

## ***Listening to the Voice of the Child: The Evolution of Participation Rights***

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*Given that art 12 is one of the fundamental principles of the United Nations Convention on the Rights of the Child, it is surprising to find that there was no mention of the voice of the child in the very first draft of the Convention. This article examines the genesis of art 12 and its evolution during the drafting process. The content of participation rights, as they have come to be known, is explored and the concept is set in its wider Convention and international contexts, before some key features of implementation and progress to date are highlighted.*

### **I Introduction**

While there had been earlier domestic and international efforts,<sup>1</sup> the United Nations Convention on the Rights of the Child<sup>2</sup> is rightly regarded as the keystone in the development of children's rights. It reflects the will of people of all nations to work together to establish goals and standards designed to protect and empower some of the most under-represented and vulnerable members of our various communities. That the Convention is the most-ratified international human rights instrument and came into force more quickly than any other signalled a commitment by national governments to securing the realisation of these goals and standards. The challenge that

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1 For discussion of earlier efforts see Philip E Veerman *The Rights of the Child and the Changing Image of Childhood* (Martinus Nijhoff, Dordrecht, 1992).

2 United Nations Convention on the Rights of the Child 1577 UNTS 3 (opened for signature 20 November 1989, entered into force 2 September 1990) [UNCRC].

remains is to ensure full implementation of all Convention rights for all children, wherever they live and whatever their circumstances.

In their Foreword to the *Legislative History of the Convention on the Rights of the Child*,<sup>3</sup> Marianne Nivert and Simone Ek commented that the insights into the drafting process it offered would assist states parties, government and non-governmental agencies and others in interpreting and applying the Convention.<sup>4</sup> They expressed the hope that the two-volume work would “also inspire research on the rights of the child at universities worldwide”<sup>5</sup> and would doubtless view this colloquium as contributing to the realisation of that aspiration. By bringing scholars from around the world together to explore the content and application of art 12 and share our experiences of its operation, our aim is to contribute to advancing the implementation process further.

The child’s right to be heard, embodied in art 12, is one of the general principles or fundamental values of the Convention.<sup>6</sup> As such, it has a pervasive impact on all aspects of children’s rights. While no single provision of the Convention should be read in isolation, understanding the essence and import of art 12 is crucial to making rights a reality for all of the world’s children.

But why does listening to children matter? There have always been those who questioned whether children could be holders of rights, as they characterised rights-holding,<sup>7</sup> and those who saw recognition of children’s

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3 Save the Children Sweden and the Office of the United Nations High Commissioner for Human Rights *Legislative History of the Convention on the Rights of the Child* (UNHCHR, New York and Geneva, 2007) vol 1 [*Legislative History* vol 1] and Save the Children Sweden and the Office of the United Nations High Commissioner for Human Rights *Legislative History of the Convention on the Rights of the Child* (UNHCHR, New York and Geneva, 2007) vol 2. The complete *travaux préparatoires* to the Convention have never been published, but insights were available from its early days of operation: see Sharon Detrick (ed) *The United Nations Convention on the Rights of the Child: A Guide to the “Travaux Préparatoires”* (Martinus Nijhoff, Dordrecht, 1992).

4 *Legislative History* vol 1, above n 3, at iv.

5 At iv.

6 United Nations Committee on the Rights of the Child *General Comment No 12: The Right of the Child to be Heard* CRC/C/GC/12 (2009) at [2]: “The Committee ... has identified article 12 as one of the four general principles of the Convention, the others being the right to non-discrimination, the right to life and development, and the primary consideration of the child’s best interests, which highlights the fact that this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights.”

7 Two “classic” pieces are: Neil MacCormick “Children’s Rights: A Test Case for Theories of Right” in Neil MacCormick *Legal Right and Social Democracy: Essays in Legal and Political Philosophy* (Clarendon Press, Oxford, 1982) 154; and Tom D Campbell “The

rights as a futile, if not dangerous, exercise.<sup>8</sup> While ratification of the Convention by all but two of the member states of the United Nations can be seen as a defeat for the nay-sayers, it remains important to be in a position to defend children's rights. In her eloquent defence of the importance of listening to children, Gerison Lansdown demonstrates that doing so contributes to the child's personal development, leads to better decision-making and outcomes, serves to protect children, prepares them for participating in civil society, teaches tolerance and respect for others and strengthens accountability.<sup>9</sup>

In the relatively short time since the Convention came into force, the right to be heard has evolved, a process reflected in the more modern term "participation rights".<sup>10</sup> As the United Nations Committee on the Rights of the Child (the UN Committee) observed in 2006:<sup>11</sup>

The new and deeper meaning of this right is that it should establish a *new social contract*. One by which children are fully recognized as rights-holders who are not only entitled to receive protection but also have the right to participate in all matters affecting them, a right which can be considered as the symbol for their recognition as rights holders. This implies, on the long term, changes in political, social, institutional and cultural structures.

This analysis sets the scene and contextualises the scholarly contributions that follow by exploring the evolution of art 12, during the drafting process

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Rights of the Minor" in Philip Alston, Stephen Parker and John Seymour (eds) *Children, Rights and the Law* (Clarendon Press, Oxford, 1992).

8 See, for example, Michael King "Against Children's Rights" [1996] *Acta Juridica* 28; and Bruce C Hafen and Jonathan O Hafen "Abandoning Children to Their Autonomy: The United Nations Convention on the Rights of the Child" (1996) 37(2) *Harv Int'l LJ* 449.

