful act rather than to show that such acts could in no way be tolerated. As it had been applied, the criminal-law system had had no dissuasive effect capable of ensuring the effective prevention of unlawful acts such as these. In view of their outcome, the impugned criminal proceedings had failed to provide appropriate redress for an infringement of the principle enshrined in Article 3. The Court therefore held that there had been a violation of that provision[9].

13. In the case of *Stoica v. Romania* of 4 March 2008, a 14 year-old minor's allegations that he had been beaten by police officers because he was of Roma origin had not been followed up and the police officers concerned were not prosecuted. The Court found a violation of Article 3 as well as a violation of Article 14 (prohibition of discrimination) taken in conjunction with Article 3 of the Convention on the grounds that the applicant's injuries had been the result of inhuman and degrading treatment, that no effective investigation had been carried out into these abuses and that the police officers' behaviour had clearly been motivated by racism[10].

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6 ECtHR *Assenov and Others v. Bulgaria,* judgment of 28 October 1998, § 100.

7 Ibid., § 106.

8 ECtHR, *Bati and Others v. Turkey* judgment of 3 June 2004, § 123.

9 ECtHR, *Okkali v. Turkey* judgment of 17 October 2006, §§ 69-78.

10 ECtHR, *Stoica v. Romania* judgment of 4 March 2008, §§ 80, 81 and 131-132.

Treatment in police custody

14. The *Dushka v Ukraine* judgment of 3 February 2011 concerned the unlawful detention and questioning without a lawyer and his parents of a 17-year old. In this case the Court found that the fact that the applicant's confession had been made in a setting lacking such procedural guarantees as the presence of a lawyer, and had then been retracted upon release, pointed to the conclusion that it might not have been given freely. It considered that such practice, especially given the applicant's vulnerable age, qualified as inhuman and degrading treatment, in violation of Article 3 of the Convention[11].

15. The *Yazgül Yilmaz v. Turkey* judgment of 1 February 2011 concerned a gynaecological examination of an unaccompanied minor girl in police custody. The Court considered that it could not agree with a general practice of automatic gynaecological examinations for female detainees, for the purpose of avoiding false sexual assault accusations against police officers. Such a practice did not take account of the interests of detained women and did not relate to any medical necessity. Thus, the lack of fundamental safeguards during the applicant's police custody had placed her in a state of deep distress. The extreme anxiety that the examination must have caused her, and of which the authorities could not have been unaware given her age and the fact that she was not accompanied, enabled the Court to characterise the examination in the present case as degrading treatment[12].

16. The *Kuptsov and Kuptsova v. Russia* judgment of 3 December 2011 concerned the pre-trial detention of and criminal proceedings against the first applicant, when he was a minor, on charges of several counts of robbery committed in conspiracy with others.

The Court held in particular that there had been a violation of Article 3 of the Convention on account of the inhuman conditions of the applicant's detention in a police station for one week after his arrest[13].

IV Right to liberty and security

According to its own wording, Article 5 of the European Convention on Human Rights, which safeguards the right to liberty and security, applies to "everyone". The safeguard obviously extends to minors, and this is a point which does not lend itself to controversy.

Cases in which deprivation of liberty is allowed

18. The Convention allows the detention of a minor by lawful order for the purpose of educational supervision.. It does not preclude an interim custody measure being used as a preliminary to a regime of supervised education, without itself involving any supervised education. In such circumstances, however, the imprisonment must be speedily followed by actual application of such a regime in a setting designed and with sufficient resources for the purpose. But, "the detention of a young man in a remand prison in conditions of virtual isolation and without the assistance of staff with educational training cannot be regarded as furthering any educational aim"[14]. In the *D.G. v Ireland* judgment of 16 May 2002, the Court ruled that, in the absence of accommodation appropriate to a regime of educational supervision, the detention of a minor in prison for several months was unlawful[15].

[11] ECtHR, *Dushka v. Ukraine* judgment of 3 February 2011, §§ 52-54.

[12] ECtHR, *Yazgül Yilmaz v. Turkey* judgment of 1 February 2011, §§ 52-54.

[13] ECtHR, *Kuptsov and Kuptsova v. Russia* judgment of 3 December 2011, §§ 71-72.

[14] ECtHR, *Bouamar v. Belgium* judgment of 29 February 1988, §§ 50 et 52.

[15] ECtHR, *D.G. v. Ireland* judgment of 16 May 2002, § 84.

19. In the *Koniarska v. the United Kingdom* inadmissibility decision of 12 October 2000, the Court found that deprivation of liberty for the purpose of protection was compatible with the Convention only if it served the aim of "educational supervision" within the meaning of Article 5 § 1 (d). Regarding the meaning of the words "educational supervision", the Court considered that they should not be equated rigidly with notions of classroom teaching. In the context of a young person in local authority care, educational supervision must "embrace many aspects of the exercise, by the local authority, of parental rights for the benefit and protection of the person concerned".

20. In the case of *Ichin and Others v. Ukraine* of 21 December 2010, two boys, aged respectively 13 and 14, had been held in a juvenile holding facility for 30 days for stealing food and kitchen appliances from a school canteen, although they had already confessed to the theft and returned some of the stolen goods and were under the age of criminal responsibility. The Court held that the boys had been detained in an arbitrary manner, in a place that did not offer the required "educational supervision", in violation of Article 5 § 1.[16].

Length of pre-trial detention

21. In the *Selçuk v. Turkey* judgment of 10 January 2006, the applicant, who was a minor at the time of the events (aged 16), was remanded in custody for four months before being released. His trial was still pending. Having regard particularly to the fact that the applicant was a minor at the time, the Court found that the authorities had failed to convincingly demonstrate the need for the applicant's detention on remand for that period and that Article 5 § 3 of the Convention of the Convention had therefore been breached[17].

22. The *Güveç v. Turkey* judgment of 20 January 2009 concerned a minor aged 15 who had been tried before an adult court. Before he was found guilty of membership of an illegal organisation he had been held in pre-trial detention for more than four-and-a-half years in an adult prison, where he had not receive medical care for his psychological problems and made repeated suicide attempts. The Court found that the applicant's detention had undoubtedly caused his psychological problems which, in turn, had led to his attempts to take his own life. Directly responsible for the applicant's problems, the national authorities had failed to provide adequate medical care for him.. Given the applicant's age, the length of his detention in prison together with adults, and the failure to provide adequate medical care to him and to take steps with a view to preventing his suicide attempts, the Court concluded that there had been a violation of Article 5 § 3, as well as a violation of Article 3 of the Convention[18].

V Right to a fair trial

The scope of Article 6 of the Convention

23. From a criminal-law standpoint, the protection system to which children in many countries have been subject obviously has some pernicious effects. In the *R. v. the United Kingdom* decision of 4 January 2007, the Court held that the warning given by the police to a minor who had indecently assaulted girls at his school did not fall within the scope of the guarantees of a fair trial since it did not involve the determination of a criminal charge.

Ability to participate in the proceedings

24. In the *S.C. v. the United Kingdom* judgment of 15 June 2004, the applicant, who was aged 11 at the time of the events, had been tried in an adult court and sentenced to two-and-a-half years' detention. He alleged that, because of his youth and low intellectual ability, he had

16 ECtHR, *Ichin and Others v. Ukraine* judgment of 21 December 2010, §§ 39-40.

17 ECtHR, *Selçuk v. Turkey* judgment of 10 January 2006, §§ 36-37.

18 ECtHR, *Güveç v. Turkey* judgment of 20 January 2009, §§ 98 and 108-110.

been unable to participate effectively in his trial. The Court considered it noteworthy that the two experts who had assessed the applicant before his court hearing had formed the view that he had a very low intellectual level for his age. The applicant seemed to have had little comprehension of the role of the jury in the proceedings or of the importance of making a good impression on them. Even more strikingly, the child did not seem to have grasped the fact that he risked a custodial sentence and, even once sentence had been passed and he had been taken down to the holding cells, he appeared confused and expected to be able to go home with his foster father. In the light of that evidence, the Court could not conclude that the applicant had been capable of participating effectively in his trial. The Court found that, when a decision was taken to deal with a child, such as the applicant, who risked not being able to participate effectively because of his young age and limited intellectual capacity, by way of criminal proceedings rather than through proceedings directed primarily at determining the child's best interests and those of the community, it was essential that he be tried in a specialist tribunal which was able to give full consideration to and make proper allowance for his particular difficulties and adapt its procedure accordingly[19].

Impartial tribunal

25. In the *Nortier v. the Netherlands* judgment of 24 August 1993, the Court found that there had been no violation of the Convention in a situation where a minor was disputing the impartiality of the juvenile judge. In effect – and here we are right at the heart of the protection-oriented model – the juvenile judge in the Netherlands at that time was the central actor in the investigation phase, in the trial stage, and in the judgment execution phase.

The applicant stressed that throughout the proceedings, i.e. during the pre-trial phase as well as at the trial, his case had been dealt with by one and the same judge who had taken all relevant decisions. The latter had acted as investigating judge and had decided on the applicant's detention on remand. These decisions implied that the judge in question had reached the conclusion that there were serious indications; furthermore, he must also already have formed an idea of the sentence or measure to be imposed. The Government maintained that the applicant's fears could not be held to be objectively justified, which was in line with the case-law of the Court[20]. For reasons of fact connected to the actions performed by the judge, the Court found that there was not an objectively justified fear of a lack of impartiality[21].

26. The *Adamkiewicz v. Poland* judgment of 2 March 2010 is important, especially in that it concerned the impartiality of a juvenile court on account of the presence on the trial bench of the judge who had directed the disputed investigation. More precisely, it concerned the successive performance by the same family-affairs judge of investigative duties and the functions of president of the juvenile court in a case concerning a fifteen-year-old who was accused of murder and was placed in a young offenders' institution for six years by the judge. The Court's conclusion was different from the one reached in *Nortier v. the Netherlands* as to whether there had been an impartial tribunal, since during the investigation the family-affairs judge had made extensive use of the wide-ranging powers conferred on him by the law (deciding to institute proceedings of his own motion and conducting the procedure of gathering evidence), before committing the minor

[19] ECtHR, *S.C. v. the United Kingdom* judgment of 15 June 2004, §§ 35-37.

[20] ECtHR, *Fey v. Austria* judgment of 24 February 1993, § 30.

[21] As an example of procedural economy: "It is not necessary to go into the question raised … whether Article 6 should be applied to juvenile criminal procedure in the same way as to adult criminal procedure" (§ 38 of the judgment).

for trial and sitting as a member of the trial court[22].

Rights of the defence

27. In the case of *Salduz v. Turkey*, the applicant, a minor, was arrested on suspicion of aiding and abetting an illegal organisation, an offence triable by the state security courts. Without a lawyer being present, he gave a statement to the police admitting that he had taken part in an unlawful demonstration and written a slogan on a banner. Subsequently, on being brought before the prosecutor and the investigating judge, the applicant sought to retract that statement, alleging it had been extracted under duress[23]. In its judgment of 27 November 2008, the Grand Chamber of the Court held that, in order for the right to a fair trial under Article 6 § 1 of the Convention to remain sufficiently practical and effective, access to a lawyer had to be provided, as a rule, from the first police interview of a suspect, unless it could be demonstrated that in the particular circumstances there were compelling reasons to restrict that right. The significant number of relevant international law materials concerning legal assistance to minors in police custody shows the fundamental importance of providing access to a lawyer where the person in custody is a minor. In sum, even though the applicant had had the opportunity to challenge the evidence against him at his trial and subsequently on appeal, the absence of a lawyer during his period in police custody had irretrievably affected his defence rights[24].

VI Right to respect for private and family life

DNA profiles

28. The *S. and Marper v. the United Kingdom* Grand Chamber judgment of 4 December 2008 concerned in particular the retention by the authorities of fingerprints, cellular samples and DNA profiles taken from a minor charged with attempted robbery after criminal proceedings against him had been terminated by an acquittal. The Court held that there had been a violation of Article 8 of the Convention[25]

Foreign and immigrant minors

29. The *Radovanovic v. Austria* judgment of 22 April 2004 concerned the deportation of a foreign national who had lived in Austria since his childhood and had been convicted while still a minor of aggravated robbery and burglary. In addition to his sentence, an unlimited residence prohibition was issued against him. Without overlooking the gravity of the offences committed by the applicant, the Court noted that he had committed them while still a minor, that he had no previous criminal record and that part of his sentence had been suspended. The Court was not therefore convinced that the applicant constituted a serious danger to public order which necessitated the imposition of the measure concerned. Further, finding that the applicant's family and social ties with Austria were much stronger than with Serbia and Montenegro, the Court considered that the imposition of a residence prohibition of unlimited duration was an overly rigorous measure. A less intrusive measure, such as a residence prohibition of a limited duration, would have sufficed.

22 ECtHR decision in *Adamkiewicz v. Poland,* 2 March 2010, §§ 104 et seq.

23 ECtHR (GC), *Salduz v. Turkey* judgment of 26 April 2007, §§ 23-24.

24 *Ibid.*, §§ 56-63. This case-law has been confirmed in subsequent judgments (see, in particular, ECtHR, *Güveç v. Turkey* judgment of 20 January 2009, §§ 131-133, and ECtHR, *Soykan v. Turkey* judgment of 21 April 2009, § 57).

25 ECtHR (GC), *S. and Marper v. the United Kingdom* judgment of 4 December 2008, §§ 125-126.

The Court concluded that the Austrian authorities, by imposing a residence prohibition of unlimited duration against the applicant, had not struck a fair balance between the interests involved and that the means employed had been disproportionate to the aim pursued, in violation of Article 8 of the Convention[26].

30. Finally, to my mind, the Grand Chamber's *Maslov v. Austria* judgment of 23 June 2008 sets out fundamental principles. In this case, the applicant had been served an exclusion order at the age of 16, prohibiting him from living in the country for 10 years, as a result of convictions for offences committed when he was 14 and 15 years old. The Court considered the young age at which the applicant had committed these offences to be a determining factor[27].

It also pointed out here that where expulsion measures against a juvenile offender are concerned, the obligation to take the best interests of the child into account includes an obligation to facilitate his or her reintegration into society. Such aim cannot be achieved by severing family or social ties through expulsion, which must remain a means of last resort in the case of a juvenile offender[28]. The Court therefore concluded that the imposition of an exclusion order had been disproportionate to the legitimate aim pursued[29].

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26 ECtHR, *Radovanovic v. Austria* judgment of 22 April 2004, §§ 33-38. See also, in the same vein, ECtHR, *Jakupovic v. Austria* judgment of 6 February 2003, §§ 27-33.

27 ECtHR (GC), *Maslov v. Austria* judgment of 23 June 2008, § 81.

28 *Ibid.*, § 83.

29 *Ibid.*, § 100.

Council of Europe recommendations for Juvenile Justice

Jungendanwältin Anne-Catherine Hatt

The Council of Europe and its influence on Swiss legislation

The **Council of Europe (**CoE) was established in 1949 after the end of the Second World War. Its aim is to respect human rights, democracy and further to encourage the rule of law. The CoE develops democratic and judicial principles on the basis of the European Convention on Human Rights (ECHR) and other essential instruments such as the CRC.

Switzerland joined the CoE on 6 May 1963. It has therefore been a member for 50 years. It is currently represented by Charles Edouard Held.

For Switzerland, joining the CoE means, on the one hand, that it can take part in discussions on a range of subjects and exert influence; on the other hand, recommendations by the CoE may influence Swiss legislation—at the very least, it is a moral duty for the legislature to incorporate CoE recommendations.

Recommendation R (87) 20: On social reactions to juvenile delinquency

Following public reaction, the CoE debated youth criminality in Recommendation No. 20 (1987). This Recommendation particularly emphasised the educational nature that applicable sanctions and measures must have. Therefore, young people's needs are to be considered paramount when responding to criminality.

According to this Recommendation, where possible, measures must be available in the minors' natural environment. The Recommendation comprises 16 articles that mainly focus on the following topics:

- **Prevention,** which first and foremost must be achieved by integrating young people into society, providing them with job opportunities and enabling them to participate, for example, in leisure activities, but also in political life, thus reducing the opportunities to commit offences.
- As a development of other Recommendations, such as the United Nations Beijing Rules, Recommendation R (87) 20 also addresses the topic of **diversion** (discontinuation of proceedings at the level of police or prosecution) in an attempt to encourage alternative ways of preventing minors from being drawn into the criminal justice system. One example is mediation, which—if successful—interrupts criminal proceedings.
- This document also mentions that diversion processes require **the rights** of prosecuted minors and those of victims **to be upheld**. Moreover, minors must not be adversely affected by the application of these proceedings.

The chapter on procedural rights refers, *inter alia*, to

- the procedural expediency principle,
- the intervention of a special jurisdiction for minors,
- presumption of innocence, and
- the right to defend oneself in court. Within this context, Article 7 on remand in custody should be noted. It states that, during the preliminary investigation stage, only older minors who have committed very serious offences may exceptionally be put in custody.

In the Recommendation's chapter on interventions or measures to be adopted, the Council of Europe promotes a wide range of intervention possibilities. Regarding criminal authorities' measures applied to a minor in connection with a crime, where possible, alternatives to custodial sentences must be sought. The aim is to improve the minor's social behaviour through probationary assistance, community service, or reparation for the damage caused by the minor's criminal activity.

If custodial sentences are inevitable, more favourable conditions for the serving of sentences are recommended, such as early probationary release. Minors must be allowed to have access to education and vocational training or finish school while in custody. After release, minors must be assisted in achieving successful social rehabilitation.

Recommendation (88) 6E: On social reactions to juvenile delinquency among young people from migrant families

The following year, the Committee of Ministers adopted a resolution on the social response to juvenile delinquency by minors from migrant families. This resolution focuses on how to avoid discrimination against young people from migrant families in criminal proceedings, promoting these minors' social rehabilitation instead of filing criminal actions and allowing them access to measures already adopted. The idea behind prevention is to underline that all foreign minors must have the same access to leisure activities, schools, and counselling centres that young nationals have.

Furthermore, they must have the option of obtaining citizenship through a simplified procedure.

When they are in contact with the police, a non-discriminatory treatment must be ensured. Policemen who work with young people must have special training. This training must include content on cultural values and the rules of behaviour applicable in different ethnic groups.

Just like an offender of Swiss nationality, foreign minors must also benefit from any innovations introduced in the criminal justice system, such as mediation.

During the adopted interventions or measures, the minors' personal and social circumstances must be reviewed in depth. Foreign minors must not merely be lectured to on the basis of cultural prejudices. Moreover, the systematic placement of foreign minors in institutions must be avoided. Staff at these institutions must be trained on the Recommendations of the Council of Europe regarding cultural differences. The incorporation of personnel with migrant backgrounds is considered a plus.

Recommendation (2003) 20: Concerning new ways of dealing with juvenile delinquency and the role of juvenile justice

Due to the worrying growth of juvenile delinquency in some European countries, and considering that the nature and the seriousness of juvenile delinquency call for new answers and new intervention methods, in 2003, the European Committee of Ministers adopted Recommendation No. 20 on the new ways of dealing with juvenile delinquency and the role of juvenile justice.

This Recommendation particularly focused on the fact that there was a certain class of juvenile offender who needed special intervention programmes, and provided examples such as members of ethnic minorities, young women and those offending in groups.

In this context, the novelty is the involvement of parents or guardians assuming responsibility for their children's offending behaviour. They must be present at and participate in the criminal proceedings, although—to the furthest extent possible—they are also to receive assistance, support, and guidance. In addition, where adequate, they must be encouraged to attend counselling sessions regarding their children's education or parenting courses, and ensure that their children attend school. Parents must assist official agencies in the carrying out of sanctions and measures

Reflecting the extended transition to adulthood, it should be possible for young adults under the age of 21 to be treated in a way comparable to juveniles (teenagers). Thus, for instance, their criminal record should remain confidential. Where it is necessary to put juveniles in police custody, they should be promptly informed of their rights and they must be accompanied by their parents during questioning.

In principle, juveniles should not be detained in police custody for more than 48 hours in total and they should not be remanded in custody for more than six months before the commencement of a trial.

It is worth noting that custodial remand should never be used as punishment or even as a form of intimidation.

Preparation for the release of juveniles deprived of their liberty and their social rehabilitation should begin on the first day of their sentence. Where possible, a phased approach to social rehabilitation should be adopted, using periods of leave before and until probationary release.

The response to juvenile delinquency must always be planned using a multidisciplinary approach, which requires good coordination among the several agencies and systems involved so that a clear line of action with respect to minors may be jointly implemented.

Recommendation (2005) 5: On the rights of children living in residential institutions

The Council of Europe has also adopted recommendations on the placement of minors in institutions. These recommendations state that it is necessary to observe the needs of minors and, where possible, factor in their personal views. Children who have to grow up outside their family must be able to grow up with dignity, in the best possible conditions, and without being subjected to marginalisation.

To stress these points, the Council of Europe adopted Recommendation No. 5 on the rights of children living in residential institutions, providing that, in principle, the family should be the natural environment for a child's growth. The placement of a child in an institution should remain the exception and serve their best interests. From the outset, the aim must be to return the child to their family, after which the family must receive support.

Should this reinsertion prove to be infeasible, the child's wishes must be taken into account and other means of care should be envisaged to allow continuity in their life. This Recommendation implicitly provides for the periodic inspection of residential institutions.

As in the case of custodial sentences, the child's contact with their family is essential. Where possible, the minor should be placed in an institution near the residence of their parents to allow regular contact with their family. If it is necessary to place several siblings, they should be placed together whenever possible. As regards the institutions, small family-style living units are to be preferred. The child must be allowed access to education or to attend school and prepare for their life outside the residential institution with the support of a personalised follow-up plan.

Recommendation (2008) 11: On the European Rules for juvenile offenders subject to sanctions or measures

In 2008, the Council of Europe adopted Recommendation No. 11 aimed at ensuring the physical, mental and social wellbeing of minors subject to community sanctions or measures. This Recommendation complements Recommendation (2006) 2 on European Prison Rules, which had already been adopted and specifically applied to adults and set out minimum treatment standards for prisoners.

The Recommendation on sanctions and measures applicable to juvenile offenders aims to take into account the specific needs of young people in connection with the enforcement of sentences and covers all sanctions and measures except for imprisonment. The 142 articles of this document constitute a very thorough set of recommendations.

Its first part lays down the basic principles and definitions. Some of the basic principles are:

- Principle of proportionality (the sanction or sentence must be in proportion to the offence)
- Principle of individualisation (the sanction must take into account the offender's personal circumstances)
- Principle of minimum intervention (expeditiousness in procedural stages, intervention only where necessary)
- Principle of non-discrimination
- Principles of community involvement and continuous care, fostering a multidisciplinary approach to the assistance to or follow-up of minors during the enforcement of a sentence or measure..

The second part of the Recommendation lists the requirements for ordering a sanction or measure. The range of sanctions or measures must be wide and focus primarily on education and reparation. Sanctions must be ordered by a court or similar authority and be appealable.

Then the Recommendation regulates the application of sentences and measures and their consequences when the sanctioned minor does not cooperate, *i.e.* disciplinary measures.

The third part contains several provisions on custodial sentences, including the placement of minors in institutions which they may not leave at will. It then deals with the organisation of residential institutions, admission procedures, accommodation, hygiene, clothing, nutrition, health, regime activities, contact with the outside world, safety, transfer between institutions, preparation for release, etc.

