

The right of the child to be heard – from CRC standards to Albanian law provisions and their application

Abstract

The aim of the article is to focus on some aspects related to the child's right to be heard in administrative or judicial proceedings, which, they are part of due to various causes. This is an essential right to making the child part of the decision-making affecting him. This may happen in cases where the problem is resolved out of the court, but also in cases when a court decision is required. There are cases which relate to the emotional, economic and social welfare of the child, school relations, domestic or other forms of violence, adoption procedures, best interest in exercising the parental responsibility, cases related to children in conflict with the criminal law, etc. Now we are faced with the question: what is the level of child participation and how is the right of the child to be heard in decision-making that affect him, actually working? Do the authorities have the competence and knowledge required to guarantee this right? Are both the Albanian judiciary as well as other authorities prepared to effectively guarantee the right to be heard or are still remaining problematic issues? The article will additionally lay down some practical difficulties and suggestions for further consideration.

Keywords: Convention on the Right of the Child, Right to be heard, best interest of the child, role of professionals.

1. Child right to be heard in a de facto situation

Albanian legislation is built on the most advanced legal models and based on best traditions of domestic legislation. Regarding the right to be heard, Albanian

legal frame¹, is in line with international standards stemming from ratified conventions². This right is part of different Albanian laws. Its implementation, as Article 12 of the CRC³ provides, has its theoretical and practical difficulties.

What the law stipulates seems not enough if the responsible authorities, their institutional structure and infrastructure do not apply it or create difficulties throughout its application. It is expected that people who work with children have the necessary knowledge, the highest awareness and dedication to protect their rights, speak and understand their language, etc. There are a lot of challenges in order for this standard to be appropriately applicable. Even the most advanced law can turn into a worthless instrument if it falls into the hands of incompetent people who create a dangerous and non-amicable environment for the child. So professionals are and remain of having key role in this process.

What delivered on theoretical bases seems easy, not problematic and understandable. This is what I took out of my experience as a pedagogue in both, initial and continuous training program for judges and prosecutors at Albanian School for Magistrate. While theoretically authorities can learn the meaning and substance of this right and understand material and procedural content of the law and international standards, still implementation can face a lot of troubles. The difficulties appear one after another during moot courts or classes dedicated to case studies. But they are multiplied in the practice. Even experienced judges and prosecutors understand the imperativeness of additional efforts to meet child's best interest. There is always place to learn and to explore in order to assure the right to be heard.

It is requested that professionals dealing with children should be well trained. They need practical skills. A number of practical questions may arise and be present on a case-by-case basis such as:

¹ Albanian Family Code, Law no. 9062/2003, Article 6; Code of Criminal Justice for Children, Law No. 37/2017, Article 16; Law no 18/2017 'On the rights and protection of the child', Article 9/2, 13, 30, etc.

² United Nations Convention on the Rights of the Child, [CRC] Article 12; Hague Convention of 25 October 1980 on the Civil Aspects of International Child Abduction, article 13; European Convention on Human Rights, Article 6 (fair trial); European Convention on the Exercise of Children's Rights, European Treaty Series no. 160, Articles 3, 4, 6 and 7; etc.

³ Article 12 of CRC: "1. States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child. 2. For this purpose the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law."

- What would be the best way for a child to express his views freely in a given situation?
- What weight should the authorities give to these views? How to give the right weight in accordance with the age and maturity of the child?
- Which are the issues that mostly affect a child in a given process?
- How should the child be asked: directly, through a suitable representative or a specific body?
- How do we fully appreciate the child's physical, emotional, educational, economic, or/and health needs?
- How to make a current and prospective assessment of the best interest of the child and 'use' the right to be heard as a potential effective instrument?

