

## PARTICIPATION OF CHILDREN IN LEGAL PROCEEDINGS FOR THE CARE OF MINORS

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**Abstract: Purpose:** *The protection of children and their rights is one of the fundamental topics in all democratic states. The objective of the quantitative research was to find out how minors are engaged in the court proceedings regarding their upbringing and whether the court takes their views into account when it comes to decision-making. The research is rooted in two key concepts – child participation and the form of their participation. Method:* *The research sample was made up of court decisions involving the upbringing of minors, and finally and firmly terminated in 2015 and 2016 at two district courts in one region in the Czech Republic. The content analysis of documents was used to collect the data. Results:* *The final selected data resulting from one-dimensional and two-dimensional analysis deliver interesting, and often alarming findings. Discussion:* *The resulting data are in conflict with valid legislation, but they often confirm the rigid Czech judiciary practice in the area of decision-making when it comes to the upbringing of a minor. All these findings are properly discussed.*

**Keywords:** *children, participatory rights, legal proceedings, upbringing, minors*

### INTRODUCTION

The protection of children and their rights is one of the fundamental topics in all democratic states. The Czech Republic is one of the many dozens of signatories to the UN Convention on the Rights of the Child, and there is significant attention paid to the protection of children in our country, both within legislation and social work. We can say that the participation of a child in terms of the child's involvement in all the facts that concern him/her is an advanced variant of the protection of the child who, in this way, can be involved in the decision-making processes that concern his/her future.

### 1. LEGISLATIVE BACKGROUND

As is widely known, the best interests of the child are not defined in the Convention on the Rights of the Child (“CRC”), however, they should be the essence of any decision on a child, whether in abstract terms from the legislator's point of view adopting any legal rule about a child and/or concerning a child or in specific situations where parents, social workers, and judges decide about the child. Particularly in the context of Article 12 of the CRC and the commentary of the UN Committee on the Rights of the Child No. 14 (2013),<sup>1</sup>

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<sup>1</sup> UN General comment No. 14 on the right of the child to have his/her best interests taken as a primary consideration. In: *United Nations Human Rights* [online]. 2013 [2021-03-30]. Available at: <[https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC\\_C\\_GC\\_14\\_ENG.pdf](https://www2.ohchr.org/English/bodies/crc/docs/GC/CRC_C_GC_14_ENG.pdf)>.

the child's opinion is an integral part of determining what are the best interests of the child in a given decision.

Legislation in the area of children's participation rights in the Czech Republic is regulated by both international treaties to which it is a signatory state and national regulations. Of the international treaties, the Convention on the Rights of the Child, the European Convention on the Exercise of Children's Rights, the Convention on the Civil Aspects of International Child Abduction, the Convention on the Protection of Children and Co-operation in Respect of Intercountry Adoption, the Convention on Contact Concerning Children, the European Convention on the Recognition and Enforcement of Children's Custody and Renewal of Custody, and the case-law of the European Court for Human Rights. National legislation is anchored in several legal regulations. What is essential is the wording of the Civil Code and the Act on the Social and Legal Protection of Children, which sets the age of 12 as the limit of a disprovable presumption that a child aged 12+ is able to accept information, form an opinion and communicate it. Even a child younger than 12 has participation rights, which are exercised with regard to the age and intellectual maturity of a particular child. At the same time, Czech case-law adds that for various issues, the age at which a child is able to comment may be also significantly lower than 12 years. The child should in principle be heard by the court already after reaching the age of 10, for example on the issue of the custody arrangement for the period after the parental breakup.<sup>2</sup> On the issue of school attendance, the opinion should be ascertained as early as the age of 6, although there is no consensus in decision-making practice on the method of ascertaining it.<sup>3</sup>

The obligation of the state under Article 12 of the CRC to ensure that a child has the right to express his/her views freely in all matters affecting him/her is the most fundamental change in the legal perception of the status of minors in recent decades. It is a key manifestation of the paradigm shift from the child as a passive object of decision-making to an active subject. The professional literature supports the view that respecting the child's opinion leads to better decision-making about the child and has a positive impact on the child's development in the communication, emotional, intellectual and social area.<sup>4</sup> The meaningful participation of a child also has a positive impact on parents and their perception of the court process.<sup>5</sup> The participation that brings these positives should be based on the principles of child-friendly justice, *that is accessible, age appropriate, speedy, diligent, adapted to and focused on the needs and rights of the child, respecting the rights of the child, including the rights to due process, to participate in and to understand the proceedings, to respect for private and family life and to integrity and dignity.*<sup>6</sup> Child partici-

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<sup>2</sup> Judgment of the Constitutional Court dated 26 May 2014, Constitutional Court I File No. 2482/13 [105/2014 USn.].

<sup>3</sup> Cf. Judgment of the Constitutional Court dated 9 January 2019, Constitutional Court IV File No. 3749/17, Resolution of the Constitutional Court dated 6 February 2018, Constitutional Court IV File No. 4075/17.

<sup>4</sup> HEIMER, M, NÄSMAN, E., PALME, J. Vulnerable children's rights to participation, protection, and provision: The process of defining the problem in Swedish child and family welfare. *Child*. 2018, Vol. 23, No. 2.

<sup>5</sup> E.g. MORAG, T., RIVKIN, D., SOREK, Y. Child Participation in the Family Courts – Lessons from the Israeli Pilot Project. *International Journal of Law, Policy and the Family*. 2012, Vol. 26, No. 1, p. 14.

