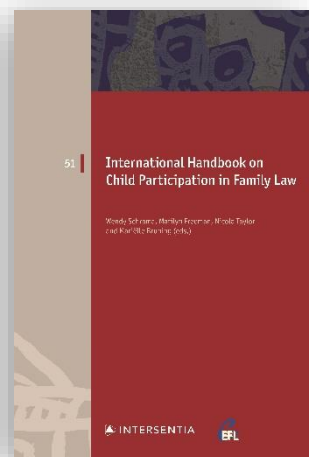


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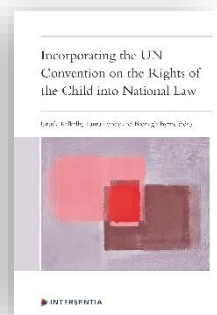
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Ursula Kilkelly, Laura Lundy and Bronagh Byrne (eds.)
ISBN 978-1-78068-992-0
June 2021 | xvi + 366 pp.



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INTRODUCTION TO THE INTERNATIONAL HANDBOOK

Nicola TAYLOR, Marilyn FREEMAN, Mariëlle BRUNING
and Wendy SCHRAMA

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1. INTRODUCTION

Children’s participation is now widely accepted as an important aspect of contemporary family law decision-making processes. Research findings emphasising children’s desire for opportunities to be heard in legal proceedings affecting them, with appropriate weight to be attached to their views, coupled with children’s Article 12 rights in the United Nations Convention on the Rights of the Child (UNCRC) 1989, have prompted many jurisdictions to enact, or strengthen, statutory provisions and to implement mechanisms to enable children to express their views in the family justice system. These laws and mechanisms vary significantly across the world and so this International Handbook aims to bring together the diverse range of approaches and practices in the field to identify their similarities and differences. The Handbook also highlights current trends and will help to point the way forward globally.

The idea for such a Handbook grew out of a collaboration between the four co-editors when we met in London in March 2017, and then in Leiden in October 2017, and agreed to develop an international project based on our shared research interest in child participation in family law contexts.

Two of us are based in common law jurisdictions (New Zealand, England and Wales), while the other two are from a civil law jurisdiction (The Netherlands). We recognised the exciting opportunity offered by combining our common law and civil law expertise, and by inviting contributions from leading child and family law researchers in our respective networks, to produce a book that would provide a state-of-the-art update on child participation internationally. This seemed especially important given that so many jurisdictions, having embraced child participation, currently grapple with how best to implement this within their dispute resolution processes. The Handbook enables the modes of child participation in these national contexts to be considered within the growing body of research on children's right to be heard in family law proceedings from legal and social science perspectives and from theoretical and international perspectives.

Child and family law proceedings span both private law and public law issues. This International Handbook focuses on private law disputes when separated parents are seeking to resolve their children's future care arrangements (variously called residence, custody, contact, access, etc.). Many divorces involve children and, while the number of children affected by the separation of parents in de facto relationships is generally less ascertainable, the separation rate for de facto relationships is thought to be higher than the divorce rate. Thus, globally, many children are affected by their parents' separation or divorce which, despite the changes in community attitudes, still represents a major life stressor for the family members involved. Most children fare well, but the development and wellbeing of those experiencing violence, abuse or high interparental conflict will be detrimentally affected, particularly when those risk factors are sustained over time. Paying close attention to how children can best participate in the decision-making processes following parental separation and divorce is therefore important as it can help to tip the balance between their good or poor adjustment to this family transition.

The Handbook not only addresses how decisions are made about children's post-separation care arrangements, but also considers (i) relocation disputes when one parent wants to move away to a new domestic or international location with the children; and (ii) international child abduction, as this can be closely associated with the actual, or feared, arrangements for the future care of the children. Only passing mention is made in some chapters of child participation in public law contexts when the state has stepped in to address children's safety, care and protection. The latter context is clearly important, and significant progress has been achieved to enable children at risk of harm, or living in out-of-home care, to express their views and contribute to the decisions being made about them. However, to keep the word length manageable, and to include as many country chapters as possible, we have focused the Handbook on private law proceedings concerning children's post-separation care arrangements.