9 Gerison Lansdown *Every Child's Right To Be Heard: A Resource Guide on the UN Committee on the Rights of the Child General Comment No 12* (UNICEF and Save the Children UK, London, 2011) at 3–18.

10 *General Comment No 12*, above n 6, at [3]: "A widespread practice has emerged in recent years, which has been broadly conceptualized as 'participation', although this term itself does not appear in the text of article 12. This term has evolved and is now widely used to describe ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes." See also Gary B Melton *Background for a General Comment on the right to participate: Article 12 and Related Provisions of the Convention on the Rights of the Child*, Report submitted to UNICEF for use by the UN Committee on the Rights of the Child, September 2006.

11 Committee on the Rights of the Child *Day of General Discussion on the Child's Right to be Heard XLIII* (2006) at 2 (emphasis in the original).

and since, before highlighting some key features of its implementation and progress to date.

## II The Evolution of Article 12

In order to understand the many facets of art 12, it is helpful to explore its genesis and development during the 10 years devoted to drafting the Convention, drill down into its precise content, and set it in its wider Convention context.

### A Drafting

Given the centrality of art 12, it comes as something of a surprise to find that neither the first Polish draft of the Convention,<sup>12</sup> nor the responses by states to it,<sup>13</sup> addressed the place of the child's views. The explanation lies in the absence of any such provision in the Declaration of the Rights of the Child on which that draft was based.<sup>14</sup> It was not until the revised Polish draft of 1979 that the following partial skeleton of what was known throughout the deliberations as art 7 — and ultimately became art 12 in the Convention itself — emerged:<sup>15</sup>

The States Parties to the present Convention shall enable the child who is capable of forming his own views the right to express his opinion in matters concerning his own person, and, in particular, marriage, choice of occupation, medical treatment, education and recreation.

The following year, the delegation from the United States put forward an amended version of art 3. The new second paragraph of that proposal added crucial flesh to the bones of the skeleton by providing:<sup>16</sup>

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<sup>12</sup> *Legislative History* vol 1, above n 3, at 32–35.

<sup>13</sup> At 53–68.

<sup>14</sup> *Declaration of the Rights of the Child* GA Res 1386, XIV (1959). While the requirement in art 7 of the Declaration for the provision of education that would, *inter alia*, enable the child “to develop his abilities, his individual judgement, and his sense of moral and social responsibility, and to become a useful member of society” contains an element of what participation rights seek to achieve, it is hardly the same thing as the right to be heard.

<sup>15</sup> *Legislative History* vol 1, above n 3, at 75 and 437, referring to Commission on Human Rights document E/CN.4/1349.

<sup>16</sup> At 438.

In all judicial or administrative proceedings affecting a child that has reached the age of reason, an opportunity for the views of the child to be heard as an independent party to the proceedings shall be provided, and those views shall be taken into consideration by the competent authorities.

That paragraph was discussed extensively by the Working Group in its 1981 session and adopted at first reading, only to be deleted at second reading so that it could be considered, where it truly belonged, under what was at the time art 7.<sup>17</sup>

Together, then, the revised Polish draft and the contribution from the US delegation gave the Working Group the key elements of what became art 12. Throughout the drafting process there was extensive discussion of the provision with various national delegations and non-governmental organisations suggesting amendments.<sup>18</sup> An early casualty was the replacement of the delightfully archaic, if ambiguous, reference to a child having “reached the age of reason” by the more prosaic formulation, a child who “is capable of forming his own views”.<sup>19</sup> Somewhat curiously, gender neutrality was not raised until fairly late in the drafting process when, during the 1988 technical review, UNESCO highlighted the problem and UNICEF suggested the use of both male and female pronouns and plurals.<sup>20</sup>

## B *Content*

The final text of art 12 is as follows:<sup>21</sup>

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.

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<sup>17</sup> At 346 and 347.

<sup>18</sup> At 439–444.

<sup>19</sup> At 439.

<sup>20</sup> At 188 and 441, referring to Commission on Human Rights Document E/CN.4/1989/WG.1/CRP.1 at 21–22.

<sup>21</sup> UNCRC, above n 2.

While the legislative history of the Convention provides valuable insights in interpreting it, the intention of the drafters is arguably not the sole measure of the content of art 12 or any other provision. Whereas, in the United States, a veritable war rages over whether rights under the US Constitution should be confined to what the drafters intended (or what a particular proponent claims they intended), that is certainly not the approach taken to many other domestic constitutional documents<sup>22</sup> and it has long been argued that human rights treaties require evolutive interpretation.<sup>23</sup> It is trite law, for example, that the European Convention on Human Rights is a “living instrument”<sup>24</sup> and that the European Court takes a “dynamic and evolutive”<sup>25</sup> approach to interpreting it.

There may be a temptation to see the views of the UN Committee on the Rights of the Child as the final word on understanding the content of the Convention and what is required of states in terms of compliance.<sup>26</sup> After all, the Committee receives the country reports and provides concluding observations on them. Increasingly, it will receive “communications”, as they are known, relating to what are, essentially, individual complaints relating to violation of Convention rights.<sup>27</sup> There is no Court of the Rights of the Child to which a state or an individual can appeal against the Committee’s observations or decisions. The position taken here, however, is that, while the Committee does much excellent work and its opinions are highly persuasive, it is neither infallible nor immune from contradiction. There is now a vast body of academic and other literature discussing all aspects of

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22 See, for example, the proactive approach of the Constitutional Court in South Africa: Elsje Bonthuis “Realizing South African Children’s Socio-Economic Claims Against Parents and The State: What Courts Can Achieve” (2008) 22 *International Journal of Law, Policy and the Family* 333. See also the approach to the Charter of Rights and Freedoms in Canada: Bohdan A Shulakewych “The Charter and the Supreme Court of Canada as Agents of Change in Family Law” (2004) 23 *CFLQ* 101.