In this respect, it is worth mentioning two specific articles which are probably not always considered in practice. Article 97 provides that juveniles shall not be transferred as a disciplinary measure. However, in practice, institutions do send children who do not respect the rules of the institution on a temporary basis into a 'timeout', a measure that runs counter to Article 97. Additionally, in practice, the obligation set forth in Article 104.4—informing foreign juveniles of their right to request that the custodial sentence be enforced in their country of origin—is usually ignored.

Guidelines of the CoE Committee of Ministers on child-friendly justice, adopted on 17 November 2010

In 2005, at a summit in Warsaw, the Heads of State and Government of the Council of Europe adopted a programme aimed at, firstly, developing national strategies to protect children's rights and prevent violence against minors and, afterwards, promoting their implementation. The title chosen for the programme at the time was "*Building a Europe for and with children*", under which a three-year strategy renewable for similar periods was established. This strategy set forth the actions to be adopted during the three-year period. The first three-year cycle (2006-2009) prioritised the awareness of children's rights across member countries.

In 2009-2011, recommendations were prepared on four specific topics:

- A public service tailored to children (in the judiciary, health, and social services areas).
- The elimination of all forms of violence against children (including sexual violence, slavery, physical punishment, and violence at school).
- Safeguarding the rights of children in vulnerable situations (such as disabled minors, young people in custody, under guardianship, migrants, and Roma).
- Measures encouraging child involvement. Within the framework of this strategy, two notable resolutions emerged: On the one hand, the **Guidelines on child-friendly justice** of 17 November 2010 and, on the other, the **Recommendations on the participation of young people under the age of 18**, dated 28 March 2012 - Rec. (2012) 2.

The Jon Venables and Robert Thompson case in Great Britain particularly raised awareness of the importance of not only informing minors of their rights during a trial, but also letting them exercise those rights. This case involved the abduction and subsequent murder of a 2-year old boy by two children aged 10 and 11. The European Court of Human Rights (ECtHR) criticised the United Kingdom on the grounds that the children had been unable to follow the proceedings and that the trial as a whole had been extremely disturbing for them, effectively barring the minors from any active involvement.

This and other determinations by the European Court show how necessary it is for children to have access to the justice system. Furthermore, the decisions served to improve the treatment of children during court proceedings.

In 2007 in Lanzarote at a conference attended by twenty Ministers of Justice of European countries, it was resolved to prepare guidelines to safeguard children's right to justice, allowing them efficient and adequate access to the court system.

Given that children may resort to courts for several reasons, such as legal custody proceedings, or as defendants or victims in criminal cases, or as migrants, the guidelines explicitly apply to civil, administrative, and criminal proceedings. Children must have the opportunity to enforce the rights specifically available to them in such proceedings.

The first chapter of the Guidelines on child-friendly justice sets out the general principles, such as the right of participation. Children must be informed about their rights, be heard in the proceedings, and have their opinion be taken into account by the authorities. In this way, they will be afforded treatment as legitimate holders of their enforceable rights.

In this context, the child's wellbeing is paramount. This must be individually established for each child, taking into account their psychological, physical, legal, social, and financial wellbeing. Children's dignity must be observed at all times during the proceedings. Children must never be tortured or subjected to cruel or inhuman treatment, and they must be protected from any form of discrimination.

Particularly vulnerable children, such as those coming from immigrant or exiled families, disabled minors, street children, Roma children or minors placed in residential institutions must be afforded special treatment and follow-up. The last general principle mentioned in the Guidelines is the rule of law or legality principle. Children may not receive worse treatment than adults during court proceedings, and they must enjoy all procedural rights, including unrestricted access to appeal mechanisms.

Then the Guidelines touch on several subjects to be taken into account before, during, and after court proceedings. At all procedural stages there is an obligation to inform the child as broadly and comprehensively as possible so that they may exercise their rights. The cause of action and the stages that follow must be described as early as possible to the child and their parents. It is not enough for parents to be informed; children must also be apprised of the proceedings according to their age and ability to understand. For this purpose, modern tools such as the Internet may be used to thoroughly explain to the child the different stages of the court proceedings.

The child's privacy must be protected at all times. Thus, for instance, information on the child's identity may not be disclosed. Any breach of this prohibition by the media may be punished. Access to sensitive documents must be subject to strict restrictions, and the interrogation of minors cannot be made public.

Children must be protected from intimidation, reprisals and secondary or repeated victimisation. To achieve this, professionals working with children must be subject to regular vetting to ensure their suitability. Special precautionary measures must apply to children when the alleged perpetrator is a parent, a member of the family, or a primary care-giver.

All professionals working with children during court proceedings must have special training and interdisciplinary knowledge. Professionals must know how to communicate with children, especially minors in situations of particular vulnerability.

Court proceedings involving children must be subject to a multidisciplinary approach with the close cooperation of all professionals working in the case. Decision makers must have at their disposal a team of specialists in several technical areas (lawyers, psychologists, physicians, migrations officials, social workers, etc.) for consultation. While implementing a multidisciplinary approach, professional rules on confidentiality must be observed.

The Guidelines include a chapter on deprivation of liberty. Given that the Council of Europe has already adopted several Recommendations on this subject, the Guidelines merely address the essentials.

Where possible, children must not be involved in court proceedings. To this end, the age of criminal responsibility must not be too low. Member States must also find alternatives to criminal proceedings. It is important that children's rights are not impaired in these alternative procedures. Of course, in this respect, certain procedural rights must still apply. Children must be thoroughly informed about the possibility of an alternative procedure and be able to make an informed decision on whether they would like to exercise that option.

Police should respect the personal rights and dignity of all children, have regard to their vulnerability, and treat them according to their age. The parents must be informed of their child's arrest and asked to come to the station. A child who has been taken into custody may only be questioned in the presence of a lawyer or one of the child's parents, except where one or both parents are suspected of involvement in the criminal behaviour or of engaging in conduct which amounts to an obstruction of justice. During court proceedings, children must have access to all available legal remedies. Where possible, there must be a special jurisdiction for minors that takes into account children's special needs and rights. Any obstacles to access to court, such as the cost of the proceedings or the lack of legal counsel, must be removed. For certain crimes, access to juvenile courts should be granted for a period of time after the child has reached the age of majority.

Children must have the right to their own legal counsel and representation at all times, particularly in situations where there is a conflict of interest with their parents. This legal aid must be free of charge and the legal representative must be specially trained in children's rights and how to communicate with minors. The attorney's client is the child, not their parents. In the event of a conflict of interest, parents and child must be assisted by different legal representatives.

As already mentioned at the beginning, the general principles place a particular emphasis on the right to be heard and to express views. In this context, it is worth noting that the right to be heard is a right, not a duty, of the child. It must be explained to the minor that their right to be heard and to have their views taken into consideration may not necessarily determine the final decision. The child's views must be considered when making a determination and, if the decision runs counter to such views, the child must be informed why this conclusion has been reached.

After the court proceedings, the child's lawyer or guardian must communicate and explain the judgement to the child and provide the necessary information on possible appeals. Once final, the decision must be enforced without delay.

After judgements in highly contested proceedings, children must have access to free guidance and support services for them and their family. In addition, victims of abuse must receive social and therapeutic support. Measures and sanctions on children must always be individualised responses to the acts committed, in proportion to the offence and guaranteeing the minor's right to education, vocational training, and social rehabilitation.

The final part of the Guidelines calls upon Member States to be innovative, including fostering new interviewing techniques and good practices; to raise awareness about children's rights, making them a mandatory component in the schools' curricula together with human rights; to facilitate children's access to courts and encourage a professional treatment of children by judges and lawyers; to ensure at free and specialised advisory offices or entities that there will be information and support at the community or municipal level for people who are in contact with children during court proceedings.

So far, I believe I have offered a succinct introduction to the extensive legislative activity of the Council of Europe. Generally speaking, we can start from the assumption that the relevant recommendations have been incorporated into Swiss legislation, particularly after Switzerland passed a series of new laws on criminal procedure. Nevertheless, it would be advisable to take a look at some of the Recommendations and the Convention on the Rights of the Child. Only if we recognise children's status as full subjects of law in society will we be able to treat them with the respect they deserve.

This is the text of a lecture presented by the author at the Annual Conference of the Swiss Juvenile Justice Administration Society in Fribourg, Switzerland on 13 September, 2013.

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Children giving evidence in court in Quebec

Judge Lucie Rondeau

Introduction

Appearing as a witness in a court of law is a special kind of experience which many people find disturbing. Witnesses are called not to speak freely, but to answer questions according to a set of rules which they may know little or nothing about. Some people, either because of personal problems or their characters, find this unusual experience more difficult to deal with than others do. These are vulnerable witnesses. Children—who are still developing—certainly fall into the vulnerable category.

During recent decades in Canada, important modifications have been made to rules of evidence in order to accommodate vulnerable witnesses, including children. Consider, for example, the case where someone who has taken a statement from a child who is too young to give evidence presents that statement in court[1]. The law has also been changed to remove the presumption that a child below the age of 14 is unfit to appear as a witness. Nevertheless, some of the rules which govern the adversarial approach which is part of Quebec's double-stranded system of justice remain incompatible with the significant vulnerability of child witnesses.

Faced with this problem, judges have developed some practical approaches to deal with those aspects that make child-witnesses vulnerable.

Over recent decades, jurisprudence has also extended the powers of a judge when vulnerable witnesses are being heard and has established principles by which the accuracy of their evidence can be tested.

This article summarises those judicial rules and practices that aim to allow children to exercise one of the most important rights under natural justice—the right to be heard.

The main features of Quebec's judicial system affecting children

Quebec is one of ten Canadian provinces and, by reason of its history, it has a unique two-strand system of justice. Civil law in Quebec derives from the civil law of France. But the procedures of the criminal law, which stems from the authority of the Canadian Federal Parliament, are those of the common law. Moreover, the effect of the British tradition is felt not only in the substance of the criminal law, but also in the way that courts are organised in Canada and Quebec, the role that judges play and the rules governing court hearings. This means that, regardless of the matter at issue or the underlying law, all judicial hearings take place within an adversarial framework.

Whether the case is civil or criminal, a child will give evidence in an adversarial setting. Advocates are in control of the evidence which, with a few exceptions, is normally given orally. The witness is heard in the presence of all the parties and each of them has the right to cross-examine. In the adversarial context, cross-examination provides a party whose interests differ from those of the witness with a guarantee of a full and open defence. One of the strengths of cross-examination is, at this stage in the proceedings, that it allows leading questions. As we shall see later on, this has important repercussions when the witness is a child.

[1] R. v. Khan, [1990] 2 R.C.S. 531; R. v. Smith, [1992] 2 R.C.S. 915; R. v. Khelawon, [2006]

The British tradition of justice also affects the role of the judge. His scope for intervention depends on the nature of the case. The power of a judge hearing a criminal case is more circumscribed than in a family matter or one seeking the protection of a child. However, in every case, the judge must avoid taking sides. He must take constant care to act as a neutral and impartial umpire, ensuring that the proceedings are fair. But, when a child appears as a witness, the judge, understanding the implications, must also make sure that the child is treated fairly. To do that, he has to exercise great vigilance during the whole of the child's testimony.

Understanding the situation of children who have to give evidence

The situations which most upset children before they appear as a witness are undoubtedly those where they have to talk about things that have put them at risk of physical or mental harm. This will be so in the majority of criminal cases and in those where the protection of the child is at issue. All too often, disputes in the family court lead to a conflict of interest which makes it difficult for the child to be *a good witness*.

So hearing and accepting the child's account always poses a real challenge to the members of the court. Professionals from the fields of psychology and sociology have helped train judges to meet the challenge by giving them insights into the cognitive and emotional factors that are in play when a child appears as a witness before a court.

Several factors affect the emotional state of children called as witnesses. The first is the certainty that they will not be believed. They have already told others what they will have to go over again in court. They think they will not be believed because they are being asked to repeat afresh what they have already clearly stated. Children think that, by bringing them before a judge, adults want to prove they are liars. It is against this background that children sometimes go so far as to retract their earlier statements to avoid an accusation of lying which is preying on their mind.

The second is children's unequal position *vis-à-vis* adults. They are convinced that their statement will not carry equal weight to an adult saying something different. They are sure they will emerge the loser. This problem becomes more acute when the child's evidence concerns an adult who matters to them and whom, in many cases, they love. They feel an immense sense of guilt and that puts them in a position of divided loyalty. These feelings combine with the guilt and sense of helplessness arising from the event itself to reinforce their belief in their unequal position in relation to adults.

Another issue is that, quite often, at the time the child has to give evidence they are in the midst of an important and intense family crisis, which may well have been going on for some considerable time.

Finally, children need to forget or blot out the details of what happened, especially when their physical integrity or their personal dignity has been affected. They are specifically being asked to remember when what they want to do is the opposite. Their difficulty in talking about what happened is in direct proportion to the trauma they have suffered. To get back on an even keel, children sometimes need to be able to forget, deny, recast, censor or minimise the things that have disturbed them.

Apart from these problems at an emotional level, several other cognitive issues affect children's ability to give evidence in the way adults hope or expect that they will.

The first is that time works differently for children and adults. Something that an adult thinks of as having happened recently may seem remote to a child. The time-lag between the event and the child's appearance in court affects the child's ability to remember and it weakens as time goes on. Moreover, children's memories do not work in a linear way and that makes it difficult to get the chronological order of events established.

Children need help to picture themselves in a time-frame.

The second factor is that children tend to remember a particular event at the expense of the context surrounding it. Adults very often consider a profusion of background detail a guarantee of accuracy. This is unfair to children because an inability on their part to recall peripheral aspects does not mean that their account of the main event is false.

Children also find it hard to distinguish between a series of similar events. They often describe the general nature of the incidents that happened. On the other hand, they may have a more precise memory of one of the incidents. That can happen if the incident stood out in some significant way from the normal run of things or if it was more serious or happened first. Meanwhile, we should note that in situations involving

grooming, children may not be able to identify the first occurrence of abuse, because they just do not see it as such.

The third point is that children are better able to describe an event when asked to talk about it in an unstructured way rather than having to respond to a series of closed questions. However, examination through a system of closed questions is the method used to gather evidence in the Quebec justice system.

A final point is what constitutes truth in the mind of a child. Children absorb information from those around them that is relevant to the case in hand. As a result, it often happens that they weave into their account things which they believe to be completely true. Their evidence can be distorted by the influence of the people who, whether in good faith or bad, gave them the information, particularly if the person is important to the child. What that person says represents the truth as far as the child is concerned and he or she takes it into their account of what happened. Caution dictates that we should encourage children to distinguish between what they really saw or experienced and what they have picked up from others. Children's suggestibility requires care and vigilance during the whole of their evidence.

Judicial rules for children giving evidence

Over time, Parliament has amended the law to provide legal practitioners with tools to reduce the problems that arise when children are called as witnesses. And, for their part, legal practitioners have developed approaches that are better suited to dealing with children. These rules and practices depend upon the nature of the litigation in which the child has been called as a witness.

Criminal cases

Under the common law, the only parties involved in the case are the prosecutor and the accused. A child witness, whether a victim of the alleged crime or not, is not a party to the litigation. They have the status of a compelled witness appearing at the request of one of the two parties.

The law makes a presumption that everyone is capable of giving evidence, irrespective of their age[2]. If one side wants to call that presumption into question, they must convince the court that there are grounds for doubting the capacity of the child to understand questions and answer them[3]. If the court considers that such grounds may exist, it will hold an investigation where no question can be put to the child concerning his understanding of a promise to tell the truth[4]. A child below 14 years of age who, in the view of the court, is not able to understand questions and answer them is not fit to be a witness. A child below 14 years of age who is fit to appear as a witness (either because of the legal presumption or because of the court's decision after investigation) may neither be sworn in nor give a solemn affirmation[5]. They must, however, promise to tell the truth and their evidence has the same standing as if they had been sworn[6].

The rules concerning the admissibility of the evidence of children over 14 are the same as for adults. Like adults, children over 14 must decide whether to swear or affirm[7].

Several methods are available to support anyone under 18 in giving evidence, as follows :

- support from someone the child trusts[8];
- video link or one-way screen[9];
- preventing an accused person who is not legally represented from directly cross-examining the child[10];
- the use of a tape recording of evidence given earlier by the child[11];
- hearing *in camera*[12];

2 Law of evidence in Canada, L.R.C. 1985, c. C-5, art. 16.1(1).

3 *Ibid.*, art. 16.1 (3) and (4).

4 *Ibid.,* art. 16.1 (5) and (7).

5 *Ibid.*, art. 16.1 (2).

6 *Ibid.*, art. art. 16.1 (6) and (8).

7 art. 16.1 (6) and (8).

8 Criminal code, L.R.C. 1985, c. C-46, art. 486.1.

9 *Ibid.,* art. 486.2

10 *Ibid.,* art. 486.3. See also : *Quebec (Prosecutor General)* v. *B.S.*, 2007 QCCA 1756

11 *Ibid.,* art. 715.1.

12 *Ibid.*, art. 486 et 537 (1) (k) and, where the accused is an adolescent, the possibility under art 132 of *the Law on juvenile justice for adolescents, L C 2002 c. 1*, of excluding from the courtroom any person or persons, especially when evidence or information is being given that might have a harmful or prejudicial effect on a child or adolescent witness or victim.

- an order preventing publication of details that would allow the identity of a plaintiff or witness to be discovered[13];
- at the sitting judge's discretion, the accused may be required to sit in a specific place in the courtroom to be out of the line of sight of the child giving evidence[14].

Cases where judicial protection is being sought for a child

The Law for the protection of young people[15] applies when the safety and/or the development of a child (from birth to 18) is or might be at risk on any of the grounds set out in that law[16].

this law has brought about an important change in judicial philosophy concerning the rights of the child. Nowadays, children are thought of as having individual rights and not being simply the object of the parental rights of those in authority over them. Children have a right to care, to education and to protection, which their parents have a duty to provide[17]. Under this approach, where the perspective is one of respect for the rights of the child, the rights granted to parents are such as to allow them to properly discharge their duties and responsibilities towards the child.

Given this background, it often happens that in cases heard in the context of the Law for the protection of young people[18] the rights of the parents are set against those of the children. It is therefore vital that the children should be parties to the action, which will be held in an adversarial manner[19]. However, the judge hearing a case concerned with child protection has greater scope to intervene and more discretion to relax the rules and manage the hearing. Even if it is only a few days old, the child is always legally represented (with the advocate's costs being paid out of public funds).

The advocate's role varies depending on the extent to which the child can give instructions[20]. The advocate acting for the child has access to all the evidence submitted and can introduce anything he or she deems relevant. The child can, like all the other parties, be compelled to testify.

The rules for the admissibility of evidence under the *Law for the protection of young people* are similar to those that apply in criminal cases[21]. But they give the judge an additional power in protection cases. The court can excuse children from giving evidence, even if they would be capable of giving it, if being forced to do so would be prejudicial to their mental or emotional development[22]. The law also allows parents to be excluded from the courtroom while their child is giving evidence[23]. The lawyer representing the parents, in such case, will remain in the courtroom and be permitted, if he or she wishes, to cross-examine the child. Parents who were excluded have may have access to the evidence given by the child during their absence.

It may be appropriate during a long deposition to have frequent pauses in recognition of the child's limited attention span. The judge should be on the look-out for signs that the child is getting tired. The tradition of evidence being given standing up should be ignored. A child who is sitting down will concentrate better and will not tire as quickly. Similarly, the advocate who is examining or cross-examining the child should also sit down to avoid making the child's sense of inequality worse. This also helps to respect the child's personal space.

The judge must make sure that everyone adopts an appropriate manner towards the child. The child should be asked to leave the courtroom if the lawyers need to raise an objection or discuss a point of law.

Apart from these practical matters, the judge should remain in a state of high alert during the whole of the child's testimony to make sure that he is not being taken beyond what he is capable of. Particular attention should be paid to the following points:

- allowing help be provided to the child to put him at ease with the time dimension;
- paying attention to the meaning the child attaches to the words he uses in order to understand his account adequately;

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13 C.cr., art. 486.4 and 486.5.

14 *R.* v. *Levogiannis*, [1993] 4 R.C.S. 475, 493.

15 15 RLRQ, c. P-34.1

16 *Ibid.,* art. 38, 38.1 and 38.2.

17 *Law on the protection of young people, op cit, note 15, art. 2.2*

18 Op cit, note 24

19 New Brunswick (Minister of Health and Social Services) v *G.(J.)*, [1999].3 R.C.S. 46

20 *M.F. v. J.L.*, [2002] R.J.Q. 676 (C.A.).

21 Op cit 15, art. 85.1.

22 Ibid art 85.2

23 Ibid art 85.4

- letting the child explain an answer that at first sounds incoherent;
- not allowing questions in two or more parts;
- paying attention to questions which, when put in another way, lead the child to give a different answer;
- disallowing questions with a double negative (Is it not true that…..?) when children do not understand the sense;
- watching out for repetitive questioning, which can be devastating for the child who will infer that his earlier answer was invalid.

Staying on high alert is very demanding for the judge. But it is essential if the child's account is to be understood and the child helped to put into words what he has seen and heard. Canada's system of justice places this onus on the judge and, consequently, gives him the power to intervene, even in the adversarial setting, to make sure the child understands what he is being asked and that terminology is clear and unambiguous. To that end, he may rephrase questions or ask different ones in order to clarify what the child has said[24]. The Ontario Court of Appeal has, however, reminded us that a judge's interventions must not upset the balance between the parties nor put at risk the right of the accused to a just and fair trial[25].

Assessing the accuracy and credibility of a child's evidence

The rules of evidence clearly establish that assessment of a person's credibility and the accuracy of his evidence is a factual question to be determined by the judge. On this matter, expert advice is not admissible[26]. This demanding task must be carried out by considering the evidence of each witness in the light of the evidence as a whole and taking into account a number of principles that have been established as jurisprudence has developed in this area.

The Supreme Court of Canada has clearly pronounced that the credibility of a child should be assessed in the same way as that of every other witness. However, in a child's case this assessment must be based on common sense and must avoid the application of inappropriate criteria[27]. For all witnesses, including children, it is necessary to assess credibility and accuracy according to relevant criteria, appropriate to the individual. These criteria are the mental development of the individual concerned, their degree of understanding and their ability to communicate[28].

In assessing a child's credibility and the accuracy of his or her evidence, the judge can also consider any abusive aspects of the examination or cross-examination to which the child was subjected[29].

Conclusion

Many factors influence a child's experience as a witness in a law court and will contribute to any consequential suffering he may undergo. A number of these factors are not under the control of the justice system.

Nevertheless, the court must exercise what power it has to minimise the consequences and above all—by creating guidelines and developing them appropriately—ensure that, despite their vulnerability, when children appear as witnesses they are treated fairly and with justice.

One must avoid jumping to the conclusion that vulnerable people's evidence will not be accurate. A similar misconception can mean that people who need legal protection do not get access to justice. The justice system must be open to all, including children. It comes down to a question of fairness and the right to equal treatment. It would be wrong to require that a child, when giving evidence, should be as persuasive as an adult. Rather, we should bear in mind that *'telling the truth requires a mental strength and emotional independence that many adults will never achieve*.'[30]

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[24] *R. v. L. (D.O.)*, [1993] 4 R.C.S. 419, 471

[25] *R.* v. *Dubreuil*, (1998) 125 C.C.C. (3d) 355 (C.A. Ont.). In the same vein, see also: *R.* v. *Hossu*, (2002)167 C.C.C. (3d) 344 (C.A. Ont.).

