The Right to a Fair Trial from a Child’s Perspective – Reflections from a Comparative Analysis of Two Child-protection Systems

Pernilla Leviner

Protecting children from abuse and neglect is an international obligation according to the UN Convention on the Rights of the Child (the Convention). Its Article 19 prescribes that the signatory States are to take all appropriate measures to protect children from all forms of abuse and neglect while they are in their home environments. However, States also have an obligation to respect other interests, such as parental autonomy, as stemming from the Convention and other international conventions. Any decision regarding the protection of children from harmful home environments involves balancing the child’s right to protection against parental rights and also the fundamental right to private and family life, for example, as set out in Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms (“European Convention”). Interference with this latter right must always be in accordance with the law, and also be necessary in a democratic society, for the protection of the rights and freedoms of others (for example, the child in child-protection cases). This means that the least intrusive intervention for securing the child’s safety and wellbeing is always to be chosen, and limited to what is necessary and reasonable under the circumstances, i.e. the interference must be proportionate to the aim pursued. Further, decisions by authorities to protect and place a child out-of-home, are always to be tried and reviewed by an independent and impartial court. This is a fundamental requirement in line with fair-trial principles set out in Article 6 of the European Convention and numerous other declarations throughout the world.

1 For example, the International Covenant on Civil and Political Rights (ICCPR), the International Covenant on Economic, Social and Cultural Rights (ICESCR) and the European Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention).


3 Despite variations in wording and placement of the fair-trial rights, international human-rights instruments define the right to a fair trial in broadly the same terms.

4 See for example Article 10 of the Universal Declaration of Human Rights (UDHR) and Article 47 of the Charter of Fundamental Rights of the European Union.
Without doubt, protecting children from abuse and neglect is a legal question that encompasses a complex balancing between at times opposing interests, and interventions are encircled by several rule-of-law principles. By tradition, these principles have primarily focused on guaranteeing that unlawful and illegitimate measures are not taken, and they have had a parental or adult perspective. This article focuses on the requirements on child-protection processes, from the perspective of judicial proceedings guaranteeing that illegitimate interventions are not taken, but also that authorities are intervening when needed to protect children. The overall objective is to analyze the meaning of the right to a fair trial in these processes from a child's perspective, and with respect to the best interest of the child as well as the right of the child to be heard. Thus the article seeks to evaluate the requirements needed to create a well-working, just and child-friendly child-protection system.

Different States have chosen different ways of organizing and regulating their child-protection systems, including the interpretation and implementation of the right to a fair trial. The analysis here draws on a comparative analysis made in a previous study7 in which the child-protection systems in Sweden and Australia, specifically the state of Victoria, were contrasted with a focus on the different roles and functions of the courts in child-protection cases. That study showed that, although largely based on the same principles and rights (children's right to protection, the respect for private and family life, the right to a fair trial, best interest of the child, etc.), the role and function, as well as the organization, of the courts in these two systems differ greatly. The analysis and conclusions on the differences in this regard raised several questions, one of which focuses on the closer meaning of the right to a fair trial and how the specific needs of children involved in child-protection cases are to be handled

---

5 Child protection is fundamentally a balancing between Article 3 (the prohibition of torture or inhuman or degrading treatment or punishment) and Article 8 (the right to private and family life) of the European Convention. A clear and often cited case from the European Court of Human Rights is Z and others v United Kingdom (Application No. 29392/95, Judgment of 10 May 2001). This case clarifies that Article 3 entails a responsibility for States to act in order to protect children from indefensible life circumstances in their home environments.

6 The differences in these aspects most probably depend on many factors, historical, cultural and, but not the least, financial; but also on the legal culture and traditions in the country, what role the courts have in different systems and also what overall approach or ideology the child protection system is based on.