To overcome these difficulties, it is advisable that authorities know the reality where a child has lived and has grown up. Is important to know the social status of the child. This status influences the right to be heard and is a guideline for measures that should be taken by the authorities dealing with a child. Authorities need to have a convincing perception about who is the child or the child's background. The child's factual situation helps them to better understand and turn into reality what actually the theoretical principles and standards emphasize. Who is the child in the process: this is the main question to better fulfill the right to be heard. Reality helps understanding why the child is in this state? How happened? Afterwards the authority can decide on the best methodology that works for that child, thus the right to be heard can be made a reality and the child part of the decision-making process. Knowing the reality helps knowing the child not only as part of a group, but also individually.

Exploring the Albanian reality we can learn more about children. On 1 January 2018, Albania counts 2 million 870 thousand 324 people.⁴ In 2017, children accounted for 25.8% of the population from 27.8% of the population in 2011. Are the children happy? Some of them attempt suicide. In 2016, there are 16 children who committed suicide, contrarily to 11 that was the number in 2015. 60 children were attempting suicide in 2016 compared to 32 children in 2015. Children's are victims of crime and abuse. For 2016: 186 [out of 276 in 2015] is the total number of children's victims of criminal offenses. Out of them 133 victims of domestic violence, 2 children victims of sexual abuse, 19 children victims of ill-treatment and 32 children are victims of murder, shameful acts, kidnapping. In 2016, 42 children

⁴ Updated information is available in: <http://countrymeters.info/en/Albania>.

were victims of trafficking out of 46, which was the figure in 2015. There are cases where their parents abandon children, thus in 2016, the court issued a decision for 20 children with abandoned status. In 2015 this number was 40. Some juveniles are in conflict with the law. For 2016 there are 567 deprived of their liberty. They make up of 3.83% of the convicted persons. Out of these 13 are girls and 554 are boys. In 2015, this number was 650 convicted children. For 2016, the average number of children entering pre-trial detention based on the type of offense of every month was 61 [80 in 2015]. They are mostly boys who go into custody for criminal offenses. The largest number of children in detention is for theft. Parents use violence to discipline their children. 49% of children between the ages of two and fourteen have at least one episode of physical or psychological violence in the family. There are still young girls who marry at early age: about 1% of girls get married before the age of 15 and 8% under the age of 18.⁵ About 32% of children under the age of five have books for children in their families. Others do not. 11% of children have impaired vision and hearing impairment, speech defects, and learning difficulties (according to their mothers' disability concept).⁶

No matter the differences, each of these child has and should be able to enjoy the right to be heard.

2. 'To be heard' – means having access

EU law,⁷ European Convention of Human Rights and UN Convention on the Rights of the Child have strong meeting points regarding the right to be heard. Under the ECHR, there is no absolute requirement to hear a child in court.⁸

⁵ A. Mandro, 'Marriage in court? Children's rights, underage marriage and the role of the court'; Report no.2. Report on the legal and social aspects and the judicial practice of underage marriages in Shkodra, Kukës, Tropoja, Lezha, Puka, Fier, and Kavaja for the period 2011-2017. Observatori për të Drejtat e Fëmijëve Tirana, June 2018. Available in: http://observator.org.al/wp-content/uploads/2018/07/Report2-Legal-social-analyze-underage-marriage_June2018.pdf

⁶ Data taken from 'Statistical Yearbook on Children's Rights Issues 2016'. Publication of Agency for the Children's Rights Protection in cooperation with central institutions and INSTAT. <http://femijet.gov.al/wp-content/uploads/2017/12/Vjetar-Statistikor-p%C3%ABr-%C3%87%C3%ABshjtjet-e-t%C3%AB-Drejtave-t%C3%AB-F%C3%ABmij%C3%ABve-20161.pdf>

⁷ Charter of Fundamental Rights, Article 24; CJEU, C-491/10 PPU, Joseba Andoni Aguirre Zarraga v. Simone Pelz, 2010 (right to be heard, international child abduction).

⁸ Handbook on European law relating to the rights of the child, European Union Agency for Fundamental Rights and Council of Europe. (2015). 41- 44.