[26] See art 2845 of the Quebec Civil Code on family matters and those seeking judicial protection of a child and, on criminal matters, *R. v. Parrott,* [2001] 1 R.C.S. 178 et *R.* v. *Mohan*, [1994] 2 R.C.S. 9..

[27] *R. v. B. (G.),* [1990] 2 R.C.S. 30, 55.; *R.* c. *W. (R.),* [1992] 2 R.C.S. 122, 133

[28] *R. v. W. (R.),* [1992] 2 R.C.S. 122, 1334

[29] *C. (A.)* v. *R.*, J.E. 92-549 (C.A.), an application for leave to appeal to the Supreme Court, refused. (22981).

[30] A remark by the psychologist, Madame Louisiane Gauthier, during a training session for judges of the Quebec Youth Court.

Cross-examination's big effect on the criminal system's smallest witnesses—-USA

Prof. Gail S. Goodman, & Deborah Goldfarb J.D.

Prof. Gail S. Goodman

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How the Judiciary can alleviate the negative effects of cross examination

Criminal courtrooms were not built for children. From the size of the witness box to the formality of the procedures, judges face the difficult challenge of fitting child witnesses into a paradigm that was constructed without children in mind. Cross-examination, where the child witness is questioned by opposing counsel and subject to leading and potentially hostile questioning, highlights this inadequacy of fit. Unfamiliar with this procedure, approach, and form of questioning, child witnesses may stumble. This is so because their abilities to recount their experiences suffer on cross-examination. Courts are not, however, without resources to help children testify in a manner that protects the rights of the defendant, protects the mental health of the child, and ensures that the judicial system's ultimate goal of justice is met. This article reviews current research on the effects of cross-examination on children and discusses child-specific modifications judges can use to help children testify. In the end, although cross-examination may have deleterious effects on children's accurate recall on the witness stand, there is much that can be done to help support children and ameliorate the potential harm.

Cross-Examination of Child Witnesses in United States Criminal Court

Presentation of children's testimony in criminal courts is vital to the prosecution of many criminal charges, particularly charges of child sexual abuse. In child sexual abuse prosecutions, the children's statements on the stand are often the sole, if not the most important piece, of evidence in the prosecution's case in chief (Quas & Goodman, 2012). Given the nature of the crimes, unless there is photographic, medical, or other supporting evidence, child victims' statements will be the focus of the trial. Due to the necessity of this testimony, children are thus often called to testify in criminal prosecutions in the United States.

Testifying in court, however, requires children to face the very person they allege caused them harm. In criminal court in the United States, child witnesses not only have to see the defendant in the courtroom but they likely will be cross-examined by the defendant or defense counsel. Each defendant in the United States criminal court system has a constitutionally protected right "to be confronted with the witnesses against him" (U.S. Const. 6th Amend.). This right to confrontation includes the ability to cross-examine witnesses, including child witnesses (*Sopko v. Smith* [2012] [holding that "because the children were present and subjected to cross-examination, the Confrontation Clause was satisfied."]).

Cross-examination is thought to encourage truthful testimony from witnesses (Maryland v. Craig, 1990); specifically, "face-to face confrontation" allegedly "enhances the accuracy of fact finding by reducing the risk that a witness will wrongfully implicate an innocent person" (Maryland v. Craig, 1990, p. 846).

In the context of child witnesses, however, cross-examination may not always further this goal of increasing the rate of truthful testimony. Instead, cross-examination may have the counterproductive effect of decreasing the accuracy of children's testimony on the stand (Zajac, O'Neill, & Hayne, 2012). Given that the constitutional right to confrontation in the United States is based in the criminal system, the focus here is on cross-examination of child witnesses in criminal court. However, this limitation is only reflective of restrictions of space and not of the potential reach and effect of cross-examination on children's testimony (e.g., in dependency or family courts).

Effect of Cross-Examination on Children's Testimonial Accuracy

Our research team conducted an extensive study of alleged child sexual abuse victims (Goodman et al., 1992; see also Goldfarb et al., 2014). For the children who testified in the criminal matter, the researchers interviewed the children regarding their experiences in the criminal courts. Child witnesses consistently reported that seeing the defendant in the courtroom was one of the most stressful parts of testifying (Goodman et al., 1992). This fear of seeing, or confronting, the defendant can have a detrimental effect on children's abilities to testify accurately. In this same study of children who testified in a criminal prosecution of alleged child sexual abuse, the children who were most nervous about seeing the defendant also had the most difficulty answering the prosecutor's questions (Goodman et al., 1992).

This degradation in recall is especially problematic during cross-examination where children are not only subjected to a more intense form of questioning, but child witnesses also have their credibility put at issue (Zajac et al., 2012). Decrease in recall appears to result not from children's inability to recall the events generally but from the nature of questioning during cross-examination itself.

Research repeatedly tells us that children more accurately report information when they are asked open-ended, non-leading questions (e.g., Hobbs et al., 2014). Cross-examination often does not lead to this sort of questioning. Whereas rules of evidence may limit the scope of permissible topics to be addressed on cross-examination, attorneys often receive additional leverage in cross-examining witnesses, including asking leading questions (Fed. R. Evid. 601). As prior research has shown, defense attorneys are more likely to ask leading questions of child witnesses than prosecutors, at least in criminal cases, and both defense attorneys and prosecutors predominately use "yes-no" questions (Godman et al., 1992; Stolzenberg & Lyon, 2014). Children's memory has been shown to suffer during cross-examination utilizing these sorts of questions (O'Neill & Zajac, 2013; Zajac & Hayne, 2003).

On cross-examination, one goal of the defence is to question child victims' credibility by questioning the children's prior responses, either on the stand or in prior interviews. This repeated questioning may trouble child witnesses, particularly when the inquiries imply that the children are not telling the truth (O'Neill & Zajac, 2013). As O'Neill and Zajac (2013) noted, child witnesses may be confused by an adult in an authority position questioning the veracity of the child witnesses' prior answers. In a classroom setting, this line of questioning is often a signal to children that they have not answered a question correctly. Child witnesses may therefore waffle on answers as to which they were previously certain or secure.

Child witnesses may also have difficulty with the areas that are frequently the focus of cross-examination. For instance, one potential topic for cross-examination is the veracity of the children's testimony regarding the date upon which a certain event took place. Such information may be vital to the defendant's alibi or to issues of the statute of limitations, the period in which a lawsuit must be brought before it is time barred. Unfortunately, research reveals that children may suffer when it comes to questions regarding timing or numerosity.

Wandrey and colleagues (2012) interviewed 6- to 10-year-old children, all of whom were currently involved in United States dependency cases, about the children's placement history and prior visits to the court. The researchers then analyzed whether the children correctly recalled details of those experiences. The children had difficulty with specifics regarding both the timing and number of events (Wandrey, Lyon, Quas, & Friedman, 2012). Thus, when pressed on cross-examination as to specifics of the date of a particular event or how many times misconduct occurred, children may have difficulty responding not because the children are lying but because children may have developmental limitations that render such questions particularly difficult.

Finally, although not specific to cross-examination, the courtroom atmosphere alone may intimidate children. Using an experimental manipulation, Nathanson and Saywitz found that children reported higher stress responses when testifying in a courtroom context, as compared to a private room or a school setting. Children with higher stress ratings revealed deficits in their recall, specifically a decreased amount of truthful information provided during their testimony (Nathanson & Saywitz, 2003; Saywitz & Nathanson, 1993). Research outside of the courtroom paradigm has similarly found that, while high levels of distress may have beneficial effects for memory during encoding, it degrades memory abilities upon recall (Quas, Yim, Rush & Sumaroka, 2012). Thus, children's stress reactions to testifying may lead to inferior memory performance by children on the stand.

Children's ability to testify coherently and consistently is not the only thing that may suffer under cross-examination. Many children who testify in court later experience adverse mental health outcomes, even after controlling for variables that may be related to why children took the stand in the first place (Quas & Goodman, 2012). These adverse outcomes are greatest in cases where the child is required to testify a number of times, the abuse was particularly severe (e.g., long-term incest cases), or the case lacks corroborating evidence.

Negative mental health outcomes are not, however, a guarantee and, for some children *not* testifying is actually associated with poor outcomes (Goodman et al., 1992; Quas et al., 2005). That said, the potential negative ramifications of cross-examination, both for children and defendants, are large and must be addressed.

Potential Accommodations for Child Witnesses

Courts in the United States, spurred by the research of developmental psychologists, have recognized these potential negative outcomes and have begun to develop accommodations to ensure that the right to confront, and specifically cross-examination, serves its intended purpose, the elucidation of the truth. For brevity's sake, we do not cover all of the hard work being carried out to help children in the legal arena in the United States. Instead, we focus on a few instances of potential avenues judges could use to support child witnesses.

In the United States, many courts currently allow child witnesses to have a "support person" during the pendency of the proceeding (McAuliff, Nicholson, Amarilio, & Ravanshenas, 2013). Who the support person is and the precise contour of the support person's role varies depending on the judge and the jurisdiction. In many jurisdictions, the support person is either a professional victim advocate or the witness's own caregiver. In a survey study, support persons reported that they most frequently attended trial with the child, helping the child prepare for pre-trial, and helping comfort the child during the process (McAuliff et al., 2013). Prior research reveals that children who have supportive caregivers repeatedly report better outcomes than children with caregivers who are unsupportive (Quas & Goodman, 2012). Programs that work to increase support for child witnesses, both within the courtroom and at home, can thus not only alleviate stress but potentially lead to better testimony and mental health outcomes.

Some jurisdictions within the United States have also approved for children to testify via closed-caption television (CCTV) rather than in the courtroom with the defendant, at least under certain circumstances.

Although this procedure, when determined on a case-by-case basis, has been held constitutional and not in violation of the rights granted via the Sixth Amendment (*Maryland v. Craig*, 1990), surveys find that CCTV is infrequently implemented (Goodman, Quas, Bulkley, & Shapiro, 1999; McAuliff et al., 2013). Prosecutors' hesitancy in using CCTV may be founded as research shows that mock jurors report child witnesses who testify via CCTV as less credible and vote to convict more when the child testified in person (Orcutt, Goodman, Tobey, Batterman-Faunce, & Thomas, 2001). Thus, whereas CCTV may be a reasonable accommodation for lowering children's stress reaction to seeing a defendant, there is potential harm to the prosecution's case by having the witness testify in this manner, at least when expectations exist of seeing witnesses appearing live in court.

Another alternative to children testifying directly is to have other witnesses testify regarding the children's prior statements about the alleged acts. For instance, having a teacher testify about how the child disclosed the abuse to the teacher rather than having the child testify directly. In the United States, this sort of evidence has always been limited by the 6th Amendment's prohibition of hearsay evidence, an out of court statement offered for the truth of the matter asserted (Fed. R. Evid. 801). Although courts in the United States previously used a number of exceptions to permit hearsay evidence, their ability to do so has become more restrained by the United States Supreme Court's 2004 ruling in *Crawford v. Washington* (541 U.S. 406). In that case, the Supreme Court overruled prior precedent allowing for the admission of hearsay where there was an indicia of reliability and instead upheld the requirement that defendant have the right to confront a witness when "testimonial evidence" is being offered. "Testimonial" evidence includes videotaped interviews of children at Child Advocacy Centers.

Post-Crawford, courts have either required children to testify themselves in court or worked to find exceptions for children to the hearsay requirement (Lyon & Dente, 2012).

The admission of prior statements by the children regarding alleged acts is particularly useful in criminal trials as jurors report that they find prior statements by the child to another adult important to their decisions of the child's credibility (Myers, Redlich, & Goodman, 1999). Further, defense attorneys, during cross-examination of child victims, are more likely than prosecutors to ask about prior disclosures, including specific details about such disclosures (Stolzenberg & Lyon, 2014). Without the admission of hearsay evidence, prosecutors will often be limited in their ability to prove these prior statements absent direct examination of the children. Thus, continued analysis into when and how this evidence may be admitted is not only necessary but vital (see Lyon & Dente, 2012).

Rather than just changing the way children testify in court, practitioners and researchers have also worked on methods for improving children's preparation to testify in court. An excellent example of a preparatory intervention is the Kids Court School (http://mcclellandinstitute.arizona.edu/kids-court-school). Kids Court School provides children with an overview of the legal system, practice using relaxation techniques, and a mock trial in a mock courtroom where the children practice being a witness on the stand. Children are thus given the opportunity to experience the courtroom setting and testify without the pressures of the actual trial. With familiarity, children are thus better prepared to testify on the stand specifically and have more knowledge of the legal system generally. As prior research has shown, children's knowledge of the legal system relates to their reported distress in appearing in court (Quas & Goodman, 2012).

In addition to training children generally on appearing in the courtroom, researchers have recently begun to study interventions directly targeted at helping children with the cross-examination phase of trial (Righarts, O'Neill, & Zajac, 2013). In one such targeted intervention, children received training and practice on how to respond to cross-examination questions, including reminders that the interviewer was not at the event and may be trying to convince the children to change their minds.

Children who received cross-examination training provided significantly more accurate responses during cross-examination than children who did not receive the training (Righarts et al., 2013). This finding held across age groups such that 5- to 6-year-olds and 9- to 10-year-olds all showed improvements.

Finally, judges often have a number of tools available to them to help control the flow and presentation of evidence. These tools can be utilized to ensure that children testify in a manner that meets their developmental needs. For instance, judges can entertain objections to the hostility or repetitiveness of cross-examination. Judges can also work with psychologists and counsel to ensure that children have been sufficiently prepared to appear in court and understand the procedure for the day.

Although these modifications do not fully alleviate the numerous concerns with cross-examination detailed above, they do help children testify in a more developmentally appropriate environment, helping to ensure that the confrontation clause meets its intended goal of bringing forth truthful testimony from witnesses. Together, developmental psychologists and judges can work collaboratively to conduct further research and find solutions to guarantee that children are able to testify in a manner that is beneficial to all parties involved, including the defendant, the child witness, and the State.

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References are listed on the following page.

References

Crawford v. Washington, 541 U.S. 406 (2004).

Federal Rule of Evidence, Rule 801.

Goodman, G. S., Quas, J., Bulkley, J., & Shapiro, C. (1999). Innovations for child witnesses: A national survey. *Psychology, Public Policy, and Law, 5*, 255-281.

Goldfarb, D., Goodman, G.S., Quas, J., Ghetti, S., Edelstein, R., Alexander, K., . . . Cordon, I. (2014). *Diverging Views of Fairness?: A Familial Model of Procedural Justice*. Unpublished manuscript, Department of Psychology, University of California, Davis.

Goodman, G. S., Taub, E. P., Jones, D. P., England, P., & Port, L. K. (1992). Testifying in criminal court: Emotional effects on child sexual assault victims. *Monographs of the Society for Research in Child Development, 57*(5), v-142. Serial No. 229, doi: 10.2307/1166127

Hobbs, S. D., Johnson, J., Goodman, G. S., Bederian-Gardner, D., Lawler, M. J., Vargas,

I., & Mendoza, M. (2014). Children's eyewitness memory. In I. Weiner & R. Otto

(Eds.), *Handbook of forensic psychology* (pp. 561-613). New York: Wiley.

Lyon, T. D., & Dente, J. (2012). Child witnesses and the confrontation clause. *Journal of Criminal Law and Criminology*, *102*, 1181–1232.

McAuliff, B. D., Nicholson, E., Amarilio, D., & Ravanshenas, D. (2013). Supporting children in U.S. legal proceedings: Descriptive and attitudinal data from a national survey of victim/witness assistants. *Psychology, Public Policy, and Law*, *19*(1), 98–113. doi:10.1037/a0027879

Myers, J. E. B., Redlich, A. D., & Goodman, G. S. (1999). How do jurors react to hearsay testimony?: Jurors' perceptions of hearsay in child sexual abuse cases. *Psychology, Public Policy, and Law*, *5*, 388-419.

Nathanson, R., & Saywitz, K. (2003). The effects of the courtroom context on children's memory and anxiety. *Journal of Psychiatry and Law*, *31*, 67–98. Retrieved from http://heinonlinebackup.com/hol-cgi-bin/get_pdf.cgi?handle=hein.journals/jpsych31&section=11

O'Neill, S., & Zajac, R. (2013). The role of repeated interviewing in children's responses to cross-examination-style questioning. *British Journal of Psychology*, *104*(1), 14–38. doi:10.1111/j.2044-8295.2011.02096.x

Orcutt, H. K., Goodman, G. S., Tobey, A. E., Batterman-Faunce, J. M., & Thomas, S. (2001). Detecting deception in children's testimony: Factfinders' abilities to reach the truth in open court and closed-circuit trials. *Law and Human Behavior*, *25*(4), 339–372.

Quas, J. A., & Goodman, G. S. (2012). Consequences of criminal court involvement for child victims. *Psychology, Public Policy, and Law*, *18*(3), 392–414. doi:10.1037/a0026146

Quas, J. A., Goodman, G. S., Ghetti, S., Alexander, K. W., Edelstein, R., Redlich, A. D., … Jones, D. P. (2005). Childhood sexual assault victims: Long-term outcomes after testifying in criminal court. *Monographs of the Society for Research in Child Development*, *70*(2, Serial No. 280).

Quas, J. A., Yim, I. S., Rush, E., & Sumaroka, M. (2012). Hypothalamic pituitary adrenal axis and sympathetic activation: joint predictors of memory in children, adolescents, and adults. *Biological Psychology*, *89*(2), 335–41. doi:10.1016/j.biopsycho.2011.11.006

Righarts, S., O'Neill, S., & Zajac, R. (2013). Addressing the negative effect of cross-examination questioning on children's accuracy: Can we intervene? *Law and Human Behavior*, *37*(5), 354–65. doi:10.1037/lhb0000042

Saywitz, K. J., & Nathanson, R. (1993). Children's testimony and their perceptions of stress in and out of the courtroom. *Child Abuse & Neglect*, *17*(5), 613–622. doi:10.1016/0145-2134(93)90083-H

Stolzenberg, S., & Lyon, T. D. (2014). How attorneys question children about the dynamics of sexual abuse and disclosure in criminal trials. *Psychology, Public Policy, and Law*, *20*, 19. doi:10.1037/0021-9010.83.3.347

Maryland v. Craig, 497 U.S. 836 (1990).

Wandrey, L., Lyon, T. D., Quas, J. A., & Friedman, W. J. (2012). Maltreated children's ability to estimate temporal location and numerosity of placement changes and court visits. *Psychology, Public Policy, and Law*, *18*(1), 79–104. doi:10.1037/a0024812

Zajac, R., & Hayne, H. (2003). I don't think that's what really happened: The effect of cross-examination on the accuracy of children's reports. *Journal of Experimental Psychology. Applied*, *9*(3), 187–95. doi:10.1037/1076-898X.9.3.187

Zajac, R., O'Neill, S., & Hayne, H. (2012). Disorder in the courtroom? Child witnesses under cross-examination. *Developmental Review*, *32*(3), 181–204. doi:10.1016/j.dr.2012.06.006

Examining child witnesses in court — Judge Leonard Edwards(ret)

Courts in the United States have struggled with issues regarding the examination of child witnesses in court proceedings. The United States Constitution's Sixth Amendment guarantees that an accused will be able to confront and cross-examine his accuser in a criminal case. The Confrontation Clause of the Sixth Amendment to the United States Constitution provides that "in all criminal prosecutions, the accused shall enjoy the right…to be confronted with the witnesses against him." The Confrontation Clause has its roots in both English common law, protecting the right of cross-examination, and Roman law, which guaranteed persons accused of a crime the right to look their accusers in the eye. "The primary object of the clause was to prevent depositions or *ex parte* affidavits, such as were sometimes admitted in civil cases, being used against the prisoner in lieu of a personal examination and cross-examination of the witness."[1]

The Confrontation Clause guarantees (1) the right of personal examination of the accuser; (2) that a witness will testify under oath; (3) That a witness will submit to cross-examination and (4) that the jury may observe the demeanor of the witness in making his statement.

However, the Confrontation Clause was created when only men were competent to testify. The framers of the Constitution did not anticipate that children would ever be competent to testify as witnesses.

In today's courts children do testify. They are frequently the victims of sexual or physical abuse or are witnesses to crimes committed at home and in the community. The defendants in these cases have a right to confront and cross-examine any child victim or witness. The exercise of this right has resulted in a number of complex legal issues.

First, does the accused have a right to have eye-to-eye confrontation with the child witness? On the one hand the accused wants to see if the child witness will be consistent in her testimony when facing the person she is accusing. The accused argues that this confrontation will determine if the witness's statements are truthful. On the other hand, the child's representative points out that the child is easily intimidated by the courtroom surroundings, the formal proceedings, and, most of all, by an adult questioning her in this setting. Many children are frightened by the courtroom setting and have refused to testify or have been too traumatized to testify in a courtroom.

Second, will the child understand the questions asked of her? Children have less developed vocabularies and misunderstand words that are commonly used in court proceedings. They also can be confused by compound questions, questions stated in the negative, and questions relating to specific times.[2]

The United States Supreme Court has addressed the issue of children testifying in criminal proceedings a number of times, concluding in one case that a screen shielding the child from the defendant was a violation of the Confrontation Clause[3] and in another excluding the defendant from a competency hearing was also a violation of that clause.[4] But in the case of *Maryland v Craig,* the Supreme Court held that the Confrontation Clause did not bar the use of

[1] *Mattox v. United States* 156 U.S. 237, 242 (1895).

[2] Saywitz, Karen,"INTERVIEWING CHILD WITNESSES: A DEVELOPMENTAL PERSPECTIVE," *Child Abuse & Neglect*, Vol. 22, No. 8, pp. 825–843, 1998.

[3] *Coy v Iowa*, 487 U.S. 1012 (1988)

[4] *Kentucky v. Stincer* , 482 U.S. 730 (1987)

one-way closed-circuit television to present testimony by an alleged child sex abuse victim.[5] In that case the trial court set up the child witness in a separate room with the judge, the prosecutor, and the defense attorney, so that the defendant and jury could only see the witness testify via the live television screen in the courtroom. The child could not see anyone in the courtroom. The Supreme Court upheld the procedure and the conviction stating that the Confrontation Clause embodies a "preference" for face-to-face, in person confrontation, but this may be limited to satisfy sufficiently important interests. The court held that because the defendant was able to cross-examine the child and her demeanor was visible in the courtroom, the defendant had a sufficient opportunity to test her credibility and the substance of her testimony before the jury.

Some states have adopted the procedures approved of in *Maryland v Craig,* but others have found that the technology is too expensive for their courts. Moreover, some state constitutions require a "face-to-face" confrontation, thus making the remote testimony unconstitutional under their law.

In juvenile dependency cases the confrontation clause does not apply. These are civil cases, thus state legislatures have been free to devise procedures that permit the child to testify outside of the presence of the accused (usually the parent or parents). In California, for example, if the court finds that (1) testimony in chambers is necessary to ensure truthful testimony; (2) the child is likely to be intimidated by a formal courtroom setting; or (3) the child is afraid to testify in front of his or her parent or parents, the court may order that testimony be taken in chambers. The only persons in chamber will be the attorneys, the witness, the judge, and the court reporter.

The court reporter will then read back the testimony to the parents or the attorneys can summarize the testimony to their clients.[6]

A child's testimony in court proceedings presents complex issues for the legal system. The court must establish procedures that balance the accused person's right to confront his accusers and the child's need to testify without being intimidated. This balance appears to have been reached in the United States, but other cases may further refine these processes.

