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## ***Children's Right to Be Heard. What Children Think.***

Roberta Bosisio

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### **Abstract**

This article analyses the implementation in Italy of the children's right to be heard in judicial and administrative proceedings and investigates children's point of view about this right. The article is organized in two sections. In the first I present an overview of Italian law on children's hearing in legal proceedings in the civil law context, and the opinion of legal professionals about child's hearing. In the second I present some findings of a research aiming at identifying children's perceptions and opinions on the right to be listened to if their parents decide to separate.

Keywords: children's hearing, children's rights, children's participation, childhood studies.

### ***1. Introduction\****

This article addresses the implementation in Italy of the children's right to be heard in any judicial and administrative proceedings affecting them – in accordance with Article 12 of the 1989 Convention on the Rights of the Child, and Article 3 of the 1996 European Convention on the Exercise of Children's Rights – and investigates children's point of view about this right.

The article is organized in two sections. In the first section I present an overview of Italian law on children's hearing in legal proceedings in the civil law context (adoption and foster placement, parents' separation and divorce), and the opinion of legal professionals about child's hearing.

In the second I present some findings of a research carried out in 2001-2002 on a sample of young people.<sup>1</sup> The aim of the study was to identify children's perceptions

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\* An earlier version of this article was presented at the ISA Conference *Marginality and Voice: Childhood in Sociology and Society*, 23-25 June 2005, Bergische Universität Wuppertal, Germany.

<sup>1</sup> The findings are part of the following national research programme: *Children's Rights of Citizenship between Participation and Control* (reference n. 9914638391\_004; year 1999).

and opinions on their own rights, in compliance with the right of participation stressed in the United Nations Convention. In this article I pay special attention to the issue of the right to be listened to if their parents decide to separate.

## ***2. Participation and children's right to be heard in the United Nations Convention on the Rights of the Child***

The latest findings of neo-cognitive research (Kaye, 1984; Lansdown, 2005) on children's cognitive, adaptation and communication skills have pointed out that children, from a very young age, are already able to actively interact with the world surrounding them, thus contributing to the construction of their relationship with adults. This participation in events is independent from adults' recommended willingness to get them involved and let them participate. However, their reading and understanding of what surrounds them as well as the competency they will acquire to deal with events vary according to the readiness shown by adults in helping them understand. Consequently, children's degree of participation depends not only on age but especially on "the age at which the adult reckons that they are able to actively participate to situations and be able to interpret them correctly" (Dell'Antonio, 2001: 41-42).<sup>2</sup> Psychology, psychoanalysis and educational sciences have also stressed that being listened to is one of children's primary needs and therefore the focus should be shifted from *whether* to listen to the child to *how* to listen to her/him (Pazé, 2004).<sup>3</sup>

These findings fit well with the new view of children stated by the sociology of childhood. According this new approach children are subjects that actively participate in social life starting with their own, specific perspective on the world. Thus, they are no longer understood to be passive recipients of the teachings of adults but rather actors who play an active role in their own development will process, which is not just a natural and universal biological event but a process that is strongly influenced by social and cultural factors (Prout, James, 1990; Qvortrup, 1991; Corsaro, 1997; James, Jenks, Prout, 1998).

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<sup>2</sup> In this regard, psychologist Annamaria Dell'Antonio highlights the existence of phenomena involving a systematic underestimation of children with regards to their cognitive as well as their affective and social spheres. See also Jaffé, Wicky, 1998.

<sup>3</sup> See also the Committee on the rights of the child's General Comments no. 12 (2009) on *The right of the child to be heard* (CRC/C/GC/12).

The CRC appears to have received and appropriated the new psychological knowledge and the perspective of the new sociology of childhood. The United Nations Convention is based upon the respect for the person and his or her competences. This means not only that children should be considered as deserving care, affection and protection but also that, all along their development, their personal, relational and emotional competences – fundamental for the shaping of their identity – should be encouraged and acknowledged. Based on these assumptions, children’s protection thus takes a new meaning: firstly, it is concerned with their present wellbeing and secondly, it assumes that the child is involved in the actual definition and the identification of such wellbeing. As a matter of fact, the Convention finally recognises children their right to participate to their upbringing and to the decisions affecting them.

