



Original research article

Fulfilment of the Convention on the Rights of the Child in the practice of Czech courts

Kateřina Cilečková¹ * , Monika Chrenková¹ , Martin Kornel^{1,2} ¹ University of Ostrava, Faculty of Social Studies, Department of Social Work, Ostrava, Czech Republic² Masaryk University, Faculty of Law, Department of Civil Law, Brno, Czech Republic; Attorney, Frank Bold Advokáti, s.r.o., Brno, Czech Republic

Abstract

The aim of the project was to find out how the opinions of minor children are ascertained in proceedings in which they are participants, what techniques are used, and whether (and to what extent) the courts take the ascertained opinions into account when making decisions that affect the children's future life. The rights of children to adequate participation in court proceedings mainly results from the Convention on the Rights of the Child. The paper discusses how the child's opinion is ascertained depending on his or her age, the methods of ascertaining the child's opinion, including the specific techniques that may be used and, last but not least, the importance of ascertaining the child's opinion for the justification of the judgment. The results of the research show the crucial role of an authority of social and legal protection of children as a conflict guardian, and also point out that it's necessary to pay constant attention to the actual realization of the rights of minors. In the Czech Republic the determination of the opinions of minors is well anchored in the legislation, but reality does not always correspond to this.

Keywords: Decision-making practice of courts; Methods of ascertaining the child's opinion; Participation of minor children; Proceedings in matters concerning the custody of minors

Introduction

Participation, in the sense of the involvement of minor children in court proceedings to which they are parties, has received considerable attention in the literature and related projects. This is a consequence of the fact that in recent decades there has been a growing awareness of the right of children to participate (Warming, 2013) in decision-making in matters affecting their lives (Fenton-Glynn, 2021). This right is guaranteed by international conventions, the key ones for the Czech Republic being the Convention on the Rights of the Child (Article 12), the European Convention on the Exercise of the Rights of the Child (in particular Articles 6 and 8, No. 54/2001 Sb. m. s.), and the European Convention for the Protection of Human Rights and Fundamental Freedoms (No. 209/1992 Sb.). The 2010 Guidelines of the Committee of Ministers of the Council of Europe on Child-Friendly Justice (Guidelines of the Committee of Ministers of the Council of Europe, 2023) and the 2016 Guidelines on Contact with Children in the Justice System (International Association of Youth and Family Judges, 2023) are also relevant for the interpretation of this right. The rights of children to adequate participation in court proceedings, to express their views, and to have their opinions considered, have been repeatedly confirmed by the case law

of the European Court of Human Rights (Daly, 2010) and the case law of the Constitutional Court.

The professional legal literature, both foreign (Mol, 2022; Schrama et al., 2021) and Czech (Čamdžićová, 2021; Rogalewiczová, 2018), have also paid increased attention to the topic. A number of studies have shown that children are interested in expressing their opinions (Birnbbaum and Saini, 2012) in court proceedings for custody arrangements, ascertaining their opinion being an essential prerequisite for the decision in the best interests of the child. For example, UN Committee on the Rights of the Child General Comment No. 14, CRC/C/GC/14, paras 53–54; Constitutional Court ruling of 30 May 2014, No. I. ÚS 1506/13, paras 22–24; Constitutional Court ruling of 30 December 2014, No. I. ÚS 1554/14 (N 236/75 SbNU 629), para 23.

Although the literature does not reach an agreement on exactly what can be included in the concept of participation (Smeets and Rap, 2021), the basic hypotheses in relation to decision-making in the case of minor children can be summarised as follows:

- The participatory rights of a child who is able to formulate his or her own opinion include the right to be heard, i.e., to express his or her opinion in court proceedings so that the judge becomes familiar with it.
- The court does not have to hear the child in every proceeding, but if the child wishes to be heard, he or she should be

* **Corresponding author:** Kateřina Cilečková, University of Ostrava, Faculty of Social Studies, Department of Social Work, Českosobratrská 16, 702 00 Ostrava, Czech Republic; e-mail: Katerina.Cileckova@osu.cz
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heard, and any failure by the court to hear the child must be duly justified in each case. For example, Judgment of the European Court of Human Rights of 11 September 2016, *Casarrubios and Cantalapiedra v. Spain*, No. 23298/12, or UN Committee on the Rights of the Child General Comment No. 12, CRC/C/GC/12 para. 35, Resolution of the Supreme Court of 31 March 2020, No. 21 Cdo 2270/2016 [C 15986].