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[5] *Maryland v. Craig*, 497 U.S. 836 (1990). A subsequent case, *Crawford v Washington*, 541 U.S. 36 (2004), addressed the admissibility of hearsay statements.

[6] California Welfare and Institutions Code §350 (West, 2014).

Rome wasn't built in a day—and neither was the intermediary scheme for child witnesses

Professor Penny Cooper & Adel Puk

Professor Penny Cooper

Adel Puk

Introduction

Child sexual abuse is notoriously difficult to detect and prosecute. This is partly because often the child and the assailant are the only witnesses to the crime and as a result it will frequently be the child's testimony which will prove pivotal to securing a conviction against the perpetrator. In the past this has proved problematic as children have long been considered more suggestible and less reliable witnesses than adults.[1] While there is research to support this view and show that the younger the child, the more this is true,[2] there is also evidence to demonstrate that under the right circumstances children are more than capable of giving accurate accounts of their experiences.[3] It is therefore imperative that these circumstances be simulated by the courts so that children can give evidence to secure the convictions of perpetrators of what are widely recognised to be some of the most horrific crimes.

Sexual offences committed against children have severe negative long-term and short-term effects including anxiety and depression,[4] as well as higher occurrences of both mental and physical illness in adult life.[5] Statistics indicate that the extent of the problem is far reaching and often under reported.[6]

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[1] Gail S Goodman 'The Child Witness: Conclusions and Future Directions for Research and Legal Practice' (1989) 40 Journal of Social Issues 157

[2] Ceci & Bruck 1995, 'The Suggestibility of Young Children' (1997) 6 Current Directions in Psychological Science 75; D S Lindsay & D A Poole, 'The Poole et al. (1995) surveys of therapists: Misinterpretations by both sides of the recovered memories controversy' 26 (1998) Journal of Psychiatry and Law 383 ; E F Loftus, *Eyewitness testimony* (first published Cambridge, MA: Harvard University Press 1979)

[3] Catherine Johnson Haden 'Fivush, R., Haden, C. A., & Adam, S. Structure and coherence of preschoolers' personal narratives over time: Implications for childhood amnesia.' (1995) 60 Journal of Experimental Child Psychology 32

[4] D Gelinas, 'The Persisting Negative Effects of Incest' (1983) 46 Psychiatry 312; C Courtois, 'Treatment of Serious Mental Health Sequelae of Child Sexual Abuse: Post Traumatic Stress Disorder in Children and Adults' (1986) ; Donaldson M & Gardner R, 'Diagnosis and treatment of Traumatic Stress in Women After Childhood Incest' (1985) ; David Finkelhor, ' Early and Long-Term Effects of Child Sexual Abuse: An Update' (1990) 21 Professional Psychology: Research and Practice 325

[5] Josie Spataro, Paul E. Mullen, Philip M. Burgess, David L. Wells and Simon A. Moss , 'Impact of Child Sexual Abuse on Mental Health: Prospective Study in Males and Females' (2004) 184 The British Journal of Psychiatry 416; Golding and Others 'Prevalence of sexual abuse history in a sample of women seeking treatment for premenstrual syndrome' (2000) 21 J Psychosom Obstet Gynaecol Journal 69

[6] Results showed that of those who were abused by an adult, more than one third did not tell anyone about the abuse. Of those who were abused by a peer four fifths did not tell anyone about the abuse. - Radford and others, 'Child Abuse and Neglect in the UK Today' [2011] NSPCC <http://www.nspcc.org.uk/inform/research/findings/child_abuse_neglect_research_PDF_wdf84181.pdf>

When reoffending rates are considered over a long period of time and undetected sex crimes are taken into consideration research shows that four out of five convicted child sex offenders will go on to reoffend.[7] With such high recidivism rates and a reported 250,000 paedophiles living in the UK[8] it is essential that the law provides mechanisms to enable and aid the prosecution of child sex offenders.

The law has indeed recognised the difficulties in obtaining evidence from children, especially in cases of alleged sexual abuse and has responded with a series of 'special measures' which aim to reduce the distress experienced by child witnesses and improve the quality of their evidence. The courts are also demonstrating an increasing awareness of the importance of adapting proceedings to allow for children to give evidence. The approach taken has altered significantly over recent years and the trial process is progressively being tailored towards addressing and providing for the needs of vulnerable witnesses.

The 'special measures' aforementioned were introduced via the Youth Justice and Criminal Evidence Act 1999 (YJCEA) ss 16-30[9] aiming to adapt the trial process so that it is more suitable to the needs of vulnerable witnesses. A child, i.e. someone under 18, who is an alleged victim of or witness to sexual offences is now entitled to give their evidence in chief by way of video recorded interview. They are also eligible to give evidence from the live link room, be assisted by communication aids and/or an intermediary, give evidence from behind a screen (where live link is not used), be heard with the court closed to the public and have the judge and advocates remove their wigs and gowns.

This article pays special attention to the witness' or victim's right to be assisted by an intermediary. Section 29 of the YJCEA first introduced the intermediary to the English legal system and a pilot scheme began early in 2004 and was such a success that it was rolled out nationally by 2009. Intermediaries are communication specialists who work at two key stages in the criminal justice process: when a witness is being interviewed by a police officer and when the witness gives evidence during the trial. They are in essence facilitators, transparently advising police and courts and intervening in the event of a miscommunication, usually to advise the questioner how better to communicate with the witness.[10] Their role is designed to ensure vulnerable witnesses and defendants are given fair treatment throughout legal proceedings and that their disability or young age does not prevent them giving accurate evidence and information. A support system and an aid to communication for the child witness, the work of intermediaries has proved invaluable yet, as this article will go on to discuss there is much that needs to be done for them to be fully utilised by a criminal justice system which, set in its ways, is proving reluctant and resistant to change.

The role of the Intermediary

The most important part of the role of an intermediary is to make sure the vulnerable witness is questioned in a way that is appropriate to their ability to answer: 'quality in terms of completeness, coherence and accuracy.'[11] Their role has widened beyond the investigative interview and trial and the scope of their work continues to grow with their value now beginning to be recognised in family cases and with vulnerable defendants.[12]

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[7] Langevin R and Others, 'Lifetime Sex Offender Recidivism: A 25 Year Follow-Up Study' (2004)

[8] Bob McLachlan, *Monsters and Men* (1st edn, Hodder & Stoughton Religious 2003)

[9] Section 28, pre recorded cross-examination and re-examination is not yet in force though three Crown Courts in 2014 were selected to pilot its use for certain cases with a vulnerable witness.

[10] Penny Cooper and David Wurtzel, 'Better Second Time Around? Department of Justice Registered Intermediaries Schemes and Lessons from England and Wales' (2014) 65 NILQ 39

[11] Youth Justice and Criminal Evidence Act 1999, s 16(5)

[12] Penny Cooper and David Wurtzel, 'Better Second Time Around? Department of Justice Registered Intermediaries

The earlier an intermediary becomes involved in a case the bigger the impact of the work they do and as consciousness of their work grows it is vital that the awareness of the relevant authorities as to when to employ their services follows suit.

An intermediary will prepare a pre-trial report for the court outlining the needs of the witness and recommending measures which need to be taken to facilitate their oral testimony. The value of this report lies in the fact that it provides the judge with much more information about the vulnerable witness than would be usually available. 'Ground rules hearings,' where an intermediary will set out their recommendations on how the questioning is to be conducted to the judge and advocates involved in the trial, have now become a requirement in cases involving intermediaries.[13] These benefit from being structured, transparent and based on the report.[14] The introduction of the ground rules hearing has become instrumental to the effective use of intermediaries and proper questioning of vulnerable witnesses.[15] Experience has shown that these are only completely effective when the judge and advocates for the trial are all present and a genuine discussion takes place, not a 'tick box' exercise. [16]

As intermediaries are involved in the whole trial process and can be used in conjunction with other special measures they can provide an unprecedented glimpse as to how in practice special measures are used and how vulnerable victims are treated with their knowledge and expertise being employed to further improve the criminal justice system.

Bringing cases to trial

The use of intermediaries is intended to ensure that as 'many people as possible are able to give evidence at trial.' [17] In cases of child sexual abuse, where the crime is of such a grievous nature, the use of intermediaries to remove hurdles to prosecution is a positive step towards a fairer and more accessible criminal justice system.

After the introduction of intermediaries police officers began reporting that often the use of an intermediary could mean the difference of a prosecution going ahead or not[18] and younger children that may not have previously been able to give their testimony are now able to do so when assisted by an intermediary. This coincides with the court's shift in attitude towards child witnesses which shows a growing awareness that youth need not be a bar to giving evidence. This in turn will reduce the chances that those who perpetrate crimes against the most vulnerable in society will go unpunished because of the vulnerability of their victims.

Schemes and Lessons from England and Wales' (2014) 65 NILQ 39, 50

13 Criminal Procedure Rules 2012, nr 29.10

14 Penny Cooper and David Wurtzel, 'Better Second Time Around? Department of Justice Registered Intermediaries Schemes and Lessons from England and Wales' (2014) 65 NILQ 39,47

15 Penny Cooper and David Wurtzel, 'Better Second Time Around? Department of Justice Registered Intermediaries Schemes and Lessons from England and Wales' (2014) 65 NILQ 39

16 P Cooper , Highs and Lows: the 4th intermediary survey (Kingston University 2014, forthcoming)

17 P. Boateng, House of Commons Committee Stage, Hansard, June 29, 1999.

18 J Plotnikoff and R Woolfson, *The Go-Between: Education of Intermediary Pathfinder Projects* (Lexicon 2007)

Children's evidence can be unreliable if not obtained properly

Children's testimony is no longer looked down upon by the courts: 'none of the characteristics of childhood, and none of the special measures which apply to the evidence of children carry with them the implicit stigma that children should be deemed in advance to be somehow less reliable than adults.'[19] Legal practice can and should be tailored for children but the process of obtaining complete, accurate and coherent testimony from a child witness is thwart with difficulty, particularly in cases when the child is very young and where the subject matter is distressing. When children are giving evidence there is a danger of them simply wishing to please and not disagree[20] and when they are asked questions they don't understand they can become distressed because they realise they are not helping the court the way they would like to.[21] This is when the use of an intermediary becomes intrinsic in ensuring that the child is asked questions which they are able to comprehend and in such a manner which doesn't cause them any further unnecessary distress.

Cross-examination

Cross-examination has been dubbed the greatest legal engine used for the discovery of the truth[22] and the right to cross-examine a witness is seen as being at the heart of what makes a trial fair.[23] However the use of the traditional style of cross-examination has invited much criticism when utilised to question child witnesses. The adversarial system as a whole has been labelled inadequate for obtaining evidence from children, more so the younger they are, and in the wrong hands, the examination method can be construed as being abusive to those who are most vulnerable.[24]

Traditionally advocates are taught to control the witness, using leading questions to obtain answers that best serve their cause during a cross-examination. [25] Advocates have been known to use cross-examination as a tool to tell the story to the jury in a way which is most advantageous to their case rather than as a means of extracting information from the witness.[26] The need to control the witness is a theme encouraged in most cross-examination teaching[27] with leading, suggestive questioning being instrumental to achieving this. These techniques have led to cross-examination becoming a vilified practice within the criminal trial[28] and raise questions as to whether the issues raised by the cross-examination of children, are indicative of a wider problem, whereby the dangers of trials becoming showcases for advocates' talents rather than truth finding mechanisms, need to be addressed on a wider scale.

In cases of sexual abuse it is particularly important that these children, who are alleged to have been through the traumatic experience of abuse, do not have their trauma amplified by the criminal trial process. The psychological impact of going to trial can act as a deterrent to reporting the crime and with the child sexual abuse already being underreported any practice which exasperates this problem should be

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19 *B* [2010] EWCA Crim 4 [40]. In this case the child witness was the victim of anal rape. She was four years old when she gave evidence at the Old Bailey. She did not have an intermediary.

20 *W and M* [2010] EWCA Crim 1926, 30

21 Penny Cooper and David Wurtzel, 'Better Second Time Around? Department of Justice Registered Intermediaries Schemes and Lessons from England and Wales' (2014) 65 NILQ 39, 49

22 K Hanna et al, Child Witness In New Zealand (AUT, 2010) Ch 2

23 Emily Henderson, 'All the Proper Protections- the Court of Appeal Rewrites the Rules for the Cross-Examination of Vulnerable Witnesses' (2014) 2 Criminal Law Review 93

24 J Spence and M Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (Hart Publishing 2012)

25 T Eichelbaum, *Fundamentals of Trial Technique* (Oxford University Press 1989) 204

26 Henderson, 'Psychological research and Lawyers' Perceptions of Child Witnesses in Child Sexual Abuse Trials' In Carson and Bull (eds) *Handbook of Psychology in Legal Contexts* (2nd edn, Wiley 2003) Ch 21

27 *Henderson*, 'Persuading and Controlling: The Theory of Cross-Examination in Relation to Children' in Wescott et al. (eds) , *Children Testimony: A Handbook of Psychological Research and Forensic* (Wiley 2002)

28 Emily Henderson,' All the Proper Protections- the Court of Appeal Rewrites the Rules for the Cross-Examination of Vulnerable Witnesses' (2014) 2 Criminal Law Review 93

banished from our legal system. Nevertheless, children who have been cross-examined without the use of an intermediary, report the experience as being very negative and detrimental to their psychological wellbeing. They have described their cross-examiners in a negative way finding them *'bullying'* and *'intimidating*.'[29] What benefit can be derived from vulnerable witnesses experiencing such feelings while giving evidence? If it is the truth we are looking for then surely we are not seeking it through such techniques? And if it is the protection of these children that is our aim then surely that is not what has been achieved here. Notably, it is not only intimidating styles of questioning which can affect the quality a child's evidence. With children who are more susceptible to suggestion and thus more likely to fall prey to clever advocates who can gain their trust, the danger lies in these advocates implanting suggestions about the child's ability to lie and using their resulting compliance as a way of discrediting them.[30]

The questioning style used to extract a child's testimony can not only affect the accuracy of the child's evidence but can also affect the way the jury perceives the child's credibility. Research has shown that where the questioning has been suggestive the jury has seen this as lessening the credibility of the child's story.[31] The use of highly leading questions has been found to make children appear less reliable witnesses regardless of their age.[32]

This is further evidence of why vulnerable witnesses and the trial process benefit from the presence of an intermediary who can safeguard against such practises being employed to question the child.

The courts have indicated a recognition of the drawbacks of using the traditional cross-examination methods on vulnerable witnesses and have made many positive steps towards reforming the practice. *B*[33], *E,*[34] *W and M*[35] and *Wills*[36] are recent cases which show the court making further restrictions on the way vulnerable witnesses were allowed to be cross-examined. The court addressed the issue of miscommunication through the use of developmentally inappropriate language[37] and found that the witness will not fail the competency test based on the fact that the questioning had to be adapted to account for their particular characteristics.[38] Suggestive questioning: "you did this, didn't you?" was too held by the courts to produce unreliable evidence whereby it is hard to distinguish whether the child is 'truly changing her account or simply taking the line of least resistance.'[39]While it was acknowledged that aspects of the child's evidence, believed to undermine the child's credibility, must be revealed to the jury, the court recognised that it need not form the subject matter for cross-examining the child[40] and that advocates need only put necessary questions to vulnerable witnesses which have real chance of uncovering useful evidence.[41]

29 J Plotnikoffr and Richard Woolfson, 'Kicking and Screaming: The Slow Road to Best Evidence' in Spencer and Lamb (eds), *Children and Cross Examinations: Time to Change the Rules?* (Hart Publishing 2012) 26

30 J Spencer and R Flinn, *The Evidence of Children* (Blackstones 1993) 374

31 Tubb, Wood & Hosch 1999; Castelli, Goodman and Ghetti ' Effects of Interview Style and Witness Age on Perceptions of Children's Credibility in Sexual Abuse Cases' (2005) 35 Journal of Applied Psychology, 2005, 35 297

32 Castelli, Goodman and Ghetti ' Effects of Interview Style and Witness Age on Perceptions of Children's Credibility in Sexual Abuse Cases' (2005) 35 Journal of Applied Psychology 297

33 *B* [2010] EWCA Crim 4 ; [2011] Crim LR 233

34 *E* [2011] EWCA Crim 3028; [2012] Crim LR 563

35 *W and M* [2010] EWCA Crim 1926

36 *Wills* [2011] EWCA Crim 1938; [2012]1 Cr App R 2

37 *B* [2010] EWCA Crim 4 ; [2011] Crim LR 233

38 *B* [2010] EWCA Crim 4 ; [2011] Crim LR 233, 42

39 *W and M* [2010] EWCA Crim 1926, at 31

40 *B* [2010] EWCA Crim 4 ; [2011] Crim LR 233, 42

41 *E* [2011] EWCA Crim 3028; [2012] Crim LR 563, 7

Whether the trial process in the above cases would have been enhanced by the involvement of an intermediary is unknown, but knowing the work they do, it is suggested that it is likely it would have been. Even now requests for intermediaries are increasing with the growing recognition of their benefits. Since intermediaries are now also beginning to be used to support vulnerable defendants and witnesses in family cases the need for more to be trained has never been so apparent. The demand is growing and if it is to be met there will have to be many more intermediaries trained and made available to support the most vulnerable parties to the criminal justice system.

While the benefits of using intermediaries are now widely recognised their struggle for recognition in the courtroom has sometimes been an uphill battle. This is disappointing as even if the psychological damage on a child witness is overlooked, the flawed outcomes which can result from failing to obtain accurate and reliable testimony from a child should be of utmost importance to the public, the court and the legislative body.[42] If the traditional cross-examination method fails to produce reliable evidence it is essential that it be adapted in order to do so. Intermediaries contribute to the goal of increased accuracy in children's testimony through the work they do. Despite this, intermediaries have reported dissatisfaction in the way advocates resist their recommendations in relation to cross-examination and a disappointingly high proportion of advocates continue to disregard the rules restricting the use of certain questioning techniques.[43]

While cross-examination continues to be taught in the traditional way of posing leading, suggestive questions, even when posed to children and this norm remains unchallenged by those training advocates, this practice is unlikely to die out.[44] Intermediaries have continuously rated the task of getting counsel to adapt their traditional form of questioning as one of the hardest they have to face and there continue to be incidents of counsel asserting their 'right' to put questions a certain way even when this is in direct conflict with the rules laid down in the ground rules hearing.[45] Unfortunately some advocates even appear to take the attitude that these rules are made to be broken.[46]

While intermediaries are trained to be impartial and neutral, their paramount responsibility is to the court[47] and they are bound by a code of Practice and Code of Ethics,[48] they still cite feeling that counsel can sometimes take the view that they are there to interfere and prevent them from winning the case rather than recognising them as an impartial facilitator. The overwhelming theme here appears to be that some advocates are more concerned with winning cases rather than helping the court hear the best quality evidence.

42 J Spencer and M Lamb (eds), *Children and Cross-Examination: Time to Change the Rules?* (Hart Publishing 2012)

43 P Cooper , Highs and Lows: the 4th intermediary survey (Kingston University 2014, forthcoming). See also P Cooper 'Tell Me What's Happening' intermediary surveys 2010-2011 available at http://www.city.ac.uk/law/courses/continuing-professional-development/in-house-courses/intermediary-training

44 E Henderson, 'Psychological Research and Lawyers Perceptions of Child Witnesses in Sexual Abuse Trials' in D Carson and R Bull (eds) *Handbook of Psychology in Legal Contexts,* (2nd edn, Wiley 2003); E Henderson 'Reforming the Cross-examination of Children: The Need for a New Commission on the Testimony of Vulnerable Witnesses' [2013] Archbold Review 6

45 Penny Cooper and David Wurtzel, 'Better Second Time Around? Department of Justice Registered Intermediaries Schemes and Lessons from England and Wales' (2014) 65 NILQ 39, 47

46 Penny Cooper and David Wurtzel, 'Better Second Time Around? Department of Justice Registered Intermediaries Schemes and Lessons from England and Wales' (2014) 65 NILQ 39, 47

47 *Intermediary Procedural Manual* (Home Office 2005) para 2.3.1

48 The *Intermediary Procedural Manual* (Home Office 2005) para 2.3.1 contains the Code of Ethics (39-40) and Code of Practice (42-44). The Codes have appeared in successive manuals.

This would explain why despite positive steps towards changing the way child witnesses are being cross-examined, some continue to use suggestive questioning which confuses child witnesses. Evidence of this was found in 2009 when a reported 64% of child witnesses found part of their cross-examination incomprehensible.[49]

Children's rights have been widely recognised and applied outside the courtroom and yet in comparison the justice system has been slow to incorporate the rights of child witnesses into the trial process. While advocates continue to intimidate children in the witness box, these rights will remain unmet. It will undoubtedly take time and commitment to better practice, even for advocates who are not resistant to the use of an intermediary, to change the habits of a professional lifetime.

Conclusion

There is an overwhelming amount of research to support the view that the way child witnesses are questioned in court has long been in need of reform. The introduction of intermediaries has been a catalyst for positive change; Parliament was responding to the demands that something needed to be done to adequately protect vulnerable witnesses. In child sex abuse cases in particular the witnesses are vulnerable and deserving of protection. Similarly the threat of loss of liberty and stigma attached to a conviction of a child sex offence means that the defendant is also entitled to the same level of protection by ensuring their right to a fair trial.

Whereas there are those who talk of balancing the interests of both parties in such cases, it can be argued that the interests of both the defendant and the witness are ultimately the same as those of the court: that the truth be established and justice be done. Intermediaries are a tool for achieving this. However, intermediaries alone cannot bring about the changes needed in the culture of cross-examination for this to truly become a reality. It will only be with the full co-operation of robust judges that child witnesses will be properly heard. As the saying goes 'Rome wasn't built in a day' but politicians to their credit, have been a driving force towards a change in legal practice and as intermediaries grow in number so too will the number of child witnesses who benefit from them.

By Adel Puk

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[49] J Plotnikoff and Richard Woolfson, 'Kicking and Screaming: The Slow Road to Best Evidence' in Spencer and Lamb (eds), *Children and Cross Examinations: Time to Change the Rules*? (Hart Publishing 2012) 27

Examination of witnesses aged under 18 in Germany

Judge Sophie Ballestrem*

Criminal proceedings

The examination of witnesses under 18 years of age must be conducted solely by the presiding judge. The prosecutor, the defendant, the defence counsel and the lay judges may request the presiding judge to ask the witnesses further questions. The presiding judge may also permit these persons to put questions to witnesses directly, but the judge is required to be sure that, in his or her view, there will be no prejudice to the well-being of the witness.

The court may order the defendant to leave the courtroom during the examination of a witness under sixteen years of age if the defendant's presence might cause considerable detriment to the witness's well-being.

The examination of a witness aged under sixteen who has suffered injury as a result of the criminal offence may be conducted via an audio-visual medium.

An oath shall not be administered to persons who at the time of the examination are still under the age of sixteen.

If minors who lack intellectual maturity or suffer from mental illness or mental or emotional deficiency do not have sufficient understanding of their right to refuse to testify, testimony may be taken from such persons only if they are willing to testify and if their statutory representative also agrees to their examination. However, if the statutory representative is himself accused, he may not make this decision. If both parents are entitled to act as statutory representative, this also applies to the parent who is not accused.

Civil Proceedings

Persons who are under the age of 16 at the time of the hearing or who for lack of intellectual maturity or through mental illness or emotional weakness do not have sufficient understanding of the nature and importance of the oath are to be heard without being sworn in.