Article 12 epitomises the conception of children’s rights that has recently been adopted by several scholars. It states that “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” but, most of all, it establishes that his or her opinions should be given “due weight in accordance with the age and maturity of the child”. In this statement one can finally identify the vision of the child as a “person with expressive capacities and potentials allowing him or her to actively participate to the choices concerning him/her” (Dell’Antonio, 2001).

This is undoubtedly an important change of perspective, since what is contained in Article 12 presupposes the adult’s readiness to change his or her opinions, attitudes and decisions according to what is expressed by the child. However, in order to achieve an actual and undistorted communication, both actors should be willing to listen to each other, which presupposes the respect and the appreciation of the other as a person whose opinions and positions are valued. Thus, the child is finally regarded as an actor whose thoughts and opinions are worth consideration (Dell’Antonio, 2001; Fadiga, 2006; Ronfani, 2006).

Therefore, all the actors involved in child protection – such as parents, teachers, social and legal workers – should consider children as able to make choices and, consequently, they should involve them when making decisions affecting them (Baratta, 1999). In this regard, it is important to stress that Article 12 does not provide for children’s rights to full autonomy, understood as self-determination; as Lansdown

states, “it does not give children the right to control over all decisions irrespective of their implications either for themselves or others. It does not give the children the right to ride roughshod over the rights of their parents” (Lansdown, 2001: 2; O’Donnell 2009). On the contrary, it calls for a recognition of the value of their experience, their points of view and their interests. In that sense, such autonomy should be understood as gradual participation, linked to the child’s progressive acquisition of the competences needed to identify his or her interests (Freeman, 1997; Verhellen, 1998; Baratta, 1999).

What is stated in Article 12 has also been reaffirmed in the 1996 *European Convention on the Exercise of Children’s Rights*. Article 3 states that “A child considered by internal law as having sufficient understanding, in the case of proceedings before a judicial authority affecting him or her, shall be granted, and shall be entitled to request, the following rights: to receive all relevant information; to be consulted and express his or her views; to be informed of the possible consequences of compliance with these views and the possible consequences of any decision”.

Finally, the most recent Council Regulation (EC) no. 2201/2003 should be mentioned. It restates the importance of child’s hearing, and, under certain conditions, it does not acknowledge those decisions concerning parental responsibilities and visiting right, when the child had not the opportunity to express his or her opinion (Fadiga, 2005).

According to scholars, the participation perspective, which is currently used when interpreting children’s rights, should be able to reconcile a moderate paternalistic attitude with the recognition of a certain degree of autonomy for the child. In this regard, children are not left alone “to fight the battles necessary to achieve respect for their rights” (Landsdown, 2001: 1-2). Adults, be they acting as parents, teachers or politicians, have the duty to make sure that children’s rights are respected by encouraging them to participate and to express their point of view on all the issues where they are directly involved.

Children’s participation, like that of adults, which is understood as the sharing of decisions, is also considered as a fundamental right of citizenship. Only through the opportunity to take part to decision-making processes within the family, school and the local community, will children learn about their rights and duties and respect decisions. They will also learn that their freedom is limited by other people’s rights and freedom

and that their actions might infringe upon other people's rights.<sup>4</sup> Besides, it would not be realistic to assume that young people, with their coming of age, suddenly become judicious citizens who are able to actively participate in democratic life (Hart, 1992). Developing real participation processes with children in all institutional contexts, on the contrary, would help them understand the meaning and the working of democracy. According to several scholars, the distancing of young generations from politics would stem from the fact that adults do not show a particular interest in what children have to say (Mayall, 2002, 2004). Consequently, on the one hand, young people feel that they do not have any influence upon decisions and, on the other, they get the impression that the rules of democracy do not apply to them. If children were encouraged to get involved, on the contrary, they would understand that political processes are a way to preserve and support their interests, which would thus increase their trust in democracy (de Winter, 1997; Commission of the European Communities, 2001; Landsdown, 2001).