23 While the Vienna Convention on the Law of Treaties provides the general standard, human rights treaties must be interpreted in an evolutive and autonomous manner designed to ensure they are effective in protecting the individual rights they seek to guarantee. See Icelandic Human Rights Centre “Interpretation of Human Rights Treaties” <[www.humanrights.is](http://www.humanrights.is)>.

24 *Tyrer v United Kingdom* (1979–1980) 2 EHRR 1 (ECHR) at [31].

25 *Stafford v United Kingdom* (2002) 35 EHRR 32 (Grand Chamber, ECHR) at [68].

26 For a discussion of the Committee’s role see David Weissbrodt, Joseph C Hansen and Nathaniel H Nesbitt “The Role of the Committee on the Rights of the Child in Interpreting and Developing International Humanitarian Law” (2011) 24 *Harv Hum Rts J* 115.

27 *Optional Protocol to the Convention on the Rights of the Child on a Communications Procedure A/Res/66/138* (2011).

the Convention, including art 12. By drawing on all of these resources, it is possible to arrive at a more nuanced and subtle understanding of art 12.

(1) Not optional

Article 12 provides that states parties “shall assure” the right to express views to a child capable of forming them, so there is no discretion over the basic obligation in subs 1. The notion of an element of state discretion enters the picture, in subs 2, in the context of administrative and judicial proceedings. During the deliberation process, there was discussion, generated primarily by the delegations from Finland, the Netherlands and Venezuela, of how participation in such proceedings was to be achieved and the words “in a manner consistent with the procedural rules of national law” were added. It remains the case, however, that states are under an obligation to ensure that the necessary mechanisms are in place to solicit views and that due weight is given to them. Not only has the UN Committee stated, quite unequivocally, that national procedures should not be used in a way that “restricts or prevents enjoyment of this fundamental right”,<sup>28</sup> it has also articulated the various steps and stages required for implementation.<sup>29</sup>

The UN Convention on the Rights of the Child adopts the familiar international human rights position on economic, social and cultural rights by providing that states “shall undertake such measures to the maximum extent of their available resources”.<sup>30</sup> Civil and political rights are different, however, and the obligation to implement them is absolute. Since art 12 addresses civil and political rights, the state obligation to implement it is not qualified by the resources at its disposal. This is simply recognition of the fact that the views of children in a poor country are no less deserving of respect than those of their counterparts in more affluent countries. That said, it would be unrealistic to divorce the means of implementation from a state’s resources and it may be that some of the mechanisms by which

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28 *General Comment No 12*, above n 6, at [38].

29 At [40]–[47], presenting the various steps as: “preparation”, “the hearing”, assessment of capacity, “feedback” and “complaints, remedies and redress”.

30 UNCRC, above n 2, art 4. The obligation to implement economic, social and cultural rights is not wholly optional, however, since a distinction is drawn between obligations of conduct and obligations of result. See also Committee on Economic, Social and Cultural Rights *General Comment No 3: The Nature of States Parties’ Obligations* E/1991/23 (1990) at [2]: “while the full realization of the relevant rights may be achieved progressively, steps towards that goal must be taken within a reasonably short time of the Covenant’s entry into force for the States concerned. Such steps should be deliberate, concrete and targeted as clearly as possible towards meeting the obligations recognized in the Covenant.”

children may express their views — using sophisticated video equipment, for example — will reach some children before they are available to others.

(2) The child “capable of forming his or her own views”

Early in the drafting process, reference to the child being “of the age of reason”, so redolent of notions of the Enlightenment, was replaced by reference to the child who is “capable of forming his or her own views”. Quite correctly, the UN Committee stresses that this requirement imposes no age limit on when a child may express views, nor should states begin from any assumption of incapacity.<sup>31</sup> Rather, it is incumbent on states to facilitate the expression of views, including the accommodation of non-verbal communication and any special steps required to empower children who may have difficulty, whether due to disability, language barriers or other cause, in expressing themselves.<sup>32</sup>

(3) The individual child and groups of children

The fact that the right to be heard applies in the light of the child’s age and maturity suggests that an individualised assessment of the child is required and, at first glance, may seem to anticipate children expressing views in their individual capacity only. Yet a whole range of policies and decisions — on urban planning, on education, on health care and so forth — may affect children, generally, or a specific group of children, like a class of schoolchildren or residents of a particular neighbourhood. In such circumstances, the UN Committee “strongly recommends that States parties exert all efforts to listen to or seek the views of those children speaking collectively”.<sup>33</sup>

(4) Opinion, views, wishes and impact

Early iterations of what was to become art 12 referred to expressions of the child’s “views” and “opinion” with the word “wishes” entering the picture at the Second Reading stage.<sup>34</sup> That there may be nuanced differences between these terms is evidenced by the fact that a number of domestic legislatures have changed the terminology of statutory provisions on this

31 *General Comment No 12*, above n 6, at [20]–[21]. See also *General Comment No 7: Implementing child rights in early childhood* CRC/C/GC/7/Rev.1 (2005) at [5].

32 *General Comment No 12*, above n 6, at [20]–[21].