<sup>6</sup> Council of Europe, Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice, Strasbourg, 17 November 2010.

pation in the broadest sense may be implemented differently and involve different levels.<sup>7</sup> From the perspective of the child's right to participate specifically in the court proceedings that concerns him/her, there are three basic pillars that ensure that the child is provided with space, voice, audience and influence.<sup>8</sup> The first pillar is the child's right to information that *should be provided in a manner adapted to the child's age, maturity and specific circumstance*.<sup>9</sup> The second pillar represents the right to ascertain (express) the opinion of the child. In court proceedings, the child's view should be ascertained primarily by the court in an environment that is not intimidating or even hostile, ideally outside the courtroom.<sup>10</sup> The third pillar requires that the child's opinion is to be taken into account by the authority deciding on the matter concerning the child.<sup>11</sup>

In the professional literary sources, the perspective pointing out the challenges and shortcomings of the implementation of participation rights prevails, rather than the introduction of possible solutions, even though more than 30 years have passed since the adoption of the CRC. It has been continuously shown that adults and the systems they create do not sufficiently support participation.<sup>12</sup> Furthermore, possible participation does not have an impact on the decision-making about the child either at all or it is difficult to assess whether it has any impact.<sup>13</sup> Some other difficulties have also emerged, such as insufficient participation in case of some groups of children with obstacles such as poverty, young age or, conversely, excessive pressure on the child, who does not want to exercise his/her participation rights.<sup>14</sup> From a global perspective, there is no doubt that children's participation rights are becoming stronger, but that at the same time a fundamental challenge is to strengthen the third component of participation mentioned above, that is, taking into account the child's opinion when deciding about him/ her.<sup>15</sup>

The essence of participation lies in the possibility of having an influence on decision-making in both the public and private processes. In the Czech legal environment, the greatest de facto responsibility for the implementation of children's participation rights is on social workers of the authority for social and legal protection of children. The Act on the Social and Legal Protection of Children in the provision of Section 8 (2) and (3) states: "A child who is able to

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<sup>7</sup> HART, R. A. *Children's Participation: From tokenism to citizenship*. Florence: Innocenti, International Child Development Centre, 1992, p. 8.

<sup>8</sup> LUNDY, L. 'Voice' is not enough: Conceptualising Article 12 of the United Nations Convention on the Rights of the Child. *British Educational Research Journal*. 2007, Vol. 33, No. 6, pp. 927–942.

<sup>9</sup> LIEFAARD, T. Access to Justice for Children: Towards a Specific Research and Implementation Agenda. *The International Journal of Children's Rights*. 2019, Vol. 27, No. 2, p. 217.

<sup>10</sup> *Ibid.*, p. 216.

<sup>11</sup> TOBIN, J. (ed.) *The UN Convention on the Rights of the Child: A commentary*. Oxford: Oxford University Press, 2019. pp. 411–413.

<sup>12</sup> MCMELLON, C., TISDALL, E. M. Children and Young People's Participation Rights: Looking Backwards and Moving Forwards. *The International Journal of Children's Rights*. 2020, Vol. 28, No. 1, p. 169.

<sup>13</sup> *Ibid.*

<sup>14</sup> *Ibid.*, pp. 19–170.

<sup>15</sup> Cf. TAYLOR, N., FITZGERALD, R., MORAG, T., BAJPAI, A. International models of child participation in family law proceedings following parental separation divorce. *International Journal of Children's Rights*. 2012, Vol. 20, No. 4, pp. 669–671. LEVINER, P. Child Participation in the Swedish Child Protection System. *The International Journal of Children's Rights*. 2018, Vol. 26, No. 1, pp. 145–150 or SKJØRTEN, K. Children's voices in Norwegian Custody Cases. *International Journal of Law, Policy and the Family*. 2013, Vol. 27, No. 3, pp. 289–309.

formulate his/her own opinions has the right to freely express these opinions regarding the matters that concern him/her for the purposes of social and legal protection, and to do so even without the presence of parents or other persons responsible for the child's upbringing. In discussing all matters relating to a child, the child's self-expression shall be given due consideration appropriate to his/her age and mental maturity. In its activities, the social and legal child protection authority takes into account the wishes and feelings of the child, taking into account his/her age and development, so as not to endanger or disrupt his/her emotional and mental development. A child who, in regard to his/her age and intellectual maturity, is able to assess the scope and significance of decisions resulting from court or administrative proceedings in which he or she is a participant, or if it is another decision relating to him/her personally, shall receive information from the social and legal child protection authority on all serious matters concerning the child; a child over the age of 12 is viewed as able to accept the information, form his/her own opinion, and communicate it."

Employees of the social and legal child protection authority, meaning social workers, are in almost 100% of cases appointed children's guardians in court proceedings to resolve the custody of minors. This procedure involves many variants related to the minor's affairs, such as consent to manage the minor's assets, committing to foster care, or to institutional care. In most cases the guardians help resolve the custody, care and contact with a child. The proceedings are always conducted before the parental divorce as a necessary condition for divorce. They are also conducted in the case of a separation of unmarried couple, unless the parents both agree on the upbringing and care of the child. They are also conducted on the proposal of one of the parents, whenever the conditions of the previous decision need to be changed. The content of the decision is to determine the type of child custody (exclusive, residential, joint), the extent of contact with the other parent and to determine the amount of care. These are therefore decisions that fundamentally concern the child's future life.

As part of its responsibility for the actual implementation of the right to participate, the social and legal child protection authority has to provide a child with neutral information on the proceedings in which he or she is a participant or is going to be affected by. This is a very important component of the whole process, because the child, if he or she has any information at all, of course obtains it mainly from the parents, who provide information from their position in the proceedings, that is, not neutrally. The information should be provided in a neutral manner; however, it should contain an explanation of the opinions of individual parties, an explanation of potential dispute between the parents with regard to the child's age as well as information on the legal regulation. Another important factor is informing the child that he or she can express his/her opinion, either directly to the court or indirectly. Information on the court proceedings should be communicated to the child in advance so that he or she can form an opinion and communicate it. Furthermore, the child should be informed about the course of the proceedings, about the possible outcome and consequences of the court decision and, last but not least, it is important to inform the child about the actual outcome of the court ruling. At the same time, social workers in the position of children's guardian ascertain the child's opinion and then communicate this opinion to the court in cases where the child, whether due to young age or other reasons, does not communicate his/her opinion directly to the court. This is often information that plays a crucial role in deciding about the child's future. Social workers repeatedly reflect that this is a very demanding task, due to lack of time, insufficient suit-

able space for making a child feel pleasant, manipulation of the child by parents, etc.<sup>16</sup> A fundamental and still unresolved problem in the Czech context is whether the social and legal child protection authority acting as a procedural guardian in court proceedings should, in relation to the child's opinion and desire act according to the *direct instruction model* or *best interests model*.<sup>17</sup> In the first model, the guardian in court proceedings should use all available procedural means to achieve an outcome corresponding to the child's wishes. This is regardless of the opinion of the relevant involved social worker about the compliance of the child's desires with the child's best interests.<sup>18</sup> The assessment of the best interests of the child in such a case is ultimately up to the discretion of the ruling court. In the second model, on the other hand, the child's custodian is not bound by the expressed opinion and promotes what he or she considers to be in line with the best interests of the child.<sup>19</sup> The situation is complicated by the fact that the social and legal child protection authority often acts in a dual role of the child's custodian and the provider of social and legal protection.<sup>20</sup>