### ***3. Children's right to be heard in Italian legislation and professional legal culture***

Italian law-makers have shown little consideration of children's views in the judicial proceedings affecting them. In this regard, Italy has already received two warnings from the Committee on the Rights of the Child because of its non-compliance with the terms of Article 12. Precisely, in the concluding observations of the second periodic report of Italy (CRC/C/70/Add.13), the Committee stated that "the right of children to be heard is insufficiently guaranteed in proceedings affecting them, in particular in cases of the separation of parents, divorce, adoption or foster care, or within education", and recommends that "Legislation governing procedure in courts and administrative proceedings ensure that a child capable of forming his or her own views has the right to express those views and that they should be given due weight".<sup>5</sup>

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<sup>4</sup> Roger Hart, who has long been concerned with children's participation, defines it as "the means by which a democracy is built and a standard against which democracies should be measured. Participation is the fundamental right of citizenship" (Hart, 1992: 5). Moreover, a 1993 report by the Council of Europe defines young people's participation as "young people's right to be included, to be allowed and encouraged to assume duties and responsibilities and to make their own decisions" (Council of Europe, 1993).

<sup>5</sup> Concluding observations of the Second periodic report of Italy (CRC/C/70/Add.13), submitted on 21 March 2000, at its 840th and 841st meetings (see CRC/C/SR. 840 and 841), held on 16 January 2003, and at its 862nd meeting (CRC/C/SR.862), held on 31 January 2003 to the Committee.

Italian judges are still reluctant to listen to children, although the Constitutional Court considered Article 12 of the New York Convention as being immediately enforceable in Italian law, without the need of an implementation law.<sup>6</sup> According to several scholars, this ruling would oblige all operators in charge of judicial or administrative proceedings where a child is concerned to give her the possibility to be heard (Pazé, 2004).

An analysis of Italian laws focussing on children's consultation during trials will show that, firstly, not all judicial proceedings affecting underage subjects imply a consultation of the child; secondly, where such action is envisaged, it is regulated in a rather incoherent way. In fact, different situations of family conflict are regulated by different provisions (Pocar, Ronfani, 2004).

For example, in case of contrast and disagreement between spouses on matters concerning the management of family life also affecting the children, or again in case of disputes concerning the couple's relationship and thus the interests of the children (Article 145 of the Civil Code), the judge may *suggest* – upon the spouses' request – an agreed solution to settle such dispute. In this phase, consideration is given to the views expressed by the *adult* members of the family, who also include children over 16 years of age. On the contrary, in disputes concerning particularly important questions of paternal authority over the children (Article 316 of the Civil Code), which provide for *the judge's intervention*, children as young as fourteen are heard.

Before the approval of the Law 54/2006, the situation was more complicated when it comes to the type of children's input to be envisaged in separation and divorce proceedings. As for personal separation proceedings, no child consultation was provided for. Article 155 of the Civil Code stated that the ordinary judge (who is the competent judge for this type of proceedings) must adopt all provisions concerning the children after considering exclusively the moral and material interests of the child. It is interesting to note that in a proceeding where all provisions concerning the children are paramount the receivers of such provisions were not heard.

On the contrary, the Law 898/1970, regulating divorce procedures, provided for child consultation, although it was not compulsory. Article 6 states that the President of the Ordinary Court *may* listen to the children “if he or she deems it absolutely necessary,

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<sup>6</sup> Constitutional Court judgement n. 1, 2002.

also in consideration of their age” in order to adopt the related temporary provisions. However, Law Reform 74/1987 further narrowed the range of child’s hearing.

The more recent Law 54/2006 should have finally clarified the procedures concerning children’s hearings within the separation and divorce proceedings. This law, in fact, introduced in the Civil Code the Article 155-sexies. This article provides that “before the emanation (...) of the provisions” concerning children, the judge pronouncing the separation “fixes (...) the hearing of the child of twelve years old and even younger who is capable of forming his or her own views”. Moreover, Article 4 widens such a provision to divorce and marriage nullification proceedings (Fadiga, 2006).

In other situations concerning the *status* or the organisation of the household, law-makers do not appear to take the same paternalistic attitude and set a precise age for the child to be allowed to express his or her agreement or disagreement. In these cases, particular attention is paid to the child’s autonomy and to his/her participation in the decision-making process by granting him or her the power to choose and decide on his/her position within the household (Spallarossa, 2001). For example, when starting or pursuing a legal action for the judicial recognition of biological parenthood, the consent of children aged sixteen and over is sought as well as their agreement to such recognition (Articles 273, par. 2, and 250, par. 2, of the Civil Code). In these proceedings, children over sixteen years of age are considered to be able to understand and evaluate their interests and to hold an early capacity to act.