33 At [10].

34 *Legislative History* vol 1, above n 3, at 438–442.



matter over the years.<sup>35</sup> In any event, it was “views” that emerged as the term of choice in the Convention. That the child should be free from pressure or manipulation in expressing these views is signalled by the addition of the word “freely”, added to the text at the urging of the Canadian delegation.<sup>36</sup> The UN Committee has also stressed the need for states to be proactive in creating conditions that facilitate the child’s exercise of this right.<sup>37</sup>

But simply having the opportunity to express one’s views would be something of an empty exercise if these views have no impact. Thus, art 12 contains the crucial requirement that the views be given “due weight” in accordance with the age and maturity of the child. This means that, as the UN Committee put it, “the views of the child have to be seriously considered”.<sup>38</sup> However, the Committee goes further, again requiring proactivity from states, this time by informing the child of the possible impact of his or her views and providing feedback on that impact after a decision has been taken.<sup>39</sup>

#### (5) Scope

It will be recalled that the revised Polish draft of art 7 gave the child the right to express opinions on “matters concerning his own person, and, in particular, marriage, choice of occupation, medical treatment, education and recreation”.<sup>40</sup> While the original input from the US delegation focused on the child’s views being heard “in all judicial or administrative proceedings affecting a child”,<sup>41</sup> it later proposed further amendment to the evolving draft to add religion, political and social beliefs, matters of conscience, cultural and artistic matters, travel and place of residence to the existing list.<sup>42</sup> The Danish suggested abandoning enumeration of the contexts in which the child’s right should apply, preferring that reference should be to “matters concerning the person of the child”.<sup>43</sup> Ultimately, rather greater breadth

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35 See, for example, Bill Atkin “New Zealand: The Emergence of Cultural Diversity” in Elaine E Sutherland (ed) *The Future of Child and Family Law: International Predictions* (Cambridge University Press, Cambridge, 2012) 265 at [9.52]: “The 2004 Act replaced ‘wishes’ with ‘views’, regarded as wider because the child’s views may not be as clearly articulated as wishes.”

36 *Legislative History* vol 1, above n 3, at 440.

37 *General Comment No 12*, above n 6, at [23].

38 At [28].

39 At [25] and [45].

40 *Legislative History* vol 1, above n 3, at 75 and 437, referring to Commission on Human Rights Document E/CN4/1349.

41 At 438.

42 At 440.

43 At 440.

prevailed with the deletion of the word “person” and art 12 refers to “all matters affecting the child”. While the UN Committee has viewed this as reflecting the drafters’ intention not to extend a “general political mandate” to children — that is, there is no guarantee of a right to vote — it welcomed efforts to include children and young people in the wider social processes of their communities.<sup>44</sup>

#### (6) The right “not to”

A recurring debate in the human rights context is whether the right “to” carries with it the right “not to”. Thus, for example, the European Court of Human Rights has noted that “some of the guaranteed [European] Convention rights have been interpreted as conferring *rights not to* do that which is the antithesis of what there is an express right to do”,<sup>45</sup> and has given the examples of the right not to join an association and the right not to marry. It was at pains to point out, however, that not all European Convention rights carry similar antithetical rights when it concluded that the right to life, under art 2, does not have the corollary of any corresponding right to die. Clearly, then, the trick is to establish into which category a particular right falls. The UN Committee was in no doubt that the child’s right to express his or her views carries with it the right not to do so.<sup>46</sup> A good example here would be the child whose parents are separating. While the child should be given every opportunity to express views about his or her future living arrangements, there should be no pressure to do so. For some children, the stress inherent in what the child perceives as choosing one parent over the other may outweigh the benefits of having a say. Of course, it is the responsibility of the parents and the legal system to find a way to allow the child to express his or her views without experiencing that stress.<sup>47</sup>

#### (7) Expressing views directly or through a representative

The child’s right to be heard in judicial and administrative proceedings may be exercised “either directly, or through a representative or an appropriate body”. This language is the result of an amendment put forward by the delegation from the Netherlands during the proceedings of the Working

44 *General Comment No 12*, above n 6, at [27]. See further Aoife Nolan “The Child as ‘Democratic Citizen’: Challenging the ‘Participation Gap’” [2010] Public Law 767.

45 *Pretty v United Kingdom* (2002) 35 EHRR 1 (Section IV, ECHR) at [6] (emphasis added).

46 *General Comment No 12*, above n 6, at [16].

47 See Ann B Smith, Nicola J Taylor and Pauline Tapp “Rethinking Children’s Involvement in Decision-making After Parental Separation” 2003 10(2) *Childhood* 201.

Group in 1981.<sup>48</sup> That suggests — at least to the present author — that states have a degree of latitude over how they implement their obligation. The wording here appears to offer states the option of permitting a child to express views to a court or tribunal directly and, indeed, there will often be considerable benefit in having the opportunity to observe the child's demeanour and to ask follow-up questions. However, art 12(2) also appears to countenance the possibility of the state providing another mechanism — a legal or other representative — by whom the child's views are conveyed. For this option to satisfy the requirements of the Convention, it is crucial, of course, that the alternative mechanism should be accessible and effective.

