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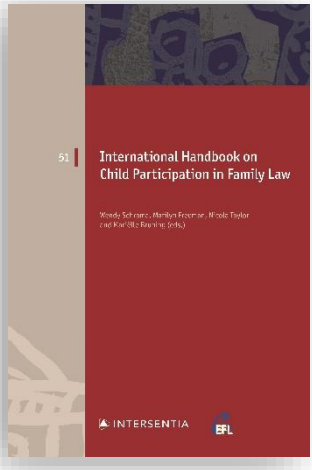

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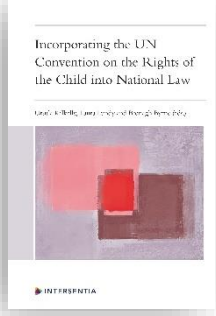

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THE NETHERLANDS

Mariëlle Bruning and Wendy Schrama

1. INTRODUCTION

The focus on the child's right to participate in the legal domain is relatively recent in Dutch family law. Even so, the actual right for children aged 12 years and over to be heard by a court was first introduced in 1982 in the Dutch Civil Code. The aim was to improve the legal protection of minors.[1] In 1990 the right of children to informally approach a family court was added to the package of children's right to participate; it is not a right to initiate proceedings, but an informal access to court (see section 2.2).[2] Participation rights are therefore not new, but the focus has shifted, partially as a result of the growing importance of children's

1 *Kamerstukken II* 1979/80, 16 127, no. 1–3, p. 1. See: C. Mol, S. Bou-Sfia and J. Huijer, 'Mijn wil is wet! De autonomie van minderjarigen in het Nederlandse personen- en familierecht' in W.M. Schrama and S. Burri (eds.), De rol van de staat, de familie en het individu in het personen- en familierecht, Boom juridische uitgevers the Hague, 2020, para. 3.2.1.

2 In Art. 1:162a (old) Dutch Civil Code, which was later changed to Art. 1:377g Dutch Civil Code. See C. Mol, S. Bou-Sfia and J. Huijer, above n. 1, para. 3.1.2.

rights in general. In legal proceedings related to divorce and separation, children now have the right to be informed and to give their opinion about the parenting plans of their parents. In the last decade there has been a tendency to better implement the child's right to participate in legal proceedings. This has led to policy improvements for the judiciary and to further use and professionalisation of guardians ad litem, who can be appointed to represent and support children in family law proceedings when there is a conflict of interests between parent(s) and child.

In 2018 the Dutch population of 17 million inhabitants consisted of 3.4 million children aged 0–18 years.[3] Of particular interest for children's participation rights are divorce and separation proceedings (see below). In 2018, 93,500 children were born to married parents, and 55,800 to unmarried parents. It is not exactly known how many of these unmarried parents cohabit.[4] Each year, a substantial number of children face their parents' divorce or separation. The most recent data indicate that, in 2016, 50,000 couples with minor children split up. Of these, 27,000 were married couples with children and another 23,000 of these parents were informal cohabitants. In total, these separations involved 86,000 minor children.[5]

In this chapter, Dutch statutory provisions and current policy relevant to child participation in family law proceedings are discussed. The various modes of child participation in family law proceedings are also explained, with a focus on legal practice. Furthermore, relevant research is presented and consideration is given to how the Dutch system of child participation could be improved.

2. STATUTORY PROVISIONS

2.1. CHILDREN'S LEGAL STATUS IN FAMILY LAW PROCEEDINGS

Child participation is not regulated coherently in one Act or code, but consists of different rights of children in regard to various family law proceedings, in both substantive family law in the Civil Code, as well in the Code of Civil Procedure. It depends on the matter at hand what right(s) a child has but, in all family law proceedings, children aged 12 or older have the right to be heard in person by a court. There is no overarching definition of the term 'family law proceedings'.