However, it is important to point out that all these cases fall within the jurisdiction of the Juvenile Court, the specialised judicial institution for juvenile matters composed by two professional judges and two honorary ones, a man and a woman, who are experts in human sciences (psychiatry, biology, pedagogy, anthropology).

In matters concerning adoption and custody, children aged fourteen and over are required by law to give their consent, while children over twelve years of age must be consulted (Article 7, par. 1, Law 184/1983). As for younger children with sufficient understanding, the law insists that their views be heard (Law 149/2001). In cases of consultation, the would-be adoptee has the right to express his or her opinion concerning the adoption, which will be freely assessed by the judge. This means that the adoption may be declared even against the child’s will.



Finally, it is worth remarking that, when Italy deposited its instrument of ratification of the Strasbourg Convention – as provided for by Article 1, par. 4 – it had to identify at least three judicial proceedings where the Convention would be applied. So far, it has only detected some “sub proceedings” of a decidedly limited scope, where the principles of the European Convention on communication and listening have little bearing (Pazé, 2004). In particular, proceedings concerning parental separation, divorce, adoption, paternal power and guardianship have been left out.<sup>7</sup>

Italy’s reluctance to comply with the recommendations expressed by the Committee on the Rights of the Child seems to stem from the enduring paternalistic orientation of Italy’s professional legal culture, which rests on the conviction that children are fragile and vulnerable subjects who require protection from themselves and from the world. Ascertaining the child’s view is therefore regarded with some concern because of the traumas that might result from the direct involvement of the child in situations characterised by family conflict. Other beliefs add to these preconceptions, like the conviction that the judge is not able to listen to the child; that the child is not a credible witness; that the child called to give her testimony is overloaded with responsibility (Spallarossa, 2001; Pazé, 2004). Another concern is that consulting the child might turn out to be a tool against the family and that it would disturb its peace.

All these fears, however, also originate from the dominant notion of children’s rights as relational rights. According to this approach, the best protection for children can be realised through an agreement between the parents, to be achieved through the intervention on the part of the judge and other experts. The fact remains, however, that, even when considering children’s rights as relational ones, agreements should necessarily be reached after consulting the child and taking in due consideration his/her views (Pocar, Ronfani, 2004).

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<sup>7</sup> As Luigi Fadiga (2004) rightly pointed out, the Italian Government, instead of identifying some “categories of controversy, (...) indicated seven articles of the Civil Code (...). What is more, those rules could not possibly by any stretch of the imagination be grouped in any logical order or according to any homogeneous categories”. The identified articles are the following: Article 145 of the Civil Code (intervention of the judge in case of disagreement between spouses concerning the orientation of family life), Article 244, last paragraph, (illegitimacy action promoted by the special curator of the child aged 16 and over), Article 247, last paragraph, (passive legitimisation in illegitimacy actions in case of death of the presumed father, mother or child), Article 264 par. 2 (authorization given to the child aged 16 and over to lodge an appeal against legitimisation), Article 274 (admissibility of the judicial paternity action), Article 322 (nullity of the actions taken by the parents in the name and on behalf of their underage child without the required authorisations), and Article 323 of the Civil Code (forbidden actions for the parents).

The paternalistic orientation of the Italian legal culture is reaffirmed in the findings of a survey conducted between 1999 and 2000 on the attitudes and the opinions of a national sample of juvenile justice personnel (professional and honorary judges and lawyers) (Pocar, Ronfani, 2004). As for the right to consultation, as few as 31% of the operators who participated to the study considered it to be a denied substantive right; 43% of the sample, on the contrary, did not regard the right to consultation as a substantive procedural right of the child. They thought that the decision as to whether to ascertain the child's views should be made independently every time, depending on whether such action is judged to be in her interest.

As for the criteria to be used to establish whether the child holds "sufficient understanding" (according to what is provided for in Article 3 of the 1996 European Convention on the Exercise of Children's Rights), 70% of juvenile justice personnel involved in the research agreed that such competence should be ascertained each time by the judge or by an expert; on the contrary, 29% of respondents thought that it should be assumed from a certain age, which was set at about 14. The research also showed that those inclined to consult children were mainly honorary judges. Such orientation probably derives from their specific fields of expertise, especially psychology and sociology, where – as mentioned above – the notion of the child as an autonomous and participatory subject is becoming increasingly established.