- The child should be heard if he or she has reached the age of 12 on the basis of a presumption provided by law [Section 100(3) of Act No. 99/1963 Sb., the Code of Civil Procedure, Section 20 of Act No. 292/2013 Sb., on Special Court Proceedings (hereinafter referred to as “SCP”) and Section 867(2) of Act No. 89/2012 Sb., the Civil Code]; in case of a younger age, the court is obliged to examine whether the individual child is able to express his or her views and, if so, the ascertainment of that is required, too (Westphalová, 2022).
- The child’s opinion should be ascertained directly by the court, or indirectly in justified cases (in particular due to the age and maturity of the child). For example, Judgment of the Grand Chamber of the European Court of Human Rights of 8 July 2003, *Sahin v. Germany*, No. 30943/96, para 73, or the Constitutional Court ruling of 30 May 2014, No. I. ÚS 1506/13.

Materials and methods

Our expert team was interested in whether (and how) the participation of minors takes place in the decision-making practice of the Czech general courts, and to what extent the above-mentioned requirements are actually met in practice. Therefore, we conducted quantitative research to determine whether and how the child’s opinion is ascertained in court proceedings concerning him/her, and how the ascertained child’s opinion is considered in decision-making. In the Czech Republic, how the child’s opinion is ascertained in proceedings concerning him or her and whether it is taken into account in decisions affecting the child’s later life (Fernando, 2014; Fleming, 2013; Littlechild, 2020) is yet to be empirically investigated.

An analysis of the text, *i.e.*, the court decision and the content of the court file, was chosen as the research method. Descriptive statistical methods such as absolute frequencies and percentages of occurrence of individual responses were used to evaluate the results. All data obtained was anonymised, including the information about the specific court from which the data was obtained. To achieve the greatest possible objectivity, the research was always conducted in one district court of a judicial region. To make the research question more specific and to obtain comparable data, the research focused on proceedings under Section 466 (b), (c), and (d) of the Code of Civil Procedure, which were finally decided in 2018 and 2019. For the purposes of the research, we planned to process 400 files, namely, 50 files from each quarter of those two years.

There was a surprising obstacle to conducting our research which we called “gatekeeping” in a figurative sense. We always approached the president of the district court in each judicial region and asked them for access to the files for the research on condition of anonymity. Individual district courts were selected by lot and when we were unsuccessful in our request to allow research at one court, another court was selected, also by lot. Each time we first contacted the presiding judge of the court with an email that included the purpose of the project,

our request to see the files, and a questionnaire containing the data collected from the files.

There is no doubt that our scientific requirements are completely beyond the legal obligations of the courts, but on the other hand, it is not possible to carry out the research objectively in any other way and to find out the real situation of the participation of minors. A total of 21 courts were contacted. In one of the regions, the first court complied with our request, and in two regions only every other court complied. In the other regions, it was the second or third courts contacted. A total of 13 district courts refused our request to allow research. There were basically two reasons for refusal, both objective and subjective ones. The objective reasons included the lack of time, the pressure on the court administration, and the ongoing renovation of the court building. The subjective reasons mainly included a lack of trust in the researchers, especially our ability to keep the information in the files confidential. In two cases, there was a concern that this was actually a check on the court’s decision-making practice. Therefore, it is possible that the research was only made possible by the presidents of those courts who believed that their decision-making practice was in line with legal requirements, which was a limitation of the research that we were unable to influence.

We were able to obtain 2,987 questionnaires from 8 courts. The questionnaire was always for one child, *i.e.*, from one file we obtained from one to several questionnaires, which depended on the number of children in the family. Although our goal was to process 400 files in each court, it was not fully met. In two cases, the courts were small, so we processed all of the final decisions specified above, of which there were approximately 200 for 2018 and 2019. In one case, it was a court with a large flow of cases, but they only provided us with 200 files due to their administrative workload.