2. UNITED NATIONS CONVENTION ON THE RIGHTS OF THE CHILD

The UNCRC is one of the core international conventions and covenants aimed at promoting and protecting human rights. In many jurisdictions, its principles have significantly influenced legislative and policy initiatives and professionals' roles regarding child participation in the family justice system. The UNCRC – and Article 12 in particular – thus plays a crucial role in underpinning the analyses presented in this Handbook.

The UNCRC's significance lies in the fact it is the first international instrument bringing together states parties' obligations with respect to the protection, provision and participation rights of children under the age of 18. It is the inclusion of this latter category of rights – particularly Article 12 regarding the child's right to express their views, and have due weight attached to these in accordance with the age and maturity of the child, and Article 13 regarding the child's right to freedom of expression and to seek, receive and impart information – that has added such a significant new dimension to the children's rights agenda internationally. Participation has been identified as one of the four General Principles for interpreting all other provisions within the Convention; the others being the right to non-discrimination, the right to life and development, and the primary consideration of a child's best interests. This has been done to highlight that participation is not only a right in itself, but should also be considered in the interpretation and implementation of all other rights.¹

The UNCRC's principles are generally regarded as a great strength of modern family law. In many jurisdictions, they have significantly influenced subsequent legislative and policy initiatives and professionals' roles regarding children in the family justice system. The UNCRC – and Article 12 in particular – features in most chapters of this Handbook.

While the phrase 'right to participate' does not actually appear in Article 12, the UN Committee on the Rights of the Child makes direct reference to it in its General Comment on Article 12.² This recognises the obligation to implement the right of participation in the context of divorce proceedings:

all legislation on separation and divorce has to include the right of the child to be heard by decision makers and in mediation processes.³

Further, Article 9(2), which relates to children separated from their parents, provides that 'all interested parties shall be given an opportunity to participate

¹ United Nations Committee on the Rights of the Child, *General Comment No. 12: The Right of the Child to be Heard*, CRC/C/GC/12, 20 July 2009.

² *Ibid.*

³ *Ibid.*, para. 52.

in the proceedings and make their views known.' This is considered to include children themselves when family disputes are occurring over their post-separation care.

3. STRUCTURE OF THE HANDBOOK

Part I sets out an evaluative framework for child participation with chapters on the international and regional human rights instruments pertinent to child participation and pedagogical insights on why and how to involve children. In Part II, child participation in the private international law context is addressed through the relevant Hague Conventions and EU instruments. Part III comprises 17 chapters reporting on the ways in which children are currently able to participate in family law proceedings in their particular country. The Handbook concludes in Part IV with a comparative chapter analysing the similarities and differences between the different modes of child participation in the 17 jurisdictions represented by the country chapters. Finally, there is a conclusion written by the four co-editors.

4. PART I: CHILD PARTICIPATION – AN EVALUATIVE FRAMEWORK

4.1. INTERNATIONAL AND REGIONAL HUMAN RIGHTS INSTRUMENTS

Mariëlle Bruning and Charlotte Mol discuss child participation in the context of six international and regional human rights instruments. They note at the outset that Article 12 of the UNCRC is the foundation for the child's right to participate and, together with the UNCRC generally, has acted as a catalyst for the development of five further international and regional instruments that have significance for children's participation in family law proceedings:

- the African Charter on the Rights and Welfare of the Child (ACRWC) 1990;
- the European Convention on the Exercise of Children's Rights (ECECR) 2000;
- the European Convention on Human Rights (ECHR) 1950;
- the Council of Europe (CoE) Guidelines on Child-Friendly Justice 2010; and
- the International Association of Youth and Family Judges and Magistrates (IAYFJM) Guidelines on Children in Contact with the Justice System 2017.

The authors then set out how each of the six international and regional instruments address the different types of family law proceedings in which children are provided with the right to participate. These include the same topics

considered in each country chapter of this Handbook – i.e. custody/residence, contact/access, relocation, international child abduction and adoption in the context of both court proceedings and alternative dispute mechanisms like mediation and arbitration. The ECECR is specifically limited to the family law field, but the scope of the other five international and regional instruments extends well beyond this.