The child's participation rights in court proceedings are regulated in procedural regulations, namely in the Act on Special Court Proceedings and in the Code of Civil Procedure. The wording of this legislation, together with the age limit of 12 years set by the Civil Code, provide a relatively clear rule; if the court learns that the child is over 12 years of age, and this is not prevented by other circumstances, or is younger and is able to formulate his/her opinions, it is obliged to hear the child. Ascertaining the child's interests indirectly – through a custodian, that is, a children's guardian, is possible only if the child is not able to receive information and is not able to form his/her own opinion. Ascertaining the child's opinion by questioning is therefore a rule from which the court may deviate in justified cases (i.e. a situation where the questioning is in conflict with the child's interests, e.g. due to his/her significant mental instability). If the opinion of the minor is perceived by the judge through his/her own senses, the risk of misinterpretation of the minor's opinion by a third party is eliminated.<sup>21</sup>

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<sup>16</sup> ZAKOUŘILOVÁ, E. *Vedení rozhovoru s dítětem v praxi OSPOD pro potřeby soudu. Sborník z konference „Zjišťování názoru dítěte v soudní praxi“*. Brno: Office for the International Legal Protection of Children, 2017.

<sup>17</sup> For the differences between these models see e.g. TOBIN, J. (ed.) *The UN Convention on the Rights of the Child: A commentary*. Oxford: Oxford University Press, 2019, pp. 428–431.

<sup>18</sup> The obligation of a social and legal child protection authority as a guardian to represent a child in this way in the Czech environment, is described, for example, by HOFSCHNEIDEROVÁ, A. O roli kolizního opatrovníka dítěte v soudním řízení o péči respektive o úpravě poměrů dítěte. In: *epravo.cz* [online]. [2021-03-30]. Available at: <<https://www.epravo.cz/top/clanky/o-roli-kolizniho-opatrovnika-ditete-v-soudnim-rozeni-o-peci-respektive-o-uprave-pomeru-ditete-110853.html>> or KRÍSTEK, A. Poznámky k procesnímu opatrovnictví nezletilých (2.) Některé sporné otázky. *Právo a rodina*, 2018, Vol. 18, No. 4.

<sup>19</sup> Although they do not consider such a solution to be fortunate, arguments in favour of the child social and legal protection office is supposed to de lege lata proceed so, are presented, for example, by KOTRADY, P., ŠTASTNÝ, P. Ještě k roli orgánu sociálně-právní ochrany dětí jako procesního opatrovníka v řízení ve věcech péče soudu o nezletilé. *Právo a rodina*. 2018, Vol. 18, No. 8.

<sup>20</sup> Critical approach has been adopted by, for example, the Constitutional Court in its judgment dated 22 November 2012, Constitutional Court II File No. ÚS 194/2011 and ROGALEWICZOVÁ, R. Možnosti aktivního zapojení dítěte do řízení. *Právní rozhledy*. 2018, No. 8, pp. 267–275.

<sup>21</sup> HRUŠÁKOVÁ, M., KRÁLÍČKOVÁ, Z., WESTPHALOVÁ, L. *Občanský zákoník II – Rodinné právo § 655-975. Komentář*. Praha: C. H. Beck. 2014, p. 855.

In its case-law, the Constitutional Court of the Czech Republic repeatedly emphasizes the need to respect the participation rights of the child and bases its decision-making also on the judgments of the European Court of Human Rights, see Constitutional Court I ÚS 2482/13 dated 26 May 2014; Constitutional Court I ÚS 1629/16 dated 2 August 2016; Constitutional Court II ÚS 725/18 dated 8 October 2018.

With regard to the above, we can conclude that the Czech legislative setting is such that every decision concerning the child must be made in accordance with his/her best interests and part of the determination of the best interests of a child is to ascertain the child's opinion. However, information from practice signals that children are not always allowed to fully exercise their participation rights. The important question is how well the social and legal child protection authorities fulfil their role, in which way the court mostly ascertains the child's opinion, to what extent the child's age plays a role here and whether the court takes the child's opinion into consideration in its decision-making process. The answers to this questions is given by the quantitative research entitled *Ascertaining the form of children's participation in upbringing and care proceedings*, which we carried out in 2017 as part of a student grant competition at the Faculty of Social Studies, University of Ostrava, Czech Republic. The reason for the research being designed as such was the fact that the Czech Republic has not yet empirically examined how the child's opinion is actually ascertained in the proceedings concerning the child and whether it is taken into account in decisions affecting the child's future life.

## 2. RESEARCH METHODOLOGY

For the purpose of this research, we worked with the concepts of participation and the form of participation as follows. We **view participation** as a process where anyone can influence decisions about his/her lives in a way that leads to a change. In relation to a minor, the basis for participation is contained in Article 12 of the Convention on the Rights of the Child, which guarantees to a child that if he or she is able to formulate his/her own views then the child has the right to express them freely; the child's views must be given due consideration according to the age and level of the child. The child must be given the possibility to be heard in any court or administrative proceedings affecting him/her.

The concept of the **form of participation** is defined as the way in which the court ascertains the opinion of the child in the ongoing proceedings. According to the applicable Czech law, if a child is older than twelve years or younger, however is able to formulate his/her opinions, the rule is that the court should hear the child. Direct discussion eliminates the risk of misinterpretation of the minor's opinion by a third party. This discussion may be conducted during the session regarding the matters concerning the child, or the child may be heard separately by the court without presence of other persons. In the case of a child who is unable to form his/her own opinion or communicate it, the child's opinion is ascertained indirectly. The commentary to the Civil Code lists as a typical way of ascertaining of an opinion by a social and legal child protection authority or also through the child's representative (parent, guardian) or from the opinion of an appointed expert.

## Subject, object, research objective, research hypotheses

**The research subject** focused on the ways in which minors participate in court proceedings concerning their upbringing and care;<sup>22</sup> **the research object** is a specific court decision on the upbringing and care of minors. In general, the research is based on the thesis that every decision concerning a child must be made in accordance with the best interests of the child, and the determination of the child's best interests must include the determination of the child's opinion.