We cannot make-believe that a system like the justice one can be child friendly without hearing the child. The mission of the judiciary and of the other actors for ensuring the best interest of the child cannot be reached without the child right to be heard. In order for the family, schools, court etc., to be places where the children are themselves and where they are protected from every inhuman treatment – children should be heard. To be heard can be simply put as the way children can have access to the world. Have access to the world that belongs to them, now and in the future. By exercising the right to be heard is the only way to participate and the only entrance to having access to family and friends and enjoying their life as children and as human beings, and finally having access to justice.

Children have the right to be heard now, as children. They live and grow every day. Attention should be given to the children's right to have their views heard at all levels of decision-making regarding issues that are related to them and affecting their lives. If this is not done at all or not done properly than every action has a reaction. And this time a negative one. Children become very soon adults. They will do the same or worse as parents, family members, authorities, judges, etc.

The right to be heard is a process. This relates to explanations, preparation and informing the child for hearings, feelings, trusts, listening's, tones of voice, body language, closed and opened questions, seriousness, understanding, etc. So it is important for professionals to be prepared and to know what is expected from a child. Authorities can conduct interviews, collect statements from children; take and write decisions. To build trust they need specialization. This helps them increasing legal knowledge and communication skills. Helps them being understandable and understanding children. The training topics should be specific depending on duties and child's situation. Training is a mandatory and continuous process – tailored made for those working with children. Training should be like preparing a team that works for the same standards, for the same goal, which is the best interest of the child. Following this, there is a good example from Albanian Juvenile Justice Code. In its Article 26 there are mentioned specifically some of the 'training topics' that any person assigned by the competent body administering criminal justice for children shall be trained. This topics cover: methodology of communication with the child; standards and principles guaranteeing the rights of the child; principles and ethical obligations related to their functions; signs and symptoms indicating that a criminal offence has been committed against a child; skills and techniques related to the assessment of critical situations, risk assessment, referral of cases and guaranteeing of the

principle of confidentiality; skills related to the technique of cross-examination of children, child psychology and communication with the child in a language convenient to the child; dynamics and nature of violence against the child, effect and consequences including the physical and psychological as well as that of the incitement to commit the criminal offence; techniques and special measures for the support and protection of the child victim and witness; methods of mandatory work for the professionals working with the children.

3. Age and maturity effects in the child's right to be heard

Does Albanian legislation indicate any clear and fix time or age to hear a child in case the child is involved in judicial or administrative proceedings? Is the age independently important or it should be considered related to the fact of the child being capable of forming his/her own views and on child maturity? This correlation between age and maturity is clearly explained by the Committee on the Rights of the Child in its General Comment No.12 of the CRC⁹ as well as by other scholars.¹⁰ Age and maturity together are the guidance of 'the due weight' given to what is expressed by the child to the authorities. In this process it cannot be left aside the level of freely (or not) expressing those views.

The right to be heard is an instant and immediate right. It is too late to wait for a child to become an adult, to be 18 years old. No one can wait the age of maturity to approach and hear the child and pretend to have better chances for him or her and the generation. If the child is not heard today, now, any time, there is a serious risk of perpetuating the violence and expecting a problematic future.

No child shall be excluded from the access to the right of being heard, only because of his/her age. Each part of the system should respect the initiative of the child to be heard about issues that affect him/her, except for the cases when it is deemed that that is not in the best interest of the child. Children should be informed about using effectively their right to be heard. On the other hand, judges and lawyers should explain to the child about his/her right to be heard and that

⁹ UN Committee on the Rights of the Child (CRC), *General comment No. 12 (2009): The right of the child to be heard*, 20 July 2009, CRC/C/GC/12, available at: <http://www.refworld.org/docid/4ae562c52.html> [accessed 3 August 2018].

¹⁰ A. Daly, S. Ruxton, M. Schuurman. 'Challenges To Children's Rights Today: What Do Children Think? A desktop study on children's views and priorities to inform the next Council of Europe Strategy for the Rights of the Child.' Council of Europe. March 2016.

not expressing their views might not necessarily determine the final outcome of the trial. These way children can understand that this is a right not an obligation. Court judgments that affect children should be reasoned in a language that the child is able to understand, and to provide clarifications, in particular about those views of the child that the court has not considered.

