

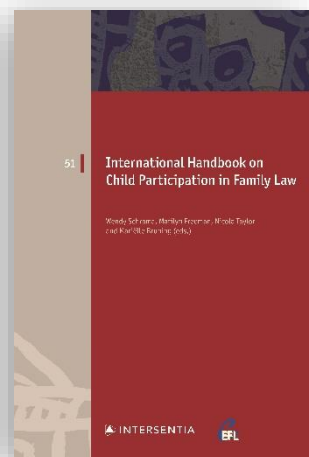


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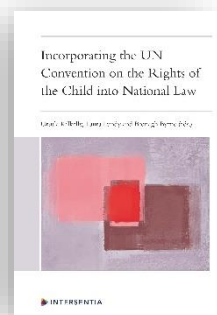
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1. INTRODUCTION

Child participation is experiencing considerable development in Italian family law at the legislative and judicial levels, and is also progressively taking hold in the policy-making field, where some authorities have cautiously started introducing child participation as a form of consultation.

The fragmentation that historically and culturally underlies the Italian system in family law proceedings, and which traditionally divides competence between ordinary and juvenile courts,¹ also concerns the child's right to be heard, enshrined in Article 12 of the UN Convention on the Rights of the Child (UNCRC). The right to be heard, in fact, is not uniformly applied in Italy, as it does not exist as a national (neither procedural nor substantive) rule, which

* This chapter is the result of a collaboration between both authors. Sections 3.1, 3.2, 3.5 and 4 are attributed to Ester di Napoli and sections 2, 3.3 and 3.4 are attributed to Francesca Maoli. The introduction and the conclusion are attributed to both authors.

¹ According to Art. 38 of the preliminary provisions to the Italian Civil Code (c.c.), as modified in 2013 by Art. 96, para. 1, let. c) of Legislative Decree No. 154 of 28 December 2013, which also added Art. 38*bis*.

would ordinarily safeguard its effective implementation throughout all types of family law proceedings.²

In general, ordinary courts (*tribunali ordinari*)³ deal with parental responsibility issues, mainly in the context of separation and divorce proceedings (custody, placement, maintenance), while juvenile courts (*tribunali per i minorenni*)⁴ deal with requests for limitation and loss of parental responsibility (so-called *de potestate* proceedings). In some circumstances, ordinary courts may ‘attract’ juvenile courts’ competence (*vis attractiva*).⁵

Juvenile judges, ordinary judges and public prosecutors work closely with all key actors involved in the proceedings, such as social and health services, communities, attorneys, and local authorities. They mainly rely on social services and local authorities during proceedings and to have their decisions enforced.

The Italian population, on 1 January 2020 comprised 60,317,000 residents, of whom 9,433,159 were children. In the year ending 31 December 2019, there were 184,088 marriages, 85,349 divorces and 94,474 separations (absolute values); per 1,000 marriages, 53.6% of separations and 40.5% of divorces involved children.⁶

² Regarding the field of family law proceedings as ‘child-friendly’ ones, see E. D’ALESSANDRO, ‘Verso una giustizia “a misura di minore” nella giustizia civile: garanzie e giusto processo’, in Autorità garante per l’infanzia e l’adolescenza (ed.), *La Convenzione delle Nazioni Unite sui diritti dell’infanzia e dell’adolescenza. Conquiste e prospettive a trent’anni dall’adozione*, 2019, p. 334, available (with English abstracts) at: https://www.garanteinfanzia.org/sites/default/files/agia_30_anni_convenzione.pdf and <https://www.garanteinfanzia.org/sites/default/files/agia-30-anni-crc-abstracts.pdf>.

³ There are currently 145 ordinary courts; after 2022, according to Legislative Decree No. 162/2019, there will be 135.