Family Proceedings

According to the German *Law on Procedure in Family Matters and Jurisdiction in Non-Contentious Matters*, in family proceedings the child may not be examined as a witness. Nevertheless, the child is to be heard.

The child is always to be heard personally. This is meant to ensure that the court can gain a personal impression of the child during the oral hearing. The aim of the hearing is to inform the child about the proceedings and to grant him or her the opportunity to make a statement (*right to be heard*, Article 12 CRC). The hearing also provides information for the court.

If the child is over 14 years of age, the court hears the child in person. If the proceedings exclusively concern the property of the child, the court may refrain from a personal interview.

If the child is under the age of 14, she or he is heard personally if his or her wishes, relationships or intentions are relevant to the decision or if a personal interview would be appropriate for other reasons.

Only if there are serious reasons will the court decide not to undertake a personal interview. If the judge must make a decision urgently without hearing the child, he must hear the child as soon as possible. The child should be informed about the subject matter, the procedure and possible outcomes of the proceedings in an appropriate manner, avoiding detriment to the child's development, education and health. The child must be given the opportunity to comment.

If a *guardian at litem* has been appointed for the child, the hearing must be held in the presence of the guardian. Apart from this, the arrangements for the hearing are at the discretion of the court.

There is no age-threshold for hearing a child. German judges are ready to hear children aged 3 years—or at least to try to do so. It depends on the circumstances and on the personality of the child. Usually children are heard in the absence of the parents. Some courts (regrettably not all) have special rooms for the hearing of children, which are furnished and equipped in a suitable way. Depending on the age of the child, judges use toys, books or paper and coloured pencils to loosen up the mood.

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Children and youths as victims in German criminal proceedings

Hon Judge Verina Speckin

I. Introduction

The question on how to take evidence in child abuse trials is not an easy one. Children having to testify as key witnesses, while often being victims at the same time, challenges the "usual" way of examination in criminal proceedings in Germany as well as in many other countries. Children need protection – not just in criminal proceedings but especially there.

The following statements set out the rules adopted by the German Federal legislator in order to support and protect witnesses as well as victims during preliminary investigations and during the main trial.

In the first part, the legal framework will be presented.

In the second part, the author deals with why the German legal system provides for an attorney for injured or abused child /adolescent.

II. Legal structure

The law that applied to criminal proceedings that involve children being witnesses is the Code of Criminal Procedure. There is no "special law" regulating the position of children in criminal proceedings. But there are some exemptions made in order to balance the interests of under-aged witnesses and the suspect or accused person.

The introduction to the commentary on the Code of Criminal Procedure states:

"1) The nature of criminal proceedings:

A. The proceedings are a legally structured process, developing from situation to situation towards the obtaining of a judicial decision (…) on a substantive legal condition (…). Its goal is not the conviction of the accused (as in the Inquisition process), but to get to an objective dictum about guilt, punishment or other measures of prosecution."[1]

The formalities regulated in the Code of Criminal Procedure implement the rule of law in the proceedings and the thereon based presumption of innocence under Art. 6 II ECHR.

The Code of Criminal Procedure regulates the modus operandi of the proceedings from the investigation through an intermediate process up to the main hearing.

The legislator has regulated the protection and participation rights of witnesses for each stage of the proceedings. These rights are linked to the respective degree of affection the person suffered by the crime.

a) Witnesses, who have observed a crime, but were not themselves affected by it and are summoned to the police or to court, are not considered to be party to the criminal proceedings *ex officio*.

Nevertheless they have the right to consult a lawyer as counsel at their own expense and can take part in the proceedings voluntarily.

If the testimony of the witness is considered to touch issues such as sexual assault, child abuse or human trafficking, the court is obliged to appoint a state-paid attorney to assist the witness during interrogation, always if it is obvious that the witness cannot defend his rights by himself or his legitimate interests cannot be taken care of in another way (§ 68b Code of Criminal Procedure).

If the witness is still a child (under 14 years of age) or an adolescent (aged 14-17 years), it is obvious, that they are entitled to a lawyer. They do not yet have any experience dealing with public authorities or institutions and require special care.

[1] Meyer-Goßner/Schmidt, Strafprozessordnung, 57 ed. 2014

The same is true for witnesses that are clumsy, timid or inhibited or handicapped in their ability or willingness to testify for other reasons.

In these cases the lawyer's activity is limited to consultation only. The lawyer then observes, whether there is the right to refuse to give evidence (so, e.g. there is no obligation to testify against relatives in a straight line) or if the witness has the right to withhold information (as there is no obligation to incriminate oneself).

The legal counsel does not have the right to inspect the records in files, so he can only accompany the witness to the interrogation.

Illegal and compromising questions can be objected to during the interrogation. The lawyer may apply for exclusion of the public if the witness is under 16 years of age and can be attempt to ensure, that the hearing is conducted exclusively by the presiding judge (§ 245a Code of Criminal Procedure). In such cases all parties to the proceedings then have to ask her questions to the child victim via the presiding judge in order to avoid a too aggressive examination by defence lawyers or the prosecutor.

The legal counsel can work towards the exclusion of the accused as well, if there is a reasonable fear, that the witness is unable to testify or cannot tell the truth in presence of the suspect.

The legal counsel may also suggest, that the hearing can take place as a video simulcast (§§ 168e, 247a Code of Criminal Procedure).

The counsel has to make sure, that persons under the age of 18 may not be sworn in. As well, it is prohibited to swear in persons, who have not enough knowledge of nature and importance of an oath due to lack of understanding, of maturity or due to a mental disease or a mental or emotional disability (§ 60 Code of Criminal Procedure).

b) The witness, who was also victim of the crime has more extensive information rights

The Code of Criminal Procedure distinguishes between victims who are entitled to participate in the criminal proceedings as a joint plaintiff and those who are not.

The general rule is that victims of violent crimes are authorized to participate in criminal proceedings as joint plaintiffs. The victims of property crimes, such as fraud or embezzlement, do not have this right.

Victims without the right of participation as a joint plaintiff may be represented by a lawyer at their own expense. They may consult a lawyer as a victim representative. This lawyer then has a limited right to inspect the files.

The lawyer of the victim may be denied access to the files, if the legitimate interests of the accused or other persons are opposed to it or if the proceedings will significantly be delayed by the file transfer.

Unlike the defence counsel the victim's counsel may only take the case file into his office or his living space. The counsel will not have access to evidence as such.

The victim has the right to be assisted by a trusted person during his interrogation. This person has the right to sit next to the victim; it serves as a personal support only. Such a trusted person may get involved also if there is already a lawyer appointed.

Having made the appropriate application the victim must be notified of the outcome of the proceedings.

Nevertheless the victim has no right to appeal the decision of the court. But the victim has to be informed whether the accused or the convicted is granted enforcement loosening and when he will be released from prison. Here it is necessary, however, that the victim himself requested that this information be given to him.

In certain cases German law recognizes the institute of a victim being a joint plaintiff as a follow up to the indictment of the prosecutor. Who as a victim is entitled to be a joint plaintiff, can exercise this right after the charge has brought before the court.

The victim, who is entitled to be a joint plaintiff, may already be represented by a lawyer during the preliminary investigations. If the victim is in need and is entitled to receive legal aid, a lawyer may be assigned to him as a joint plaintiff's counsel already during investigation.

If the accused is charged with sexual assault or attempted homicide, the victim is entitled to a state paid lawyer independent upon his earnings.

It is laid down by law that the costs of a lawyer are to be taken over by the state; if the accused is charged with a crime against sexual self-determination or an attempted homicide (crime means criminal offenses which are punishable with the minimum of one year imprisonment).

The lawyer of the joint plaintiff has an unconditional right to inspect the records. He is also entitled to participate in judicial interrogations of the accused or other witnesses during the investigation (§§ 406e, 406g Code of Criminal Procedure).

If the victim, entitled to join an action is not able to communicate sufficiently in German or is hearing or speech impaired, he is entitled to get a state-paid interpreter. This interpreter may be called in also for the interviews with the own attorney.

Unlike witnesses, joint plaintiffs have the right to participate with their lawyer during the entire trial. They also have the right to be present at the non-public parts of the hearings (§ 406g II Code of Criminal Procedure).

By joining the action as co-plaintiffs the victim becomes party to the proceedings. The Criminal Procedure Code endows them with special rights. Their legal position in the proceedings comes close to the legal position of the prosecution and the defence.

Both the defence and the lawyer of the joint plaintiff have to be granted full access to the files.

All examination records can be searched, as well as expert reports. Confiscated documents of the accused may be searched as well as his protective letters and seized evidence.

The inspection of the files is carried out regularly in the way that the prosecutor or the court shall send the whole file to the lawyer's office. There, the records may be completely copied.

The joint plaintiffs have the right to ask questions in examinations and to request more evidence during the evidence taking process.

Just as judges, prosecutors, defence-lawyers and the accused the joint plaintiff may interview any witnesses and experts during examination. There is also the right to introduce evidence by own motion and file petitions with respect to evidence that should be taken by the court.

If there is a concern that the court or an expert is biased, the joint plaintiff may object on grounds of interests.

Like all parties joint plaintiffs and their lawyers have the right to participate in the whole trial from the beginning to the end.

Before the court takes any procedural or merit decision, they must be heard.

The hearing must take place even in cases where there is no appealing right for the joint plaintiff. This applies, e.g. in cases in which the court and prosecutor's office make a deal with the defence to close the proceedings with or without further conditions because of a lower degree of guilt.

If such deals are discussed - joint plaintiffs will only be heard and can express their view of the case in contrast to prosecutor, defence-counsel and the accused who must give their consent to the outcome.

Notwithstanding the limited rights of joint plaintiffs in deal negotiations, with good communication skills a joint plaintiff's counsel may exercise a significant influence on the conditions of the deal by arguing that the victim's interest must be observed.

The joint plaintiff has the right to appeal Court decisions only insofar as that the accused was wholly or partly declared innocent.

If the joint plaintiff is not satisfied with the extent of the pronounced punishment, he cannot do anything against it. Insofar the legislature has not given any right to appeal. It is the clear goal of the legislator that the joint plaintiff is not granted any influence on the extent of the punishment in first place. But the counsel to the victim has the right to plead in the trial to the same extent as prosecution and defensc. So through that channel the victim may have some influence on the court's decision.

c) Special features in the criminal proceedings relating to young offenders (accused 14 to 17 years of age)

In cases of young offenders German law provides the application of a special procedural act for youths which deals with under-aged offenders only (*Jugendgerichtsgesetz* JGG). The act has the aim to emphasize the need for certain educational therapies and/or measures in order to re-socialize young people who have committed offences or crimes.

In criminal proceedings against young offenders, the law introduced the institute of a joint plaintiff relatively late, namely in 2006. It had faced fierce opposition to exercise victim rights in criminal proceedings related to youths.[2]

Due to the need of balancing the interests of victims and the goal to exercise special educational measures in cases of young offenders the legislator has restricted the right to take joint action against young offenders. It must be the case that the victim has been mentally or physically severely injured by the crime or subjected to such danger (§ 80 III JGG).

The jurisdiction assumes that these have to be consequential damages beyond the amount that is usually associated with a crime.

III. Legal representation of the injured child

a) When should a lawyer be involved?

From a lawyer's perspective, it is necessary for an effective representation of children with the right to join the action, to indicate as early as possible, that the child wants to become a joint plaintiff.

This should be done at the very beginning of the investigation. Neither the prosecution nor the court is required to report to a victim who has not made any connection statement about the progress of the proceedings. They do not have the obligation to inform the victim, that a charge has been raised nor that the proceedings have been opened.

Only in case the victim is to be heard as a witness, he learns only by receiving the summons to the main hearing that charges have been laid.

At that time, any oppportunity of influencing the trial is gone.

If there has been no notification about closing the investigation or about rejection of the court to accept the charge after the intermediate proceedings, the victim has no chance at all to object these decisions.

However, legislation allows the victim to appeal to a closing of the investigation and then the Attorney General's Office is obliged to examine again, whether the closing of the proceedings has taken place based on valid arguments.

The victim has the opportunity to point out potential sources of error after inspecting the files.

The same applies if the victim wants to turn against the rejection of the opening of the main trial.

If the closing of the proceedings during the investigation remains, the law provides for the opportunity of proceedings to force criminal prosecution, so the victim may demand impeachment at the court of appeal.

However, it should be mentioned that this is a thorny path. From the author's own experience there have been only two or three cases in the last 20 years, with only one of them leading finally to a main trial.

b) Why have a lawyer of their own?

On the disclosure of the fact that a child/adolescent was injured or abused or that it has observed such issue, a whole "industry" will start to run its automatic reflexes. Many people and institutions begin to take care of the injured or abused child. Parents or one parent, employees of the Youth Welfare Office, employees of administrative agencies, the police, the prosecution, the court ...

What need is there for a lawyer for the child's own?

If there is an allegation of sexual abuse or violence, the victim is often the one and only evidence.

The outcome of the trial depends upon the testimony of the victim.

If the accused denies the crime, he or she will defend him/herself attacking and questioning the credibility of the victim as a witness.

The various people, who take care of the injured or abused child, sometimes may have selfish interests in the outcome of the proceedings. Some want the accused to be punished, others not - driven by interests that may not be the interests of the victim.

The staff of the Youth Welfare Office must decide whether the child is at risk and needs to be taken out of the family. If there are siblings the Youth Office will also consider whether they are affected and may need to be separated from their parents.

The police want a rapid result from the investigation, the prosecution wants to enforce the state's right to inflict punishment, and the court wants a quick hearing with as little conflicts as possible.

[2] see, for example Höynk ZJJ 05.38-40 or 07 76)

The child / youth witness knows that there is a lot that depends upon its testimony. It feels responsible for the fate of his siblings or other children at risk, for the fate of his mother, and sometimes, if it is a related party, for the fate of the accused. Often the abused child / abused teen also feels guilty and believes that it has caused the deeds by is own behavior. Maybe also it is worried about what can happen to the accused in jail.

Adults often do not take the wishes or the declared will of a child witness as serious as necessary. Criminal charges will be brought up and an investigation started over the child's head. When the prosecutor or the police know about a complaint, the victim is not able to terminate the proceedings by his statement. There have to be official investigations.

Against the will of the child, a gynaecological examination can be made. Examinations take place without regard to the particular condition of the affected child.

Adults are the ones who determine the timing and the conditions.

Often it is desired that the victims give evidence at the trial in the presence of the accused. The procedural parties want to see how the defendant reacts and whether communication takes place between the victim witness and the accused.

For some under-aged witnesses, this is the main negative factor in a criminal case: the direct confrontation with the defendant. It is a burden for the child witness to know that there is a lot that depends on its testimony.

Even less than other adult legal layman the child is unable to see and understand the course of the main proceedings and the associated rituals.

A child does not know the Code of Criminal Procedure, which, as described above, gives a wide range of opportunities to avoid such a confrontation.

The legislator has therefore rightly realized that even a child or adolescent requires its own independent and professional legal representation in criminal proceedings.

The lawyer of the child will act, as in any other case, according to the needs of the client and not in the interests of other parties of the proceedings or the parents or custodians. Only the attorney has the right to inspect all files. Only the lawyer then knows which defence tactic results from the documents and how the accused is going to behave.

If a credibility report has been obtained about the question whether the information of the injured child could be based on own experience from the perspective of the expert, or whether there were suggestions, the lawyer can deal with the outcome of this review and, if necessary, explain it to the child or adolescent.

German attorneys pass the same training as prosecutors and judges. They master the instrument of the Criminal Procedure Code as well as those. Thus, they are competent companions of the injured child and can explain the roles of the other parties and their behavior.

Persons injured by sexual self-determination, human trafficking, attempted murder, attempted homicide or abuse of wards, that are not yet 16 years old, are entitled to state-paid lawyer when respective application is filed,.

Witnesses, older than 16 years, have a right to a state-paid lawyer when they are victims of a crime only.

The right arises ever since the investigation process has begun. Even before criminal charges are filed to police or prosecutor, a lawyer can be selected.

The legislator protects the child even if its legal representative (parents) is not interested in choosing a lawyer or is prevented from representing the child, because he/she is the accused, or he/she is exercising joint custody together with the accused or in cases when a conflict of interest arises.

The guardianship court may then order a court-appointed special advocate for the child or young person.

This advocate has to keep the interests of the child as it ought to have done the legal representative.

The court-appointed special advocate can decide whether the child knows about the importance of the right to refuse to give evidence and he intends to exercise it. It can give or refuse consent to medical examinations, if this is in the child's interest. Similarly, the court-appointed special advocate may hire a lawyer in the interest of the child to exercise his criminal procedural information and participation rights.

IV. Child (victim) witnesses are as different as all children are different.

There are bright, well-read children, eager for knowledge, which are able to explain to the police officer after a sexual abuse by a stranger, what DNA is and why the child thought it was important to make sure that the sock, with which it was tied, is also found at the crime scene. If such a video interrogation is played in a trial, all the parties are astonished.

Other children are mind-locked and do not want to talk about what happened, they want to be left alone, they have no interest at all in the state's criminal proceedings.

Some children know a lot, they have got their experience from television and cinema. Other children react with suspicion to strange adults and authority figures. Some do not know if they meet the expectations that are placed on them.

For a lawyer who advises and represents child witnesses, it requires an individual approach for each child as well as for each other client.

If the accused confesses the crime, it is omitted in most cases to listen to the child in person. The confession itself or a video interrogation, recorded with the police will be sufficient then in the main hearing.

The joint plaintiff representative should then, however, make sure that in the case of playing the video, the public is excluded. Classmates and their parents read the newspaper, abuse processes are often communicated to the media, and affected children will no longer dare to go to school.

If the accused denies the crime, the case will depend upon the interrogation of the child in the main hearing. Then it will be helpful to the child to visit the courtroom in advance and to have a short meeting with the presiding judge, so that the child may get an idea of the external circumstances, on how the court looks like, who is going to sit where and who is going to talk to me.

Some children are confused when the presiding judge, as required by the law, claims that questions to the witness be asked only via him.

The child can hear the prosecutor, the defence lawyer or his own lawyer formulating a question and is then already able to answer immediately. The child witness may find it peculiar to wait until the presiding judge rephrases the question.

(The habit of judges rephrasing the questions asked may also be considered peculiar by readers of this article.)

There are other children who prefer to have contact only with one person.

Some children understand why it may be useful to testify in the presence of the accused, some children become silent.

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The wellbeing of the child comes first– child victims in Swiss criminal proceedings

Jugendanwältin Anne-Catherine Hatt

Anne-Catherine Hatt

Image of interview room used by the author

Legal Background

Victimology, as a part of criminology, is a very young science. It was only after the second world war that the relations between victims and perpetrators began to be studied systematically[1]. The Swiss federal law on assistance to victims of criminal acts came into force on 1 January 1993[2]. The objective of this law was to offer effective assistance to people affected by crime and to improve their legal standing. This included: competent counselling and care, protection of victims and safeguarding of their legal rights during criminal proceedings with adequate compensation and redress. Since then the law has gone through several revisions. The most important revision concerning the wellbeing of children came into force on 1 October 2002 when a special chapter with *special provisions for the protection of children as victims in criminal procedures* was added. With the adoption of the Swiss Criminal Procedure Code (CrimPC)[3] in 2011, procedural rights have been integrated into the new law. From then on the law on assistance to victims of criminal acts has dealt only with questions of counselling and care, compensation and redress.

Special measures to protect child victims

Beside the general protective measures–which are mentioned in articles 149ff and also apply to child victims–Art. 154 CrimPC contains special measures to protect child victims from a second victimisation. These measures apply to victims if they are under 18 years of age at the time of the examination, hearing or confrontation hearing. The first examination hearing with the child must take place as quickly as possible after the incident or the notification of the complaint. This rule acknowledges the fact that the risk of undue influence on the child should be reduced to a minimum[4]. Despite this clear rule, the wellbeing of the child should nevertheless be paramount. This means that a hearing should never be arranged at an inappropriate time of day and it should always be well-prepared. The examination hearing is usually carried out by a police officer or the public prosecutor. The role of a prosecutor in Switzerland is to conduct preliminary proceedings, to pursue offences within the scope of the investigation, and where applicable bring charges and to act as prosecutor[5].

[1] Gomm, OHG-Kommentar, 2005, S. 6

[2] Law on assistance to victims (OHG), SR 312.5

[3] Strafprozessordnung (StPO), SR 312.0

[4] Wohlers, Kommentar zur Schweizerischen Strafprozessordnung, Art. 154 N.3

[5] Art. 16 CrimPC

The victim may be accompanied at all procedural hearings by a confidant[6] who can be excluded from the proceedings if this person could exert a decisive influence on the child.

If it is evident that the hearing could be a serious psychological burden for the child, the following rules have to be respected:

a. A confrontation hearing with the accused may be ordered only if the child expressly requests it or if the accused's right to be heard cannot be guaranteed in any other way.

As it is a fundamental right of the accused to be heard, criminal procedures have to provide a confrontation hearing if the accused refuses to confess. Under Art. 152 CrimPC, the authorities must ensure that the victim does not have to encounter the accused if he or she does not wish to do so, so confrontation hearings are usually conducted by videolink. The accused and his legal counsel can follow the hearing of the witness from a separate room and ask questions through the interrogator (see e below).

b. The child may not normally be interviewed more than twice during the entire proceedings.

c. A second interview may take place only if the parties were unable to exercise their rights at the first interview or the examination hearing is essential in the interests of the investigation or of the child. If possible, the child should be questioned by the same person who conducted the first interview.

Often the child is heard the first time without the accused being present. If a confrontation hearing is needed, there will be a second hearing. It is worth mentioning that it is the victim who has the right to restrict the hearings to two. If the victim agrees to be heard more then twice during the procedure, several hearings can take place. As children get tired easily it may be less stressful for the child to be questioned several times, but for a shorter length of time.

d. Examination hearings must be conducted in the presence of a specialist by an investigating officer specifically trained for this purpose. Unless a confrontation hearing is held, audio and video recordings must be made of the examination hearing.

Examination hearings may be conducted only by specifically trained police officers or prosecutors. At the University of Applied Sciences in Luzern/Switzerland a specific training programme exists for these kinds of hearings. The more vulnerable a child witness is, the more often the hearings should be taped on video recordings. This gives the public prosecutor or the judge a real feeling for how the questions were formulated and whether the child was influenced by the interrogator. They are therefore able to make up their own mind about the credibility of the witness's statements. During the hearing, the specialist (usually a child psychologist) follows the conversation and makes sure that the hearing is conducted in a child-friendly way, avoiding—as far as possible—a retraumatisation of the child.

e. The parties shall exercise their rights through the person asking the questions.

f. The person asking the questions and the specialist shall record their special observations in a report.

These measures have to be applied whenever there is concern that the hearing could cause a serious psychological burden to the child. They are usually used in cases involving any form of child abuse or violence towards children.

