

Children's Participation to Custody institution: Comparative Study

*Hajar Azari**

*Azam Oladighadikolai***

DOI: 10.22096/HR.2021.522277.1281

[Received Date: 03/11/2020 Acceptance Date: 15/04/2021]

Abstract

Advances in the humanities have led to a shift in attitudes toward children and the issuance of the Convention on the Rights of the Child (1989). Social activists to reduce the negative consequences of divorce on children and their better adjustment after their parental divorce, have been wanted to change family law to provide children's participation in any judicial proceedings (such as custody and access disputes) to express their views about decisions affecting their lives and well-being.

In this article we analyses with content method, Iranian family law statement, to extract capacity of children's legal right to decision-making in custody disputes. The findings show, three dimensions of approach in children's right and participation are identified: rights approach, best interests approach and mixed approach. The rights approach focuses on fundamentally rights such as: equality, dignity thus emphasis on the right of the child to be heard. The second approach seem to have negative views about children's right to participation

* Assistant Professor of Women's studies group, Faculty of Humanities, Tarbiat Modares University, Tehran, Iran.

Email: h.azari@modares.ac.ir

** PHD student in Women's Studies, Tarbiat Modares University, Tehran, Iran.

Email: azam.oladi@modares.ac.ir



because involving children in parental fighting, are very harmful. While the third approach states, it is necessary children's voice to be heard, as the same time emphasis on child protection. The paper notes, that under Iranian law, children's views are sometimes absent in decision-making particularly in custody litigation.

Keywords: The Children's Right to be Heard; The Best Interest of Child; Family Proceedings; Iranian Custody System.

Bibliography

- Archard, David (2013). "Children's Rights", *International Encyclopedia of Ethics*, pp.1-9.
- Archard, David and Marit Skivenes (2009). "Hearing the Child", *Child & Family Social Work*, Vol. 14, No. 4, pp. 391-399.
- Asadi, Leila Sadat (2009). "Child's Right to be with Parents and Relatives", *Bi-Quarterly Scientific Promotion of Jurisprudence and Family Law, Nedaye Sadegh*, Vol. 14, No. 5, pp. 5-31. [In Persian]
- Atwood, Barbara A (2003). "The Child's Voice in Custody Litigation: An Empirical Survey and Suggestions for Reform", *Arizona Law Review*, No. 45, p. 629.
- Aubrey, Carol and Sarah Dahl (2006). "Children's Voices: The views of vulnerable Children on their Service Providers and the Relevance of Services they Receive", *British Journal of Social Work*, Vol. 36, No. 1, pp. 21-39.
- Augsberger, Astraea; Vicki Lens & Andrea Hughes (2016). "I didn't Know you were Fighting So Hard for me: Attorneys' Perceptions of Youth Participation in Child Dependency Proceedings", *Family Court Review*, Vol. 54, No. 4, pp. 578-590.
- Azizi, Ali; Mohammad Farajiha Saber; Seyed Darid Mahmoudo Mousavi Mojab (1398). "Problem-Solving Courts in the Light of Comparative Studies", *Comparative Law Research*, Vol. 23, No. 4, pp. 91-126. [In Persian]
- Bigdeli, Saeed (2011). "Problems and Legal Gaps of Custody in the Iranian Legal System", *Jurisprudence and Family Law*, fall and winter 2011, pp. 5-24. [In Persian]
- Bilson, Andy and Sue White (2005). "Representing Children's Views and Best Interests in Court: an International Comparison", *Child Abuse Review*, Vol. 14, pp. 220-239.
- Birnbaum, Rachel (2014). "The Voice of the Child in Separation/Divorce Mediation and other Alternative Dispute Resolution Processes: A Literature Review", *Research Report, Canada Department of Justice*.
- Boshier, Hon. Peter & Damien Steel-Baker (2007). "Invisible parties: Listening to children", *Family Court Review*, Vol. 45, No. 4, pp.548-559.