Why is the right to be heard important? There are some features of the right that put the authorities in several obligations and can be considered seriously:

- As a right, 'to be heard' is not an obligation for the child, while it is an obligation for the authorities to ensure and guarantee this right. 'By not allowing children to be involved in decision-making processes which affect them, they are being denied their fundamental right to have their views considered in decision-making processes affecting them'.¹¹
- The child is not an empty box. He or she has his/her own ideology. Authorities have to know this ideology. Children may belong to the same or different cultural groups and sub-groups. The similarities and differences are important to be known and considered in order to embrace the right to be heard at its full capacity. Children may speak a different language. Their socialization is different. Some children are at a real risk, some living in extreme poverty, others living with no parental care. Some of them are children that live in the streets and children immigrating to other countries without their parents, unaccompanied ones. Some children are even in conflict with the criminal law.
- The complexity of the right to be heard can result in failure of the guarantees provided by law. The complexity depends very much from the vulnerability of the child, which is strongly related to and because of the age; because of immaturity or different disability/es which can be present in specific cases; because of the parents influence and their relatives role; because of religion; etc.
- There are situations where it is evident the child's lack of self-respect, existence of stigma and a strong non-integration profile. All mentioned could result in problematic access and in this way can even extinguish the right to be heard. Compulsory participation of child is not allowed.

¹¹ G. Lansdown. 'Promoting Children's Participation in Democratic Decision-Making,' (2001). *Innocenti Insights* no.6. <https://www.unicef-irc.org/publications/290-promoting-childrens-participation-in-democratic-decision-making.html> [accessed 3 August 2018].

Communication disorder and stress disorder can negatively influence the communication with the child and worsen the trauma.

There are a lot of insecurities that judges and other officials have in dealing with children and understanding the importance of the right to be heard and its application in an adequate way. 'Judges dealing with children are a priority, they should be a priority'. But this is related not only to judges. This is not enough. Compulsory changing of mind of the authorities to take seriously the right to be heard is an adequate issue with a capillary effect. It is not an easy and simple issue or task to evaluate if the child is capable of forming his or her own views; to avoid obstacles and to make possible to express those views freely; to be given due weight in accordance with the age and maturity of the child. Collaboration with different experts such as psychology is important.

4. The right to be heard in practice

In both, judicial and administrative proceedings the right to be heard remains a principle, a standard and a guarantee, a strong tool and methodology to go into the right direction which aims towards achieving the best interest of the child. What is made evident by several decisions of the High Court of the Republic of Albania is that the fact-finding courts [instant court¹² and appeal court] generally just point out and give importance merely to the fact that a child's opinion/view is mentioned in a number of international instruments, such as the Convention on the Rights of the Child (Article 12 of the CRC), the European Convention on the Exercise of the Rights of the Child (Article 6) and domestic legal frame. However, the above-mentioned courts do this without listing all the procedural measures that are actually taken to guarantee this right during the process. In a number of decisions, the High Court draws the attention of the lower level courts to the need of carefully assessing the child's right of being heard and weighting the views in accordance with child age and maturity. In practice, there are cases where the court has approved the parents' agreement on child custody after divorce without further hearing the child and considering the child's point of view. Also, the lack of giving the right place and proper weight to the views of the child has been assessed

¹² Decision no. 11-2015-5868/12.12.2015 of Durrës District Court; Decision no. 3998/12.05.2016 of Tirana District Court.

as a violation of the child's rights in the practice of the ECtHR. For example, in the case of *Ignaccolo-Zenide v. Romania*¹³, the court has underlined the importance of giving the right weight during the decision-making of the child's opinion.

