



The Child's Right to Be Heard in Divorce Proceedings: Legal Framework and Practical Challenges in Kosovo

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Abstract

The right of the child to be heard in judicial proceedings is guaranteed by international legal instruments, notably enshrined in Article 12 of the United Nations Convention on the Rights of the Child, a binding international standard that has been transposed into Kosovo's domestic legal framework, particularly within family law legislation. In the context of divorce proceedings, the child's right to express their views assumes particular significance, as judicial decisions concerning custody, visitation, and residence have a direct and lasting impact on the child's daily life and overall well-being. This paper critically examines the normative framework and procedural implementation of the child's right to be heard in post-divorce legal proceedings within the Kosovo legal system. Although this right is formally recognised, its practical implementation remains problematic, particularly in relation to assessing the child's age and maturity, as well as the methodologies used to obtain their views in a procedurally appropriate and sensitive manner. By drawing on doctrinal legal analysis and selected judicial decisions, the paper identifies significant gaps between legal provisions and their application in practice. The paper concludes with practical recommendations aimed at strengthening the enforcement of this right in Kosovo's judicial system, in line with international standards and the overarching principle of the best interests of the child. Special emphasis is placed on the need to establish a child-friendly environment throughout all stages of judicial proceedings.

Keywords: best interests of the child; family law; judicial system; procedural safeguards; voice of the child

1. Introduction

The child's right to be heard in legal proceedings, particularly in sensitive contexts such as divorce, represents a fundamental principle enshrined in both international and domestic legal frameworks.

Article 12 of the United Nations Convention on the Rights of the Child explicitly affirms this right, stipulating 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, the views of the child being given due weight in accordance with the age and maturity of the child''. (United Nations, 1989) Moreover, the Council of Europe's Guidelines on Child-Friendly Justice underscore the imperative of facilitating children's meaningful participation in judicial processes. These guidelines mandate that judges respect the right of children to be heard in all matters concerning their interests, taking into account the child's cognitive capacity and communicative abilities throughout the proceedings.

It is crucial to highlight that the child's right to be heard should not be restricted solely based on chronological age; rather, the child's willingness to participate must be duly considered. Additionally, children should be clearly informed that their expressed views do not necessarily dictate the court's final determination (Council of Europe, 2010) Within the context of divorce proceedings, this right obliges courts to attentively consider and weigh the child's views and best interests when adjudicating issues related to custody and visitation, given that children typically lack the capacity to advocate for their own rights effectively. (Aliu, 2022)

2. Research Methodology

This study applies a qualitative legal research methodology, combining three main approaches. First, it uses normative legal analysis of Kosovo's Family Law and relevant international legal instruments, including the Convention on the Rights of the Child, to examine the child's right to be heard in divorce proceedings.

Second, the doctrinal method is employed through a review of academic and scientific literature to explore theoretical and comparative perspectives. Third, the paper conducts case law analysis of selected judicial decisions from Kosovo's courts to assess how this right is implemented in practice.

3. Legal Framework on the Child's Right to Be Heard in Kosovo

At the national level, Kosovo's Family Law incorporates provisions recognising the child's right to be heard during custody and divorce proceedings. Family Law of Kosovo and Law on Child Protection provide the primary legal framework that governs children's participation in legal proceedings.

These laws affirm the right of the child to express their views, particularly in matters of custody and visitation. According to the Family Law of Kosovo, article 140.5 emphasises that *'' The opinion of the child who is capable of forming his/her views shall be taken into consideration by the court in all cases of parental custody. Such opinion shall be given due weight in accordance with the age and the ability of the child to understand''*. Furthermore, article 144.2 emphasises that *'' In case the child is older than ten years, the court shall consider in particular the emotional situation of the child. If deemed necessary, the court shall take into consideration the opinion of experts''*. (Law No.2004/32, 2006).

The Law on the Protection and Promotion of the Rights of the Child further reinforces these rights, aiming to ensure that children's opinions are considered in all decisions affecting them. (Law No. 06/L-084 on Child Protection, article 7, 2019) In Kosovo, despite legislative efforts to uphold this right, significant practical challenges remain including the absence of standardized procedures, limited training for judges and social workers, and a lack of child-friendly environments for hearings. The OSCE has identified several significant shortcomings in how cases involving children are handled in Kosovo courts.

These include issues related to custody, visitation rights, financial support, protection orders in domestic violence cases, and various other civil and criminal matters involving children. Their monitoring revealed procedural and substantive flaws that may infringe on the rights of the children concerned. A key concern is the inadequate response from Centers for Social Work and the courts' failure to prioritize the best interests of the child. Specifically, OSCE points out two main problems with CSW representatives:

The absence of social workers during court hearings, where their presence as supportive persons is necessary, and the insufficient quality of reports regarding custody, alimony, and parent-child contact arrangements.(OSCE, 2020).

This paper examines the existing legal framework governing the child's right to be heard in divorce cases in Kosovo and identifies the practical obstacles faced by the judicial and social actors in ensuring meaningful child participation. The aim is to highlight gaps in practice and propose recommendations for strengthening child participation in divorce cases.