3 Central Statistics The Netherlands, open data files: https://opendata.cbs.nl/ ('bevolking, kerncijfers').

4 Central Statistics The Netherlands, https://opendata.cbs.nl/#/CBS/nl/dataset/37975/table?ts=1613630996628.

5 M. ter Voert, *Factsheet 2019-1, Scheidingen 2018, Gerechtelijke procedures en gesubsidieerde rechtsbijstand*.

In general, these include parental responsibilities, care and access, relocation issues and child abduction (although this has its own framework due to international law), adoption and parentage issues. Three aspects of participation rights may be discerned. Firstly, there are issues related to legal standing (section 2.2). In some cases children have the right to initiate legal proceedings and thus to be a party to legal proceedings. In addition, children have a veto in respect of some family law issues, such as adoption. Also related to legal standing is the child's right to informally approach the court in specific family law matters. The second aspect is the right to be represented by a parent or third person in legal proceedings (section 2.3); and the third the right to be heard by the court (section 2.4). Children's participation rights in out-of-court proceedings – or rather the lack of them – are also discussed (section 2.5).

2.2. LEGAL STANDING

In general, children have no legal standing in civil law proceedings, including family law proceedings. Children are in principle incapable of autonomously participating in legal proceedings and lack *locus standi*. They are represented by their parents (or guardian). Thus, children have no independent rights in family law proceedings, such as the right to information and to receive case files,[6] the right to receive judgments of the court, or the right to appeal a decision of a family court. Children are interested parties (*belanghebbende*) in all family law proceedings. Children are normally represented by their parents (or guardian), which implies that their parents are supposed to share information and to make use of the right to appeal. In 2014, the Dutch Supreme Court ruled that a child is an interested party in family court proceedings which regard them, but not a legal party to the proceedings with an independent right to access all files.[7] An 11-year-old girl had requested access to all documents in the proceedings in order to decide about the possibility to be heard, but this was declined by the District Court and the Court of Appeal. The girl's mother lodged an appeal complaining that her child was denied the right to access all case files as an element of the child's right to be effectively heard in light of, for example, Article 12 of the UN Convention on the Rights of the Child (UNCRC). The Supreme Court upheld the judgment of the lower courts and ruled that the child's right to access to justice, as laid down in Article 6(1) of the European Convention on Human Rights (ECHR) and Article 12 UNCRC, had

6 Children aged 12 and older do have the right to access all case files in family law proceedings (Art. 811 Dutch Civil Code of Procedure) unless they are deemed incapable to oversee their best interests.

7 Dutch Supreme Court 05.12.2014, ECLI:NL:HR:2014:3535, available (in Dutch) at: https://uitspraken.rechtspraak.nl/.

been sufficiently safeguarded and the lack of independent access to all relevant documents was not in violation with these standards. According to the Supreme Court, neither Article 6(1) ECHR nor Article 12 UNCRC nor any other legally binding provision of international law proclaim that a child can only effectively make use of their right to access to justice and be heard if the child has such an independent right, which can be exercised autonomously from their legal representative(s).[8]

Several exceptions have been introduced in recent decades to allow the child to litigate independently. Children sometimes have veto rights (adoption)[9] or the right to initiate proceedings regarding a limited number of topics. For example, children aged 16 and older can initiate proceedings with regard to changing the registration of gender on their birth certificate. They may request the Registrar of Civil Status to do this when they are convinced they are of another gender.[10] Another example concerns underage mothers aged 16 or older who want to care for and raise the child: they can request to be emancipated before the Family Court.[11] These and other exceptions are fragmented in the Dutch Civil Code and have 12 years, and sometimes 16 years, as the lower age limit. Various reasons for these differences can be found in parliamentary history, but they are inconsistent as there is no clear objective, policy or uniform view with regard to the civil procedural position of children.[12]

In some family law matters, Dutch law provides children aged 12 or older with the possibility of approaching the court informally and asking for a specific decision. Informal access to court is available in matters related to parental responsibilities after divorce and separation (including relocation matters) and care and contact arrangements between a child and a parent.[13]

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8 T. Liefaard and M. Bruning, 'Hoge Raad 5 December 2014: Judgment and Commentary' in H. Stalford, K. Hollingsworth and S. Gilmore (eds.), *Rewriting Children's Judgments: From Academic Vision to New Practice*, Hart Publishing, Oxford 2017, pp. 173–192; according to the authors the Supreme Court has completely disregarded the recognition of the child as a rights holder under the UNCRC and the ECHR and a less restrictive approach can be defended.

9 Art. 1:228 section 1 under a Dutch Civil Code; age limit of 12 years plus the younger ones who are sufficiently mature.