**The objective** of the quantitative research was *to find out how minors participate in court proceedings regarding their upbringing and care and at the same time whether their opinion is taken into account in court decisions.*

Following the research objective, **the research question** was formulated: *“In which way do minors participate in court proceedings on upbringing and care, and to what extent is their opinion taken into account in court decisions?”*

Following the research objective and the research question, we defined **the main theoretical hypothesis**, which was based on the assumption that *the modes of participation of minors in court proceedings on their upbringing and care are uniform for the court system in the Czech Republic. This theoretical hypothesis was further developed by three theoretical sub-hypotheses, from which selected results should be presented below.*

**The basic research sample** consists of court decisions on the upbringing and care of minors, which were finalized in 2015 and 2016 by the district courts in the Moravian-Silesian Region. The Moravian-Silesian Region was chosen mainly due to good accessibility. The choice of time period was determined with regard to the topicality of the topic and also with regard to the effective date of the “new” Civil Code, i.e. from 1 January 2014, which regulated children's participation rights.

**The research sample** was selected using **quota** (non-random purposive or deliberate) sampling. In our case, it was court decisions on the upbringing and care of minors finalized in 2015 and 2016 by two district courts in the Moravian-Silesian Region, which were willing to participate in the research. Due to the need for a high degree of anonymization, the research does not include information, which district courts are involved.<sup>23</sup> To adhere to the identical research sample, we asked each district court to make available 400 files in which a final decision on the custody of minors was issued in 2015 and 2016. Each district court provided the first 50 files from each of the calendar quarters of 2015 and 2016.<sup>24</sup>

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<sup>22</sup> Although the pilot research presented by us uses the term court proceedings on upbringing and care, the child's nutrition in the form of a maintenance obligation is not the subject of our interest. We're coming out from applicable legislation (and case law), which regularly links upbringing and care. As part of the research, we therefore focused only on care proceedings, especially in order to be able to set the parameters of the research and define the research sample.

<sup>23</sup> Courts are indicated by the letters A and B.

<sup>24</sup> The total number of files regarding the custody of minors kept by courts, in which a final decision was made in Court A in 2015 was 622 files, in 2016 it was 706 files. The total number of files regarding the custody of minors kept by courts, in which a final decision was made in Court B in 2015 was 1.871 files and in 2016 it was 1.682 files. Thus, there was a total of 4.881 files for which a final decision was made in 2015 and 2016 regarding the custody of minors in two district courts in the Moravian-Silesian Region.

Content analysis of documents was chosen as the **data collection technique**. For the analysis of the documents, court decisions on the upbringing and care of minors were used, which were finalized in 2015 and 2016 in two district courts in the Moravian-Silesian Region. Due to time constraints, the data collected using content analysis was recorded in a pre-prepared **record sheet**. The record sheet was divided into three parts. The purpose of the first part was to identify basic data, such as the child's age and sex, and also the form of the parents' partnership (married/unmarried). The second part was devoted to ascertaining the child's opinion, specifically whether the opinion was sought for at all. The third part focused on the relationship between the ascertained opinion of the child and its consideration by the court.

Selected courts in the Moravian-Silesian Region were asked to participate in the research (or more precisely the vice-chairmen of the relevant courts), which for the purpose of maintaining anonymization, we keep confidential not listing them herein. The courts were contacted by telephone, followed by the submission of an official request, which was granted in two cases. A confidentiality protocol was signed in the relevant courts in connection with reviewing the file files. Also, we were acquainted with the arrangement of files, their content and handling.

The actual data collection was carried out in July and August 2017. Five recorder-keepers were involved in the data collection – they were the grant's principal investigator and co-investigators. The recorder-keepers were acquainted with the data collection process from the file documentation and with the method of recording data in a record sheet, which was created for the purpose of saving time and clarity.

**Data processing and subsequent analysis** was performed using the SPSS program (Statistical Package for the Social Sciences). In the first phase, first-order classification was performed, the so-called one-dimensional analysis, allowing the description of individual characteristics of files, or more precisely evaluation of the response frequency for individual questions in the record sheet. Subsequently, second-order classification, the so-called two-dimensional analysis, was performed, allowing testing of the relationship between two characteristics, or more precisely confirming or disproving the formulated hypotheses.

### 3. INTERPRETATION OF RESEARCH RESULTS

The research results from both one-dimensional and two-dimensional analysis are quite extensive, so we present only those that we consider important and interesting.

**Selected results of one-dimensional analysis are presented according to the structure of the record sheet:**

#### **Description of the research sample** (part 1 of the record sheet)

As part of the data collection, a total of 1,050 children were included in the research sample, or more precisely, 1,050 record sheets were collected, each record sheet belonging to one child. The listed number of children was included in a total of 675 families, or more precisely, 675 court files were used in the research, with one file always belonging to one family. When we looked at the family background from which the children came, more than 72% of children came from their parents' marriages.



The gender distribution in the research sample was almost equal, with girls making up for 49.9% and boys 50.1%. In terms of the age distribution, the most represented group were children under 9 (43.6%) years old, and when looking at age-specific distribution, the largest groups were children under 8 (9%), 10 (8.5%) and 7 (8.1%) years old.

### **Identification of the child's opinion** (part 2 of the record sheet)

The following part of one-dimensional data analysis will focus on the description of the actual eliciting of a child's opinion.

The analysis of the data showed that the child's opinion on the issue of upbringing was ascertained in almost 53% of cases, compared with an estimated 47% of cases when it was not sought out.

According to the results of the analysis, the most common reason for not seeking a child's opinion was the young age of the child. It played a role in a total of 64% of the cases in which the child's opinion was not sought out and the file revealed an apparent reason for not finding it. Within the Other option item, the responses most frequently included *the child could not be reached when conducting the investigation*, as well as the *non-identification of the child's opinion due to his/her disability*.

In cases where a child's opinion was sought out, the most frequent form of opinion search was the indirect questioning of the child. This variant was true for almost 95% of the cases. Based on the analysis, only 5% of children were interviewed directly by the court. If we look at the most frequent form used for an indirect child questioning, it is undoubtedly the seeking of opinion through a social worker from the department of social and legal protection of children. This option was reported in almost 98% of cases when the child's opinion was ascertained through indirect interrogation and this form was detectable from the file. In cases of other forms of indirect interrogation, the most frequent form was by *a psychologist*.