Bruning and Mol next consider how these different human rights instruments construe children's participation rights. Multiple participation forms are provided for children, but the two primary ones involve the child being heard (i) directly, or (ii) indirectly via a representative such as a parent, lawyer or other professional like a social worker or psychologist. The right to be heard directly is provided by all the instruments, as are indirect forms, although there is a scale of different options for representation in this regard.

The authors found that participation in family law proceedings is not an absolute right for all children. Rather, the six instruments each set out various conditions that apply in exercising this right – these include, for example, that the child must be capable of forming or communicating their own views; or that due weight should be given to the child's views. While the phrasing and presentation of the respective conditions varies across the instruments, one core requirement, regarding the child's maturity, is shared by them all. However, the child's maturity is also variously expressed through reference to such other factors as age, capacity, sufficient understanding or discernment.

Bruning and Mol review how the international and regional instruments attend to various practical issues, including the location of the child's participation, the methods of communication and the child's right to information and feedback.

They conclude by noting that the binding instruments (the UNCRC, ACRWC and ECECR) all required broad political approval and could not therefore be as specific as the 'soft law' instruments (the CoE Guidelines on Child-Friendly Justice and the IAYFJM Guidelines on Children in Contact with the Justice System). The instruments that came after the UNCRC also had the benefit of being able to build upon its general principles and to explicate them further. All six international and regional human rights instruments are very clear that children have the right to participate in family law proceedings that concern them, but they do not provide a blueprint for how children's procedural inclusion is best achieved in practice. The practical implementation of how children can and should participate is where work needs to occur. In this regard, it is intended that this Handbook will help to fill that void.

4.2. PEDAGOGICAL INSIGHTS

The social and financial consequences of parental separation can detrimentally impact children's developmental outcomes, wellbeing, and parent-child attachments,

particularly when interparental conflict and loyalty binds are evident. As part of the Handbook's evaluative framework, Daisy J.H. Smeets and Stephanie Rap consider the pedagogical conditions that enable children to participate effectively in judicial decision-making processes within the context of divorce proceedings. Interaction between law and social science is considered essential to enhance both the quality of family law decision-making and children's developmental trajectories.

The authors provide a brief historical perspective on childhood and child participation. The definition of children, childhood and children's rights has varied greatly across time and place, depending, among other things, on social, economic and cultural circumstances. The Western conceptualisation of childhood has changed markedly over past centuries with children now regarded as worthy of being listened to and as capable of providing their views and opinions in important decisions affecting their lives. However, protecting children's interests is also an important pillar of the UNCRC and, particularly in family law cases involving parental separation and divorce, a tension can arise between protecting children and involving them. Smeets and Rap therefore discuss the dominant theoretical underpinnings of child participation to reach a more nuanced understanding of how children can be involved in a meaningful way, while at the same time having their rights and interests protected.

Definitions of participation vary widely and incorporate both individual and collective elements. Participation can be considered as a process or an outcome, or as an end in itself, as well as a means of achieving other goals, such as the possibility of having an impact on the nature of the decision being made. Roger Hart, Harry Shier and Laura Lundy have each developed models to better conceptualise child participation and to evaluate practice on the basis of children's different levels, or types, of participation. This has helped to highlight the challenges embedded in implementation in practice, including in the settings and contexts for child participation. A persistent criticism is the tokenistic nature of many forms of involvement by children.

The authors consider several empirical, mainly socio-legal, research studies on child participation in family law proceedings. These primarily consist of interviews with children, parents and (legal) professionals about their experiences with child participatory procedures and/or involve observations of court hearings. Children's desire to be included in decision-making processes seems to outweigh their concerns. However, Smeets and Rap discuss the research findings showing how children's right to participate is not always fully satisfied. Children do not always feel heard and may not be adequately informed. Major barriers thwarting child participation include professionals' lack of skills and time, children's loyalty conflicts and related fears, and adults' concerns about children's cognitive capacities.