10 This was introduced in Art. 1:28 Dutch Civil Code in 2014; *Stb*. 2014, 1. In adoption cases, children from the age of 12 and older have the right to veto an adoption (one of the requirements for the adoption of a child of 12 or older is that the child did not object to the granting of an adoption request at its hearing in court, Art. 1:228 section 1 sub a Dutch Civil Code). A recognition of paternity is null and void if it is done without the prior consent of the child of 12 or older (Art. 1:204 section 1 sub d Dutch Civil Code); children who have reached the age of 16 years can recognise paternity (Art. 1:204 section 1 sub b Dutch Civil Code).

11 Art. 1:253ha Dutch Civil Code.

12 M.R. Bruning et al., *Kind in proces: van communicatie naar effectieve participatie*, Meijers-reeks no. 335, Wolf Legal Publishers, Nijmegen 2020, p. 63; C. Mol, S. Bou-Sfia and J. Huijer, above n. 1, paras. 1 and 5.

13 Art. 1:251a section 4, Art. 1:253a section 4 and Art. 1:377g Dutch Civil Code; see M.R. Bruning and J. Peper, 'Giving Children a Voice in Court?' [2020] *Erasmus Law Review*, http://www.erasmuslawreview.nl/tijdschrift/ELR/2020/1%20(incomplete)/ELR-D-19-00030.pdf.

This option can also be used when the child has not yet reached the age of 12 years, but may be regarded as capable of making a reasonable evaluation of their interests in the matter. Children can request that joint parental responsibilities be changed to sole parental responsibilities or to bring a case with respect to access rights or care plans subsequent to divorce or separation. Children can informally contact the court (e.g. by writing a letter or sending an email) without (legal) representation.[14] Children can thus approach the court informally in these matters, but they do not have a right to court proceedings. Judges have discretionary powers to decide if a child will be heard on such request and if this will lead to a judgment ex officio.

2.3. GUARDIAN AD LITEM

The general idea is that parents with parental responsibilities represent their children in the legal domain. However, there are situations where the interests of parents and child might not align. The Dutch Civil Code allows for the appointment of a guardian ad litem by the family court in the event of a potential conflict of interests regarding who can act on the child's behalf as a (formal) litigant. However, courts are only allowed to appoint a guardian ad litem in two types of cases: (i) matters relating to the care and upbringing of the child or the child's property[15] and (ii) proceedings regarding issues of legal parentage. A guardian ad litem cannot be appointed for any other family law proceedings.

The first scenario concerns concrete conflicts of interest between the parents and child. When there is no fundamental, specific conflict of interest, the Dutch Supreme Court has ruled that the criteria to appoint a guardian ad litem are not met.[16] Among the issues covered are, for example, those related to parental responsibilities, care and access, relocation, and the main residence of the child. Often guardians ad litem are appointed in complex divorce cases, where the parents' and child's interests might easily conflict.

The guardian ad litem is responsible for instigating proceedings when this – according to the guardian – is necessary in the child's best interests.[17] The aim of introducing a guardian ad litem in 1995 in these matters, and thereby enlarging the possibilities for children to be represented by others than their parents, was to strengthen their legal position in family law cases.[18]

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14 Arts. 1:251a section 4, 1:377g and 1:253a section 4 Dutch Civil Code. Children younger than 12 who are considered competent can also use this opportunity.

15 Art. 1:250 Dutch Civil Code.

16 Dutch Supreme Court 04.02.2005, ECLI:NL:HR:2005:AR4850, *NJ* 2005/422.

17 Art. 1:250 Dutch Civil Code. Since 1995 a guardian ad litem can be appointed in matters relating to the care and upbringing of the child.

18 *Kamerstukken II* 1991/92, 33487, 3, p. 7.

Secondly, the guardian ad litem also plays an important role in proceedings on legal parentage, such as recognition of the child by the father where the mother does not consent, paternity requests and challenges to existing legal parentage. Family courts are obliged to always appoint a guardian ad litem (ex officio) to represent the child.[19] The court has no discretionary power in such proceedings to decide whether it will appoint a guardian.[20] In these matters, the guardian ad litem can act as a representative of the child and can initiate proceedings on behalf of the child, including when the child is very young.[21] The statutory provision does not make clear whether the child himself can approach the court for the appointment of a guardian ad litem, if the parents do not commence legal proceedings. In legal doctrine it has been argued that it is possible.[22]

Guardians ad litem are usually trained as (family or children's) lawyers or educationalists (behavioural experts).[23] In a recent pilot where a psychologist, but not a lawyer, was appointed, the outcomes were generally quite positive.[24] The court can appoint a guardian ad litem ex officio. Children can also request the appointment of a guardian ad litem. Judges have wide discretionary powers to decide about appointing a guardian ad litem, except in legal parentage cases, where the appointment is mandatory.