Giving the right weight to child's views is not an easy task. Albanian courts in some cases encounter difficulties regarding the child's demonstrated thoughts and feelings and their connection with the truth. For example, in a practical case, the High Court,¹⁴ analyzed the minutes administered by the court bailiff. According to the bailiff's minutes, turns out that the child, several times, refuses to meet his mother. Referring to the psychologist's report the situation was different. As the decision of High Court highlights: "...According to this report, the child appears as being manipulated by his father's family, the way he was expressed against his mother, as if she has abandoned him when he was very small. The child introduces the aunt (father's sister) as the mother, which, according to him, is she that gave the life to him. But when the psychologist's interview took place with the child in the presence of the mother, he [The child] changed the behavior, approached her, hugged and kissed, saying he missed her. ... Looking at these minutes, the conclusions reached in the psychologist's act are clear or more precisely confirmed, that the behavior of the infant is manipulated or influenced by her father's family". In another similar case,¹⁵ the High Court has evaluated as not appropriate the way the first instance court has concluded '... *the express consent of children since taken without considering the age of 9 and 6 years old as well as the psycho-physical development/maturity...*' Under these conditions, the High Court estimates that the Court of Appeals "should make a thorough analysis of how the children consent was expressed during the first instance trial and how this court placed it in relation to the level of their psychological, emotional and social development and assessing a number of other factors, in a way that consent could be accommodated to the best interest for children's needs for growing up and education."

¹³ European Court of Human Rights, *Ignaccolo-Zenide v. Rumania* (application no. 31679/96). Judgement 25.01.2000: "Due weight should also be given to children's views"; European Court of Human Rights, *M.K. v. Greece* (application no. 51312/16); European Court of Human Rights, *M. and M. v. Croatia* (application no. 10161/13); ECtHR, *Sahin v. Germany* [GC], No. 30943/96, 2003 (hearing a child in court in access proceedings) etc.

¹⁴ Decision no. 163/24.03.2015 of the Civil College of the High Court.

¹⁵ The same analysis is done in the Decision no. 345, date 02.07.2015 of the Civil College of the High Court. This court found the same fact: "... In taking this decision, the district court has reasoned that: 'The child asked by the court in the presence of psychologists MP was found [after taking the psychologist's opinion], that he is processed by his mom and is confused in his answers ... because of the age'.

The child's opinion does not have the same value as the testimony given in a process. The Civil College of the High Court of Albania in a decision¹⁶ has underlined that '*... the way of getting child opinion from the court cannot be in the form of a testimony. So not allowing the parties to be present and to address questions to the child. This conclusion is reached in order to protect the child from the pressure exerted by the parties or their representatives, in order not to feel compelled to give opinions and considerations that do not show child's true will.*'

Protection from any form of child discrimination helps actors involved in the process to play the role in order to guarantee the children's rights to be heard. There are a lot of ethical barriers in communications because of discriminating behavior that can destroy the essence of the right to be heard in specific cases.

A checklist of the child situation analysis helps the court to properly grasp the right to be heard and evaluate every child's opinion. Of course, such lists are not exhaustive since they are also individualized in conformity with child specific and special situation and needs, maturity, intellectual and physical development, skills, etc.

It is important to take measures for children to be heard in appropriate facilities, considering their age, their level of maturity and possible communication difficulties. The examples can be from criminal matters where a child is victim and/or witness. Audiovisual statements from children victims or witnesses should be encouraged as much as possible. Even the European Court of Human Rights (ECHR), in the case of *W.S. versus Poland (Application no. 21508/02)* suggested some ways of testing the credibility of the child victim should be more appropriate, and not through direct interviews. The Court proposed that the process of the interview of the child may be conducted via the psychologist, who is given the questions in advance in written form, by the attorneys of the parties in the proceeding, or another alternative could be to interview the child in a studio that makes possible the presence of the lawyers through videoconference or through a mirror that the child is not able to detect it. In case that it is necessary that the child-victim is involved in more than one interview, they should possibly be performed by the same person, in order to ensure coherence for the best interest of the child. On the other hand, the number of child interviews should be as limited as possible, as well as the duration, which should be age-appropriate.¹⁷ ECHR in

¹⁶ Decision no. 374, date 12.06.2014 of the Civil College of the High Court.