As for the methods used for indirect questioning of a child, interviews dominated the research. This method was used in more than 98% of indirect questioning cases where this form was detectable. The question of the form of indirect questioning was also closely related to where the indirect interrogation was carried out. The most frequently represented option, in a total of 56% of the cases, proved to be an inquiry in a child's household. Another option that cannot be omitted is the seeking of a child's opinion in a school or a nursery school, or in the department of the social and legal protection of children. The second option was represented in less than 30% of cases, and the third one in less than 13%. The percentage representation refers to cases where the place of indirect questioning was stated in the file. The answer *Other option* included the following responses – through *a psychologist at the Centre for Psychological Help or in a counselling centre*.

The research also examined how many children showed an actual interest in expressing their views. The positive answer was only recorded in the cases of 19 children (3%), or rather 19 children themselves certified that they had been questioned. However, in many cases this information was not detectable from the file.

### **Taking of a child's opinion into account by the court** (part 3 of the record sheet)

The following results relate to information on how courts handle a given child's identified opinion.

The first question from the last part of the record sheet was focused on whether the courts in their decisions state the child's view. According to the results of the analysis, the opinion of a child was only mentioned in court decisions in less than 29% of cases, compared to 72% where it was not mentioned. However, here it is necessary to point out that those cases, where in a court decision the child's opinion was not stated, also include the cases where the child's opinion was not sought out.

Another pair of questions focused on whether a court decides in compliance with a child's opinion and whether a court states for what reason it has agreed or failed to agree. The analysis of the acquired data subsequently revealed that in almost 95% of cases, in which it was possible to judge whether or not the court's decision was in compliance or non-compliance with a child's view, it was decided in accordance with the child's view. In the examined sample, the court in its decision failed to comply with only 22 children, i.e. 5%. The reasons why the court has decided in accordance with, respectively against the view of a child, were only stated in less than 24% of cases. In approximately 76% of cases, this information was not included in the judgment. Again, however, it is necessary to draw attention to the fact that the "no" answer also includes cases where a child's opinion has not been sought out.

### **Selected results of two-dimensional analysis:**

For the purpose of determining the existence (or non-existence) of correlation (dependencies, relations) between individual variables, Pearson's Chi-square Test of Independence (Pearson Chi-Square) with a contingency table was used, the essence of which is to test the null hypothesis  $H_0$  that both the row and column variable is independent of each other. For the application of these tests, a significance level of **5%** (i.e. 0.05) was determined, to which all tested Chi-square test results were subsequently compared. Due to the selected 5% level of significance, the obtained results of the sample will therefore apply to the basic sample with an accuracy of 95%.

If the calculated value of the Chi-square Test (denoted by the abbreviation **Sig.**) was calculated to be  $\leq 0.05$ , the null hypothesis of the absence of a correlation (relations, dependencies) was rejected, thus **confirming the correlation** between the tested variables. If the Chi-square test result (Sig.) was  $> 0.05$ , the null hypothesis of the absence of a correlation between the row and column variables in the contingency table was not rejected, thus **not confirming the correlation** between the tested variables.

### ***Theoretical hypothesis 1***

The first theoretical hypothesis was based on the assumption that ***the court is obliged to ascertain the child's opinion on his/her upbringing in relation to the child's age.*** Below find outputs of one of two working hypotheses.

**Working hypothesis 1.1**

The first working hypothesis asked the question **whether the ascertaining of a child's opinion by the court is related to the child's age**. In two-dimensional analysis, the correlation between question no. 1 inquiring about the child's age and question no. 4 whether the child's opinion was ascertained was tested for the needs of this hypothesis. An answer to this pair of questions was recorded onto a total of 1,050 record sheets.

Figure 1. Age of the child – Age category<sup>25</sup> x Ascertaining of a child's opinion (self-report data)

Age of the child – Age category	Ascertaining of no	child's opinion	
		yes	Total
<b>under 9 years</b>	347 75,8%	111 24,2%	458 100,0%
<b>between 9–11 years</b>	117 50,6%	114 49,4%	231 100,0%
<b>more than 12 years</b>	89 24,7%	272 75,3%	361 100,0%
<b>Total</b>	<b>553</b> <b>52,7%</b>	<b>497</b> <b>47,3%</b>	<b>1050</b> <b>100,0%</b>

According to the test results, it is possible to state a general rule that **the age of a child has an impact on whether or not his/her opinion is ascertained**.

The analysis showed that nine-year old children or younger were heard in only one of the four cases, however, with the increasing age of the child, the frequency of their interviewing also increased. In the second group of children, i.e. children aged 9–11 years, the child's opinion was ascertained in about half of the cases. An interesting finding, however, is that almost one quarter of children under the age of 12 were not interviewed, even though they were required to be interviewed by law.

**Theoretical hypothesis 2**

The second theoretical hypothesis assumes that **the forms of ascertaining the child's opinion on his/her upbringing are related to the child's age**. For testing purposes, this

<sup>25</sup> To determine the individual age categories, we primarily relied on the statutory limit of 12 years, when it is considered that a child who reaches this age is able to information about driving and the matters to be decided, to accept, form an opinion and communicate it to the court accordingly. However, „in proceedings involving a minor who is able to formulate his/her views, the court proceeds to ascertain his/her views on the matter“ – so it may be a child under the age of 12. Here we can further proceed from the periodization of human developmental periods, in our case a child, according to the authors Langmeir and Krejčířová LANGMEIER, J., KREJČÍŘOVÁ, D. *Vývojová psychologie*. Praha: Grada, 2006). For the purposes of our research, we adjusted the period of younger school age (from 7 to 12 years) to the limit period of 9–11 years, when the child approaches the age set by law to find out his opinion in matters that concern him, in our case upbringing.

hypothesis was divided into five working hypotheses. We have listed the outputs from four of them below.

### ***Working hypothesis 2.1***

The first working hypothesis examined the correlation between **the form of questioning in ascertaining the child's opinion and the child's age**. For the two-dimensional analysis, we used question no. 1 inquiring about the child's age and question no. 6 about the form of ascertaining the child's opinion. The answer to this pair of questions was recorded onto a total of 497 record sheets.