2.4. THE RIGHT TO BE HEARD IN FAMILY LAW PROCEEDINGS

Children aged 12 and older have the right to be heard by the court. The Dutch Civil Code of Procedure provides that the judge will give these children the opportunity to present their views/opinion in family law proceedings that regard them.[25] Only for child maintenance proceedings is the higher age of 16 years applicable. The right to be heard is not a duty but an option for the child. In Dutch law, participation forms and methods of communication are not regulated.

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19 Art. 1:212 Dutch Civil Code; this was introduced in 1998 to give children a voice in parentage proceedings; Wet van 24.12.1997, *Stb.* 772.

20 Dutch Supreme Court 23.11.2012, ECLI:NL:HR:2012:BY3968.

21 Dutch Supreme Court 31.10.2003, ECLI:NL:HR:2003:AJ3261, *NJ* 2004/315, annotated by J. de Boer.

22 W.M. Schrama, commentary on Art. 1:212 BW, aant. 7 in S.F.M. Wortmann (ed.), *Groene Serie Personen- en familierecht*, Wolters Kluwer, Deventer 2018.

23 See also the professional standards on appointing a guardian ad litem ('*Werkproces benoeming bijzondere curator op grond van art. 1:250 BW, 14 October 2014*'; '*Werkproces benoeming bijzondere curator in afstammingszaken op grond van 1:212 BW*') that were established by the judiciary. In December 2017 a Foundation of Dutch Guardians ad Litem was launched aimed at safeguarding professional standards; see C. van Leuven and I. Pieters, 'Stichting bijzondere curator Nederland', *Relatierecht en Praktijk* 2018/201.

24 M. Valenkamp, E. Sondorp and A. van Montfoort, 'Pilot bijzondere curator/gedragsdeskundige in de rechtbank Zeeland-West-Brabant, locatie Breda. Het belang van het kind in complexe scheidingen', Research Memoranda 2017, no. 1.

25 Art. 809 Dutch Civil Code of Procedure.

Children younger than 12 may also be given the opportunity to be heard on the basis of the statutory provision in the Dutch Civil Code of Procedure. They are not invited by default by the judge for a child hearing, but if they request to be heard in family law proceedings, the judge has a discretionary power to decide on hearing the child when the child is sufficiently mature.

The purpose of the child's right to be heard has not been explicitly mentioned in any statutory provision. It can be inferred from the parliamentary history that the child's right to be heard was introduced to offer legal protection to children.[26] Nowadays, the child's right to be heard is more perceived as giving substance to the right of every child to be heard in proceedings as laid down in Article 12 UNCRC.

There are a few exceptions to the rule to hear every child aged 12 and older – for example, when the case is of minimal relevance to the child.[27] The Dutch legislator has underlined that when it is plausible that the minor does not want to be heard, the judge is not obliged to hear them.[28] The same applies for minors who are unable to be heard due to physical or mental health problems.[29] A final exception concerns the situation in which the judge fears that hearing the child will negatively influence the child's health and development.[30]

2.5. OUT-OF-COURT SETTLEMENT

What are children's participation rights in out-of-court proceedings? The Dutch Civil Code and Civil Procedural Code promote mediation in family law disputes and this has become more common than before.[31] However, little attention is given to the position of children.[32] Their participation rights in mediation are not regulated by statutory law, which focuses solely on court proceedings. If there are no court proceedings, it is a matter for the parents and the mediator

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26 *Kamerstukken II* 1979/80, 16 127, 3, p. 1.

27 Art. 809 section 1 Dutch Civil Code of Procedure.

28 *Kamerstukken II* 1992/93, 22 487, 6, p. 16; see also Dutch Supreme Court 19.03.1982, *NJ* 1982, 559.

29 *Kamerstukken II* 1991/92, 22 487, 3, p. 10 (MvT).