Results and discussion

The first data we collected concerned the age of the child. For the sake of simplicity, the age of the child can be divided into 3 categories. The first category is from 0 to 6 years of age (which is the usual age of entry into first grade), 39.36% of the children fell into this category. The second category is from 7 to 11 years of age, and 33.99% of the children fell into this one. The age of 12 years can be considered as the limit of the “compulsory” child opinion ascertaining in accordance with Article 867 (2) of the Civil Code (Hultman et al., 2020). The category of children over 12 years of age (specifically from 12 years of age to adulthood) consisted of 26.65% of children.

The next question focused on the first step in the implementation of the right to participation, namely, whether the child was informed about the proceedings to which he or she was a party. This information was not always clear from the file, but if the child’s opinion was ascertained, it appeared that the child had mostly been informed of the proceedings. According to our findings, the child was informed about the proceedings to which he or she was a party in 47.78% of cases. In 17.41% cases he or she was not informed, and in the remaining 34.81% of cases the information could not be ascertained from the file. In cases where the child was informed about the proceedings (this was in 47.78% of cases, *i.e.*, 1,422 children) we asked who informed the child about the proceedings. The parents played a positive role there; in accordance with the exercise of parental responsibility they were the ones who informed the child about the proceedings in 72.22% of cases. It was only the child’s social welfare authority that informed the

child about the proceedings in 5.77% of cases. In rare cases, a psychologist informed the child about the proceedings, or the proceedings were initiated by the child. In 19.83% of cases, this information could not be found in the file.

We wanted to know whether the child was interested in giving their opinion. However, this could not be ascertained in 60.32% of the files. In 34.21% of cases the child did not express an interest in giving his/her opinion. The answer was only positive in 5.48% of cases (163 children). Of these 163 children, 28.22%, *i.e.*, 46 children, expressed an interest in giving their opinion directly to the court. 85 children, *i.e.*, 52.15%, did not express this interest or refused it straight away. For 32 children, *i.e.*, 19.63%, it was not possible to find out either way.

Now we come to perhaps the most important question of the research: whether the child's opinion was ascertained at all in the proceedings. The child's opinion was ascertained in 46.24% of cases (*i.e.*, in 1,376 children), it was not ascertained in 44.09% (*i.e.*, in 1,312 children), and it could not be found out in 9.68% (*i.e.*, in 288 children).

As mentioned above, by dividing the children by age, we observed two basic indicators. The first is the usual age of commencement of school, *i.e.*, 6 years of age. This is associated with a relatively high level of cognitive ability, justifying the assumption that the child is able to take in information, form his/her own opinion, and communicate it (Mayne et al., 2018). The second milestone is the age of 12, as set out in the Civil Code (Table 1).

Table 1. Ascertaining the child's opinion (the percentage given is relative to the number of children in the age group, so the sum does not add up to 100%)

The child's opinion was ascertained	Number	%
0–6 years of age	72	7.35
7–11 years	686	56.98
12 years and more	618	77.93

The first data we collected was *the age of the child*. For the sake of simplicity, this can be divided into 3 categories: from 0 to 6 years of age, *i.e.*, the usual age of entry into the first grade (9.36% of children were in this category), from 7 to 11 years of age (33.99% of the children), and 12 years old and more. The age category of children over 12 years of age, where the age of 12 years is according to § 867 par. 2 of the Civil Code considered to be the threshold for “mandatory” ascertainment of the child's opinions, 26.65% of children fell into the category – see the Chart 1.