Figure 2. Age of the child – Age category x Form of questioning<sup>26</sup> of a child (self-report data)

Age of the child – Age category	Form of direct	questioning of a child	
		indirect	Total
<b>under 9 years</b>	2 1,8%	111 98,2%	113 100,0%
<b>between 9–11 years</b>	4 3,5%	110 96,5%	114 100,0%
<b>more than 12 years</b>	19 7,0%	251 93,0%	270 100,0%
<b>Total</b>	<b>25</b> <b>5,0%</b>	<b>472</b> <b>95,0%</b>	<b>497</b> <b>100,0%</b>

Based on the results of the analysis, it turned out that indirect questioning of a child was the absolutely predominant answer in all examined age categories.

Subsequently, the result of statistical testing showed that **there is no correlation** between the age category of a child and the way or form of ascertaining the child's opinion.

### ***Working hypothesis 2.2***

Another working hypothesis was focused on the **correlation between the age of the child and the form of indirect questioning**. The two-dimensional analysis was performed using question no. 1 (the child's age) and question no. 6b (form of indirect questioning). The answer to this pair of questions was recorded onto a total of 477 record sheets.

<sup>26</sup> For the variables, we use a combination of § 867 of the Civil Code and § 100 of the Code of Civil Procedure (Act No. 89/2012 Coll. on Civil Code; Act No. 99/1963 Coll. on Civil Procedure Code) that if the court finds that the child is older than 12 years or younger and in both cases is able to formulate his views, he is obliged to hear the child – so-called direct court hearing. In cases where the child is not able to form or communicate his/her own opinion, his/her opinion is ascertained indirectly (indirect questioning), through the child's representative, an expert opinion or the competent child welfare authority (Department of Child protection). The child himself also has the right to express his opinion, but it is his right, not his duty.

Figure 3. Age of the child – Age category x Form of indirect questioning (self-report data)

Age of the child – Age category	Form of depart. of child protection	indirect questioning			
		established	representtive	other	Total
<b>under 9 years</b>	107	0	2	2	111
	96,4%	0,0%	1,8%	1,8%	100,0%
<b>between 9–11 years</b>	107	0	1	2	110
	97,3%	0,0%	0,9%	1,8%	100,0%
<b>more than 12 years</b>	251	1	3	1	256
	98,0%	0,4%	1,2%	0,4%	100,0%
<b>Total</b>	<b>465</b>	<b>1</b>	<b>6</b>	<b>5</b>	<b>477</b>
	<b>97,5%</b>	<b>0,2%</b>	<b>1,3%</b>	<b>1,0%</b>	<b>100,0%</b>

The analysis performed showed that regardless of the child's age, the child's opinion was ascertained (in almost all cases) through a social and legal child protection authority.

As was the case with the previous hypothesis, we can also state that **there is no correlation** between the age category of a child and the form of indirect questioning in determining the child's opinion.

### *Working hypothesis 2.3*

The third working hypothesis related to the second theoretical hypothesis aimed to determine the **correlation between the age of the child and the place of ascertaining the child's opinion**. For testing purposes, question no. 1 (child's age) and question no. 7 (the place of ascertaining the child's opinion) was used. The answer to this pair of questions was marked onto a total of 367 record sheets.

Figure 4. Age of the child – Age category x Place of ascertaining the child's opinion<sup>27</sup>  
(self-report data)

Age of the child – Age category	Form of depart. of child protection during inquiry	ascertaining the child's opinion			
		at depart. of child protection	school/ nursery school	other answer	Total
<b>under 9 years</b>	47 58,0%	6 7,4%	28 34,6%	0 0,0%	81 100,0%
<b>between 9–11 years</b>	41 50,6%	5 6,2%	34 42,0%	1 1,2%	81 100,0%
<b>more than 12 years</b>	119 58,0%	35 17,1%	47 22,9%	4 2,0%	205 100,0%
<b>Total</b>	<b>207</b> <b>56,4%</b>	<b>46</b> <b>12,5%</b>	<b>109</b> <b>1,3%</b>	<b>5</b> <b>1,4%</b>	<b>367</b> <b>100,0%</b>

The analysis showed that in all age categories, in more than half of the cases, the child's opinion was ascertained at home within the survey. Ascertaining of child's views in a social and legal child protection office or in a school facility then differed in individual age categories.

In the first two categories, i.e. in children under the age of nine and in children between the ages of nine and eleven, the second most frequently used option for the place of determining child's opinion was school and kindergarten. In children over the age of twelve, a social and legal child protection office was the second most frequently used option.

According to the test result, it is possible to state a general rule that **the age of the child affects where the child's opinion was ascertained.**

#### **Working hypothesis 2.4**

The following working hypothesis assumes a **correlation between the age of the child and the method of ascertaining the child's opinion.** Questions no. 1 (child's age) and no. 8 (methods of opinion ascertainment) relate to the above hypothesis. The answer to this pair of questions was recorded onto a total of 489 record sheets.

<sup>27</sup> Indirect interrogation by the relevant Department of Child Protection (DCP) can be carried out in many places, which depends on the presence of the child. Within the divorce / separation situation, DCP plays the role of a conflict guardian, defending the interests of a minor child and conducting investigations at the place of residence of the child's parents. (Act No. 359/1999 Coll. on Social-Legal Protection of Children).

Figure 5. Age of the child – Age category x Method of ascertaining the child's opinion<sup>28</sup> (self-report data)

Age of the child – Age category	Method interview	of ascertaining the child's opinion		
		special techniques (e.g. methaforic)	other answer	Total
<b>under 9 years</b>	108 95,6%	2 1,8%	3 2,7%	113 100,0%
<b>between 9–11 years</b>	108 98,2%	1 0,9%	1 0,9%	110 100,0%
<b>more than 12 years</b>	265 99,6%	0 0,0%	1 0,4%	266 100,0%
<b>Total</b>	<b>481</b> <b>98,4%</b>	<b>3</b> <b>0,6%</b>	<b>5</b> <b>1,0%</b>	<b>489</b> <b>100,0%</b>

The analysis showed that regardless of the child's age, the most commonly used method was interview. The interview method was used in almost all cases of ascertaining the child's opinion.

In general it can be conclude that there is **no correlation** between the age group of a child and the forms of ascertaining the child's opinion.