30 This exception is not mentioned in legislation, but is introduced by the Dutch Supreme Court with reference to a similar exception in France, the UK and Germany. In her annotation Wortmann explains that this comparison is rather weak; she suggests to define this exception with a higher threshold ('significant harm for the child's health and development') in order to promote children being heard in court: Dutch Supreme Court 01.11.2013, ECLI:NL:HR:2013:1084, *NJ* 2014/24 (annotated by S.F.M. Wortmann).

31 Art. 1:253a section 5 Dutch Civil Code; Art. 818 section 2 Dutch Civil Code of Procedure. In 2018, 1,911 family and youth law cases were referred by the court to a mediator: Jaarverslag Raad voor de rechtspraak, 2018, p. 28.

32 B.E.S. Chin-A-Fat and M.J. Steketee, *Evaluatie Experimenten Scheidings- en Omgangsbemiddeling*, Verwey-Jonker Instituut, Utrecht 2001; and B.E.S. Chin-A-Fat, *Scheiden:(ter)echter zonder rechter? Een onderzoek naar de meerwaarde van scheidingsbemiddeling*, Sdu, The Hague 2004.

what the child's role will be. There is one exception in the law: while making a parenting plan, which is mandatory, the parents have to involve the child. The parenting plan concerns agreements on care and upbringing of the child, the right to information and child maintenance.[33] It applies to all parents, married or not, and regardless of whether they use mediation or not. All parents with custody have to make a parenting plan.

3. MODES OF PARTICIPATION

3.1. PRACTICE AND EXPERIENCES WITH THE LEGAL STANDING OF CHILDREN

Children do not often start proceedings in legal practice; the small number of cases where this occurs usually involve parental responsibilities and access rights.[34] Dutch Children and Youth Law Centres that are run by law students can support children in proceedings and can inform them about their rights. Judges indicate that the opportunity for children to litigate independently is rarely used and that informal access to justice (namely informal requests with regard to custody, care and access, with discretionary power of the judge to decide whether to proceed or reject the request) is rarely used.[35]

3.2. HEARING CHILDREN BY THE COURT IN FAMILY LAW PROCEEDINGS IN PRACTICE

Bearing in mind that there is no guidance from statutory provisions on the modalities and methods on the hearing of the child, the four Courts of Appeal have developed a professional standard on 'child conversations'. However, lower district courts, which deal with most cases, do not have such guidelines. Children aged 12 or older are invited for a child hearing by the court with an invitation letter. These letters vary from court to court, since there is no default letter. Children are invited to either accept the invitation to be heard or to express their views in writing by returning a form enclosed with the invitation which leaves space for them to write their views down. Children often do not respond to the invitation letter.[36] In family law cases about 15 minutes are available for

33 Art. 815 section 2 Dutch Civil Code of Procedure.

34 M.R. Bruning et al., above n. 12, pp. 39–40.

35 M.R. Bruning et al., above n. 12, pp. 214–215.

36 Almost half of the judges who participated in the research of M.R. Bruning et al., above n. 12 (pp. 179–180) indicated that most children do not respond to the invitation; of the youngsters who participated and had experienced family or child law proceedings, about 40% expressed that they had not responded to the invitation letter.

the child hearing.[37] Its location varies; it might take place in a child-friendly room, in the courtroom or in the council chamber. Often only one judge and a clerk are present during the child interview, but sometimes three judges (the full chamber) take part. It is not common practice to take a support person (e.g. a family member or friend) to the child hearing. Children are informed by the court that the child will be heard alone. When the child asks to bring a support person, judges appear to be lenient. After the hearing, the judge discusses with the child what information is to be shared with the parents. The child's views are not confidential and, at the hearing with the parents, it appears that judges regularly summarise the most important aspects of the child's view. This is particularly relevant when the court takes a decision which is consistent with the child's view, but not with the parents' view. The clerk prepares notes that are included in the court's file, but these notes are not made available to the parties.

Children in family law proceedings regularly talk with a social worker from the Child Protection Agency before the hearing. This Agency participates as an expert for the court in family law proceedings.[38] This cannot be considered as a way of indirectly hearing the child in family law proceedings, since the Agency's aim is to prepare advice for the court and not to represent the child or express their views to the court.