4. Practical Challenges in Kosovo Regarding the Child's Right to Be Heard

During divorce proceedings between spouses, the court makes custody decisions based on the best interests of the child (Zendeli et al., 2020). This principle varies according to the child's emotional and material needs, requiring courts to conduct individualized assessments for each case when determining custody in favor of one parent (Omari, 2012). Even in cases where the marriage dissolution is by mutual consent, the court must verify that the agreement regarding custody and visitation arrangements adequately protects the child's best interests (Mandro, 2009). For example, in the Basic Court of Prishtina, case number C.nr.2689/18, during divorce and child custody proceedings, a social worker recommended that the child's opinion be heard because the child was over 10 years old.

The recommendation was based on the fact that the child was initially placed in the father's care; however, the mother sought custody citing improved economic circumstances and her caregiving capacity, making it necessary to consider the child's views as well. The court subsequently heard the child during the main hearing, in a conversation held without the parties present. The child, a primary school student, stated that although he had lived with his father, he wished to live with his mother, influenced by her expressed desire for custody, while maintaining contact with his father and sibling (C.nr.2689/18). Analysis of this case reveals that the mother exhibited a stronger claim for custody in opposition to the father.

Nevertheless, the child's statement raises concerns regarding the authenticity of his preference, as it appeared influenced by his mother's wishes. This decision also resulted in the separation of the child from a sibling living with the father, highlighting a failure of the court to adequately evaluate the child's genuine opinion. Such practices point to a troubling trend where judges apply legal provisions procedurally, without granting sufficient weight to the child's views, thereby compromising meaningful child participation in custody determinations.

This lack of individualized assessment is further illustrated in another case such as case C.nr.137/16, where the Basic Court failed to directly hear the opinion of a child over the age of ten during divorce and custody proceedings. Instead, the court relied exclusively on a report from the Center for Social Work, which documented the child's preference regarding parental custody. The court simply asserted that an additional hearing with the child was unnecessary but provided no substantive justification for bypassing this procedural step. This approach raises serious concerns in light of Family Law requirements, which obligate courts to consider not only the child's views but also their emotional well-being, particularly in sensitive matters.

When necessary, the court should seek input from psychological experts to assess the child's maturity and emotional state. The omission of such considerations undermines the right of the child to be meaningfully heard. Moreover, a recurring issue in judicial practice in Kosovo is the lack of detailed reasoning in court decisions when judges decide to give or not give weight to a child's opinion. Courts rarely articulate the basis for their assessment of the child's capacity, including maturity or comprehension of the proceedings.

It is also uncommon for courts to involve psychologists in interviews with children, despite the fact that psychologists are better equipped to evaluate a child's developmental and emotional readiness to participate in legal decision-making. Furthermore, in instances where the child's views are ultimately disregarded, the reasoning behind such decisions is often omitted from the judgment entirely. In practice, there appears to be an over-reliance on the child's age specifically the threshold of ten years as a sufficient condition to hear the child, with little regard for individual maturity or context.

5. Results and Discussion

In Kosovo, children's ability to express their opinions during divorce proceedings, especially in matters concerning their custody, is hindered due to the lack of specialized training among judges and social workers. These professionals often lack the necessary knowledge and skills to communicate effectively with children in sensitive legal situations. Moreover, current procedures often fail to ensure that children understand the process in which they are involved, making their hearing formally fulfilled but lacking in substance.

The court infrastructure, specifically the courtrooms, does not provide a child-friendly environment, which negatively affects children's emotional well-being and their willingness to participate. Furthermore, institutional coordination between courts, social services, and psychological support systems is insufficient. These limitations reduce the effectiveness of mechanisms intended to ensure meaningful child participation.

6. Conclusion

The right of the child to be heard in divorce proceedings in Kosovo is legally protected but only partially realized in practice. Based on the findings of this study, enhancing the enforcement of children's right to be heard in divorce proceedings in Kosovo requires a comprehensive institutional commitment and concrete actions. It is essential to provide specialized training for judges and social workers, equipping them with the necessary skills to communicate effectively with children and understand their emotional and cognitive development. Additionally, clear and standardized protocols should be established to guide when and how children's views are heard, considering their age and maturity, while ensuring psychological support is available throughout the process.

Creating child-friendly environments within judicial institutions is also crucial; courtrooms and hearing spaces need to be adapted to feel safe and non-intimidating for children, supported by trained personnel who can offer emotional assistance during hearings. Furthermore, strengthening collaboration between courts, social services, and psychological experts will promote an integrated approach that better supports children involved in legal proceedings. Lastly, mechanisms for regular monitoring and evaluation of judicial practices should be introduced to assess the quality of procedures and ensure compliance with international standards. Implementing these measures will contribute to respecting children's rights not only in principle but in practice, facilitating their meaningful and effective participation in decisions

that impact their lives. Moreover, this will bring Kosovo closer to fulfilling its obligations under international conventions and, more importantly, protect the dignity and well-being of its youngest citizens during one of the most vulnerable periods in their lives, the separation of their parents.

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