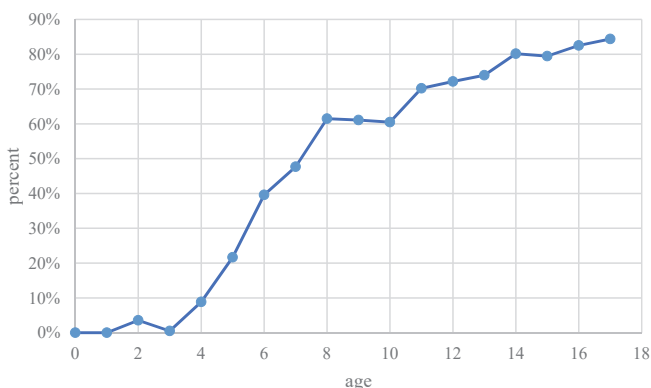


Chart 1. Child's opinion ascertainment curve in relation to age

In our sample, the opinion was not ascertained in 1,312 children, and 1,172 children were under 6 years of age. When we investigated why the child's opinion was not ascertained, we found that it was not ascertained in 857 children due to the tender age. In the remaining 455 children, there were other reasons, the two dominant ones being: (1) the proceedings only involved an increase/reduction of maintenance, (2) it was a procedure in which the parents agreed on the custody of the children. It is debatable whether to ascertain the child's opinion in a situation where the parents have agreed together on the regulation of rights and obligations after separation or divorce. The conclusion of an agreement on the exercise of rights and obligations is an expression of the parents' common opinion, but, in our view, it is also the situation covered by Section 875 (2) of the Civil Code, *i.e.*, a decision which affects the interests of the child. Whether the parents have given due consideration to the child's opinion and taken it into account in their decision cannot be ascertained in any other way than by asking the child.

Some of the reasons for not ascertaining the child's opinion were objective and rational, *e.g.*, when the child's physical and mental state did not allow the ascertainment of the opinion. Other reasons for not ascertaining the opinion are somewhat debatable, *e.g.*, a situation where the parent did not want the opinion to be ascertained, or the child's opinion was not ascertained only because the child was not at home at the time of the visit of the child protection authority (hereinafter OSPOD). There were also repeated situations where the child's opinion was not ascertained but the OSPOD somehow automatically assigned the same opinion to the child as was ascertained from his/her older sibling. Given the type of proceedings, it must be considered highly inappropriate to ascertain the child's opinion only through the parents' interpretation; these situations were also found in the files, albeit sporadically. In rare cases, it was clearly an error on the part of both the OSPOD and the court in question; since the children concerned were aged 12 and over, the file did not show any mental limitations on their part, and yet their opinion was not ascertained and no reason for that was given in the file.

In contrast to this negative finding, many of the files showed the good practice of social workers and child protection authorities who regularly ascertain the opinion of children from the age of 5 (and even from younger ones). Within the framework of qualification and further training, social workers should acquire knowledge and methods and techniques used in communication with children of different ages. Social workers can then ascertain the child's opinion using a wide range of different methods and techniques and combinations thereof, *e.g.*, by supplementing the interview with projective or metaphorical techniques to provide a more accurate picture of the child's actual opinion, even though an interview was the predominant way of communication with the child and ascertaining his/her opinion (as shown in Table 2).

Ways of ascertaining the child's opinion

Next, we were interested in how the child's opinion was ascertained. We established two basic categories: ascertaining

Table 2. Technique of ascertaining the child's opinion

What technique(s) was/were used to ascertain the child's opinion	Number	%
Other option	198	14.39
Interview	1176	85.61

the child's opinion indirectly, either through the child welfare authority, or through an appointed expert (in child psychology or child psychiatry), or by the child's representative. The last category was the "other option", which includes ascertaining the child's opinion through a mediator, social worker, or psychologist from a counselling centre, etc. (Table 3).

The figures below demonstrate the dominant role of the child welfare authority (Woodman et al., 2023) as a conflict guardian in ascertaining the child's opinion (Seim and Slettebø, 2017). In only about 10% of the cases was the child's opinion ascertained directly in an interview with the judge (Bruning, 2020). It is perhaps unfortunate that this step is taken almost as a "last resort" (Martins et al., 2018; Powell and Smith, 2009) and is used especially in long-standing and highly conflicting disputes between the parents. Custody judges positively perceive the minor's personal participation in the court proceedings, his/her directly communicated opinion on a possible agreement between the parents, as well as the justification of the minor's views in the judgment itself. In neither case did they confirm the existence of the traditional negatives, such as the child's stress at being in the courtroom and talking to the judge. On the contrary, the judges reported very positive feedback from the minors who were happy to be participants in the proceedings – the outcome of which concerned them deeply (Turoy-Smith et al., 2018).