At first glance, the UN Committee appears to extend less latitude to states. In its General Comment, it takes the position that, once the child has decided to be heard, "he or she will have to decide how to be heard",<sup>49</sup> suggesting that selecting the mode of communicating views lies wholly with the child. A necessary consequence of this would be a requirement on states to provide the opportunity for all children who choose to do so to appear in person before courts and tribunals dealing with matters affecting them. Further reading of the *General Comment* suggests, however, that the Committee may not be taking such an absolute position since it goes on to state that "wherever possible, the child must be given the opportunity to be directly heard in any proceedings",<sup>50</sup> implying that such an approach may not always be possible. Later, discussing the transmission of the child's views through a representative, the Committee notes that "it is of utmost importance that the child's views are transmitted correctly to the decision maker by the representative",<sup>51</sup> a sentiment with which no one would quarrel. However, immediately after that statement there is the following sentence: "The method chosen should be determined by the child (or by the appropriate authority as necessary) according to her or his particular situation."<sup>52</sup> It is unclear whether this refers to the method for ensuring accuracy or the method of communication itself.

### C Context

Article 12 does not exist in isolation. It, like the other provisions of the Convention, operates alongside other international and regional instruments. That this can lead to tension is exemplified by the Hague Convention on

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<sup>48</sup> *Legislative History* vol 1, above n 3, at 439.

<sup>49</sup> *General Comment No 12*, above n 6, at [35].

<sup>50</sup> At [35].

<sup>51</sup> At [36].

<sup>52</sup> At [36].

the Civil Aspects of International Child Abduction, which prioritises the speedy return of children who have been wrongfully removed and places less emphasis on the child's views than does art 12.<sup>53</sup> To date, regional instruments seem to have presented less of a problem. Some, like the African Charter on the Rights and Welfare of the Child,<sup>54</sup> were drafted with the UN Convention firmly in mind, but even older instruments that predate the UN Convention, like the European Convention on Human Rights, are now interpreted using the UN Convention as a benchmark.<sup>55</sup>

As one of the fundamental values of the UN Convention, the impact of art 12 is pervasive in terms of that Convention: that is to say, where the child who is capable of forming views wishes to express them, these views are relevant in the implementation of all Convention rights. Sometimes this is implicit in the provision itself, as is the case in art 5 requiring the adults who are obliged to provide the child with appropriate direction and guidance to do so "in a manner consistent with the evolving capacity of the child".<sup>56</sup> However, even where no mention is made of the child's views or evolving capacity, as is the case in arts 21 (adoption), 28 (education) and 37 (juvenile justice), they remain relevant.<sup>57</sup>

Conversely, the realisation of participation rights is, at least to some extent, dependent on other Convention rights being respected. In this, arts 13 (freedom of expression), 14 (freedom of thought, conscience and religion), 15 (freedom of association) and 17 (right of access to information) are of particular importance since it is only through a holistic approach that the child can be armed with the tools that are so essential to full participation.

In addition, art 12 operates in the context of the Convention as a whole and the other fundamental values of the Convention come into play. In conformity with art 2 (non-discrimination), the right to be heard applies to all children and young people without discrimination on grounds of race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status. As the UN Committee was all too aware, this can present a problem where "gender stereotypes and patriarchal values undermine and place severe limitations on girls in the enjoyment of the right set forth in article 12".<sup>58</sup>

53 Convention of 25 October 1980, HCCH No 28. For a discussion of the South African solution to resolving the conflict see Trynie Boezaart "Listening to the Child's Voice" [2013] NZ L Rev 357.

54 African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (opened for signature 11 July 1990, entered into force 29 November 1999).

55 See *Sahin v Germany* (2003) 36 EHRR 43 (Grand Chamber, ECHR) at [39].

56 *General Comment No 12*, above n 6, at [91]. See also [84]–[85].

57 At [50]–[69] and [86].

58 At [77].

Article 3 requires that the best interests of the child are a primary consideration in all actions concerning the child and its interaction with art 12 has the potential to create what has long been regarded as a fundamental tension in the Convention.<sup>59</sup> Where the child holds clearly articulated views preferring option X and the adult decision-maker, whether an individual or a court, believes option Y would serve the child's best interests better, which prevails? Given the primacy of best interests — and provided the child's views have been given due consideration — most children's rights lawyers would have no difficulty in preferring option Y. That may explain the following curious, yet unequivocal, statement from the UN Committee:<sup>60</sup>

There is no tension between articles 3 and 12, only a complementary role of the two general principles: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children. In fact, there can be no correct application of article 3 if the components of article 12 are not respected. Likewise, article 3 reinforces the functionality of article 12, facilitating the essential role of children in all decisions affecting their lives.

While the Committee's elegant defence of its position has a certain attraction, it elides a very real and practical tension, and it is submitted that denying the existence of this tension, rather than confronting it, is not the best way to proceed.

### III Implementation

All but two countries have now ratified the Convention and, thus, are bound by its terms. Two important qualifications, each reflecting established norms of international law, are worth noting at this point. First, ratification may be subject to reservations, limiting the state's commitment in respect of certain provisions and, second, how obligations are implemented is a matter for the individual state. In 2007, the UNICEF Innocenti Research Centre reported that two-thirds of countries in its study had incorporated the Convention into

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59 For an excellent overview see Jane Fortin *Children's Rights and the Developing Law* (3rd ed, Cambridge University Press, Cambridge, 2009) at 19–30. In the criminal context see Annemarijke Beijer and Ton Liefwaard "A Bermuda Triangle: Balancing Protection, Participation and Proof in Criminal Proceedings affecting Child Victims and Witnesses" (2011) 7(3) *Utrecht Law Review* 70.