#### ***4. Children's rights: opinions and perception of the self***

According to some sociologists, the increasing international recognition of the importance of children's rights calls for: a) considering children's perception of their own rights; b) investigating the meaning of the concept of children's rights among its beneficiaries; c) inspecting whether children know that they hold some fundamental rights and, if they do, which ones; d) checking whether they think it is fair that they should be attributed such rights, whether they know that they can claim them and whether they think that the rights they hold are sufficiently respected.

Understanding children's notion of their rights is, in the first place, fundamental for planning social policies, since it makes it possible to identify children's priority issues, which often differ from the ones identified by adults. It is also useful to identify the obstacles children come across when exercising their rights. In particular, research on

children's and young people's orientations and experience about their rights can provide valuable information for policy-makers to define "*structures and procedures* for the implementation of children's rights in a manner that is most protective of children's dignity" (Melton, Limber, 1992: 168) and to persuade children that they do enjoy some distinctive rights. Until children develop this awareness and believe that their rights shall be implemented, they will be unlikely to exercise them (Limber et al., 1999). If young people do not know and understand their rights, children's rights may be only nominal: "A child may have the right to be free from abuse, but in the absence of understanding of what that right means or how to exercise it, may not be able to prevent parental abuse" (Covell, Howe, 1996: 252).

Moreover, taking into consideration what children think about their rights means most of all respecting them as persons (Melton, Limber, 1992). As Martha Minow noticed (1990: 297): "Including children as participants alters their stance in the community, from things or outsiders to members...", and, in the "rights discourse", this implies that children are attributed "equality of *attention*".

Finally, children's involvement in the definition of their own rights is one of the main goals of the current concept of legal socialization, which is to encourage the subject's acquisition of the necessary competences to exercise his/her rights and responsibilities, thus contributing to the spreading of democratic values. As mentioned above, encouraging children to express their views about their own rights is unquestionably an important prerequisite for the shaping of a responsible citizen, who will then be able to take an active part in democratic life.

### ***5. What children think about children's rights to be heard***

Starting from these premises, it was decided to carry out a study among a sample of young people attending the last year in six lower secondary school in Northern Italy: four in Milan and two in two small towns. One hundred and twenty young people (57 male and 63 female) aged between 12 and 15 years old were individually interviewed, with the aim of ascertaining children's knowledge of the 1989 International Convention on the Rights of the Child, collecting their opinions on the rights granted.

The questions contained in the interview concerned rights pertaining to various spheres, ranging from very personal rights to rights relating to everyday life situations –

where children's rights clash with those of adults – and again the right to participate in decision-making processes concerning issues that affect them, at school and in their local community. It should be stressed that all the questions were aimed at investigating the young people's perception of themselves as active and autonomous subjects in the decision-making processes that involve them and that place them before the adult authority.

This report contains the results of the question concerning children's right to be consulted if their parents decided to separate and to express their opinion about their custody.

From a sociological perspective, knowing what children think about being heard in the judicial proceedings affecting them, and in particular in case of parental separation, we thought it was particularly important to verify: a) whether the children consider that being consulted was a right; b) whether they deem it useful to voice their opinion about such matters; c) finally, whether they consider themselves able to express an opinion about their custody.

We believe this information to be a fundamental element, firstly, to check whether the concerns characterising the Italian legal culture are actually grounded and, secondly, to obtain indications on the ways to listen to children.

The interviewees were asked the following question: *“Chiara's parents are separating; do you think Chiara should have the right to tell the judge which of her parents she would like to live with?”*.

All the respondents (52 boys and 60 girls), except for 8, claimed the right to express their opinion and be heard. Among them, as many as 29 interviewees claimed the right to choose and decide themselves. This assertion, however, did not mean that the children underestimated the difficulty and the complexity of the situation. On the contrary, they showed a certain awareness of the implications that such choice might carry. The main reason put forward by respondents claiming the right to play a role in the decision was the fact that such choice would heavily affect their future life.