Table 3. Indirect ways of ascertaining the child's opinion (expressed in percentage)

How was the child's opinion ascertained indirectly	Up to 6 years of age	7 to 11 years of age	12 and older
Child protection authority	74.29%	83.78%	89.07%
Other option	15.71%	13.07%	7.96%
Appointed expert	10.00%	2.05%	1.11%
Child's representative	0.00%	1.10%	1.85%

Using the child's opinion in reasoning

Where the child's opinion was ascertained (*i.e.*, in the case of 1,376 children), it was almost always included in the files (specifically in 1,269 cases). Of these 1,269 judgments, the court ruled in accordance with the child's opinion in 90.31% of cases (1,146 children). In 8.2% of cases it was not possible to say whether the court ruled in accordance with the child's opinion or not (mostly because the child's opinion was vague), and in only 1.5% (19 children) the court ruled against the child's opinion.

In situations where the court decided in accordance with the child's opinion (1,146 children), the reason was stated in the judgment in 65.35% (749) cases, whereas in 34.65% (397) cases, the reason was not stated in the judgment. Where the court ascertained the child's opinion, either directly or indirectly, it significantly supported its reasoning of the judgment by quoting it (Kratky and Schröder-Abé, 2020). In decisions on the custody of minors, where the primary concern is not the resolution of legal problems but the establishing of a new arrangement of family relations, the argument that the legal solution is in line with the wishes of the minor is quite significant and, in some situations, leads to a compromise between the previously hostile parents. This fact appears repeatedly in the judgments, *e.g.*: "The minor, after speaking with the OSPOD, expressly wished to be present at the hearing and, based on the wishes he expressed there, the parents managed to reach an agree-

ment in a previously very conflicting situation; the court is unable to override the minor's feelings by an authoritative decision and, in view of the minor's age, respects her wishes."

Situations in which the court decided contrary to the expressed opinion of the child are rare, as there are 19 decisions, which is 1.5% of the number of decisions in which the child's opinion was included in the file. In all these situations, with 3 exceptions, the reasons for the court's decision were given, for example: "The minor stated that he did not want to be in contact with his mother; on the basis of a psychological examination, the court assessed the minor's opinion as a manifestation of immaturity and infantilism, which the minor himself would certainly have regretted at a later age; the minor is placed in his mother's custody because of temporary unsuitable conditions at his father's home – a new investigation will be carried out as soon as the conditions change."

The conducted research showed that the child's opinion was sought from more than half of the children in the 7–11 age group. This result proves that the participation of children under the age of 12 in court proceedings is common in Czech practice. This is a positive finding as in other states (also bound by the Convention on the Rights of the Child) the child's opinion is not ascertained until after the age of 12 (Bruning, 2020; Fernando, 2014).

The choice of specific techniques for ascertaining the child's opinion was related to the method of ascertaining the child's opinion (direct, indirect), to the place where the child's opinion was ascertained (court, OSPOD, kindergarten/school, at home, another option), and to the child's interest in communicating his/her own opinion on the situation (Lundy et al., 2011). The interview technique was dominant. The category of 'other option' most often included a combination of different techniques, ranging from interview, through observation, to professional psychological and diagnostic techniques – the use of which was based on the need to involve a psychologist or expert. This category also included (although rarely) so-called projective techniques or metaphorical techniques such as *three wishes* (finding out the current wishes and feelings of the child), *enchanted family* (using drawings we get information about mutual relationships in the family and how the child perceives the current situation in the family), *magic wand* (finding out the child's opinion by asking what it would look like tomorrow if you waved a magic wand?), or *desert island* (using a simple question to discover the child's preferences – what would you take with you to a desert island?) (Šínová and Kapitán, 2019; Zakouřilová, 2014). The 'other option' also included the use of a *communication box* containing resources and tools appropriate to the age of the child (*e.g.*, coloured paper, stickers, markers, crayons, plasticine) to help develop communication with the child (Knetlová, 2016).

A very important finding is that only 10% of the child's opinion is ascertained directly on the basis of an interview with the judge. There is an extensive training programme for custody judges in Czech judiciary, provided by the Judicial Academy, which includes topics on developmental psychology and communication with children *etc.* However, the training for judges is voluntary and depends entirely on their motivation. This differs from other countries where such training is more systematic (Fernando, 2014; Kišová, 2021).