⁴ Juvenile courts are specialised courts established by Royal Law-Decree No. 1404 of 20 July 1934, converted into Law No. 835 of 27 May 1935. Each juvenile court (one in each district court of appeal – 29 in total) is a collegiate body made up of four judges: two professional judges (the president and a side judge) and two ‘honorary magistrates’ (a man and a woman), who are professionals with jurisdictional functions (among others, psychologists, attorneys, pedagogues, anthropologists). Each juvenile court has its own public prosecutor, who has a leading controlling function in civil proceedings. Juvenile courts were created before the adoption of the Italian Constitution in 1948 and of the UNCRC in 1989. However, the principles underlying the creation of this special jurisdiction, as well as their unique specialisation and commitment to children’s rights, anticipated and fully responded to the principle of the best interests of the child enshrined therein (Art. 3). The list of Italian juvenile courts is available at: <http://www.tribmin.milano.giustizia.it/it/Content/Index/28721>.

⁵ According to the modifications introduced to Art. 38 in 2013, the competence of juvenile courts is excluded pending – between the same parties and before an ordinary court – separation or divorce proceedings, or proceedings concerning parental responsibility of children born out of wedlock. In such cases, the ordinary court shall also have jurisdiction in proceedings concerning the limitation or revocation of parental responsibility. See G. BUFFONE, ‘Riparto di competenza tra T.O. e T.M in materia di provvedimenti ablativi: *iudicium finium regundorum* della Cassazione’ (2015) *Famiglia e Diritto* 653.

⁶ ISTAT, available at: <https://www.istat.it/it/archivio/253756> (published on 18 February 2021).

2. STATUTORY PROVISIONS

Children's participation in family law proceedings has been transformed in the Italian legal system. The hearing of the child was first introduced in 2006,⁷ within parental responsibility proceedings, where the new Article 155*sexies* of the Italian Civil Code (c.c.) established a new obligation for the judge to hear children aged 12 years or over, or younger if capable of discernment (i.e. of forming their own views).⁸ However, the current legal framework is mainly attributable to the reform of 2012–2013 when significant changes to substantive and procedural family law were made.⁹

Addressing child participation in judicial proceedings before Italian courts starts with distinguishing the nature of civil proceedings carried out before juvenile courts (limitation or revocation of parental responsibility, as a child protection measure)¹⁰ and before ordinary courts (regulation of parental responsibility within separation and divorce proceedings).¹¹

With respect to the second category, with Law No. 219/2012 the Italian lawmaker introduced Article 315*bis* c.c., which expressly states that the child has the right to be heard in all matters and proceedings affecting him/her, and not only in divorce or separation proceedings. However, the right to be heard is still limited to children of 12 years of age or over, or younger if they are capable of discernment.¹²

Subsequently, Legislative Decree No. 154/2013¹³ introduced a new and more specific framework regarding the admissibility and the requirements for the

⁷ Law No. 54 of 8 February 2006 on separation and shared custody. On the topic G. CAMPESE, 'L'ascolto del minore nei giudizi di separazione e divorzio' (2011) *Famiglia e Diritto* 958 ff.; G. DE MARZO, 'L'affidamento condiviso. I. Profili sostanziali' (2006) *Foro Italiano V* 92; M. DOGLIOTTI, 'I procedimenti: la separazione personale' in G. FERRANDO (ed.), *Il nuovo diritto di famiglia I*, Zanichelli, Bologna 2007, p. 1052; F. TOMMASEO, 'Le nuove norme sull'affidamento condiviso: b) profili processuali' (2006) *Famiglia e Diritto* 397; L. SALVANESCHI, 'I procedimenti di separazione e divorzio' (2006) *Famiglia e Diritto* 371; F. DANOVÌ, 'L'affidamento condiviso: le tutele processuali' (2007) *Diritto di Famiglia e delle Persone* 1921.

⁸ Before Art. 155*sexies* c.c., the hearing of the child was considered a mere faculty of the judge, as stated by Arts. 4(8) and 6(9) of Law No. 74/1987.

⁹ Law No. 219 of 10 December 2012 is well known in the Italian legal system because it inaugurated a season of reforms, inspired by the fundamental scope to eliminate (or at least significantly reduce) the differing status of children born in or out of wedlock, or adopted.

¹⁰ According to Arts. 330 and 336 c.c.

¹¹ According to Arts. 336*bis* et seq. c.c.

¹² The assessment of the capacity of discernment is discussed in section 3 of this chapter.