60 *General Comment No 12*, above n 6, at [74].

domestic law.<sup>61</sup> In some countries, it ranks alongside the constitution while, in others, it is on a par with domestic legislation. While incorporating the Convention into domestic law is the gold standard, a failure to do so is of less significance in countries where treaty obligations take precedence over domestic law.<sup>62</sup> Even where that is not the case, Convention provisions may find expression in a domestic constitution,<sup>63</sup> be echoed in legislation or given the imprimatur of domestic courts.

There are, of course, many different contexts, both international and domestic, in which the child — or groups of children — might have a voice. In addition, participation can take different forms, classified by Gerison Lansdown as “consultative”, “collaborative” and “child-led”.<sup>64</sup> In the years since the Convention came into force, a whole range of strategies and mechanisms have been developed to facilitate this. What progress has been made and what still remains to be done?

### *A The world stage*

In his masterly, and sometimes wry, account of the drafting of the Convention, Adam Lopatka, Chairman-Rapporteur of the Working Group, observed:<sup>65</sup>

sometimes I was asked half seriously and even half derisively whether children — the beneficiaries of the Convention — participated in the work on the draft convention and if so what were their proposals.

As he noted, like any other international human rights treaty, the Convention was the product of government and other representatives. It is probably a reflection of the state of children’s rights at the time that children played so little part in the process, albeit the delegates of a few states referred to the opinions of children and youth organisations in their own countries.<sup>66</sup>

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61 *Law Reform and Implementation of the Convention on the Rights of the Child* (UNICEF Innocenti Research Centre, 2007) at 5–7.

62 This is the case, for example, in the Netherlands.

63 Aside a constitutional amendment, this will be possible only where the constitution post-dates the Convention, as happened in South Africa.

64 Lansdown, above n 9, at 147–151.

65 *Legislative History* vol 1, above n 3, at xl.

66 At xl. He elaborated: “When work on the draft was about to be completed, a group of Swedish children entered the hall where the Working Group was holding its meeting and submitted a petition written on a poster one metre wide and several metres long signed by approximately twelve thousand children. The petition contained support for the Convention and especially for Sweden’s proposal that children should not be called up for service in the armed forces or involved in armed conflicts. On a few occasions,

There is no doubt that the participation rights of children were not a first priority for a number of international organisations during the early days of the Convention. Given the basic survival challenges so many of the world's children face, that is hardly surprising. On the other hand, effective participation is crucial, not only if these children are to be given a voice in ensuring their very survival, but for the many more fortunate children whose basic needs are being met and who want to help shape their own future and that of their fellows.

Only a few weeks after the UN Convention entered into force, in 1990, world leaders met together at the World Summit for Children in New York. Reaffirming their commitment to its goals, they adopted the Declaration on the Survival, Protection and Development of Children and a 10-point Plan of Action for its implementation.<sup>67</sup> The focus of that exercise was on children's survival, health, nutrition, education and protection, rather than participation rights to which only gentle allusion was made.<sup>68</sup>

A decade later, (then) UN Secretary-General Kofi Annan was able to report significant, if not universal, progress in meeting the benchmarks set in that Declaration.<sup>69</sup> Participation rights were given a more prominent place, with it being noted that:<sup>70</sup>

The growing recognition of children's right to participate, in accordance with their evolving capacity, in local or national decision-making processes and to contribute to the development of their own societies has been among the most significant advances of the last decade.

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schoolchildren from Canada came to listen to the debates in the Working Group. Also, representatives of several French child and youth organizations displayed an active interest in the work on the draft convention."

67 See further <[www.unicef.org/](http://www.unicef.org/)>.

68 See, for example, *World Declaration on the Survival, Protection and Development of Children* "The Task" <[www.unicef.org/](http://www.unicef.org/)> at [15]: "All children must be given the chance to find their identity and realize their worth in a safe and supportive environment, through families and other care-givers committed to their welfare. *They must be prepared for responsible life in a free society. They should, from their early years, be encouraged to participate in the cultural life of their societies*" (emphasis added).

69 Kofi A Annan *We the Children: Meeting the Promises of the World Summit for Children* (UNICEF, 2001), adapted, updated and abridged version of Kofi A Annan *We the Children: End-decade review of the follow-up to the World Summit for Children A/S-27/2*; and *Progress since the World Summit for Children: A statistical review* (UNICEF, Geneva, 2001).

70 Annan *We the Children: Meeting the Promises of the World Summit for Children*, above n 69, at 78–79.

In 2002, the General Assembly of the United Nations held a Special Session on Children at which participants pledged “to complete the unfinished agenda of the World Summit for Children” and endorsed a fresh 10-point list of principles and objectives.<sup>71</sup> This time, participation rights were on the list, with item 9 being expressed in the following terms:<sup>72</sup>

Children and adolescents are resourceful citizens capable of helping to build a better future for all. We must respect their right to express themselves and to participate in all matters affecting them, in accordance with their age and maturity.

Participation rights, it seems, had finally found a place at the top table.