*It is about her life.*

*She should be able choose because, in the end, she has to live with one of her parents, although it is difficult to think that a little girl could decide who she wants to live with.*

*She will be the one who'll have to live with her mother or with her father, so if she prefers one of them she should rightfully say so.*

*If she feels better with one parent, it wouldn't be fair for her to live with the one chosen by the judge.*

Although several children stressed that – apart from some specific circumstances – there was not normally a favourite parent, they also highlighted that their preference did not result from a particular fondness for one parent but rather from practical reasons, linked to the management of everyday life and to an increased closeness. This is shown by the repeated use of the expressions “getting on better” and “feeling better”, which call to mind a sense of familiarity and intimacy:

*Maybe she feels better with her mother because she has lived most of her life with her, since her father was working all the time, while her mother was a housewife and therefore she would spend more time with her.*

*Sometimes some parents leave home early in the morning and get back late in the evening. In my case, for example, my mum is at home while my dad goes out to work, so I can only spend time with him in the evenings and especially on Saturday and Sunday. I have a closer relationship with my mum although I love both of them. There is no difference.*

*I don't think there should be a favourite parent because after all they are your parents and you love both your father and your mother in the same way. However, in my case, for example, if my parents separated I would prefer to live with my mother because she is a woman like me, she understands me better and she is able to help me better.*

*You might be closer to one parent, have a better relationship with him or her and prefer to spend more time with him or her than with the other one, with no disrespect to the other parent, of course. I would prefer to live with my mother, not because I don't love my father, but... sometimes I get on better with my mum.*

It is interesting to stress that children are aware of the fact that expressing a preference, although they consider it to be right, is often taken by the discarded parent as a demonstration of lesser affection, with the ensuing risk that he or she might feel excluded and might grow increasingly estranged from them.

*Maybe she's afraid of losing... of disappointing the other parent.*

*The parent who is not chosen feels 'rejected' and might feel disappointed.*

Several responses described the embarrassment or the worry involved when having to choose one parent over the other:

*It is difficult to take a stand because you care for both in the same way and yet you have to decide between the two. I would find it embarrassing, because I would*

*probably want to stay with my mother, but at the same time I would feel sorry for my father ...*

Other respondents could clearly distinguish between the right to express their views and the right to choose and decide. They showed to be in favour of the right to participate to the decision being made by expressing their opinion, which the judge should take in due account; however, they were also against making the child responsible for the decision.

Some answers showed a tension between, on the one hand, the young people's desire to take part to a decision-making process affecting them and, on the other hand, the fear of taking on an excessively big responsibility. Thus, the decision should be up to the judge who, according to some respondents, may be aware of some factors that might escape them:

*If the father is a drunk and even a bit violent and the little girl decides to live with him, then surely the judge has the right to step in.*

*Sure, she must have the right to have her say, but at the end of the day it is up to the judge to assess who she can live better with.*

*She has to endure difficult family circumstances; choosing the parent she prefers to live with would make it easier for her to go through this situation. However, one would need to check whether the parent she chooses is able to look after her, give her an education and keep her. One needs to assess whether that's feasible....*

Half of the 8 boys and girls who were against the recognition of this right had experienced their parents' separation. They account for about one fourth of all the respondents with separated or divorced parents. It thus appeared that these children were less inclined to get the child involved in the proceedings concerning their custody. The 4 interviewees (3 boys and 1 girl), in the light of their experience, reckoned that expressing their views in this regard would mean compromising their relationship with the non-custodial parent. They also did not feel they were ready to make such decision:

*I don't think so, because then one of the parents might get upset. I think it is better to leave it up to the judge who, in theory, should usually make the fairest decision.*

*I don't think it would be a good idea, because she would be put against her parents – I know this because my parents are divorced too. I will shortly have to see the judge and tell her that my father doesn't help us financially: it is already quite difficult to say that he never helps us, let alone if I was to say it in front of him... I think it would be best if the judge decided on these matters.*

*My father wanted me to go to court because he wanted me to decide who I wanted to live with, but I was little and scared to death; I cried and did not know what to say... because if I chose one of them, then the other would get really upset and would not talk to me anymore. So I didn't speak. My mum did not want me to do it (...), she didn't think it was fair for a three-year-old boy to have to choose on such an*

*important matter, so in the end the decision was made by the judge. (...) I think it should be up to the parents to decide together with the judge because involving the child would be useless.*

*I think this is a difficult choice that would only complicate things. The parents should choose while trying to explain the situation to the child; if they cannot reach an agreement, then it would be right for the judge to decide. If the child has to choose one of the parents, whom she loves in the same way, the one who is left out... will feel disappointed.*

The other 4 respondents motivated their answers by stating that the child, as opposed to the judge, was not able to evaluate the most suitable solution correctly on the grounds of her age.

