

# CHILD-FRIENDLY CRIMINAL JUSTICE. THE RIGHT OF THE CHILD TO BE HEARD

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**Abstract:** *This paper seeks to discuss how the limited capacity of the child can be realistically accounted for in court proceedings. Firstly, analysis is undertaken of the data concerning the legal capacity of children in the court process. Secondly, international instruments are analyzed in order to obtain a conclusion.*

**Key words:** *children, legal capacity, juvenile, criminal procedure, trial.*

## 1. Introduction

In recent years developmental research has enhanced our understanding of child and adolescent development.

Some authors [1] assert that there are four spheres of development in children and adolescents: neurological, intellectual, emotional and psychosocial.

In the neurological area children in early and mid-adolescence are generally neurologically immature.

Another author [2] that their brains are unstable and they have not yet attained their adult neurological potential to respond effectively to situations that require careful or reasoned decisions.

In the intellectual division, children and younger teens differ significantly from adults in their cognitive functioning. In the emotional and psychosocial categories, children are shown to lack impulse control and future orientation.

Grisso and Scott conclude that between the ages of 12 and 15, impulse control improves. However, for some adolescents this process extends well into middle or late adolescence.

In the psychosocial realm, adolescents have been proved to be less risk averse than adults. They tend to weigh anticipated gains more heavily than losses in making choices.

Children and adolescents tend to focus on the short term implications of decisions and to pay less attention to the long term consequences.

During the period of early to mid-adolescence, decisions are often driven by acquiescence or opposition to authority or by efforts to gain peer approval.

These cognitive and emotional limitations have been held to directly impact on the ability of the child to participate effectively in legal proceedings.

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Psychosocial immaturity may affect the performance of youths as defendants, in ways that extend beyond the elements of understanding and reasoning [3].

Adolescents may be more likely to make choices that reflect a propensity to comply with authority figures such as making statements or admissions to the police.

Furthermore they are less capable than others to recognize the risks inherent in the various choices they face such as choosing and consulting a lawyer and evaluating the various factors in entering a plea.

Children and adolescents are less likely to consider the long-term implications of their decisions, instead concentrating on the immediate consequences.

From the conclusions of developmental research and the judicial acceptance of these findings it is clear that limited legal capacity of the child has a direct impact on his/her ability to understand the court proceedings and their consequences.

This indicates that changes are needed within court proceedings to account for these limitations.

These changes help to ensure that the child fully comprehends the judicial process and the consequences of decisions made by them and those involved in the proceedings, such as their lawyers or the presiding judge.

In defining the changes required, guidance can be taken from international standards of best practice.

The right to be heard provided by article 12 of the United Nations Convention on the Rights of the Child [4] (UNCRC) has been broadly conceptualized as the principle of effective participation [5].

This is widely used to describe the ongoing processes of information-sharing and dialogue between children and legal personnel in the criminal justice system and how children can learn how their views are taken into account and shape the outcome of these processes.

Article 3 of the European Convention on the Exercise of Children's Rights[6] outlines that the right to be heard is realized when children receive all relevant information; are consulted; allowed to express their views; informed of the possible consequences of compliance with these views and the possible consequences of any decision.

In accounting for the legal capacity of the child, adopting the structures synonymous with effective participation in court proceedings is imperative.

The ongoing dialogue and information sharing with the child is essential in light of the child's diminished neurological, emotional and psychosocial capacities.

Explanation of decisions, their consequences, the nuances and implications of the court process can help to ensure that the child reaches a level of understanding that would otherwise be impossible.

This requires augmentation of communication techniques and the physical atmosphere of the court to ensure this child-centered dialogue.

The Council of Europe's Guidelines on Child Friendly Justice echo the principles of existing international standards.

Although the limited legal capacity of the child is not expressly recognized within the guidelines, it is required that the child should be treated with respect for their age,

their special needs, their maturity and level of understanding [7].

The communication difficulties they may have must also be recognized. The Guidelines further state that cases involving children should be dealt with in non-intimidating and child-sensitive settings.

Before proceedings begin, children should be familiarized with the layout of the court or other facilities and the roles and identities of the officials involved.

Language appropriate to children's age and level of understanding should be used.

This may require court sessions involving children to be adapted to the child's pace and attention span.

Regular breaks should be planned and hearings should not last too long. Judgments and court rulings affecting children should be reasoned and explained to the child in language that he/she understands.

To facilitate the participation of children to their full cognitive capacity and to support their emotional stability, disruption and distractions during court sessions should be kept to a minimum.

The guidelines also recognize that, as far as possible, specialist courts, procedures and institutions should be established for children in conflict with the law.

This could include the establishment of specialized units within the police, the judiciary, the court system and the prosecutor's office.

Combined, the continuous child-friendly communication advocated by effective participation and the procedural changes recommended by the Guidelines, can help

to ensure that the child's lack of legal capacity is accounted for.

In conclusion, training in the area of youth justice and children's rights, needs to be provided to judges and prosecutors before presiding or practicing in matters involving juveniles.

This training should include theoretical and experiential modules on how the fair trial rights of the children are implemented and observed in practice.

Communication training is also needed to encourage and develop open dialogue between children and all legal personnel involved in the court process.

As outlined in international guidelines, judges and prosecutors should also be required to undertake specific training updates on a yearly basis as part of a specialised continuous professional development program.

If not already undertaken, specialised panels should be established consisting of legal representatives with the adequate skills and qualifications needed to provide effective representation to children.

## References

1. Scott, E., T. Grisso, T.: *Developmental Incompetence, Due Process and Juvenile Justice Policy*, University of Virginia Law School: Public Law and Legal Theory Working Paper Series, Paper 11, 2004, available at: <http://law.bepress.com> .
2. Sowell, E.: *Mapping Continued Brain Growth and Gray Matter Density Reduction in Dorsal Frontal Cortex: Inverse Relationships During Postadolescent Brain Maturation*,

- Journal of Neuroscience 218819 – 8821, 2001, as cited in E. Scott & T. Grisso 'Developmental Incompetence, Due Process and Juvenile Justice Policy' University of Virginia Law School: Public Law and Legal Theory Working Paper Series, 2004, Paper 11
3. Grisso, T., Steinberg, L., Woolard, J., Cauffman, E., Scott, E., Graham, S., Lexcen, F., Dickon Repucci, N., Schwartz, R.: *Juvenile Competence to Stand Trial: A Comparison of Adolescents' and Adults' Capacities as Trial Defendants*. Law and Human Behavior, 27(2) (2003) p. 357.
  4. United Nations Convention on the Rights of the Child, art. 12, November 2, 1989, 1577 U.N.T.S. 3; 28 I.L.M. 1456(1989).
  5. United Nations Committee on the Rights of the Child, Fifty-first session Geneva, 25 May-12 June 2009 General Comment No. 12, *The Right of the Child to be Heard* at para. 3.
  6. Council of Europe, *European Convention on the Exercise of Children's Rights*, 25 January 1996, ETS 160.
  7. Council of Europe, *Guidelines of the Committee of Ministers of the Council of Europe on Child-friendly Justice and their Explanatory Memorandum* [2010, edited version 31 May 2011].