There is no regulation addressing how the child will learn of the court's decision and how their views were taken into account. As mentioned, children are not supported by a guardian ad litem or another support person during a family law hearing and a child conversation. The legal system presumes that parents will inform their child about the outcome of the case. Therefore, it is rare for there to be feedback on the decision by a state authority (court, child protection services) in relation to the child (explaining how the child's views are given due weight) and an explanation of the decision. More recently, some 'child-friendly' judgments have been issued using clear, plain language to explain a decision to the child and parents.[39] However, judges emphasise that they have insufficient time to prepare these special judgments. Sometimes, during the hearing, judges ask the parents to explain the decision to their child. Since family law judgments are not given directly after the hearing, but weeks later, there is no opportunity for the judge to explain the decision to the child in the

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37 In child protection cases it appears that much less time is available for a child hearing and these conversations usually last five minutes; M.R. Bruning et al., above n. 12, pp. 186–187.

38 Art. 810 Dutch Civil Code of Procedure; the court can request the advice of the Child Protection Agency or the Agency can independently express its views to the court in family law proceedings (with the exception of alimony proceedings).

39 There are different modes: a child-friendly judgment without any complicated legal language (e.g. District Court Midden-Nederland 22.03.2017, ECLI:NL:RBMNE:2017:1541), a special paragraph with explanation for children in the judgment (e.g. Court of Appeal Arnhem-Leeuwarden 21.03.2017, ECLI:NL:GHARL:2017:257) or a separate letter that explains the judgment to the child (e.g. District Court Limburg 29.01.2019, ECLI:NL:RBLIM:2019:1253); see M.R. Bruning et al., above n. 12, pp. 75–76.

courtroom – it is common practice for the judgment to be sent to the parents and their lawyers rather than being given during a court session.

Hearing children younger than 12 years of age practically never happens, although statutory provisions provide for this possibility.[40] Nevertheless, some initiatives have occurred in recent years, including for younger children. In 2016 the Amsterdam District Court initiated a pilot to reduce the age limit. This was a success and it has now become common practice in Amsterdam to invite all children from the age of eight to be heard in the most common family law proceedings (access, relocation and parental responsibilities).[41] The District Court of The Hague started a pilot in international child abduction cases that has also become common practice since 2018.[42] All children from the age of three are heard (in two meetings) by a guardian ad litem, who subsequently informs the court about the child's views before the hearing. Children aged six and older are invited to be heard directly in court after the interview with the guardian ad litem.[43] The guardian ad litem will support children who wish to be heard in court, and will explain the court's judgment to the child. In 2018 the District Court of Overijssel commenced a pilot to actively have children participate in parenting plans by way of a 'bridge conversation', in which parents talk with their children about the parenting plan, followed by a court hearing. During the court hearing, the judge asks the parents and their lawyers about the results of the parenting plan and the conversation with their children. Research shows that in about 75% of all cases in the pilot the parents did discuss the parenting plan with their children.[44]

4. RESEARCH

In recent decades, there have been repeated calls for strengthening the procedural position of children. These proposals have always been rejected by Parliament because of a desire to protect children and to involve them as little as possible in legal proceedings.

Recently, child participation has been a more frequent research topic. The Ministry of Justice commissioned large-scale multidisciplinary research on

40 M.R. Bruning et al., above n. 12, pp. 78–80.

41 M.R. Bruning et al., above n. 12, pp. 162–163.

42 De Rechtspraak Blik, *Annual Report 1 January 2014–1 January 2015*.

43 A.C. Olland, 'De procedure bij de Nederlandse rechter' in F. Ibili and A.C. Olland, *Internationale Kinderontvoering*, Kluwer, Deventer 2019, pp. 81–82.

44 T. van den Berg and H. Schröder, 'Participatie van het kind bij het ouderschapsplan' in M. Jonker and F. de Kievit (eds.), *Actuele ontwikkelingen in het familierecht: Dertiende UCERF symposium*, Ars Aequi Libri, Nijmegen 2019; and https://www.rechtspraak.nl/Organisatie-en-contact/Organisatie/Rechtbanken/Rechtbank-Overijssel/Nieuws/Paginas/Proef-kinderen-betrekken-ouderschapsplan-succesvol-afgerond-.aspx.

child participation in family and child protection proceedings.[45] The findings were presented in 2020 (and are referred to below as 'the 2020 research') and shed light on the experiences, needs and opinions of professionals in legal practice.[46]