The conditions for effective child participation need to be based on pedagogical and psychological knowledge on how to involve and talk with children.

Three important conditions are reviewed: (i) access to legal procedures and informing children; (ii) stimulating a safe environment; and (iii) communication skills. Guidance is provided on how child participation can best be facilitated in family law proceedings, given the particular challenges posed in relation to hearing children's views in post-separation parenting contexts.

5. PART II: PRIVATE INTERNATIONAL LAW

While private international law instruments do not usually impose direct duties to hear the child, and leave the modalities for doing so to national law, Thalia Kruger and Francesca Maoli set out how the influence of human rights law is being clearly felt in the private international law contexts governing child protection, international child abduction, parental responsibility and maintenance.

Kruger and Maoli highlight and discuss the careful nudges by supranational legislators to better respect children's right to participation, paying particular attention to the 1980 Hague Convention on the Civil Aspects of International Child Abduction, which they concede, in itself, does not greatly enhance child participation. However, they conclude that the obligation to hear the child in return proceedings under the 1980 Convention has become even more stringent in light of the different understanding of such proceedings by the European Court of Human Rights (ECtHR) and that a coherent interpretation of the 1980 Convention with the UNCRC, and, where applicable, the European Convention on Human Rights and the EU Charter of Fundamental Rights, guarantees children's participation rights. They are clear that the 1980 Hague Convention can be applied in a way that is respectful of children's participation rights.

The 1996 Hague Child Protection Convention includes just one mention – in its chapter on recognition and enforcement – of a child's right to be heard. While this provides a useful reminder to judges to grant children the opportunity to be heard to avoid the decision not being recognised or enforced, the authors note that the Convention does not introduce, or refer to, an international standard for child participation.

Kruger and Maoli acknowledge the value of small steps as they examine the development of the EU Regulations on parental responsibility, Brussels II*bis* and *ter*, the latter of which will come into force in August 2022, and which uses the language of the UNCRC in relation to giving children capable of forming their own views the opportunity to express those views, and for due weight to be given to these in accordance with their age and maturity. This opportunity must be genuine and effective, thus further enhancing child participation, and giving important nudges to national judges.

Their assessment that private international law instruments can create incentives to cautiously move national procedures in the right direction provides welcome encouragement for the child participation field.

6. PART III: NATIONAL PERSPECTIVES

Leading researchers were also invited to contribute to the International Handbook and we are delighted to have 17 country chapters detailing the approach to child participation in family law proceedings in Australia, Belgium, Canada, China, Croatia, Denmark, England and Wales, Germany, Israel, Italy, the Netherlands, New Zealand, Norway, Romania, Scotland, South Africa, and the USA. Each country author was asked to follow a standardised template developed by the co-editors to ensure that each of these chapters addressed similar issues. These included:

- a general introduction to the jurisdiction, its demographic profile, and an overview of the key decision-making processes and roles of key actors;
- the statutory provisions relevant to child participation in family law proceedings and whether these have any age/maturity/capability/capacity requirements;
- the modes of child participation: (i) direct forms of participation (e.g. judicial meetings with children); (ii) representation forms of participation (e.g. by children's legal representatives); and (iii) whether or not a child can litigate on their own behalf by commencing litigation or by appealing a decision;
- the types of proceedings and leading case law on child participation issues in legal/court proceedings for custody/residence, contact/access, relocation, international child abduction; and, where relevant, parentage and adoption (note that children's participation in proceedings relating to child protection, family and domestic violence were not included);
- out-of-court family dispute resolution processes (e.g. mediation)
- research on child participation in the jurisdiction, if available;
- significant policy or practice developments or initiatives (e.g. recent, or forthcoming, legislation or new policies/practices); and
- consideration as to whether the requirements of Article 12 of the UNCRC are being met in the jurisdiction, and how/how not.