## **6. Some reflections and conclusions**

The analysis of the research findings showed firstly that almost all our interviewees considered child consultation in judicial proceedings as a real subjective right of the child. This, however, does not mean underestimating the sensitivity of these matters, especially when it concerns parental separation and the ensuing child custody orders. Respondents whose parents have separated are more aware of the difficulties and the sensitivity involved and of the possible implications involved when expressing a preference about which parent they should live with, especially when consultation is not performed in an adequate way. In particular, some boys and girls who experienced parental separation talked about the difficulty of voicing their preference in the presence of one or both of their parents. In this regard, a girl pointed out that she had never felt free to express herself freely during her interviews with the social workers since she had never been met alone. It also clearly appeared from several answers that children were afraid of disappointing the “discarded” parent and that they were fully aware that expressing a preference for one parent, although solely on the basis of practical considerations, would almost inevitably be misinterpreted by the other parent as an indication of a greater fondness.

The answers given by our interviewees therefore seemed to corroborate the importance of consulting children and the need to shift the debate from *whether* to listen to children to *how* to listen to them. In this respect, Dolto insists on the fact that children should be able to express their views concerning marital matters affecting their parents and eventually themselves to the judge every time they should wish to do so; the judge,

on the other hand, should be able to address the child and communicate with him or her in an appropriate way (Dolto, 1995).

Consequently, it becomes necessary to envisage some appropriate *comprehension channels* allowing children, especially those of a very early age, to input into the judge's decision, which affects them directly (Pazé, 2004). As Pazé points out, this should be done initially through the production of a written communication for children about the existence of civil proceedings concerning them – which is currently not envisaged – and then by illustrating and explaining the judicial proceedings and their meaning to them in words. He adds that this calls for a “considerable creative work aimed at giving young people appropriate legal information by putting the contents of the documents on paper using a language that they can understand” (Pazé, 2004).

As far as consultation as such is concerned, in order for it to be performed effectively, we reaffirm above all the need for the operator to *pay attention*, to be able to understand the child, to actually listen to what the child has to say and to take it in due consideration. The child's views should be taken into account during the consultation, thus showing the child that what she has to say *really* does matter, and also when making a decision, analysing the opinion voiced by the child in view of the decision (Pazé, 2004). The child must therefore be regarded as an active subject upon which proceedings should be centred rather than a tool to attain the truth. Focus should be placed on the child's interests rather than on the reconstruction of events. Child consultation should mainly bring out affectivity, desires, and emotions. In this way, the child's right to be heard would shape her right to participate to her protection (Dell'Antonio, 2001).

### **References**

- Baratta, A., “Infanzia e democrazia. Per una interpretazione dinamica della Convenzione internazionale sui diritti del bambino”, *Materiali per una storia della cultura giuridica* 1999 (2), 495-525.
- Commission of the European Communities, *European Commission White Paper. A New Impetus for European Youth*, Brussels 2001.
- Council of Europe, *The Development of an Integrated Approach to Youth Policy Planning at Local Level*, European Steering Committee for Intergovernmental Co-Operation in the Youth Field (CDEJ) (Strasbourg, 1993).
- Corsaro, W., *The Sociology of Childhood* (Thousand Oaks: Pine Forge Press, 1997).
- Covell, K., Howe, B., “Perspectives of Canadian Youth on Children's Rights”, in E. Verhellen (eds), *Monitoring Children's Rights* (Netherlands: Kluwer Law International, 1996).