### ***Theoretical hypothesis 3***

The third and last theoretical hypothesis is based on the presumption that ***the court pays attention to an elicited opinion of the child in its decision-making process on the custody of the child***<sup>29</sup>. The theoretical hypothesis was further sub-divided into three working hypotheses, from which we chose to present an output from two hypotheses.

#### ***Working hypothesis 3.1***

The following working hypothesis assumes that **if the child's opinion is ascertained, the court decides in accordance with that opinion**. Question no. 4 regarding ascertainment of a child's opinion and question no. 11 regarding the court decision in accordance with the child's opinion are related to the hypothesis. The answer to this pair of questions was recorded onto a total of 431 record sheets.

The two-dimensional analysis revealed that if the child's opinion was in any way ascertained, the court almost always decided in accordance with that opinion. It was decided contrary to the child's opinion in twenty-two cases.

<sup>28</sup> Currently, the Department of Child Protection, but also other participants, can find out the child's opinion in addition to the interview but also other techniques. See ZAKOUŘILOVÁ, E. *Speciální techniky sociální terapie rodin*. Praha: Portál, 2014.

<sup>29</sup> Attention in the decision takes the following forms as part of partial working hypotheses. The following is based on the legal definition, where the court pays due attention to the child's opinion. (Act No. 89/2012 Coll. on Civil Code).

Figure 6. Regarding ascertainment of a child's opinion x Regarding the court decision in accordance with the child's opinion (self-report data)

Regarding ascertainment of a child's opinion	Regarding opinion no	court decision in accordance with child's	
		yes	Total
no	2 28,6%	5 71,4%	7 100,0%
yes	20 4,7%	404 95,3%	424 100,0%
<b>Total</b>	<b>22</b> <b>5,1%</b>	<b>409</b> <b>94,9%</b>	<b>431</b> <b>100,0%</b>

Depending on the test result, a general rule that **there is a correlation** between ascertaining a child's opinion and a court decision in accordance with that opinion, can be applied.

### *Working hypothesis 3.2*

The last established working hypothesis is based on the presumption that **if the child's opinion is ascertained, the reasoning of the court's decision states why the court ruled in accordance with or contrary to the child's opinion**. Question no. 4 focused on the ascertainment of a child's opinion and question no. 12 focused on the reason for which the decision was made in accordance with/contrary to the child's opinion are related to the above hypothesis. The answer to this pair of questions was recorded onto a total of 1,050 record sheets.

Figure 7. Regarding ascertainment of a child's opinion x Reason for which the decision was made in accordance with/contrary to the child's opinion (self-report data)

Regarding ascertainment of a child's opinion	Regarding opinion no	court decision in accordance with child's	
		yes	Total
no	546 98,7%	7 1,3%	553 100,0%
yes	256 51,5%	241 48,5%	497 100,0%
<b>Total</b>	<b>802</b> <b>76,4%</b>	<b>248</b> <b>23,6%</b>	<b>1050</b> <b>100,0%</b>

The analysis revealed that if the child's opinion was ascertained, only half of the cases contained the reasoning of the court decision stating the reason why the court ruled in accordance with or contrary to the child's opinion.



Depending on the test result, a general rule that **there is a correlation** between ascertaining a child's opinion and the fact, whether the reasoning for the court decision stated why the court ruled in accordance with or contrary to the child's opinion, can be applied.

#### 4. RESULTS AND DISCUSSION

Given the above research results, which showed many problematic points, the research team decided to continue on with the topic. The new and more extensive research has been funded by the Grant Agency of the Czech Republic and will be implemented in 2020–2022. We will again use a quantitative research strategy. First, a research instrument will be developed to determine whether and how the child's opinion is ascertained in court proceedings and whether the child's opinion is taken into account in decision-making. The Czech Republic is divided into eight districts of regional courts; one district court will be randomly selected from the district of each regional court (due to the need for a high degree of anonymization, the research will not include information about which district courts will be involved). Representation of the districts of all regional courts should lead to the greater research objectivity. In order to adhere to the same research sample, we will ask each district court to make available a total of 400 files for research purposes, virtually 50 from each calendar quarter of 2017 and 2018, in which a final decision on the custody of minors was issued. The analysis of the collected data will describe the real state of application of the participation rights of minors in court proceedings across the Czech Republic; on this basis, it will be possible to propose appropriate strategies and tools to improve all stages and forms of participation of minors. To complement quantitative research, we plan on interviewing guardianship judges, which can help clarify subjective and institutional obstacles to the broader exercise of children's rights.

The final data resulting from one-dimensional analysis and in particular two-dimensional analysis deliver interesting, and often alarming findings.

The finding that the child's participation in court proceedings increases with his/ or her age, corresponds to the applicable legislation. It is assumed that with the increased age of a child, his/her mental abilities and maturity also increase. Since in the group of children aged 9 – 11 their opinion was ascertained in about half of the cases, we can assume that in half of the situations the court came to the conclusion that a particular child is not able to formulate his/her opinions and therefore did not ask him/her. We consider the fact that almost a quarter of children over the age of 12 have not been questioned, that is, after they already reached the age limit of ability to accept information, form their own opinion and communicate it according to legislation, to be an interesting finding about the children's participation practice. In these cases, however, this fact must be carefully justified in the court decision, since the unreasonable failure to ascertain the child's opinion is a violation of his/her right to be heard within the meaning of Article 12 of the Convention on the Rights of the Child and the right to a fair trial.<sup>30</sup>

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<sup>30</sup> HOFMANNOVÁ, H. Účast dítěte (participační práva) v rozhodovacích procesech v sociálně-právní ochraně dětí s důrazem na judikaturu Ústavního soudu. Analýza projektu Kodifikace právní úpravy podpory rodin, náhradní rodinné péče a systému péče o ohrožené děti. In: *Ministerstvo práce a sociálních věcí* [online]. [2021-03-30]. Available at: <<http://www.pravonadetstvi.cz/stahnout-soubor/ucast-ditete-participacni-prava-v-rozhodovacich-procesech-v-socialne-pravni-ochrane-deti-s-durazem-na-judikaturu-ustavniho-soudu/>>.