We acknowledge the many gaps in the global coverage of countries included in this Handbook. Notwithstanding this, the 17 jurisdictions that are represented provide valuable insight into how child participation is undertaken within each family justice system. This reveals the range of legislative provisions, modes of participation, and roles and types of professionals involved in engaging with children.

7. PART IV: COMPARATIVE ANALYSIS

The Handbook includes a comparative analysis chapter, authored by Charlotte Mol, which identifies the similarities and differences between the different modes of child participation in the 17 jurisdictions represented by the country chapters.

This chapter begins by addressing the types of family law proceedings in which children are allowed to participate and those in which their participation rights may be more limited. Globally, there are many specific types of proceedings for divorce, custody/residence, contact/access and parentage issues. The delineation between these types of family law proceedings differs between jurisdictions and child participation opportunities can be fragmented between different types of proceedings even within a single jurisdiction. In most jurisdictions, the modes of participation available to the child depend on the type of proceedings. Sometimes these modes are available in most proceedings but, other times, they may only be available for a very specific type of proceeding. It is therefore difficult to compare the modes of participation available by the type of proceedings so the comparative analysis focuses on four modes of participation independent of the type of proceedings:

- *Direct modes*: The hearing of a child by the court, or a judicial meeting, was found to be available in all 17 jurisdictions.
- *Representation modes*: Many different modes of representation were identified in the jurisdictions. These representatives are mostly lawyers, but non-legal representatives such as laypersons, relatives, recommended citizens, psychologists and pedagogical experts are also evident. The purpose of the representation also varies between representing the child's views/wishes and/or the child's best interests/welfare.
- *Indirect modes*: In nine jurisdictions children's views can be expressed by means of an expert/specialist report.
- *Party status and litigation by children*: Children generally have no party status in family law proceedings and, in the small number of jurisdictions where this is possible, it is limited and used in a minority of cases. The potential for children to initiate litigation on their own behalf is also either non-existent or limited to specific types of cases or through requirements of understanding/maturity.

The comparative analysis then addresses child participation in (i) international child abduction proceedings, where most jurisdictions offer similar participation opportunities for children in these proceedings as they do in domestic family law proceedings; and (ii) alternative dispute resolution (ADR) processes like mediation, which parents are required to, or voluntarily, use to try to reach agreement prior to any commencement of family law proceedings. Children's right to participate in ADR is regulated by law in a few jurisdictions, but most lack any specific laws regarding how children should be able to express their views in ADR processes. This can mean little involvement by children in ADR, although several jurisdictions report child participation is increasing over time. Child-inclusive models have, however, been developed in other jurisdictions through soft-law or service-based protocols.

The chapter then discusses two overarching issues regarding the requirements for child participation and children's right to receive information about their opportunities to participate in the proceedings and to receive feedback on the decisions made. Age and maturity requirements are popular criteria, albeit often phrased in different ways across the jurisdictions – the child has to, for example, have 'sufficient age and maturity', the 'capacity to express views', the 'capacity to instruct' a representative, be 'capable of understanding the meaning and legal consequences' of litigation, or have 'sufficient understanding'. In some jurisdictions these norms are complemented by a presumption that children of a certain age can be automatically granted the opportunity to express their views, while younger children will have to fulfil maturity requirements. These age limits vary from six years to 15 years, with some jurisdictions (such as Germany) hearing even younger children (aged three) in practice.

8. CONCLUSION

As long-term researchers in the field of child participation within various family law contexts, we recognised at the outset the wide range of approaches to child participation which exists globally in family law decision-making. Our aim as editors was to mine this information with the help of international children's rights specialists to identify current and best practice around the world, and bring together the results of that collaboration for your consideration. This Handbook details the undoubted progress that has been made towards the dual ambitions of honouring the right of children to be heard and involved in decisions affecting their lives, and protecting their interests. However, it is clear that there remains more to do to ensure that children and young people feel that they have been adequately informed and properly heard when they wish to participate.

We hope you will enjoy delving into the rich array of child participation material provided in this Handbook in both national and international contexts, and that it may act as a springboard for further comparative research as we, the international family law community, look together to ways in which child participation may continue to flourish around the world.