¹³ Above n. 2. On the reform L. QUERZOLA, 'La revisione delle norme in materia di filiazione: profili processuali' (2014) *Rivista Trimestrale di Diritto e Procedura Civile* 185; F. TOMMASEO, 'I profili processuali della riforma della filiazione' (2014) *Famiglia e Diritto* 530; F. DANOVÌ, 'Il d.lgs. n. 154/2013 e l'attuazione della delega sul versante processuale: l'ascolto del minore e il diritto dei nonni alla relazione affettiva' (2014) *Famiglia e Diritto* 535; G. BUFFONE, *Le novità del decreto filiazione*, Giuffrè, Milan 2014; V. CARBONE, 'Il D. Lgs. n. 154/2013

hearing of the child, contained in Articles 336(2), 336*bis* and 337*octies*(1) c.c. These provisions confirm the age threshold of 12 years, with children under this age only being heard if their capacity of discernment is assessed. They also contain further indications on the modalities of the hearing, as well as on the cases in which the judge may refuse to hear the child. The direct participation of the child at a hearing is the main method envisaged by the legal system.

Alongside these, a further initiative is occurring to develop institutionalised forms of ‘advocacy’ for the child. A professional, external to the court and independent from the child’s family, has the duty of helping children to express their opinion to adults who have to take a decision concerning the child’s future.¹⁴ This is not a substitute for representation of the child, but a mechanism to allow the child to benefit from practical help and support in expressing their opinion. The appointed professional does not speak on behalf of the child, but helps the child in giving voice to his/her position when they experience difficulties in expressing their views to adults. Currently, advocacy is not operating on a regular basis in the entire Italian judicial system, but experimental models of advocacy are running in several courts, with advocacy professionals appointed by the social services.

In addition, participation may occur indirectly through the expression of the child’s views when an expert witness is appointed. A technical consultancy (*consulenza tecnica d’ufficio*, CTU) in parental responsibility, separation, divorce or adoption proceedings (as well as in other proceedings where a child is involved) may request the preliminary hearing of the child by the appointed expert.

The hearing of the child is also foreseen in proceedings for the appointment of a guardian when both parents are deceased or, in general, when no one is exercising parental responsibility over the child (Art. 348(3) c.c.).¹⁵ The same age threshold of 12 years applies. A child is also heard in proceedings when the judge has to take certain important decisions concerning the child’s future. In particular, according to Article 371 c.c., the judge shall hear a child of 10 years of age or over, or younger depending on his/her capacity of discernment, before

sulla revisione delle disposizioni vigenti in materia di filiazione’ (2014) *Famiglia e Diritto* 447; P. SCHLESINGER, ‘Il D.Lgs. n. 154 del 2013 completa la riforma della filiazione’ (2014) *Famiglia e Diritto* 443.

¹⁴ See V. CALCATERRA, ‘L’advocacy nella tutela minorile. Prime esperienze italiane del portavoce professionale’ (2016) *Minorigiustizia* 155; J. BOYLAN et al., *Cos’è l’advocacy nella tutela minorile. Guida per educatori e assistenti sociali*, Erickson, Trento 2011. The first Italian pilot projects on the institution of independent advocacy professionals were carried out in 2013 in the area of Varese, through a project that saw the implementation of case advocacy interventions at the request of child protection services. Case advocacy interventions were carried out at the request of the Juvenile Court of Milan, the Ordinary Court of Varese and, to date, a request for the activation of advocacy services has also been received from the Juvenile Court of Turin.

¹⁵ Introduced by Legislative Decree No. 154/2013.

taking a decision on the place where the child will be raised, on their education or their professional future.¹⁶

3. MODES OF CHILD PARTICIPATION

3.1. DIRECT FORMS OF PARTICIPATION

Doctrine¹⁷ and case law¹⁸ (the law is not clear on this point) agree that the child is a party – like his/her parent(s) – only in proceedings that take place before juvenile courts. In such proceedings, the child is therefore also the direct recipient of the decision's effects and, as such, has the right to be informed of any pending proceedings and to participate in them.