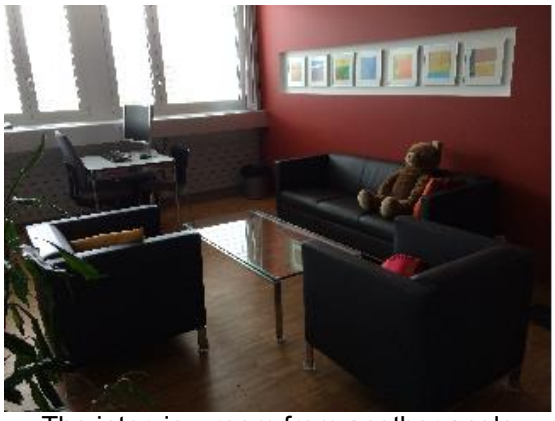
Explanatory remarks to safeguard the wellbeing of the child

The Swiss legal system does not include the method of cross-examination employed in Anglo-American trials. Evidence is usually obtained by the prosecutor during the investigation and presented to court. The right of the accused to be heard has to be respected throughout the whole investigation and in court. If direct knowledge of the evidence appears necessary in order to reach a decision, the judge must take evidence again that has already been taken in the proper manner in the preliminary proceedings[7]. Due to this legal system and the fact that the above mentioned protection measures have to be respected, it is rare that a child is heard as a witness in court in Switzerland. Therefore it is very important that the evidence is taken in the proper manner and without influence on the statement of the child.

[6] Art. 152 para 2 CrimPC

[7] Art. 343 para 3 CrimPC

Hearings of children should be conducted in a child-friendly environment. Most of the Swiss cantons have specially equipped rooms for such hearings. They are usually provided with one or two discreetly placed video cameras and microphones. The hearing can be monitored in a separate room by the accused, his legal counsel, the prosecutor (in cases where he is not questioning the child him/herself) and other people if needed (eg. the child's parents). To avoid any influence on the child's testimony it is recommended that no other person is present in the room with the child except the person questioning and–if the child wishes–by a confidant. It is not recommended that the room be furnished with toys as that will make the child want to play instead of talking to the interrogator.



The interview room from another angle

The child and its parents must be well-informed about the proceedings before the hearing. Sometimes it makes sense to meet the child in advance and to show him the location where the hearing will take place. It is also very important to discuss in advance who will be the child's confidant. It should be a person who is not involved in the case (eg. godparents, teacher). If the child feels confident with the interrogator he or she usually renounces the right to be accompanied by a confidant.

The interrogation should be held in a child-friendly and comprehensible language adapted to the child's age and mental development. Questions should be formulated in a simple and open-ended way, which should not influence the child's answer. The interrogator has to be sensitive to the child's well-being and take breaks or even stop the interrogation, as necessary.

The well-being of the child should be paramount during the whole procedure. Despite their young age, the child is a fully-fledged witness and should be treated respectfully at all times. This way a second victimisation of a child can be avoided or at least reduced to a minimum.

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Testimony from girls, boys, and adolescents who are victims of or witnesses to crimes—the "Gesell Chamber" system.

Judge Patricia Klentak

Introduction

In the Argentine Republic, there are specific rules governing the manner in which testimonies from girls, boys, and adolescents who are victims of crimes are collected through the use of the "Gesell Chamber", and other similar devices.

The **"Gesell Chamber**" consists of an area for the collection of a child's testimony, specially adapted to their age and developmental stage. A (one-way) mirrored glass makes it possible for the judge and the parties to observe the testimony from an adjacent room, to follow the development thereof as well as to suggest questions to the psychologist specialized in childhood and adolescence who leads the interview. Video-recording equipment records the testimony in order to avoid its repetition.

Background

The **origin** of this practice goes back to the works carried out by the U.S. psychologist and paediatrician Arnold Gesell (1889-1961), a child development specialist. Gesell devised the Theory of Child Development in stages, from observing and recording the behaviour of children of different ages, not making them feel any pressure due to the presence of an observer.

To that effect, he created a subdivided, double-mirrored chamber that would allow him to observe and record them at the same time, which he called the "Observation Chamber", and which is currently named after him. In Argentina, the use of the Gesell Chamber is incorporated in legal proceedings through the so-called Rosansky Law, in honour of its mentor, Carlos Rosansky, inspired by the need to incorporate a mechanism that would respect the victim.

Goals

The Gesell Chamber has the following main goals:

1. to protect the child's **right to preserve their privacy** (avoiding contact with parties) and **their health** (in a broad sense) from the psychological damage that could be sustained in an examination that does not use the tools necessary for the care of their psyche, in such a difficult moment as is the account of the facts
2. to prioritise their **higher interest**
3. to guarantee the **right to a defence** through the participation of the parties in the proceeding
4. to protect the child's **right to be informed and participate** (including the right to be heard) in the legal proceeding in which they are the victim by giving a free and unrestricted testimony.

International Regulatory Framework

The reference international regulatory framework for the application of the Gesell Chamber covers the "Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power" adopted by the Organization of American States and the "Guidelines on Justice in Matters Involving Child Victims and Witnesses of Crime" prepared by the International Bureau of Children's Rights.,Montreal (Canada).

Legal Framework in the Argentine Republic

In the Province of Buenos Aires, Section 102 *bis* of the Code of Criminal Procedure (according to Law No. 13954/2009) states that, with respect to the witness statements of girls, boys, and adolescents, when a child under the age of 16 who is a victim of any crime against his/her sexual integrity (as described in Chapter II, Title III of the Criminal Code), he or she shall be examined by a Prosecutor, a Judge, or a Court that may request the participation of a psychologist or professional specialized in child abuse, who shall ensure that the child's psychological and moral integrity is protected, and who may suggest that any questions which may cause harm should not be put.

The testimony shall be taken in a room equipped with the appropriate elements according to the child's developmental stage; this procedure –if so advised by the intervening professional- may be followed by the parties, from outside the room, through a mirrored glass, audio system, video equipment, or any other technical means available. To avoid the need of repetition of the child's testimony personally, the requirements stated in Section 274 of the Code of Criminal Procedure of the Province of Buenos Aires shall be complied with, regarding taking evidence in advance of a trial, making the video-recording of the procedure or any other means with similar features available, for its subsequent incorporation into the oral trial stage. Such records shall be confidential and may only be shown to the parties to the proceedings.

Furthermore, Section 102 *ter* of the above-mentioned Code states that when an adolescent aged 15 to 18 years, who is a victim of the crimes indicated hereinabove, is required to testify, the Prosecutor, Judge, or Court –subject to the collection of the testimony- shall require a report by a psychologist or professional specialized in child abuse on the existence of risk to the adolescent's psychophysical health in the event that they shall appear in Court. Should that be the case, the proceeding shall follow the requirements of Section 102 *bis* previously described.

Unlike the regulations governing the operation of the Gesell Chamber in the Province of Buenos Aires, in other provinces and **at a national level** it is mandatory that the interview be led by a child and adolescent specialist appointed by the Court. In no case may they be examined directly by the said court or the parties. Furthermore, a report by the intervening professional stating their conclusions is required.

Action Protocol

In conformity with the provincial law mentioned above, and for the purpose of providing guidelines for the use of the Gesell Chamber, the Supreme Court of the Province of Buenos Aires passed, through resolution No. 903/12, a "**Protocol for collecting testimonies of victims/witnesses who are boys, girls, and adolescents, as well as mentally handicapped people in a Gesell Chamber"**.

Its more relevant aspects are the following:

1. .no witness statement shall be taken at a police station from a child or adolescent but from the accompanying adult in the case of maltreatment or sexual abuse;
2. special care shall be taken as to reality distortion in the adult's statement with respect to the child's statement when the former is connected with the possible aggressor;
3. the different types of participation shall be coordinated for the fulfilment of a single medical examination of the victim, which shall be under the charge of an infant and youth physician with experience in the treatment of children who are victims of abuse. Examinations shall be carried out promptly, the parties shall be notified of the report to protect the right to a defence and prevent annulment in the future.
4. upon report of the crime notification must be given to, the child's school, the child's parents or closest relatives (unless they are involved in the reported event), the pertinent police or court authority, the children advisor and the victim assistance office.
5. such notice shall be given within 24 hours. However, it shall be given immediately when the case requires an urgent intervention due to, the absence of protection for the boy, girl, or adolescent, or in the event of domestic abuse;

6. prior to the statement being given in the Gesell Chamber, an expert shall have a psychological evaluation interview with the victim/witness, in a private environment, using a the method the professional deems suitable for the case;
7. the psychological and emotional state of the child who is a victim or witness shall be assessed, as well as their cognitive, ideational, expressive and conversational abilities according to the age and socio-cultural context to which thechild belongs;
8. -if the professional determines that the child is able to give a witness statement, the former shall inform the latter about the court proceeding, the parties, their respective functions, and the dynamics thereof according to the age and characteristics of the case;
9. the parents or adults in charge of the victim/witness shall be interviewed for the purpose of learning more about both the individual and family dynamics;
10. the expert shall prepare a written or oral report on the conclusions reached in the previous evaluation and shall inform the requesting authority, who shall in turn inform the intervening parties;
11. if it should be concluded from the evaluation that the child is able to give a witness statement, it shall be carried out as soon as possible;
12. -should the expert notice that it is convenient for the child to be directly examined in the Gesell Chamber by the prosecutor or judge in order to protect the child's psychological health, the foregoing shall be notified, stating the pertinent grounds, to the Supervisory Judge in Preliminary Proceedings, who shall settle the issue;
13. should the expert determine that the child is not able to give a witness statement, the expert shall state the pertinent grounds for such a conclusion and notify the requesting authority, and the latter shall notify the parties;
14. to the extent possible, efforts the psychological examination shall be performed on the day the testimony is collected in the Gesell Chamber, as the case may be;
15. once evidence has been admitted by the judge, the prosecutor shall fix the date and time of the hearing;
16. the parties shall be notified in advance of the date and time of the hearing so that the testimony collected in the Gesell Chamber may be incorporated into the oral trial stage through its video recording, avoiding the oral repetition of the child's testimony in the oral trial stage.
17. the Prosecutor shall notify the parties of their duty to refer the questions suggested for the future examination to the Supervisory Judge in Preliminary Proceedings so that the latter may determine if they are appropriate and establish the final list of questions, which shall be notified to the parties and the expert who will carry out the Gesell Chamber interview;
18. the room shall be duly equipped, in a stripped and neutral environment. Strident colours, ornaments, or identifications of any kind shall be avoided;
19. on the testimony day, visual contact between the child and the defendant shall be avoided;
20. the expert shall have access in advance to the list of questions for its examination so as to decide the manner to handle it and any pertinent adaptation thereof, notwithstanding any adaptation made at the time of the hearing and according to its dynamics;
21. should the accused not be legally represented, a public defender shall act, free of charge;
22. during the interview, only the expert psychologist appointed by the judge, as well as the child, shall be present, unless the professional deems it necessary to invite a responsible adult;
23. during the interview, the specialist may take breaks as he deems necessary or at the request of the judge, which breaks shall be short in duration and few in number;
24. at the request of the parties, the judge may order that new questions be asked; if so ordered, the new questions shall given to the professional during such breaks. Likewise, the judge may ask any pertinent explanatory questions, which shall also be given to the intervening professional. Any objections raised by the parties shall be resolved by the judge during such proceeding;

25. finally, the expert shall review or summarise the information provided by the child; at that time the former shall invite the latter to clarify something that is not understood or to mention any concerns. The child's questions shall be answered to clarify any doubts raised;
26. -in the event the supervisory judge in preliminary proceedings shall order, upon suggestion by the psychologist, that the child be examined and that the examination be carried out by the court authority, the latter shall be assisted and accompanied, during the interview, by the psychologist;
27. -the judge or prosecutor shall write a report, commencing with facts related to the child's daily life, allowing a free, not inquisitive storytelling to make the child feel comfortable and express themselves with confidence, avoiding direct, incisive, repeated, and biased questions leading to uncertain answers, being patient, respecting pauses, silences, avoiding emotional reactions or significant projections during the description of the abusive behaviour;
28. upon completion of the above stage, the secretary or investigating magistrate at the prosecutor's office shall write the pertinent record stating the steps taken, the intervening parties, the circumstances or statements expressed and the technological support employed in the interview;
29. -said material shall be kept in the safe box of the intervening prosecutor's office;
30. should the case be set for trial, the video recording shall be enclosed as expressly stated in the order of committal for trial;
31. the necessary measures shall be taken for the appropriate training of all professional parties in the use of the Gesell Chamber.,.

The Gesell Chamber Debate

The use of the Gesell Chamber has raised different points of discussion and concerns. Some concerns have been whether

- the nature of the proceeding is about testimony(evidence) or an expert evaluation,
-)the practice constitutes or does not constitute a violation of due process. because the equal treatment and immediacy principles are affected when it is not the judge who conducts the examination)
-)the binding nature of the standards included in the action protocol are affected and
-)the measures to be taken for the preservation of the video are acceptable.

Currently, it is general practice in the Argentine Courts, which, following the guidelines of the Convention on the Rights of the Child, recognise the dignity of the human being.

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Child witnesses in the criminal justice system of Pakistan

Abdullah Khoso

Introduction

This article explores the status of child witnesses in the Criminal and Civil Justice System of Pakistan by

- setting out two guiding laws
- reviewing judgements made by the high courts
- reporting interviews with practicing lawyers and NGO workers.

In both the criminal and civil justice systems of Pakistan, the matter of witnesses is dealt by

- Qanun-e-Shahdat Order (QSO), 1984, and
- by some provisions in the Criminal Procedure Code (CrPC) 1898.

No law provides a specific age for a child to be a witness but there are criteria and procedures for accepting the evidence of a child below 18 years of age (and of a person above 18years).

The following are details of laws that provide criteria and procedures for taking or using witnesses:

The Qanun-e-Shahdat Order (QSO), 1984:

The QSO says that every person is competent to testify in a case if acquainted with the facts and circumstances of the case, but it gives discretionary powers to the concerned Court to consider the testimony of the person the guiding principle being if the witness is able to understand questions put to him/her and able to provide rational answers to those questions. In addition, the concerned Court can consider tender age, extreme old age and the effects of diseases on both the body and mind when making a determination of competency.

A person is tested by the Court before taking his/her testimony. If the Court feels that the person for one reason or another is unable to understand questions and unable to provide facts, then that person cannot testify in the case [1]. Even a mentally disturbed person is competent to testify unless s/he is prevented by his/her mental illness from understanding the questions put to him/her and giving rational answers. The QSO provides grounds to judge a witness not based on his/her tender age but his/her ability to understand questions as well as the reason for being in the witness box. There is no precise age which determines the question of competency and his/her competency to narrate the story.[2] The admissibility of children's testimony "depends upon the sense and understanding they have of the danger and [immorality] of [lying], which is to be [determined] from their answers to the questions propounded to them by the Court".[3]

[1] Section 3 of the Qanun-e-Shahdat Order, 1984 at http://www.mumkinalliance.org/wp-content/uploads/2012/05/qanun-e-ShahadatOrder1984.pdf

[2] Shariat Court of AJ&K 1998 PCr.LJ 1680 Zatoon Bibi and another, appellant versus THE STATE, respondent

[3] Rizvi, A. (20013), Child as a witness at http://www.pljlawsite.com/2013art9.htm

The Criminal Procedure Code (CrPC) 1898:

Some provisions of the CrPC related to the evidence are applied before the application of criteria laid down in the QSO. According to the CrPC, a police officer:

> *may examine orally any person (witness, victim and accused) supposed to be acquainted with the facts and circumstances of the case, and the person is bound to answer all questions relating to such case put to him/her by the officer.*[4]

Statements made by any person to the police may be written but have not to be signed by any person. These statements are further used as evidence and submitted to the concerned court. The Court may examine statements and exclude all or any part of the statements if irrelevant to the trial or not in the interests of justice. No one will stop anyone recording a statement [given] under his/her own free will.[5]

The court concerned can record a statement or confession made in the course of an investigation or at any time afterwards before the commencement of the inquiry or trial.[6] Statements of witnesses recorded under section164 are only to be made part of the evidence in the case if they were made in the presence of the accused and if s/he had knowledge of these and was given an opportunity to cross examine the witnesses.[7]

"Witnesses are generally required to testify under oath, although children under 12 who understand the duty of speaking the truth may be permitted to give unsworn testimony. Children may also be permitted to give evidence in closed proceedings

Family court proceedings may be held either wholly or partially in private, and criminal proceedings may be closed to the public at the discretion of the judge. In civil proceedings, however, evidence must generally be given in open court."[8][9]

Examples of High Court judgements

Judgement of Sindh High Court in Karachi in 1971—evidence of a 7 year old victim

The Sindh High Court[10] dismissed the appeal against both conviction and sentence of an 18 year boy in a rape case of 7 a year old girl and upheld the sentence. The boy appealed to the Court that the case against him was fabricated and that the three child witnesses (mainly the girl victim) were used to implicate him in the false case and that they were not competent to testify in the case because of their tender ages. The two other child witnesses were 11 years and 10 years old. The Trial Court considered the girl victim's evidence to be the main evidence which was corroborated by the testimony of the other two children. In addition there was the forensic evidence of the boy's semen on his *shalwar (loose pyjamas)* and the girl's trousers. The case's details show that the girl was cross examined by the defence council, but it does not disclose how that cross examination had taken place.

Judgement of the Shariat Court Azad Jammu & Kashmir in 1998—evidence of a young girl (no age given)

In 1998 the Shariat Court[11] of AJ&K in a murder case valued a child's evidence and stated that the Trial Court before recording evidence of the child eye-witness had properly tested the child's intelligence and capability to testify.

The girl child's evidence categorically implicated her mother and a co-accused in the murder of her father. Lengthy cross examination could not discredit her testimony. [12] But this case also does not provide details about cross examination.

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4 Section 161 of the Criminal Procedure Code 1898

5 Section 162 of the CrPC

6 Section 162 of the CrPC

7 Section 244 of the CrPC

8 Child Rights International Network, Legal Briefing on Children's Rights in Pakistan at http://www.crin.org/docs/Pakistan_Legal_Status_Final.pdf

9 Evidence Order ("Qanun-e-Shahadat"), 1984, available at http://www.mpil.de/shared/data/pdf/qanun-eshahadat_order.pdf.

10 By 1971 it was not yet declared Sindh High Court

11 Islamic Court

12 Shariat Court of AJ&K 1998 PCr.LJ 1680 Zatoon Bibi and another, appellant versus THE STATE, respondent

Judgment of the Supreme Court of Pakistan in 2009—corroborated evidence of 10 and 12 year old witnesses

The Supreme Court of Pakistan in 2009 appraised witnesses of two children aged 12 years and 10 years who witnessed the murder of their father by their mother along with another man. The Supreme Court said that the Trial Court

> *"had taken all possible and due steps to judge the level of intelligence and maturity of the child witnesses before recording their statements; they gave consistent accounts of the offence and participation of their mother and her paramour in killing their father and they had no reason whatsoever for falsely implicating their mother- Eye witness evidence derived strength and corroboration from other evidence including the post-mortem report. Conviction of the accused was consequently upheld…."*.[13]

This judgement also quotes the judgement of the Lahore High Court, which states that the Court is impressed with statements made by two child witnesses.

> "*Their statements were absolutely consistent, categorical and emphatic and at the same inspired complete confidence…The medical evidence also provided complete support to these witnesses and, thus, we have found no reason for not placing a whole-hearted reliance upon their statements*…".[14]

Views from lawyers—
general practice in using child witnesses

1. "The current practice shows that complainants usually do not use a child witness in their cases so that their cases are strong and flawless. This is also recommended by lawyers and police officers to the complainants in any case", said Sajjad Cheema, a lawyer in Lahore. He further added that children can be confused, not frequently available for police/court appearance and not able to face cross examination. They are also not aware of legal technicalities. Therefore, in order to make a case fit for conviction complainants prefer to rely on adult witnesses, mainly family members and close friends who are available to attend court hearings and able to face cross examination.

Theoretically the testimony of the 7 year old girl who was raped (Karachi case above) was accepted but in practice a 7 year old and even a 17 year old child would not be considered a trustworthy witness. It is not merely because of their tender age that they cannot understand reality, distinguish between the facts, and explain the circumstances, but they also live a fantasy, dreamy and imaginative life, which, it is thought, usually overpowers their testimony. It is easy for them to be influenced, threatened and prejudiced by any person having influence upon them. The Court accepts their testimony when it is corroborated.[15]

Cheema went on to say

> *"It is common practice that a complainant will produce fake witnesses (loyal close friends and family members) to avoid relying on actual eye witnesses who they do not know".*

2 Hadi Bux Bhat, a Legal Advisor of SAHIL[16] says that it is now common practice that witnesses who are available outside the court premises are bought but in most cases, the police after taking bribes help the complainants to make a strong case with the support of adult but stable people to face court hearings for many days.

However, there are rare reported cases (as mentioned above) in which children are made witnesses. "This rarity is because the police are in a hurry and are aware of the legal complications that arise out of using children as eye witnesses" commented Raja Rafaqat, a practicing lawyer in Rawalpindi. He said that there is a possibility of children being used as witnesses if present at the scene of an incident when there were no adults such as family, school teachers, child care centre professionals available as witnesses.

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[13] 2009 SCMR 1428, Supreme Court of Pakistan; Mst. Razia alias JIA, Appellant versus THE STATE, respondent

[14] 2009 SCMR 1428, Supreme Court of Pakistan; Mst. Razia alias JIA, Appellant versus THE STATE, respondent

[15] Rizvi, A. (20013), Child as a witness at http://www.pljlawsite.com/2013art9.htm

[16] Sahil is an NGO working against child sexual abuse in Pakistan

However, Cheema added that there is a possibility that during the trial the Trial Court can summon any one including a child who might have been present at an incident and who might be called upon to give evidence if it corroborates that of other witnesses. But it all depends on the Court accepting or rejecting the child's testimony in the case.

Procedure for recording a statement or cross-examination

The QSO lays down rules on how and on what grounds an adult or child becomes a witness in a case but there are no procedures set down(or separate procedures from adults) to test a child's intelligence and understanding, to record his/her statement or to cross examined him/her. It is again at the discretion and understanding of the concerned court for laying down a procedure for recording a statement of a child witness.

Imtiaz Soomro, a practice lawyer in Islamabad and legal expert with an NGO working against child sexual abuse said that the system in Pakistan had never been challenged. He added that "other than the statement recorded by the police officer under Section 161 of the CrPC, all statements have to be recorded in the Court, in the presence of the judge and accused. There is also no **fixed** procedure for recording the statements of victims, witnesses and accused. However as a matter of routine most judges are aware about the nature of cases and the procedures required to provide privacy to people (including children) who come to testify in a case.

In 2013, the **Supreme Court of Pakistan** in its judgment[17] set down new guidelines for the judicial, police and other authorities in matters of investigation and prosecution of all rape cases. Four of those are related to dealing with female victims and the recording of their statements. The Court said that

1. as soon as the victim is composed, her statement should be recorded preferably by a female Magistrate;
2. trials for rape should be conducted in camera and after regular court hours;
3. during a rape trial, screens or other arrangements should be made available so that victims and vulnerable witnesses do not have to face the accused persons; and that
4. evidence of rape victims should be recorded, in appropriate cases, through video conferencing so that the victims, particularly **juvenile victims**, do not need to be present in the court.

Analysis and recommendations

In law and in the face of court, the child witness has significant value but the child's evidence is assessed with care and caution because the evidence of a child witness is considered a delicate matter; the complainants and accused hardly rely on child witnesses, and the concerned courts also hardly rely on them unless corroborated which means if the child is speaking the truth and is not corroborated either by proper witnesses or by artificially constructed witnesses(by opportunists and complainants) then a child's evidence/statement will not be taken into consideration. An environment has been created by opportunists (rented witnesses) including lawyers waiting outside the court, and also through poor police performance that does not properly deal with cases and collect relevant evidence and bring proper witnesses.