- de Winter, M., *Children as Fellow Citizen. Participation and Commitment* (Oxon: Redcliffe Medical Press, 1997).
- Dell'Antonio, A., *La partecipazione del minore alla sua tutela* (Milano: Giuffrè, 2001).
- Dolto, F., *Quando I genitori si separano* (Milano: Mondadori, 2005).
- Fadiga, L., *L'ascolto del minore e la convenzione europea sull'esercizio dei diritti dei fanciulli*, Corte d'appello di Roma. Incontro di formazione decentrata, Roma, 6 febbraio 2004.
- Fadiga, L., *Il regolamento (CE) n. 2201/2003 del Consiglio dell'Unione europea* ([www.minoriefamiglia.it](http://www.minoriefamiglia.it), 13.3.2005)
- Fadiga, L., "Problemi vecchi e nuovi in tema di ascolto del minore", *Minori giustizia* 2006 (3), 132-144.
- Freeman, M., *The Moral Status of Children. Essays on the Rights of the Child* (The Hague: Martinus Nijhoff Publishers, 1997).
- Hart, R., *Children's Participation. From Tokenism to Participation* (Firenze: Unicef – Istituto degli Innocenti, 1992).
- Jaffé, P.D., Wicky, H.R., "Children's Competence", in A. Saporiti (eds), *Exploring Children's Rights* (Milano: FrancoAngeli, 1998).
- James, A., Jenks, C., Prout, A., *Theorizing Childhood* (London: Polity, 1998).
- Kaye, K., "Verso le origini del dialogo", in H.R. Schaffer (eds), *L'interazione madre bambino: oltre la teoria dell'attaccamento* (Milano: FrancoAngeli, 1984).
- Lansdown, G., *Promoting Children's Participation in Democratic Decision-Making* (Firenze: Unicef – Innocenti Research Centre, 2001).
- Lansdown, G., *The Evolving Capacities of the Child*, (Firenze: UNICEF Innocenti Research Centre, 2005).
- Limber, S.P., Kask, V., Heidemets, M., Hevener Kaufman, N., Melton, G.B., "Estonian Children's Perceptions of Rights: Implications for Societies in Transition", *The International Journal of Children's Rights* 1999, (7 (4)), 365-383.
- Mayall, B., *Towards a Sociology for Childhood. Thinking from Children's Lives*, (Maidenhead: Open University Press, 2002).
- Mayall, B., "Lo status morale dell'infanzia: appunti dalla Gran Bretagna", in H. Hengst and H. Zehier (eds), *Per una sociologia dell'infanzia* (Milano: FrancoAngeli, 2004).
- Melton, G.B., Limber, S.P., "What Children's Rights Mean to Children: Children's Own Views", in M. Freeman and P. Veerman (eds), *The Ideologies of Children's Rights* (Dordrecht: Martinus Nijhoff Publishers, 1992).
- Minow, M., "Rights and Relations: Families and Children", in Id., *Making All the Difference. Inclusion, Exclusion, and American Law* (London: Cornell University Press, 1990).
- O'Donnell, D., *The Right of Children to be Heard: Children's right to have their views taken into account and to participate in legal and administrative proceedings*, Innocenti Working Paper No. 2009-04 (Firenze: UNICEF Innocenti Research Centre, 2009).
- Pazé, P., *L'ascolto del minore*, 27.01.2004 ([www.minoriefamiglia.it](http://www.minoriefamiglia.it), 27.01.2004)
- Pocar, V., Ronfani, P., *Il giudice e i diritti dei minori* (Roma-Bari: Laterza, 2004).
- Prout, A., James, A., "Introduction", in A. Prout and A. James (eds), *Constructing and Reconstructing Childhood* (London: The Falmer Press, 1990).
- Qvortrup, J., *Childhood as a social phenomenon. An introduction to a series of national reports*, *Eurosocial Report*, 36 (Vienna: European Centre for Social Welfare Policy and Research, 1991).

- Ronfani, P., “Le buone ragioni a sostegno della pratica dell’ascolto”, *Minori giustizia* 2006, (3), 144-147.
- Spallarossa, M.R., “Diritti dei figli minori etra autonomia e protezione”, in Id. (ed), *Famiglia e servizi. Il minore, la famiglia e le dinamiche giudiziarie* (Milano: Giuffrè, 2001).
- Verhellen, E., “The Convention of the Rights of the Child”, in A. Saporiti (eds), *Exploring Children’s Rights* (Milano: FrancoAngeli, 1998).