In proceedings concerning parental responsibility, the conditions and forms of the hearing are contained in Article 336*bis* c.c. The judge may decide not to hear the child if such hearing is against the child's best interests, provided that this assessment is supported by adequate reasoning.¹⁹ The hearing must take place with particular caution and with the help of experts. The parents, the representatives of the parties and the public prosecutor may participate in the hearing if authorised by the judge.²⁰

Finally, the child must always receive information 'on the nature of the proceeding and on the effects of the hearing'.²¹ Despite the positive obligation stated in Article 336*bis* c.c., the law does not provide further indications as to how, and by whom, the information is to be provided to the child. The courts' practice in this regard is highly inconsistent, since there are no common guidelines and the omission of this duty to provide information has not been addressed by the case law.

Further provisions on the hearing of the child are contained in Article 337*octies* c.c., which specifically refers to the exercise of parental responsibility following separation, divorce or marriage annulment, or concerning children born out of wedlock. Apart from reiterating the specific obligation to

¹⁶ Note that this age threshold is lower than the usual limit of 12 years of age.

¹⁷ B. POLISENO, *Profili di tutela del minore nel processo civile*, Edizioni Scientifiche Italiane, Napoli 2017, p. 99.

¹⁸ Constitutional Court, decision of 14 July 1986, No. 185, in *Giur. it.* 1988, 1112; Constitutional Court, decision of 30 January 2002, in *Foro italiano* 2003, 423.

¹⁹ Art. 336*bis*(1) c.c.

²⁰ Art. 336*bis*(2) c.c. Surprisingly, a slightly different approach is affirmed in Art. 38 of the Implementing Provisions of the Civil Code, where it is stated that, when the protection of the child is ensured by appropriate means (e.g. with the use of a mirror glass and an intercom system), the parents, the representatives, the special curator of the child and the public prosecutor may follow the hearing without requesting any authorisation from the judge.

²¹ Art. 336*bis*(3) c.c.

hear the child (with the same age threshold contained in Arts. 315*bis*, 336(2) and 336*bis* c.c.), the provision provides for an exception to the general rule. If the proceedings concern the mere judicial homologation of an agreement made by the parents regarding the exercise of parental responsibility, the hearing of the child does not take place if it conflicts with his/her best interests or is manifestly unnecessary.²²

3.2. REPRESENTATION FORMS OF PARTICIPATION

While hearing the child constitutes a general obligation for the judge (even with limits and exceptions), the separate representation of the child is not foreseen in proceedings concerning the exercise of parental responsibility over a child.²³ A child cannot initiate legal proceedings or be brought to court alone (Art. 75 of the Italian Code of Civil Procedure (c.c.p.)). In order to do so, the child needs a legal representative (i.e. a person holding parental responsibility as a parent or guardian).

Whenever there is a conflict of interest between the child and the holder of parental responsibility, whether before the ordinary or juvenile courts, the judge appoints a special representative for the child (*curatore speciale*) whose aim is to safeguard the child's interests, according to Article 78 c.c.p. The same provision does not specify in which proceedings the child's special representative shall be appointed, as it only requires certain conditions (e.g. urgency). Article 79 c.c.p. further specifies that the appointment of the special representative can be requested 'in any case' by the public prosecutor, by the child or by any interested party to the proceedings. The Italian legal system does not provide any rules regarding the *curatore speciale* (e.g. conditions for the appointment, record-keeping, training). This has led to the proliferation of regional practices (mainly protocols between courts and key actors, including professional bodies), the establishment of registers and their governance, as well as training activities required for registration.²⁴

²² This means that the obligation to hear the child is 'softened', since there is an implicit presumption that an amicable solution already reached by the parents would be consistent with the child's best interests, in particular where the right of the child to maintain regular contact with both parents is respected. On this *amplius* M.A. INANNICELLI, 'La crisi della coppia genitoriale e il "diritto" del figlio minore di essere ascoltato' (2016) *Famiglia* 87, 98.

²³ The appointment of a representative is obligatory only in proceedings concerning the limitation or withdrawal of parental responsibility (Art. 336(4) c.c.) and the declaration of adoptability (Art. 17 of Law No. 184 of 4 May 1983 on adoption and foster care), for which the juvenile court is competent and where there is a concrete conflict of interests between the child and the parents. Outside of these cases – which are categorised within the child protection measures – Italian law does not foresee the appointment of a separate representative of the child.

²⁴ This is the case, for example, of the protocol agreed on the 7 February 2018 between the Court of Milan and the Milan Bar Association.