The above courts' judgments and points of views of lawyers show that the law and the Court do not consider the factor of age but the intelligence and competency of the child witness in the circumstances of the case. A child is a competent witness provided the court thinks him/her to be so by testing his/her ability to give evidence.

Excepting for the Supreme Court's guidelines[18], there are no special procedures laid down to test the child's ability and record his/her statement, but it depends on the court concerned to adopt procedures as per the nature of the offence. Police procedures before a case goes to court rarely maintain the dignity of the victims, witnesses and accused.

[17] 2013 SCMR 203: Salman Akram Raja vs. Government of Punjab

[18] Even the Supreme Court's guidelines are limited to only females but can be applied on children too.

This brief analysis shows that generally legislative framework to govern the area of witnesses is weak but in specific children's evidence is the most ignored and neglected.

There is a dire need to improve legislation to provide a detailed, safe and secure procedure to engage children while testing their competency and ability and recording their statements in all cases. In addition reforms are needed to improve police and prosecution practices so that they do not avoid having children as witnesses in cases where it is appropriate to do so. In one sense, avoiding having children give evidence is good because it will save children from court complications and the risks that appear during a trial; but on the other hand, trusting children gives them not only confidence but the right to be recognized and acknowledged i.e. the right to be heard.

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Introduction

Bangladesh's Children Act 2013 came into force on 21 August 2013. It seeks to implement the State's obligations under the UN Convention on the Rights of the Child (CRC) It also reflects other international guidance, such as the Beijing Rules[1], as well as our own Supreme Court's directives.

The Act is a special law, with overriding effect.[2] Anyone aged below 18 years is a child.[3]

The Act replaces the Children Act 1974 and includes many new provisions as outlined below. These deal with children both in *conflict* and in *contact* with the law and with disadvantaged children and introduce many new procedures, including diversion, family conferencing, alternative care and dispute resolution[4].

1. Probation Officers[5]

The government is to appoint one or more Probation Officers (PO) in every administrative district. Their duties will include communicating and co-ordinating with the police about cases or complaints, tracing a child's parents, assessing the possibility of bail with the Child Affairs Police Officer (CAPO), undertaking a diversion process where applicable or, where diversion or bail are not possible, placing the child in a safe home before production in court.

The PO's duties also include dealing with children in *contact* or in *conflict* with the law brought before the Children's Court—supporting the child; submitting an inquiry report about the child's condition and surroundings; ensuring legal representation for the child; and being present during the trial. The PO is also required to put in motion any diversion or alternative care processes for children who are sent to a Child Development Centre (CDC) or certified institute.

2. Child Welfare Boards

Child Welfare Boards (CWB) are to be established at national, district and sub-district levels. With the PO, the CWB is mandated to determine the appropriate method of care, taking into account the best interests of the child. Where the Board feels that it is necessary to remove a child from the child's parents or anyone else responsible for the child's care and control, then it may refer the matter to the Children's Court.[6]

The National CWB has a mandate to issue guidelines and directives and to advise the government on obtaining gender-disaggregated data regarding disadvantaged children and those in contact or in conflict with the law. The National Board has only supervisory powers, while the District and sub–district Boards have more practical functions in respect of disadvantaged children and children in *contact* with the law. These start after children are sent to a Child Development Centre (CDC) or certified institute. It appears that the District Boards will not have any function to do with children in *conflict* with the law, so it is not clear what their function is in visiting prisons.

[1] The United Nations Standard Minimum Rules for the Administration of Juvenile Justice, 1985 (Beijing Rules).

[2] See section 3 of the Act.

[3] Section 4, *ibid.*

[4] Section 95 of the Act provides that the government may make rules for carrying out the purpose of the Act. Many of the newly introduced concepts require the framing of Rules for their implementation.

[5] Section 5, *ibid.*

[6] Section 94 of the Act.

The Boards will deal primarily with children who are disadvantaged or in *contact* with the law (and their care). They have no function in adjudicating allegations against children in *conflict* with the law. Hence, there is no independent non-judicial forum as contemplated by the CRC to deal with children in *conflict* with the law.

3. Child Affairs Desks in police stations[7]

Child Affairs Desks headed by a *Child Affairs Police Officer*[8] (CAPO), are to be established; with female officers given priority in appointing CAPOs.

The CAPO has authority to determine the age of the child either on the basis of a birth certificate or other reliable evidence[9].

After consulting the PO, the CAPO may implement diversion processes regarding the allegations brought against the child, and consider bail.

4. Children's Courts[10]

At least one *Children's Court* is to be established in every district headquarters and in every metropolitan area, presided over by an Additional Sessions Judge and with exclusive jurisdiction to try all cases where children are in *conflict* or in *contact* with the law.[11]

If an adult and a child are alleged to have committed an offence together, there will be a separate charge sheet for the child. Both trials will take place in the Children's Court on the same date, one after the other.

The sittings must take place in an ordinary room without a witness box or podium[12] and the lawyers, police or any other officials must not wear any professional or official uniform.[13] The court may not use terms such as "offender", "convicted" or "sentenced" in relation to children. Instead, the terms "a person found guilty of an offence", "a finding of guilt", or "an order made upon such findings" or other synonyms the court deems appropriate should be used.[14]

If the person accused of an offence was below 18 years of age on the date the offence was committed, the case will be dealt with under the provisions of this Act[15]. Some other recommendations made by the High Court[16] have been incorporated in the new law, for example: the provision of legal aid, victim/witness protection, and on the exploitation of children by adult criminals etc.

The Children's Court will determine age by calling for relevant documents, registers, information or statements from any person or institute.

5. Participation of children in court proceedings

Following article 12 of the CRC, the Act provides for every child's right to participate in person at all stages of the trial.[17]

Keeping the child in safe custody before or during the trial shall be considered as a last resort and should be for the shortest possible period of time, and any such child shall be dealt with by way of diversion within the shortest possible time.[18] The child shall be sent to a certified institute situated within a reasonable distance and kept separate from older children staying in that institute.

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[7] Section 13 of the Act.

[8] Section 14, *ibid.*

[9] Section 14(c), *ibid*

[10] Section 16, *ibid.*

[11] According to section 2(4) of the Act, a child in *contact* with the law includes a child who is a victim of or a witness to an offence under any existing law, and all cases involving such a child will be tried in the Children's Court. However, under the *Nari O Shishu Nirjatan Daman Ain 2000* or the *Acid Aporadh Daman Ain 2002*, the Tribunals set up under those statutes retain jurisdiction to hear all matters under those laws and where any accused under those statutes is a child then that law provides that s/he will be tried in the relevant Tribunal in accordance with the provisions of the Children Act, 1974. These provisions have not been repealed or amended by the Children Act, 2013.
Arguably, children involved in matrimonial proceedings, where matters of their guardianship, custody, parental access, maintenance etc. are in issue, are also children in contact with the law. Where parents are separated and the place of residence of the child has to be decided, then article 9 of the CRC applies. Article 12 provides that the child shall be provided the opportunity to be heard in any judicial and administrative proceedings. This would include proceedings in the Family Court. The definition of the child in contact with the law in section 2(4) read with sections 17 and 22 of the Act appear to exclude proceedings other than those in criminal matters.

[12] Section 17(4), *ibid.*

[13] Section 19(4) of the Act

[14] Section 36, *ibid.*

[15] Section 20, *ibid.* This follows the recommendation in *Roushan Mondal* thus taking away the anomalous situation mentioned there. Previously the Appellate Division had held that the relevant date was the date of framing the charge.

[16] in *The State v. Secretary, Ministry of Law, Justice and Parliamentary Affairs (2009)*

[17] Section 22 of the Act.

[18] Section 26, *ibid.*

Reporting restrictions mean that in any trial before the Children's Court involving a child (even as a witness), no photograph or description of the child shall be published in any print or electronic medium or through the internet if it directly or indirectly identifies him/her, unless it is apparent to the court that such publicity will not be harmful to the child's interests[19]

The Court has the power to refer suspected cases of carelessness or negligence on behalf of POs or CAPOs to the relevant authority.

6. Legal representation

No court shall proceed with a trial without legal representation for a child in conflict/ contact with the law.[20] If a legal representative is not appointed, then the Children's Court shall appoint a lawyer to conduct the case,[21] who must be present at every hearing, failing which the court shall adjourn until another lawyer has been engaged.

***7.* Matters to be considered**

When making any order under this Act the Children's Court shall consider the child's age and gender; physical and mental condition; qualification and level of education; social, cultural and ethnic background; family's financial condition; the lifestyle of the child and his family; reasons for commission of the offence; information regarding gang formation and overall background and surrounding circumstances; the child's opinion; social enquiry report and other factors that are relevant to the best interests of the child and his or her correction.

8. Social inquiry report

The PO must submit to court a confidential social enquiry report, with a copy to the nearest Board and Department.[22] This should include, among other things, a description of the child's family, social, cultural, financial, psychological, ethnic and educational background and also the condition and locality in which the child lives, as well as the circumstances under which the offence was committed.[23]

9. Timeframe

The Children's Court must complete any trial within 360 days from the day of the child's first appearance in court, failing which the Court may extend the deadline by another 60 days, giving reasons. Daily hearings must be held without a break. If the trial does not end within the extended time, the child shall be discharged if the allegation is of a minor offence and does not involve murder, rape, robbery, dacoity, drug-dealing or any other serious offence. But the trial of an adult shall continue if s/he was being tried jointly with the child.[24]

10. Settlement of disputes

If a child has committed an offence of lesser gravity, the court may direct the PO to take steps to settle the dispute with the participation of people from the community. The process shall be concluded expeditiously and on being informed of the result the Children's Court will make the necessary orders.[25]

11. Orders upon finding of guilt

i) Restrictions on punishment

No child shall be sentenced to death, imprisonment for life or imprisonment.[26] However, for serious offences, if the court considers that the legal punishment is not sufficient, or if the court is satisfied that the child is so unruly or of such depraved character that he cannot be sent to a certified institute, and no alternative methods would be suitable, then the court may sentence her/him to imprisonment. He may be detained in a certified institute instead of prison until he is 18. If a child is sentenced to imprisonment, s/he will not be allowed to associate with any adult prisoners.[27]

ii) Detention Orders

The Children's Court may order a child to be discharged after due warning or may order his release on probation subject to good conduct.[28] The PO will supervise this, or the child's carer may take care of him/her[29] for up to 3 years on condition that they are responsible for his/her good behaviour.[30]

[19] Section 28, *ibid.*
[20] Section 55(1), *ibid.*
[21] Section 55(3), *ibid.*
[22] Section 31, *ibid.*
[23] Section 31(2), *ibid.*
[24] Section 32, *ibid.*
[25] Section 37 *ibid.*
[26] Section 33(1) *ibid.*
[27] Section 33, *ibid.*
[28] Section 34(6), *ibid.*
[29] Section 34(7), *ibid.*
[30] Section 34(7), *ibid.*

Where a child is found to have committed an offence punishable with death or imprisonment for life, the Children's Court may order her/him to be detained in a CDC for not less than 3 and not more than 10 years. For any other offence, the child may be ordered to be detained in a CDC for up to 3 years.[31]

If the behaviour and character of the child changes positively and s/he has not been charged with a serious offence, steps may be taken for her/his release once s/he reaches 18.[32] If a child is charged with a serious offence, then on reaching 18 years, if the case is still under trial, s/he may, with the approval of the Children's Court, be transferred by the CDC to Jail,[33] but kept in a ward separate from convicted prisoners or prisoners undergoing trial.[34] If a child is above 18 when the trial finishes and is found guilty, the Children's Court shall send her/him directly to the Central or District Jail.[35]

iii) Periodic review and release

The court shall mention within every order that it may be reviewed periodically and it may release a child with or without attaching conditions.[36]

The government may release a child from a CDC or certified institute with or without conditions on considering a recommendation by the CDC or institute. Alternatively, it may refer the matter to the National Board for recommendations.[37]

12. Removal of disqualification upon conviction

Children found guilty of an offence are not subject to the provisions for reoffenders such as suffering a higher subsequent sentence or being disqualified from government office or election.[38]

13. Appeals or revisions

Appeals **or revisional applications** from orders of the Children's Court lie before the High Court and must be brought within 60 days from the date of the judgement and disposed of within 60 days from filing.[39]

14. Arrest, investigation, diversion and bail

No child below the age of 9 years may be arrested or detained.[40]

When a child is arrested, the police officer concerned must inform the CAPO of the reasons, the place and details of the allegations, determine the age based on the birth or school certificate or school register and note this in the records. In the absence of any such evidence, the arrestee may be treated as a child if the police officer so considers. No child shall be handcuffed or tied with a rope around his waist. If there is no safe place in the Police Station, the child should be held in a safe home until produced in court. While there, the child shall not be kept with adults or any convicted child offender or any child in contact with the law.[41]

The CAPO shall inform the parents or carer, PO and CWB once an arrested child is brought to a police station, failing which the CAPO must submit a report to court with reasons when the child first appears there.[42]

The CAPO shall record the child's statement in the presence of a parent, carer, PO or social worker,[43] and may release the child after warning or use diversionary measures.[44]

Diversionary measures may be applied at any time after arrest and during the trial. The case may be sent to the PO for that purpose and he will see that the parents or carers comply with the conditions. The Social Welfare Department is mandated to adopt programmes to implement diversionary measures.[45]

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[31] Section 34, *ibid.*

[32] Section 34(2), *ibid.*

[33] Section 34(3), *ibid.*

[34] Section 34(4), *ibid.*

[35] Section 34(5), *ibid.*

[36] Section 35, *ibid.*

[37] Section 35(2), *ibid.*

[38] See section 75 Penal Code 1860, section 565 Code of Criminal Procedure, 1898 and section 43 Children Act, 2013.

[39] Section 41, *ibid.*

[40] Section 44(1) of the Act

[41] Section 44, *ibid.*.

[42] Section 45, *ibid.*

[43] 'Social Worker' is defined in section 2(21), a Social Worker under the Department or the Union of Municipal Social Workers working under the Department or Aunty (Khalamma), or Senior (Boro Bhaia) or any other employee of similar position, who is tasked/concerned with services for children.

[44] Section 47 of the Act.

[45] Section 48, *ibid.*.

The PO may arrange a family conference to resolve any dispute. Participants may adopt any programme in the best interests of the child and shall inform the Children's Court and where appropriate the CAPO. When a child is being referred for diversion the Court or the CAPO may specify the need for a family conference and the PO will organize it accordingly. If no consensual decision is reached, the conference will be abandoned and the court or CAPO informed so as to adopt different diversionary measures. The family conference is confidential and discussions about it cannot be admitted in evidence in any court.[46]

If the Children's Court or the CAPO consider on receiving the PO's report or otherwise that the child, or carers have failed to comply with a diversionary order, they may make a similar order with new conditions; issue a warrant for the arrest of the child; send a written notice for attendance in court or the police station; send the case file to the Public Prosecutor to initiate a trial; or send the child to a certified institute.[47]

After arrest, if a child is not released, referred to diversion or brought before a court, the CAPO may release the child on bail, whether the offence is bailable or non-bailable,[48] with or without conditions or surety under the supervision of the child's parents, carer or PO.[49] Bail cannot be granted if the offence alleged is serious or would be against the child's best interests or if there is apprehension that the child might come into contact with any notorious criminal, be exposed to moral risk or that the course of justice will be perverted.[50]

A child not released on bail shall be produced before the nearest Children's Court within 24 hours,[51] which shall either release him on bail or order his custody/detention in a safe home or CDC.[52] The Children's Court must give its reasons if bail is refused.

15. Child victims or witnesses

In the case of a child in *contact* with the law (ie a victim of or witness to a criminal offence), the CAPO, PO or Social Worker must make arrangements for the child's overall safety.[53] The CAPO shall interview the child in a child-friendly environment. A female child shall be interviewed by a female police officer in the presence of her parents or carers and a PO in whose presence she feels comfortable and is willing to be interviewed.[54]

Steps may be taken to prevent direct contact between the victim/witness and the accused, to provide security through the police or others and keep the child's whereabouts secret. Application may be made to the court or police for adequate security for both the child and her/his family.[55]

Considering the best interests of the child, the Children's Court may make an order to ensure her/his safety and confidentiality; to maintain secrecy of all related information; to prevent disclosure of the identity, photographs or descriptions of the child; and to keep the child behind a screen when giving evidence. Her/his evidence may be given through previously recorded video recordings or by video linkage, when available, in the presence of the lawyer for the accused who will be given the opportunity to cross-examine the child.[56]

In a case involving a child victim or witness, the court may make an order for alternative dispute resolution, provided that is in the child's best interests.[57]

On an application or *suo motu* the Children's Court may order compensation to be paid to a child victim either as a lump sum or instalments to be used for the child's welfare.[58]

[46] Section 49, *ibid.*
[47] Section 51, *ibid.*
[48] Section 52(2), *ibid.*
[49] Section 52(1), *ibid.*
[50] Section 52(3), *ibid.*
[51] Section 52(4), *ibid.*
[52] Section 52(5), *ibid.*
[53] Section 53, *ibid.*
[54] Section 54(2), *ibid.*
[55] Section 58, *ibid.*
[56] Section 54(3), *ibid.*
[57] Section 54(4) of the Act.
[58] Section 38, *ibid.*.

Where the person found guilty of committing an offence against a child is also a child, the court may order compensation to be paid to the victim by the parents or carers if they can be traced, are financially solvent and if they had instigated the child to commit the offence through their neglect.[59] If they cannot pay the compensation, the convicted child may not be sent to prison for that reason alone.[60]

16. Offences against children

The new law criminalises certain activities involving children, including cruelty to a child, engaging a child in begging, being drunk while in charge of a child, giving intoxicating liquor or harmful medicine to a child, permitting a child to enter places where liquor or dangerous drugs are sold, inciting a child to bet or borrow, taking articles from a child on pledge, allowing a child to be in a brothel or leading or encouraging a child to immoral activity.

Other activities that have been made offences include using a child for carrying fire arms, illegal or banned articles or for committing terrorist activities; exploitation of a child; confining a child or living off a child's earnings. Anyone who enjoys the gains made as a result of exploitation is liable as an abettor.[61]

If the court finds on complaint from any person that a child is being led on an immoral path or is exposed to the risk of prostitution it may direct the parents or carers to enter into a recognizance to exercise due care and supervision in respect of the child.[62]

The Act also lays down a penalty for abetting the escape of a child from a certified institute, safe home or the custody of anyone with responsibility for alternative care; or harbouring or concealing the child after escape; or preventing their return.

17. Disadvantaged children

A child will be considered as *disadvantaged* where either or both her/his parents are dead, or who is without a legal guardian, or is homeless or lacks means of livelihood, or is engaged in begging or in any activity against the interest of the child, or who is dependent on parents who are in prison or who is living in a prison with the mother undergoing imprisonment, or who is a victim of sexual assault or harassment, or who is staying with a person who is a prostitute or engaged in anti-social or anti-State activities, or who is disabled, or who has a behavioural disorder caused by drugs or any other reason, or who has fallen into bad company or may face moral degradation or is under the risk of entering into the criminal world, or who is living in a slum, or who is living on the street, or who is effeminate (hijra), or who is a gipsy or Harijan ('low caste' Hindu), or who is affected with HIV/AIDS or who is considered by the Children's Court or the CWB to be in need of special protection, care and development.

A Police officer who receives a disadvantaged child or a child in contact/conflict with the law or information about such a child shall send the child to the CAPO who will deal with the child in accordance with this Act and send a disadvantaged child to the Department to take steps for her/his care.[63]

On receiving a child under this Act, a PO or Social Worker shall place the child in an institute or safe home, assess him and take necessary measures to ensure his overall development.[64]

To ensure the child's best interests the PO shall forward all information received by him to the relevant CWB with a copy to the Director General of the Department. The District CWB shall review the information and make recommendations to the relevant authority for the overall welfare of the child.[65] If the Board is satisfied that it is in its best interests for the child to be removed from his or her parents or carer then it may refer the matter to the Children's Court.

Any children disobedient towards their parents who are kept in the CDC or certified institute shall be returned to their parents or guardian immediately after the expiry of the period for which they were detained.[66]

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[59] Section 39, *ibid.*
[60] Section 39. *ibid.*
[61] Section 80, *ibid.*
[62] Section 78(2), *ibid.*
[63] Section 91, *ibid.*
[64] Section 92, *ibid.*
[65] Section 93, *ibid.*
[66] Section 100(2), *ibid*

18. Child Development Centres and certified institutes

The government is to establish and maintain CDCs based on gender segregation for the accommodation, rehabilitation and development of children who are ordered to be detained and those who are undergoing trial.[67] Existing institutes may be certified as suitable.[68] Private institutes may be set up with government permission.[69] Certified institutes are mandated to protect the best interests of every child staying there and to ensure their proper behaviour and appropriate education including vocational training.[70]

19. Alternative care

The CWB or the PO shall determine the most suitable alternative care for the child, considering her/his best interests.[71]

Alternative care may be short or long term. Parents will have priority regarding care of disadvantaged children and children in contact with the law, followed by the extended family or any fit person within the community. If the parents are divorced or separated, the child's opinion will be considered.

If it becomes apparent that the parents may engage the child in immoral or illegal activity, then, until there is a change in their circumstances, the child may be placed in an institute. The government may rehabilitate the parents in order to reintegrate the child with them.[72]

Failing parental or non-institutional care, the Department shall provide institutional care in a government children's home or other institute.[73]

The Department shall support the alternative care system through counselling or training and financial or other support for the livelihood of the parents or carers.

The PO shall periodically review the care arrangements, considering the opinion of the child and its family, and regularly observe the child's alternative care and inform the Welfare Board or Department.

Rules

The government may make Rules to implement this Act[74] and, in cases of ambiguity, may issue clarification in the official Gazette.[75] The government may take measures under the Rules for ensuring special protection, care and development of disadvantaged children.[76]

Conclusion

The Children Act 2013 finally came into being seven years after the High Court's recommendation in *Roushan Mondal*.[77] Many aspects of children's vulnerability such as rights of children in jail with their mothers, rights of children whose parent(s) or guardian is sentenced to a term of imprisonment, children who are used in criminal activities such as breaking into property for facilitating the entry of adult criminals for the purpose of theft or dacoity or the consequence of using children as pick-pockets or hijackers, enticing children into taking part in political demonstrations and picketing and acts of vandalism etc. and those involved in civil and domestic violence proceedings could be covered by this new legislation, which would be beneficial to the children of Bangladesh.

At present the most important tasks before the government are: establishing the Children's Courts, setting up the Child Affairs Desks and appointing CAPOs and POs, establishing enough safe homes and certified institutes, and framing Rules for the detailed running of the whole system.

Without Rules the new concepts of diversion, family conferencing, alternative care and dispute resolution cannot be put into practice. Training for all those involved in the child justice system is a key factor. A holistic approach is needed. It is critical to ensure that children's rights under the Constitution and international law are safeguarded and ensured.

I would like to thank UNICEF Bangladesh and Dr Ridwanul Hoque for help in preparing this paper.

The Hon Justice M Imman Ali* is a Justice in the Appellate Division of the Supreme Court of Bangladesh.

[67] Section 59(1), *ibid.*
[68] Section 59(2), *ibid.*
[69] Section 60, *ibid.*
[70] Section 63, *ibid.*
[71] Section 86, *ibid.*
[72] Section 84 of the Act
[73] Section 85, *ibid.*
[74] Section 96, *ibid.*
[75] Section 97, *ibid.*
[76] Section 89, *ibid.*.
[77] See note 20 above.