That process has continued and, in 2009, the 20th Anniversary Commemoration of the Convention on the Rights of the Child at the United Nations in New York was addressed by young delegates from around the world as well as adult world leaders.<sup>73</sup> Similarly, the celebration of the 20th anniversary organised by the UN Committee and the Office of the High Commissioner for Human Rights included children’s and youth groups as well as states parties, UN bodies, inter-governmental and non-governmental organisations and academics.<sup>74</sup> In its annual publication, *The State of the World’s Children*, UNICEF has adopted the practice of including contributions from young people as well as those from adults.<sup>75</sup> Children, it seems, are gaining a voice on the world stage, something reflected in various regional instruments addressing children’s rights.<sup>76</sup>

Meanwhile, the UN Committee had been playing its part in promoting art 12 and monitoring compliance with it by receiving the reports which states parties are required to submit to it two years after ratifying the Convention and every five years thereafter.<sup>77</sup> The Committee’s guidance on what is

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71 *A World Fit for Children* A/RES/S-27/2 (2002) at [3] and [10]. Encouraging ratification and implementation of the Convention on the Rights of the Child had also been one of the express goals of the *United Nations Millennium Declaration* A/RES/55/2 (2000) at [26].

72 *A World Fit for Children*, above n 71, at [7(9)]. See also [32].

73 See the photo gallery of the event at </untreaty.un.org/cod/avl/ha/crc/crc\_photo.html>.

74 See Committee on the Rights of the Child *Celebration of the 20th Anniversary of the Adoption of the Convention on the rights of the Child* <www2.ohchr.org>.

75 See, for example, *The State of the World’s Children 2011: Adolescence: An Age of Opportunity* (UNICEF, New York, 2011).

76 African Charter on the Rights and Welfare of the Child, above n 54, art 4(2); and the European Convention on the Exercise of Children’s Rights ETS No 163 (1996), art 3.

77 UNCRC, above n 2, art 44.



required in country reports includes express reference to art 12,<sup>78</sup> and the Committee's concluding observations on a country's progress refer, *inter alia*, to the implementation of art 12. In 2006, the Committee dedicated its Day of General Discussion to the child's right to be heard, focusing particularly on children as active participants in society and the child's right to be heard in judicial and administrative proceedings.<sup>79</sup> Three years later, as part of its Celebration of the 20th Anniversary of the Adoption of the Convention on the Rights of the Child, listening to the child in the family setting was also included as a specific topic for discussion.<sup>80</sup> As a result of its work over the years, the Committee was in a position to offer amplification of its expectations in respect of art 12 by means of a General Comment dedicated to it.<sup>81</sup> UNICEF too has contributed to the implementation process, not least by publishing an implementation handbook on the Convention,<sup>82</sup> a resource guide on art 12,<sup>83</sup> as well as its own 2007 study and other research offering valuable insights.<sup>84</sup>

#### *B National implementation: the macro level*

That the participation rights of children and young people should operate at the domestic macro level has been endorsed and reiterated by the UN Committee, which has refined its thinking on what this means. In 2003, it stressed: "It is important that Governments develop a direct relationship with children, not simply one mediated through non-governmental organizations (NGOs) or human rights institutions."<sup>85</sup> Six years later, it emphasised that:<sup>86</sup>

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78 *Treaty-specific guidelines regarding the form and content of periodic reports to be submitted by States parties under article 44, paragraph 1(b), of the Convention on the Rights of the Child* CRC/C/58/Rev.2 (2010) at [23] and [25].

79 Geneva, 15 September 2006. The theme was "Speak, Participate and Decide — The Child's Right to be Heard" and the recommendations that resulted can be found at <www2.ohchr.org>.

80 Geneva, 8–9 October 2009. See the proceedings of *Working Group 6: Children's Voices in the Family: Overcoming Resistance* at <www2.ohchr.org>.

81 *General Comment No 12*, above n 6.

82 *Implementation Handbook for the Convention on the Rights of the Child* (3rd ed, UNICEF, Geneva, 2007).

83 Lansdown, above n 9.

84 *Law Reform and Implementation of the Convention on the Rights of the Child*, above n 61.

85 *General Comment No 5: General Measures of Implementation for the Convention on the Rights of the Child* CRC/GC/2003/5 (2003) at [12].

86 *General Comment No 12*, above n 6, at [12].

The views expressed by children may add relevant perspectives and experience and should be considered in decision-making, policymaking and preparation of laws and/or measures as well as their evaluation.

The UN Committee's view of youth parliaments, municipal children's councils and ad hoc consultations, however, was rather more guarded. While it welcomed them as a means by which children's voices could be heard, it saw them as only part of the process since only a relatively small number of children could participate and it was concerned that they might amount to no more than one-off events having no real impact.<sup>87</sup> Thus, it called on states to encourage the formation of child-led organisations<sup>88</sup> and to designate a specific authority with responsibility for implementing children's rights, that person or body having direct contact with these organisations<sup>89</sup> — a recommendation later expressed as establishing the office of children's ombudsman or commissioner.<sup>90</sup> It saw children as having a role over a wide range of matters from the design of schools and health facilities to community development plans.<sup>91</sup> As the UN Committee understood all too well, meaningful implementation of art 12 requires that the community as a whole, and particularly those involved with children, understand its content and implications.<sup>92</sup>

The year 2012 provided two graphic examples of young women seeking to participate in shaping their societies, each demonstrating very different contexts and consequences. Martha Payne, a nine-year-old pupil, established a blog, *NeverSeconds*, on which she posted photographs of the, often unimpressive, lunches served at her state school in Lochgilphead, Scotland, along with a brief critique and a 1–10 score of the offerings. Initially, Martha anticipated the information being shared with friends and family, but the blog quickly attracted wider attention and she expanded it to include photographs of school meals from around the world. The local authority responsible for her school sought to silence her by banning her from taking photographs, rightly earning condemnation from the Scottish public and a host of others, including a celebrity chef and the Minister of Education, and forcing it into an embarrassing climb-down.<sup>93</sup>

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87 At [127].