Nor are there any rules specifying the ways in which the hearing of the child or the preliminary assessment of the child's best interests should be undertaken. This lack of rules has paved the way for a number of decisions and practices establishing modes of direct or indirect hearing. The practices have been mainly formalised through the creation of protocols between courts, public prosecutors, social services, professional bodies and associations active in the field of protecting and promoting children's rights.

3.3. TYPES OF PROCEEDINGS AND AGE/MATURITY/CAPACITY REQUIREMENTS

The right of the child to be heard in every matter and proceeding affecting him/her, including in family law proceedings, established by Article 315*bis* c.c., represents a positive step forward in Italian legislation. Indeed, the provision represents the acknowledgment, in the Italian legal system, of the fundamental right of the child consecrated in the UNCRC and in the 1996 Strasbourg Convention.²⁵

However, a specific age threshold establishes a difference in treatment. For children older than 12, the hearing represents an essential procedural step, the omission of which may lead to the invalidity of the judgment, if not based on adequate grounds. The judge may omit the hearing only if it would be against the child's best interests,²⁶ or if the hearing is considered to be superfluous (for instance, because the factual circumstances of the case are clear and uncontested, or because the child has already been heard in connected proceedings). However, for children aged up to 12, the judge can only order a hearing if the child is capable of discernment. This means that the child should be able to form his/her own views and to understand the circumstances of the meeting with the judge, being mature enough to communicate in a conscious way. These circumstances are the object of a free and discretionary evaluation by the judge.²⁷ Since this

²⁵ As already invoked by the Italian case law before the reform of 2012–2013: see Corte di Cassazione, Sezioni Unite, 21 October 2009, No. 22238; Corte di Cassazione, 16 June 2011, No. 13241; Corte di Cassazione, 11 August 2011, No. 17201; Corte di Cassazione, 15 May 2013, No. 11687. The same reasoning can be found, *a fortiori*, in the case law subsequent to the introduction of Art. 315*bis*: see Corte di Cassazione, 26 March 2015, No. 6129.

²⁶ Even before the introduction of the new discipline, the omission of the hearing was justified on the basis of the child's best interests: see Corte di Cassazione, Sezioni Unite, 21 October 2009, No. 22238/2009. On this topic A. GRAZIOSI, 'Ebbene sì, il minore ha diritto di essere ascoltato nel processo' (2010) *Famiglia e Diritto* 364. See also Corte di Cassazione, 8 March 2013, No. 5847; Corte di Cassazione, 15 May 2013, No. 22687.

²⁷ Corte di Cassazione, 29 September 2015, No. 19327; Corte di Cassazione, 19 January 2015, No. 752.

constitutes a specialised assessment, the judge can appoint a psychologist or a social assistant for this purpose. This practice happens very frequently with children younger than eight years of age, but is generally also used for children between eight and 12 years old. There are no specific legal provisions governing this, as these are practices developed in the civil courts that are sometimes incorporated in official soft-law guidelines.

The case law provides further clarification on the different modes of the right to be heard as applied to 12-year-old children compared to younger ones. The *Corte di Cassazione* has stated that the judge has a margin of discretion regarding the hearing of children up to 12 years of age and that the omission of the hearing does not require a specific reasoning if the parties have not submitted a request indicating the topics on which the child's opinion was considered necessary.²⁸ This is different for children aged 12 or older, who it is mandatory to hear, unless this is superfluous or contrary to their best interests; in the latter case, the failure to provide reasons renders the decision null and void.²⁹

3.4. INTERNATIONAL CHILD ABDUCTION

There is a specific provision on children's participation in international child abduction proceedings, where the relevant legal framework is represented by the 1980 Hague Convention on the Civil Aspects of International Child Abduction³⁰ and, as regards abductions occurring within the European Union, Regulation No. 2201/2003.³¹ With Law No. 64/1994,³² Italy ratified the 1980 Hague Convention and introduced the necessary implementing rules governing the procedure for return of the child. According to Article 7(3) Law No. 64/1994, the juvenile court shall hear the child 'if appropriate'. While the provision does not explicitly state that the hearing is mandatory (nor qualifies it as a right of the child), the latter has been given a flexible interpretation by

²⁸ Corte di Cassazione, 7 March 2017, No. 5676, on which A. Nascosi, 'Nuove direttive sull'ascolto del minore infradodicesimo' (2018) *Famiglia e Diritto* 354; Corte di Cassazione, 6 December 2018, No. 31671; Corte di Cassazione, 14 December 2018, No. 32520.