Implications for practice

As part of the indirect method of ascertaining the child's opinions, the opinion is sought through social workers of OSPOD (so-called collision guardians). The current practice of performing collision guardianship faces a number of problems,

where collision guardianship is not the only activity of OSPOD, but in fact it occupies a significant part of the capacity of these workers. There is also a conflict of roles, where on the one hand the collision guardians find out the situation in the child's family, on the other hand they represent the child and defend his interests.

A possible solution to strengthen the direct ways of ascertaining the child's opinion is the introduction of a new position – a judicial social worker, who would assist judges in the implementation of the participation rights of minors. The pilot introduction of the position of judicial social worker is among the sub-activities of the Judicial Academy project that have been implemented in the last three years (Judicial Academy, 2022).

International research agrees that finding out a child's opinion is always beneficial (Kratky and Schröder-Abé, 2020; Turoy-Smith et al., 2018), which is also evidenced by the results of our research – if the child's opinion is ascertained, almost always stated in the court file and very often also figures in the justification of the judgment. The fact that the courts mostly decide in accordance with the child's opinion (as confirmed through our research) is sometimes criticised in practice, especially in situations where the child's opinion is suspected to be strongly influenced by one of the parents. However, this risk cannot be a reason for not ascertaining the child's opinion. The Constitutional Court commented on this issue in its ruling I. ÚS 3241/2019, stating that, although the opinion of minors is an important guide for the court's ruling, it cannot be relied upon exclusively; the case must be considered in the overall context of the circumstances and family situation so that the child's best interests are the primary consideration. If, however, the court does not intend to consider the clearly expressed views of the children, it is necessary to give sufficient reasons for such a decision.

Policy implications

In the Czech Republic, there is an expert discussion about a possible change in the position of the collision guardians. One possibility is the creation of a separate department within OSPOD, which would only perform the role of collision guardians. The second option is to create a new position of social worker – judicial social worker – see above. However, the solution to this issue is rather political, as each of the new variants will be more financially demanding than the current situation.

Future research

It would be appropriate to follow up the quantitatively conceived research with a qualitative research strategy that would include the opinions of all interested parties, both the child himself and the collision guardian, the judge and perhaps in the future also the judicial social worker. In the case of a research group of children, it would be interesting to find out how they approach their involvement, how they perceive and experience this involvement. In the case of the judges themselves, we could focus on how much weight they give to the child's opinion in their decision-making.

Conclusion

Our research has shown that in the decision-making practice of Czech courts (proceedings under Section 466 (b), (c), (d) of the Code of Civil Procedure), there are both positive and negative aspects in relation to the child's right to be heard, which is a fundamental component of the child's participatory rights in relation to the judiciary.

A positive aspect is that as the age of the child increases, his/her opinion is more and more frequently ascertained, and in the case of children aged 12 and older it is predominantly ascertained. In the category of children aged 6 to 11, the child's opinion is ascertained relatively frequently. The data show that it is around the age of 6 that the rate of ascertainment of the child's opinion by the courts increases significantly, which corresponds to the case law recommendation formulated by the Constitutional Court. On the other hand, we consider it problematic that the approach of individual district courts to ascertaining the child's opinion in proceedings varies considerably. Moreover, our results show that in such cases, court rulings often do not specify the reasons why an opinion was not ascertained, or they only include reasoning that cannot be considered relevant. The statistical data also show that the direct ascertaining of the child's opinion by the judge is an exception rather than a rule. The ascertaining of the child's opinion by OSPOD prevails considerably.

We believe that in order to strengthen children's participation rights, it is appropriate for the courts to ensure in their rulings that: (1) the court's decision always contains proper reasoning as to why the child's opinion was not ascertained in the proceedings; (2) the child's opinion is ascertained by the court primarily directly, not indirectly, and using appropriate methods; (3) the child's opinion is not ascertained by his or her parents.

Ethical considerations

The research was approved by the Ethics Committee of the University of Ostrava on 29 March 2019.

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Conflict of interest

The authors have no conflict of interest to declare.

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