¹⁷ Paragraph 61 of the Case *W.S. v. Poland*.

the case of *S.N. versus Sweden* (application no. 34209/96)¹⁸ ruled that in the cases of criminal offenses related to sexual violence, the courts may apply specific proceedings, in particular when the victim is a child.

Child-friendly justice entails guaranteeing respect and effectiveness of enforcement of the rights of children, at the highest attainable levels, in the system of justice in the country. This requires, particularly that justice is accessible, age-appropriate, fast, and focused on the needs and rights of children. This includes due legal process, the right for participation and understanding the procedures, the right for respect of private life and home, as well as of integrity and dignity. All mentioned are strongly related with the right to be heard. This concept should be perceived *in an integral manner*, and should serve as a frame for the development of a justice system, for cases when children are either *involved or affected*.

Other difficult cases are those where, for example, in family matters, the opinions and feelings expressed by the child and the opinion of psychologist's are in conflict with each other. How will the court act and to which of them should the court give more weight?¹⁹ Article 157 of the Albanian Family Code stipulates that regarding the children's consequences of divorce the judge takes into consideration: a) the agreement between the former spouses; b) the opinion and feelings expressed by the child, assessing the age and development of the child; c) the opinion of the psychologist or of the social services sector in the municipality after they have heard the child.

One of the questions that arise is whether Article 157 have any prioritizing value of the aspects that the court should take into consideration or not. In our opinion, the criteria do not compete with one another. The court cannot ignore any of them. That is why the legislator uses the phrase "takes into consideration". On the other hand, it is incumbent on the court to specify in its case analysis the reason why it moved more in one or the other aspect and consolidated it in decision-making and why it has a different attitude to another aspect. The Court analyzes all these aspects in the spirit of the principle of the best interest of the child. The court decides after having received and analyzed these criteria in harmony with one another. To this end, it is the court that determines the greater or absolute weight of one or the other criterion based on the assessment made by the concrete case.

¹⁸ Paragraph 47 and 52 of the case *S.N. v. Sweden*.

¹⁹ A. Mandro. "Principle of the best interest of the child – importance and challenges". (2008). "Jeta Juridike", no.4. (A publication of the School for Magistrate.)

So if the child's opinion is different from the psychologist's recommendation or the parent's opinion and agreement, then it is the highest interest of the child leading the court's decision as to which of them is of interest to the child.²⁰ This is also what High Court decided. But this is not in any case what district an Appeal court do.²¹

Family members, parents, every institutions and actor within our society, are responsible for the child. Child protection and child's best interest is the responsibility of every adult. Lawyers in general and judiciary especially have an increasingly important role to play in child protection and child's best interest and especially towards securing their voice to be heard.

5. Conclusion and recommendation

What can be improved?

- Communication with the child is a vital element. Hearing the child is the essence. Absenting should be a concept and a reality that should cease to exist;
- Do children trust the adults? Eliminating the deficit in trust in all the process of hearing the child and young people is very important for all the actors;
- Child and youth mobilization to better understand their rights and the right to be heard - is an issue that should be better explored and tailor-made;
- The right to be heard is a right that should be used properly. It means that there is no time not to use this opportunity;
- Eliminate all the legal black hole in procedures, which can influence negatively in the right of the child to be heard. The suspension of rule of law and constitutional provisions is the most dangerous thing that professionals can do.
- Taking the child away from the situation, which is not safe for him/her – should be taken under consideration while realizing the right to be heard.
- Professionals are all required to be on track. The lack of sustainability has been a highly 'pervasive' tradition for Albania.

²⁰ Decisions no. 188/01.06.2016 of the Civil College of the High Court.

²¹ Decisions no. 347/04.06.2013; no. 345/02.07.2015 and no. 416/26.06.2014 of the Civil College of the High Court.

- Taking away persons to whom a final decision has been made for a deliberately committed offense against juveniles or acts of domestic violence. Such measures lie up to the capillary level including non-profit organizations that provide services for the child and young adults in order to ensure that persons convicted as juvenile offenders have no contact with them.

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