The fact that the child's opinion was not ascertained due to the fact that he or she was not present during the social and legal child protection authority's investigation is not in accordance with applicable laws. The extensive workload of a social and legal child protection office may not be the reason for revocation of the child's participation rights. In these cases, it is the role of the court to ask the social and legal child protection authority to supplement the report, or to invite the child to a direct hearing. In a situation where the social and legal child protection authority does not communicate with the child because he or she is not present during the investigation, it acts in conflict with its obligation imposed in Section 8 (3) of Act No. 359/1999 Coll., on the Social and Legal Protection of Children, that is, the obligation of the social and legal child protection authority to inform a child who is a participant in court or administrative proceedings of all serious matters concerning the child.

The finding that indirect (mediated) questioning is the predominant form of ascertaining the child's opinion in all age categories is food for thought. According to the legislation,<sup>31</sup> the determination of the child's opinion by questioning is a rule from which the court may deviate in justified cases (a situation where the questioning is in conflict with the child's interests, e.g. due to his/her significant mental instability). If the opinion of the minor is perceived by a judge through his/her own senses, the risk of misinterpretation of the minor's opinion by a third party is eliminated. The opinion of the priority of personal (direct), not indirect (mediated) questioning is also held in its case-law by the Constitutional Court, see the rulings under the Constitutional Court II File No. ÚS 1945/08, the Constitutional Court III File No. ÚS 3007/09, the Constitutional Court I File No. ÚS 2661/10 and the Constitutional Court III File No. ÚS 3363/10, although in its later case-law it also accepts an indirect method of questioning, e.g. a report by an employee of a social and legal child protection authority, or an interview with a psychologist. Compare the findings of the Constitutional Court II File No. ÚS 1651/09, the Constitutional Court II File No. ÚS 1649/13, and the Constitutional Court III File No. ÚS 2621/10.

The research results showed a completely predominant practice of indirect (mediated) questioning of a child. The question is whether the courts consider indirect questioning to be a sufficient form of child participation or whether the reason for little use of direct questioning is the factual conditions of the court proceedings, i.e. pressure on the proceedings speed and efficiency, inability to hear the child in friendly conditions outside the courtroom, etc.

The fact that the indirect (mediated) questioning is carried out in a prevailing number through a child interview with an officer of the social and legal child protection authority confirms data from practice. This de facto very important role of the social and legal child protection authority should also be considered in the training and education of a social and legal child protection authority workers.

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<sup>31</sup> HRUŠÁKOVÁ, M., KRÁLÍČKOVÁ, Z., WESTPHALOVÁ, L. *Občanský zákoník II – Rodinné právo*, § 655-975. *Komentář*. Praha: C. H. Beck. 2014, p. 855.

The research showed that only a small number of children (13 children) showed an interest in expressing their opinion. Hereto it makes sense to ask the question whether and how the provisions of Section 8 (3) of Act No. 359/1999 Coll., on Social and Legal Protection of Children, that is, the obligation of the social and legal child protection authority to inform a child who is a participant in court or administrative proceedings in respect of all serious matters concerning the child. Serious matters include certainly learning about the possibility to express one's opinion independently in court. The record sheets did not contain a question whether a social and legal child protection authority informed the child of his/her right to participate, as it was not possible to ascertain this fact from the content of the court file. The research result, that is, only 19 children who expressed an interest in expressing their opinion, is not a convincing argument for an actual fulfilment of the above-mentioned provision of the social and legal child protection authority.

The hypothesis relating to the ascertainment of the child's opinion and its conformity in the court's decision brought a somewhat surprising finding, because if the child's opinion was ascertained, the court almost always ruled in accordance with that opinion. The relevance of the child's opinion is anchored in Section 867 of the Civil Code in such a way that "*the court pays due attention to the child's opinion.*" The working hypotheses of theoretical hypothesis no. 3 focused on the court's attention to the child's opinion. Paying attention to the child does not mean that the court always rules in accordance with the child's views. The interpretation of this issue is contained in the findings of the Constitutional Court of the Czech Republic, e.g. the resolution under Constitutional Court III File No. ÚS 707/04 states that "the final assessment of the interests of the minor is up to adults, or up to the general courts, which must adjust the minor's ideas and opinions as to what is appropriate and not appropriate for him/her in a particular case. The general courts, in the sense of the provisions of Section 100 (3) of the Code of Civil Procedure, therefore hear the minor, however take into account the minor's opinion with regard to the minor's age, mental and emotional maturity. According to the opinion of the Constitutional Court to be found in the Constitutional Court II resolution File No. ÚS 1818/07, it cannot in any case be inferred from Article 12 of the Convention on the Rights of the Child "*that the child's opinion, which is a subject of a decision in the court proceedings, would be binding for the court and that it could not therefore decide differently from that opinion.*" Although it is a surprising finding, it is also positive. The child will certainly feel better in a new family arrangement that he or she agreed to than in the opposite case.

Other working hypotheses were, among other things, to answer the question of the extent to which the court in its decision-making follows the opinion of the child. This relationship can be found in the rationale of the decision, in which the court can state the reason for its decision in accordance with or contrary to the child's opinion. What is quite surprising is that in a situation where the child's opinion has been ascertained, the court does not state this finding in the rationale of the decision in half of the cases. This is not the case even in situations where it has decided in accordance with the child's opinion, although in our opinion the court deprives itself with this missing information in the rationale of the decision of a decision-making argument in accordance with the best interests of the child.

## 5. CONCLUSION<sup>32</sup>

Given the above research results, which showed many problematic points, the research team decided to continue on with the topic. The new and more extensive research has been funded by the Grant Agency of the Czech Republic and will be implemented in 2020–2022. We will again use a quantitative research strategy. First, a research instrument will be developed to determine whether and how the child's opinion is ascertained in court proceedings and whether the child's opinion is taken into account in decision-making. The Czech Republic is divided into eight districts of regional courts; one district court will be randomly selected from the district of each regional court (due to the need for a high degree of anonymization, the research will not include information about which district courts will be involved). Representation of the districts of all regional courts should lead to the greater research objectivity. In order to adhere to the same research sample, we will ask each district court to make available a total of 400 files for research purposes, virtually 50 from each calendar quarter of 2017 and 2018, in which a final decision on the custody of minors was issued. The analysis of the collected data will describe the real state of application of the participation rights of minors in court proceedings across the Czech Republic; on this basis, it will be possible to propose appropriate strategies and tools to improve all stages and forms of participation of minors. To complement quantitative research, we plan on interviewing guardianship judges, which can help clarify subjective and institutional obstacles to the broader exercise of children's rights.

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