88 At [128].

89 Committee on the Rights of the Child *Day of General Discussion*, above n 11, at [26].

90 *General Comment No 12*, above n 6, at [49].

91 At [128].

92 At [49].

93 Peter Walker "World gets second helpings of girl's school dinner blog as ban is overturned" *The Guardian* (United Kingdom, 16 June 2012).

Martha's blog went on to raise over £120,000 (about NZ\$240,000) for Mary's Meals, a charity in Malawi, and Martha received a slew of awards for her work.<sup>94</sup> While one can frame Martha's actions as an exercise of her art 12 right to express her views over the quality of meals being provided in her school, the attempt to silence her also implicated her right to freedom of expression under both the European and UN Conventions. What is so encouraging about the tale is the way the public and many officials rallied behind her and the fact that the local authority corrected its error quickly. One hopes that those working for the local authority received the training on art 12 that they so clearly needed.

The other example reflects very much more serious consequences for the young woman concerned. In October 2012, a horrified world learned of the shooting, by a Taliban activist, of Malala Yousafzai in Swat Valley, Pakistan.<sup>95</sup> Malala had long been outspoken over her support of education and the particular challenges faced by girls and young women in accessing it, writing for the BBC and receiving numerous awards for her work.<sup>96</sup> A Taliban spokesman was quoted in the British press as saying: "This is a new chapter of obscenity, and we have to finish the chapter."<sup>97</sup> What was the "obscenity" to which he referred? Was it the atrocious act of violence perpetrated against Malala for exercising her right to freedom of expression and seeking to participate in shaping her world? Was it the ill-disguised attempt to silence her and deter others from speaking out? For him, it was unlikely to be any of the above, reminding us of just how much remains to be done in making the participation rights of so many young people a reality. At the time of writing, Malala has been released from hospital in England, where she continues to receive treatment as an outpatient, and there have been calls for her to receive a Nobel Peace Prize.<sup>98</sup> During the celebrations of Malala Day, on 10 November 2012,<sup>99</sup> UN Secretary-General Ban Ki-moon described "her as the 'global symbol' of every girl's right to an education".<sup>100</sup>

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94 "Award for food blogger and fundraiser Martha Payne" *The Scotsman* (Scotland, 25 January 2013).

95 Jon Boone "Pakistani girl shot over activism in Swat valley, claims Taliban" *The Guardian* (United Kingdom, 9 October 2012).

96 Halima Mansoor "Malala Yousafzai: a young Pakistani heroine" *The Guardian* (United Kingdom, 10 October 2012).

97 Boone, above n 95.

98 Haroon Siddique "Pakistan schoolgirl Malala Yousafzai discharged from hospital" *The Guardian* (United Kingdom, 10 October 2012).

99 Office of the United Nations Special Envoy for Education "Malala Day" <educationenvoy.org>.

100 "World celebrates November 10 as 'Malala Day', UN chief extends support" *The Times of India* (India, 10 November 2012).

### *C National implementation: the micro level*

There is common ground between children, young people and adults in respect of decisions taken at the micro level. Whether they are taken by courts, tribunals, health-care professionals, educators or family members, these decisions will often have an immense and tangible impact on our lives that can be immediate or longer-lasting. Adults expect to play some part when such decisions are taken and art 12 seeks to ensure that children and young people will also secure a participatory role in the decision-making process.

It will be remembered that the earliest iteration of what was to become art 12 was concerned largely with these micro-level decisions, albeit it evolved during the drafting process into something much more all-encompassing. Nonetheless, the UN Committee has recognised that decisions within the family, adoption and kafalah, parental separation and divorce, child protection, juvenile offending and the child as a witness to, or victim of, a crime are all contexts in which it is crucial that the child's voice be heard.<sup>101</sup> In its 2007 study, the UNICEF Innocenti Research Centre found that it has often proved possible to implement the child's art 12 rights in these areas through domestic policy, law and practice where courts or other state agencies are involved.<sup>102</sup>

## **IV Concluding Thoughts**

It is ironic that no mention was made of the child's right to be heard — what have come to be known as the participation rights of children and young people — in the first draft of the United Nations Convention on the Rights of the Child since it is now regarded as one of its pillars. What began as a fairly limited right developed into a multi-faceted concept that, along with other core provisions, underpins the whole structure of the Convention.

The evolution of art 12 continues through the work of the UN Committee, the Innocenti Research Centre and scholars around the world. An essential facet of that evolutive process, of course, has been the implementation of art 12 at all levels and, in this, states have played a vital role. There remain those who doubt the value of "children's rights" as a concept or are sceptical

101 *General Comment No 12*, above n 6, at [51]–[64]; and the *Implementation Handbook*, above n 82, at 165–166.

102 *Law Reform and Implementation of the Convention on the Rights of the Child*, above n 61, at 28–31.

that their pursuit makes a significant difference,<sup>103</sup> but countless examples of art 12 in operation are proving them wrong.

The immense progress that has been made in implementing art 12 is a testament to the wisdom of the drafters of the Convention, but it will take continuing and concerted efforts by the international community, governments, non-governmental organisations and individuals — both young and older — to ensure its full implementation. This colloquium and the articles that follow seek to contribute to that process.

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103 Martin Guggenheim *What's Wrong with Children's Rights?* (Harvard University Press, Cambridge (Mass), 2005); and Clark W Butler (ed) *Child Rights: The Movement, International Law and Opposition* (Purdue University Press, West Lafayette, 2012).