Macedonian Juvenile Justice—— The new Law on Justice for Children

Dr Aleksandra Deanoska–Trendafilova

Introduction. On October 29th, 2013, the Parliament of the Republic of Macedonia adopted new juvenile justice legislation -- the Law on Justice for Children[1]. This Law replaced the Law on Juvenile Justice, which was adopted in 2007 and implemented in 2009. Shortly after the beginning of its implementation a new Law on Criminal procedure was adopted that dramatically changed the earlier criminal proceedings model, particularly in the area of investigation. This issue was also essentially linked to juvenile justice legislation since it refers often to the provisions of the Criminal Code and Law on Criminal Procedure. The Law on Justice for Children was implemented on 1.12.2013, together with the initial application of the Criminal Procedure Code of 2010 whose application was repeatedly postponed.

The Law on Justice for Children is multi-dimensional. It consists of substantive and procedural criminal law provisions, provisions on protection of child-witnesses and especially provisions on protection of and procedures to be followed with child-victims. Therefore, it has restorative, correctional, protective and preventive dimensions.

It is important to stress that the Law does not operate with the expression "children who have committed criminal offences and misdemeanours" but instead with the expression "children who have committed acts that by law are considered as criminal offences and misdemeanours". It is a consequence of the Macedonian legal doctrinal position that children cannot be classically liable as perpetrators of crime. This is due to their age and limited capability to understand their actions, and therefore society should not punish them, but rather help and protect them from further conditions and factors that brought them to such behaviours.

Therefore, the Law manages the treatment of children at risk and children who have committed acts that by law are considered as criminal offences and misdemeanours. Further, it determines the conditions for

- the application of measures of assistance, care and protection,
- educational and alternative measures,
- the punishment of children and young adults,
- the position, role and powers of the bodies participating in the treatment of children and implementation of sanctions, educational measures, alternative sanctions etc.

This Law operates with many terms that are defined according to the meaning of the provisions of the Convention on the Rights of the Child and relevant European acts. They are the following: child, child at risk, children at risk up to 14 years, children at risk from 14 to 18 years, children in conflict with the law from 14 to 16 years, children in conflict with the law over 16 years, child victim, younger adult, measures (considered as measures of assistance and protection), sanctions, competent court - in the sense of a judge for children and judicial council for children, other specialized organs--Centres for social work, Public Prosecution, Ministry of Internal Affairs and Institutions for execution of sanctions on children, parents and family or guardians etc.

[1] The Law is available in the Macedonian language at: http://www.pravo.org.mk/documentDetail.php?id=6690 .

The Law regulates the procedures for children, measures of assistance and protection provided for children under the age of 14 years, as well as for children at risk. This is so, due to the provision of the Law that envisages that no sanctions can be applied against children that at the time of committing the act are aged under 14. The measures of assistance and protection envisaged for children under 14 and children at risk aged above 14 consist of measures of educational, health, social, family and other types of protection.

System of sanctions for children.
The system of sanctions for children who committed acts that according to the criminal legislation constitute crimes consists of the following:

- educational measures,
- punishments,
- alternative measures,
- security measures, etc.

The sanctions are for juvenile offenders aged over 14 years.

Children aged 14 to 16 years may be sentenced only by educational measures (reprimand, referral to a child centre, measure of increased supervision by parents/ guardians, measures of intensified supervision by the centre etc.).

Punishments may be pronounced on children over the age of 16 and it is allowed only if due to the severe consequences of the crime committed and the high degree of criminal responsibility, it would not be justified to impose educational measures.

The following penalties may be imposed on a **child over the age of 16**, under the conditions specified in the Law:

- imprisonment,
- fine (exceptional),
- prohibition of driving a motor vehicle of a particular type or category,
- deportation of a foreigner from the country.

Imprisonment for children can only be imposed as a sentence if a child over the age of 16 has committed an act, which the Law provides is a criminal offence and for which a prison sentence of five years or a more severe punishment is prescribed. If the offence is committed under the circumstances mentioned above its duration is prescribed from one to ten years, and it can be pronounced in half or full years. In determining the sentence for a child over 16 the court may only impose a prison sentence of a length commensurate with the punishment prescribed for that offence; the court is not bound by the smallest prescribed measure of that sentence. This means that the judge can go below the special minimum.
Children aged **over 16 years** may also be sentenced with the following alternative measures:

- probation with supervision,
- conditional termination of the proceedings against the child and
- community service.
- Security measures may also be used for juvenile delinquents. They are regulated in the Criminal Code. The Law on Justice for Children refers to them. They are:
- mandatory psychiatric treatment in a health institution,
- mandatory psychiatric treatment while free and
- mandatory treatment of alcoholics and drug - addicts.

The criminal law allows confiscation of assets and property and items obtained through criminal actions in accordance with the general requirements set out in the Criminal Code. It applies to all ages and all types of crime. Its essence is that what is criminally obtained cannot be kept by the offender.
Sanctions for misdemeanours committed **by children aged 14 to 16 years** are the following:

- educational measures
- reprimand,
- measures of increased supervision by parents/ guardians,
- measures of intensified supervision by the child centre.

The Law also allows for an adult person aged **under 21 but over 18** to be prosecuted for a crime committed as a child 14 to 18 years of age under the rules provided for children if the legally provided circumstances justify such treatment (circumstances of the case, especially the type of the offence, the time elapsed since its execution, the behaviour of the offender etc.). So an adult person at the time of trial aged less than 21 years may be sentenced to probation.

Procedures for juvenile offenders.

The Law elaborates in detail the procedure

- for the application of measures of deterrence,
- for the process of mediation,
- for the criminal procedure against children etc.

The procedure for measures of deterrence is usually applied when the committed action constitutes by law, a, so called, "less serious crime". The decision is made by the public prosecutor.

The process of mediation is possible for actions that constitute crimes for which the Criminal Code prescribes imprisonment of up to 5 years.

Regarding the court procedure for child offenders, the Law mainly refers to the provisions of the Law on Criminal Procedure. The Law on Justice for Children elaborates in detail the specific characteristics of court procedure, pointing out the rights of the accused children, the enhanced procedural protection for children, the right to a defence lawyer, free legal aid if necessary and more detailed provisions regarding the possibility of application of the different forms of deprivation of liberty of the child. Plea bargaining is also a possibility

Protection of Children–victims and witnesses of an offence.

A special Chapter in the Law on Justice for Children covers the protection of child victims of crime and child witnesses in criminal proceedings.

The child victim and the child witness have the following rights:

- to be treated with respect for their dignity,
- to be protected from any discrimination,
- to be informed of their rights in a language understandable and appropriate to his age,
- respect for their right to privacy,
- to get special protection for his safety and the safety of his family,
- to care and attention from the authorities and entities that participate in criminal proceedings,
- to special protection from secondary victimization or re-victimization and
- to psychological and other professional help and support from the authorities, institutions and organizations to help child victims of crimes[2].

Furthermore, child victims have the right that their parents or guardians are informed about all questions relating to the crime as well as about the suspect, the accused and the convicted and to participate in criminal proceedings as a damaged party and to join the criminal prosecution and to claim for damages.

The child victim and the child witness have the right to special procedural protection at all stages of the criminal procedure. Thus, according to art.145 of the Law, a child is entitled to legal aid from a specially trained attorney before giving a statement to the police in a criminal investigation/procedure, when

- the child-victim is in need of special assistance and protection and
- if he/she is victim of child trafficking, violence or act of sexual abuse.

A statement by a child will be audio and video recorded and further used in a criminal procedure. *In exceptional cases, when new circumstances appear, the court may take a statement or interrogate the child only one more time using technical means of communication*. This means that a child could be faced with the process of interrogation only twice in the procedure.

The following special procedural measures for protection of the child victim and the child witness during the process of giving a statement (evidence) in court are possible:

- using monitors for protection of the victim from the looks of the accused,
- giving a statement via videoconference,
- exclusion of the public,
- giving audio and video registered statement and interrogation,
- taking a statement via a professionally trained person, and
- using technical means of communication etc. (art.147)

[2] The Law does not specify at which stage in legal proceedings psychological/psychiatric help is available. It may be covered in subsequent by-laws

In all the criminal cases where the victims are children *only specially trained persons from the police, public prosecution office and the courts,* may be involved in the procedures (art.148).

The fronting (facing) between the child and the suspect/accused is **forbidden** in cases where the child is the victim of the offences mentioned above (child trafficking, violence, sexual abuse and other crimes).

The Law strictly points out that all these solutions are provided in order to ensure that the procedure will not have a negative impact on the personal development of the child.

Short review of the amendments to the Criminal code to further child protection.
In January, 2014, new amendments to the Criminal Code[3] were adopted. Beside the other interventions, there are several that directly aim to contribute to the child protection objective through increased sentencing provision--the maximum prison sentence has been raised for sexual abuse offences (eg immorality and where a person has no freedom of movement) especially where the victim is a child. In almost all these cases the prescribed sentence is a minimum of 10 years imprisonment. Additionally, a new security measure has been introduced in the system of sanctions for the perpetrators of the criminal offence of sexual violence against a child – popularly called chemical castration, officially named: medical-pharmacological treatment. Despite the expected preventive action, this measure has been widely criticized because of its controversial nature: the therapy is usually hormonal and is applied after the prison sentence has been served (i.e. used on older persons, who will have served a minimum of 12 years imprisonment and maybe life imprisonment). The 'treatment' can have very negative impact on the convict's health and remaining life.

Back in 2012, Macedonia introduced a Law providing for a Special Register of persons convicted for the criminal offences of sexual abuse of juveniles, paedophilia and child trafficking.[4]

Prevention of child delinquency is another aspect of the new Law on Justice for Children. The State Council and the Municipality Councils have the responsibility for developing and putting in place strategies, programmes, studies and initiatives at both the national and local level for the protection of children and prevention of delinquency.

Concluding remarks. According to the legal experts, the new Law on Justice for Children does not bring substantial and significant changes. However, as well as harmonization with European standards and the standards set up in the Convention on the Protection of a Child, it does aim to solve problems

- by implementing free legal aid which involves putting in place a workable mechanism for financing it for juveniles where the family is unable to bear the costs of a case;
- with more precise provisions relating to summons, arrest and detention of children at a police station. For example, when a child is detained before trial, he is guaranteed and the law provides for
    - contact with the family at least once a week,
    - the right to private and confidential communication if necessary,
    - the right to medical assistance and care,
    - the right to monitor information through the mass media, for the duration of the pre-trial detention.

The Law is in its second month of implementation and it is still too early to conclude whether it will give the expected results. However, it provides a good basis for a suitable response by the state to child delinquency cases.

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[3] See *Закон за изменување и дополнување на Кривичниот законик*, Official Journal of Republic of Macedonia, No.27/2014.

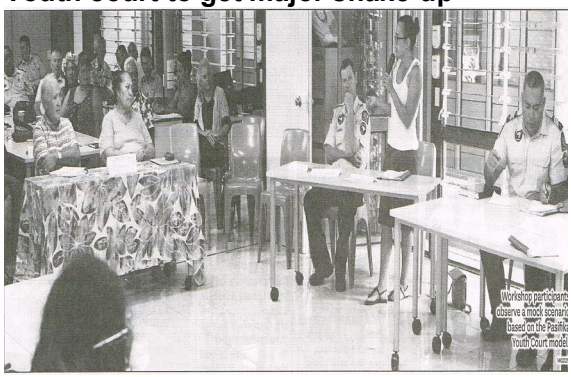
[4] See *Закон за посебен регистар за осудени лица со правосилна пресуда за кривични дела за сексуална злоупотреба на малолетни лица и педофилија*, Official Journal od Republic of Macedonia, No.11/2012

New Youth Court in Cook Islands, South Pacific

Merita Wi-Kaitaia & Magistrate John Kenning

The following is a newspaper[1] report of a mock courtroom scenario at a Pasifika Youth Court in the Cook Islands where Judges, police, community workers and the youth offender are on the same level. Magistrate John Kenning who presided over the workshop proceedings has kindly added further comment.

Youth court to get major shake-up



Dealing with young offenders in a uniquely Cook Islands way may be a reality with a new type of youth court being planned by our judiciary.

The Pasifika Youth Court, a Samoan *fono*-based youth court that embraces the family and community being a part of the youth judicial process in a uniquely Pacific way was introduced to stakeholders at the Family Violence and Youth Justice Workshop on Wednesday. The court acts as a last resort, for youth who have admitted their crime. It can be adapted to the customs of the country it is in and is made up of the community the youth belongs to. Its concept is to re-connect youth to their cultural roots and reduce reoffending.

A mock "courtroom" scenario was set up, facilitated by Justice of the Peace[2] John Kenning, with *pareu*-clad tables arranged in a circle facing each other and a woven mat on the floor.

"The situation now is that [youth] are isolated. In this court everyone sits on the same level... Nobody is ignored," explained Kenning to the wide-eyed and enthusiastic workshop participants.

According to Kenning the court can be implemented under the current *Prevention of Juvenile Crimes Act 1968* and can be held at a meeting house in the youth's village or *vaka*.

The court is opened with a prayer, and begins with *pa metua*[3] addressing the youth. A judge who has overseen the youth's process from their first appearance in court to a pre-court family conference presides over the court. *Pa metua*, community agency representatives, the court registrar, a youth advocate and/or lay advocate, the young offender, parents or guardians of the youth and anyone else from their family make up the rest of the circle.

"The most important thing is that it is all about the youth," said workshop speaker, Inspector Kevin Kneebone of the New Zealand police, "the fact that they can sit as part of a circuit, and feel supported, takes the pressure off."

Issues arose around finding lawyers who may be asked to represent the youth and family *pro bono* and the financial costs for holding the court, which will be raised through the planning stages. A proposal for a Cook Islands version was asked to be drafted by Justices of the Peace for overview at a closed courtroom activity on Thursday.

"Pasifika court and Te Kooti Rangatahi (New Zealand Maaori Youth court) have totally changed the face of the youth judicial process, we would like to be able to bring the community to that process," said Kenning.

Merita Wi-Kaitaia, journalist

[1] Cook Islands News (South Pacific), February 14th 2014

[2] Magistrate

[3] ancestors, a collectivity, over ten children to one father; siblings along whom titles are passed before proceeding to the children of the first born.

Justice of the Peace John Kenning facilitates a mock scenario as it would be in a Pasifika Court

Magistrate John Kenning's comments

Concept document

On the last day of the workshop the attending Justices of the Peace created a concept document on the development and implementation of the new style Youth Court (Children's Court is the actual term as per the Act) which was circulated for comment and further development. This was followed up with another meeting of participants last month where Inspector Kevin Kneebone, one of the participants from NZ Police, led the discussion on the way forward for the implementation of the changes necessary to enable the proposed court to be created and the employment of the processes that will engage the extended family and community in addressing the issue of children who are the subject of police enquiries and potential prosecution.

An opportunity grasped to stage the first Family Group Conference (FGC)

By chance, Inspector Kneebone was still here on Rarotonga when I convened the next Children's Court, and express approval was granted for his participation as an assistant to the prosecution (Police). Two of the children appearing had engaged counsel so we had most of the desired components to fit our proposed structure. As a result of discussion amongst the parties it was agreed that we had the opportunity to stage Family Group Conferences for the two children concerned and these were ordered, with Child and family Services being the convening party. The reports on these FGCs will be received by the court this month (April 2014).

Start date

An implementation date of 1 September, 2014 has been set, but in reality we need to be certain about the cooperation of the extended family and the legal fraternity. With April's sitting we have commenced some implementation and will receive a report on how it was received at this month's Children's Court.

Legal representation for the children

We are currently in discussion with the Cook Islands Law Society about advice for adults appearing in the adult court for the first time and how the Society can assist in this regard. It appears that a similar service could be applied to the Children's Court. In reality, only state funding of counsel will provide an adequate solution to advocacy in the Children's Court, and this has not been addressed in the budget currently under discussion. If there is to be an immediate fix, it will be through pro bono advocacy.

With grateful thanks to **Mark Ebrey**, Editor, Cook Islands News for permission to publish both the article reporting the mock Youth Court workshop and the two photographs taken that day and to **Magistrate John Kenning*.**

Treasurer's column — Avril Calder

Subscriptions 2014

In February 2014 I sent out e-mail requests for subscriptions to individual members (GBP 30; Euros 35; CHF 55 for the year 2014 as agreed at the General Assembly in Tunis in April 2010) and to National Associations.

May I take this opportunity to remind you of the ways in which you may pay:

1. by going to the website of the IAYFJM—click on membership then subscribe to pay online, using PayPal. This is both the simplest and cheapest way to pay; any currency is acceptable. PayPal will do the conversion to GBP;
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3. if under **Euros 70**, by **cheque** (either in GBP or euros) made payable to the International Association of Youth and Family Judges and Magistrates and sent to me. I will send you my home address if you e-mail me.

If you need further guidance, please do not hesitate to email me.

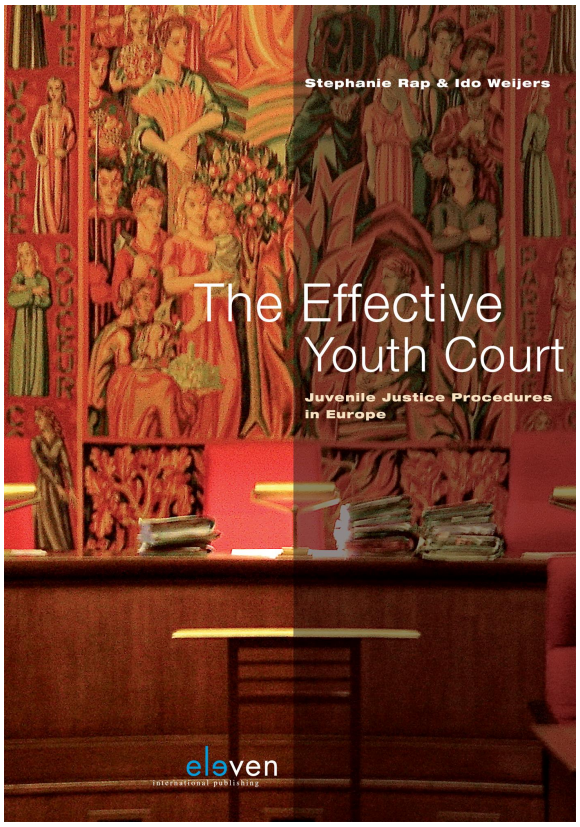
It is, of course, always possible to pay in cash if you should meet any member of the Executive Committee.

Without your subscription it would not be possible to produce this publication.

Avril Calder

A book by IAYFJM members Stephanie Rap and Professor Ido Weijers

Stephanie and Ido have kindly contributed to the Chronicle over the years and so I am delighted to be able to publicise their novel about Juvenile Justice which you are sure to find of interest—*Editor*



978 - 94 - 6236 - 112 - 6 paperback | 1st edition| 47,50 € / 71,50 $ / 44 £

The Effective Youth Court is purpose-made for professionals and academics working in the field of juvenile justice to inform them about a new interdisciplinary perspective. The book explores the way juvenile defendants are involved in the courtroom. The leading idea of the book is that a combination of two perspectives is required to be able to react legally correct and adequately to youth delinquency. Knowledge of the legal framework that has been developed in the past decades in the area of human rights, particularly the procedural rights of the child, has to be enriched with social scientific insights in the development and treatment of the child. First, the book develops a normative framework for the application of the right to be heard in the youth court. Then it offers a comparative analysis of the actual practice of participation of juvenile defendants in Europe. In total 50 youth courts have been visited, involving more than 3000 cases of juvenile defendants. Finally, best practices in the youth court procedure are designated regarding the actual participation of juvenile defendants.

Contact Corner — Anaëlle Van de Steen

We receive many interesting e-mails with links to sites that you may like to visit and so we are including them in the Chronicle for you to follow through as you choose. Please feel free to let us have similar links for future editions.

From	Topic	Link
CRIN The Child Rights Information Network	Website	Find it here
	Email	info@crin.org
	Introduction to child friendly justice and children's rights	https://www.crin.org/en/guides/legal/child-friendly-justice-and-childrens-rights/introduction
DCI Defence for Children International	Website	Find it here
IAYFJM	Website	Find it here
IDE International Institute for the Rights of the Child	Website	Find it here
	Newsletter	http://www.childsrights.org/documents/actualites/nouvelles-ide/ide_news_30_en.pdf
	Applications for the 2015-2016 postgraduate programme in Children's Rights by 30 September 2014. **Conference 25 years CRC** 20-21 November 2014	Find it here
IJJO International Juvenile Justice Observatory	Website	Find it here
	Newsletter	newsletter@oijj.org
IPJJ Interagency Panel on Juvenile Justice	Website	Find it here
	Newsletter **Optional Protocol on a Communications Procedure** came into force 15.04 2014 TDH & IPJJ **Compilation of juvenile justice standards** in English, French and Spanish. All versions may be found	newsletter@juvenilejusticepanel.org on the IPJJ website on the IPJJ website
Leiden University The Netherlands	**International Conference 25 Years CRC** 17-19 November 2014 Leiden Law School, Leiden University	www.25yearscrc.nl
OHCHR Office of the High Commissioner for Human Rights	Website	Find it here
PRI Penal Reform International	Website e-newsletter Follow us on Twitter! *Is a prison sentence always the solution?*	www.penalreform.org Sign up @PenalReformInt Watch our new short animation!
TdH Fondation Terre des Hommes	Website **Juvenile Justice World Congress** –Geneva, 26th to 30th of January 2015. .	Find it here www.**tdh**.ch/en/news/world-**congress**-juvenile-justice
UNICEF	Website	Find it here

Associcao Brasiliera de Magistrados, Promotores de Justia e Defensores Publicos de Infancia e da Juventude (ABMP)

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Chronicle Chronique Crónica — Voice of the Association

The Chronicle is the voice of the Association. It is published bi-annually in the three official languages of the Association—English, French and Spanish. The aim of the Editorial Board has been to develop the Chronicle into a forum of debate amongst those concerned with child and family issues, in the area of civil law concerning children and families, throughout the world

The Chronicle is a great source of learning, informing us of how others deal with problems which are similar to our own, and is invaluable for the dissemination of information received from contributions world wide.

With the support of all members of the Association, a network of contributors from around the world who provide us with articles on a regular basis is being built up. Members are aware of research being undertaken in their own country into issues concerning children and families. Some are involved in the preparation of new legislation while others have contacts with colleagues in Universities who are willing to contribute articles.

A resource of articles has been built up for publication in forthcoming issues. Articles are not published in chronological order or in order of receipt. Priority tends to be given to articles arising from major IAYFJM conferences or seminars; an effort is made to present articles which give insights into how systems in various countries throughout the world deal with child and family issues; some issues of the Chronicle focus on particular themes so that articles dealing with that theme get priority; finally, articles which are longer than the recommended length and/or require extensive editing may be left to one side until an appropriate slot is found for them

Contributions from all readers are welcome. Articles for publication must be submitted in English, French or Spanish. The Editorial Board undertakes to have articles translated into all three languages—it would obviously be a great help if contributors could supply translations. Articles should, preferably, be 2000 - 3000 words in length. 'Items of Interest', including news items, should be up to 800 words in length. Comments on those articles already published are also welcome. Articles and comments should be sent directly to the Editor-in-Chief. However, if this is not convenient, articles may be sent to any member of the editorial board at the e-mail addresses listed below.

Articles for the Chronicle should be sent directly to:

Avril Calder, Editor-in-Chief,

chronicle@aimjf.org

Editorial Board