- Bosisio, Roberta (2012). "Children's right to be heard: What children think", *The International Journal of Children's Rights*, Vol. 20, No. 1, pp. 141-154.
- Bruce, Margaret (2014). "The Voice of the Child in Child Protection: Whose Voice?", *Social Sciences*, Vol.3, No.3, pp.514-526.
- Burr, Vivion (2003). *Social Constructivism*, translation by Ashkan salehy, Tehran: Ney publishing. [In Persian]
- Coley, M.aria (2007). "Children's Voices in Access and Custody Decisions: The Need to Reconceptualize Rights and Effect Transformative Change", *Appeal (Review of Current Law and Law Reform)*, Vol. 12, p. 48.
- Correia, Tomas (2020). "Social Constructionism, Power and Behavior: A Post-structuralize Analysis",http://www.observatoriopolitico.pt/wp-content/uploads/2020/03/WP_90_TC.pdf.
- Dehghani, Ali (2008). "Special Court for Children and Adolescents: A Step towards Compliance with International Obligations", *Quarterly Journal of the Faculty of Literature and Humanities*, Vol. 3, No. 10 and 11, pp. 77-107. [In Persian]
- Ebadi, Shirin (2003). "Children's Right to Participation", *Social Welfare Quarterly*, Vol. 2, No. 7, pp. 111-115.[In Persian]
- Emery, Robert E. (2003). "Children's voices: Listening-and deciding-is an adult responsibility", *Arizona Law Review*, Vol. 45, pp. 621-627.
- Emery, Robert E. and J.A. Jackson (1989). "The Charlottesville Mediation Project: Mediated and Litigated Child Custody Disputes", *Mediation Quarterly*, Issue: 24, Pages: 3-18.
- Tara Grover (2005). "Divorce Mediation: Research and Reflections", *Family Court Review*, Vol. 43, No. 1, pp. 22-37.
- Erfani, Mahmoud (1992). "Economic and Judicial Protection of the Child in Parental Divorce and Separation in Iranian Law and UN Convention", *Legal Perspectives*, No. 2, p. 201-217. [In Persian]
- Fernando, M.ichelle (2014). "Family Law Proceedings and the Child's Right to be Heard in Australia, the United Kingdom, New Zealand, and Canada", *Family Court Review*, Vol. 52, No. 1, pp. 46-59.
- Ghabouly Dourafshan, Seyed Mohammad Mehdi & Saeed Mohseni (2015). "Innovation of Family Protection Law in the Field of Formal Regulations

- Related to Family Lawsuits”, *Women's Research Journal*, Institute of Humanities and Cultural Studies, Vol. 6, Issue 2, pp. 119-139. [In Persian]
- Giesinger, Johannes (2017). “The Special Goods of Childhood: Lessons from Social Constructionism”, *Ethics and Education*, Vol. 12, No.2, pp. 201-217.
 - Karle, Michael & Sandra Gathmann (2016). “The State of the Art of Child Hearings in Germany, Results of a Nationwide Representative Study in German Courts”, *Family Court Review*, Vol. 54, No. 2, pp. 167-185.
 - Kelly, Joan (1994). “The Determination of Child Custody”, *The Future of Children*, Vol. 4, No. 1, pp. 121-142.
 - Krappmann, Lothar (2010). “The Weight of the Child's View (Article 12 of the Convention on the Rights of the Child)”, *The International Journal of Children's Rights*, Vol. 18, No. 4, pp. 501-513.
 - Mohammadpour, Ahmad (2015). *Anti-Method: Philosophical Underpinnings and Practical Procedures of Qualitative Methodology*, Qom: Logos Publishing. [In Persian]
 - Mol, Charlotte (2019). “Children’s Representation in Family Law Proceedings: A Comparative Evaluation in Light of Article 12 of the United Nations Convention on the Rights of the Child”, *The International Journal of Children's Rights*, Vol. 27, No.1, pp. 66-98.
 - Morss, John R (2002). “The Several Social Constructions of James, Jenks, and Prout: A Contribution to the Sociological Theorization of Childhood”, *The International Journal of Children's Rights*, Vol. 10, No. 1, pp. 39-54.
 - O'Donohue, William and April R Bradley (1999). “Conceptual and Empirical Issues in Child Custody Evaluations”, *Clinical Psychology: Science and Practice*, Vol. 6, No.3, pp. 310-322.
 - Rasekh, Mohammad (1388). “Theory of Right”, *Quarterly Journal of Reproduction and Infertility*, Vol. 10, No. 4, pp. 299-316. [In Persian]
 - Rešetar, Branka and Robert E Emery (2008). “Children's Rights in European Legal Proceedings: Why Are Family Practices so Different from Legal Theories?”, *Family Court Review*, Vol. 46, No. 1, pp. 65-77.
 - Ruck, Martin D.; Daniel P. Keating; Elizabeth M. Saewyc; Felton Earls & Asher Ben Arieh (2016). “The United Nations Convention on the Rights of the Child: Its Relevance for Adolescents”, *Journal of Research on*

Adolescence, Vol. 26, No. 1, pp. 16-29.

- Safaei, Seyed Hossein and Assadollah Emami (1997). *Family Law*, Volume II, Tehran: University of Tehran Press. [In Persian]
- Walker, Janet; David Marjoribanks and Gabriela Misca (2019). "Modern Families, Modern Family Justice: Supporting Family Relationships in Fast Changing Socio-Political-Economic Climates", *Family Court Review*, Vol. 57, No. 3, pp. 301-312.
- Woodhouse, Barbara Bennett (1993). "Out of Children's Needs, Children's Rights: The Child's Voice in Defining the Family", *Brigham Young University Journal of Public Law*, Vol. 8, p. 321.
- Woodhouse, Barbara Bennett (2003). "Enhancing Children's Participation in Policy Formation", *Arizona Law Review*, Vol. 45, p. 751.
- Woodhouse, Barbara Bennett (2019). "Reimagining Equality Through the Lens of Human Rights: Lessons from the United Nations Convention on the Rights of the Child", *Fordham Urban Law Journal*, Vol. 47, p. 353.