²⁹ See all the decisions above n. 28.

³⁰ Hague Convention of 25 October 1980 on Civil Aspects of International Child Abduction (<http://www.hcch.net>).

³¹ Council Regulation No. 2201/2003 of 27 November 2003 concerning jurisdiction and the recognition and enforcement of judgments in matrimonial matters and the matters of parental responsibility, *OJ L* 338, 23 December 2003, 1. The Regulation has been applicable since 1 March 2005 (Art. 72). Recently, the Regulation has been subject to a recast with Council Regulation 2019/1111 of 25 June 2019 on jurisdiction, the recognition and enforcement of decisions in matrimonial matters and the matters of parental responsibility, and on international child abduction, *OJ L* 178, 2 July 2019, 1, which will apply as from 1 August 2022.

³² Law No. 64 of 15 January 1994.

Italian courts over the years on the basis of the evolving understanding of the fundamental right of the child to be heard.³³ Most recently, the *Corte di Cassazione* has confirmed that the judge must hear the child, according to Article 315*bis* c.c., unless there are particular reasons (to be specifically indicated) that would prevent the hearing, such as when it could be harmful to the child.³⁴ The obligation to provide for an adequate statement of reasons has been taken very seriously by the court of final instance in the aforementioned decision, which annulled the decision on the merits when the motivation was generically based on the child's immaturity or insufficient evidence was provided on the harmful effects of the hearing.

3.5. ADOPTION

The principles set out by Article 315*bis* c.c. apply to all proceedings concerning the child. Therefore, the judge must also hear the child in adoption proceedings that are governed by Law No. 184/1983.³⁵ The child shall be heard in proceedings for the determination of the state of adoptability,³⁶ before the declaration of adoption,³⁷ and in proceedings concerning foster care,³⁸ in line with the same age and maturity requirements established by Article 315*bis* c.c. The modes of the hearing are the same stated in Articles 336(2) and 336*bis* c.c.

4. RESEARCH

In April 2020, the Italian Independent Authority for Children and Adolescents³⁹ carried out a survey on the implementation of the child's right to be heard in

³³ See also the chapter by T. KRUGER and F. MAOLI in this Handbook.

³⁴ Most recently, Corte di Cassazione, 4 April 2019, No. 10874. On the same terms, Corte di Cassazione, 4 June 2019, No. 15254.

³⁵ Above n. 23. See also B. POLISENO, 'La tutela del minore nel procedimento per la dichiarazione dello stato di adottabilità' (2018) *Rivista di Diritto processuale* 1026.

³⁶ Law No. 184/1983, Arts. 10 and 15.

³⁷ Law No. 184/1983, Arts. 7 and 25.

³⁸ Law No. 184/1983, Arts. 22 and 23.

³⁹ The Italian Independent Authority for Children and Adolescents (*Autorità garante per l'infanzia e l'adolescenza*), established by Law No. 112/2011, is the independent body aimed at verifying the correct application of the UNCRC in Italy. All information is available at: <https://www.garanteinfanzia.org/>. Within the Italian Authority for Children and Adolescents operates the *Consulta dei ragazzi*, it is an advisory board established in 2018, which comprises boys and girls aged under 18 who meet on a weekly basis and is involved anytime the Authority is asked to give its opinion to the competent institutions or adopts recommendations related to children's rights. The *Consulta dei ragazzi* was heard, inter alia, in the adoption of the Charter of Children's Rights within their Parents' Separation, available at: <https://www.garanteinfanzia.org/landing2EN/children-s-rights-within-their-parents-separation.html>.

all juvenile courts and in a selection of 22 ordinary courts.⁴⁰ With reference to the ordinary courts, the child's capacity of discernment was particularly taken into account, despite the frequent absence of ad hoc spaces in these courts. In general, this illustrates the lack of uniform operating procedures, which creates uncertainty and leaves room for discretion in such a sensitive area.

5. CONCLUSION

Despite the developments that have occurred over the last decade in Italy, at both the legislative and jurisdictional level, much still needs to be done to fully implement Article 12 of the UNCRC. In particular, the Italian legislator should adopt rules recognising the child's right to be heard at the national level, and provide further practical guidelines to judges and other professionals involved in family proceedings. While the legislative provisions introduced in the Civil Code have been able to set more precise standards, and have received concrete implementation in the subsequent case law, the practice of the ordinary and juvenile courts reveals that a further step forward is needed. Moreover, the fact that a growing number of couples are choosing to conclude out-of-court divorce agreements should be considered:⁴¹ in this context, there could be important limitations concerning the possibility for the child to express their views. The current legal system still seems quite fragmentary with respect to the implementation of the child's right to participation in different subject matters and procedures. Legal professionals and other practitioners working in the field cannot rely on common standards and/or common best practices at the national level. More needs to be done to create practical methods and guarantees on the hearing of children and, more generally, clear-cut proceedings, along with clarification at the national level of general aspects regarding all actors involved (e.g. the *curatore speciale*). In this context, the Italian legislation still provides an age limit regarding the hearing of the child (which creates an obligation for the judge to hear the child only if the child is 12 years of age or older). This contrasts with the latest developments and trends in human rights law, and studies concerning the wellbeing of children, which require a genuine case-by-case assessment of the opportunity for child participation.⁴²

⁴⁰ Autorità garante per l'infanzia e l'adolescenza, 'Il diritto all'ascolto delle persone di minore età in sede giurisdizionale. Indagine relativa alle modalità messe in atto sul territorio nazionale dai tribunali per i minorenni, tribunali ordinari e relative procure della Repubblica', 2020, <https://www.garanteinfanzia.org/sites/default/files/ascolto-minorenni-procedimenti-giurisdizionali.pdf>.

⁴¹ ISTAT, available at https://www.istat.it/it/files//2021/02/Report-matrimoni-unioni-civili-separazioni-divorzi_anno-2019.pdf.

⁴² See the study carried out by K. VAN HOORDE et al., *Bouncing Back. The Wellbeing of Children in International Child Abduction Cases*, 2017, <http://missingchildreneurope.eu/>.

In February 2019, the UN Committee on the Rights of the Child adopted its Concluding Observations on the combined fifth and sixth periodic reports of Italy,⁴³ and recommended that the State

[i]ntroduce a comprehensive legal provision establishing the right of the child to be heard without any discrimination due to age, disability or any other circumstance, both in the family environment and in any administrative, judicial or mediation procedure in which the child is affected, and ensure that the child's opinion is taken into account in accordance with the child's age and maturity, and adopt national uniform standards implementing regulations and guidelines accordingly, in particular in relation to all decisions concerning unaccompanied or separated children having arrived in the State party.⁴⁴

These Concluding Observations encourage an approach that addresses the issue from a broader perspective, rather than just focusing on judicial proceedings. In this regard, the implementation of children's participation measures should sit alongside the empowerment of out-of-court decision-making processes. A new frontier of child participation would be the effective implementation (starting with its dissemination) of the 2011 Optional Protocol to the UNCRC,⁴⁵ which allows children (on their own behalf or represented by adults) to submit communications concerning the infringement of rights contained in the UNCRC and its Optional Protocols to the Committee. This entered into force in Italy in 2016,⁴⁶ but it is still almost unknown, not just to children and families, but also amongst family justice professionals.

⁴³ UN Committee on the Rights of the Child, *Concluding observations on the combined fifth and sixth periodic reports of Italy*, adopted at its 80th session (14 January–1 February 2019), https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/SessionDetails1.aspx?SessionID=1226&Lang=en.

⁴⁴ UN Committee on the Rights of the Child, *Concluding Observations*, above n. 43, point 17(a).

⁴⁵ Optional Protocol to the Convention on the Rights of the Child on a communications procedure, adopted and opened for signature, ratification and accession by General Assembly resolution A/RES/66/138 of 19 December 2011 and entered into force on 14 April 2014.

⁴⁶ Law No. 199 of 16 November 2015.