Regarding the legal standing and the initiating of family law proceedings, the research found that children rarely start proceedings and in the small number of cases where this does occur – on the basis of the above-mentioned informal access to court – it is usually in parental responsibilities and access cases. These findings confirm earlier research that pointed to unfamiliarity and scarce use of the informal legal entry by children to initiate family law proceedings.[47] Furthermore, it has become clear that requests from children through informal access to justice do not always lead to a judicial decision; judges do indeed make use of their discretionary powers to reject a child's request.[48] Judges mention that many children are probably unaware of this option.[49] Furthermore, a majority of the professionals participating in the research believed that children currently receive insufficient support during legal proceedings and that parents should not be the ones representing the child in family and child protection proceedings.[50]

In the last decade, there has been an increase in court appointments of guardians ad litem in matters relating to the care and upbringing of the child.[51] In 2017, 320 requests for guardians ad litem for state support were submitted, compared to 94 in 2014. This is also evident in legal parentage cases, where appointments rose from 306 in 2014 to 898 in 2017.[52] Whether this is a result of a change in policy favouring children's participation rights or the fact that legal parentage is more contested than before is unclear. Still, a guardian ad litem is not always appointed by the court upon request.[53] In the 2020 research, many experts wanted the criteria for appointing a guardian ad litem to represent

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45 *Kamerstukken II* 2017/18, 33836, 24.

46 The empirical part of this research involved questionnaires and interviews; 272 participants from legal practice completed the questionnaire (judges, lawyers, guardians ad litem, social workers, Children and Youth Law Centres). Furthermore, 136 adolescents aged 16–24 years participated (43 had experienced family or child protection proceedings as a child) and 131 parents.

47 M.H.L. van den Hoogen and P.J. Montanus, 'Hoe staat het anno 2017 met de informele rechtsingang?', *Tijdschrift voor Familie- en Jeugdrecht* 2017/62, 286–289.

48 M.R. Bruning et al., above n. 12, p. 216.

49 M.R. Bruning et al., above n. 12 p. 332. This aligns with other research outcomes that found absence of knowledge about the child's procedural rights, unfamiliarity and scarce use of the informal access to court by children; e.g. Dutch Children's Ombudsman, *De bijzondere curator: een lot uit de loterij*, Den Haag 2012; M.H.L. van den Hoogen and P.J. Montanus, above n. 47; M.J. Steketee, A.M. Overgaag and K.D. Lünneman, *Minderjarigen als procespartij?,* Verwey-Jonker Instituut, Utrecht 2003; H. Bouma et al., 'Meaningful participation for children in the Dutch child protection system: A critical analysis of relevant provisions in policy documents' (2018) 79 *Child Abuse & Neglect* 279–335.

50 M.R. Bruning et al., above n. 12, p. 332.

51 M.R. Bruning et al., above n. 12, pp. 45 and 49.

52 M.R. Bruning et al., above n. 12, pp. 51–52.

53 M.R. Bruning et al., above n. 12, pp. 48–49. See also Dutch Children's Ombudsman, above n. 49.

children to be broadened. It should not be limited to the requirements of Article 1:250 of the Dutch Civil Code and should be used to support children.[54]

The 2020 research did, for the first time, ask children themselves how they felt about being heard by the court. Adolescents emphasised the importance of speaking with the judge in person (and not via an indirect hearing with an expert). Children often found the child hearing stressful; however, they felt this was not a reason not to use their right to be heard. On the contrary, almost all the adolescents indicated that they thought it was important to give their opinion. Some of the reported reasons for stress were the possibility of bumping into a parent in the court and raising problems when the situation has just become stable. Most adolescents strongly felt they were taken seriously during their conversation with the judge. They were less satisfied with the information provided to them about the procedure and the child hearing.[55] Moreover, they need support to understand the invitation letter.[56]

The duration of the child hearing in family proceedings and in child protection proceedings, the location of the child hearing and the way of hearing the child (with one or three judges) differ.[57] The empirical research also shows that the degree to which the child's opinion is taken into account varies between judges. Feedback to the child about the decision is often absent. In some exceptional cases, a 'child-friendly' judgment is prepared by the judge. In addition, children under the age of 12 are rarely heard in family law cases; the judges' discretionary power with regard to hearing children younger than 12 is sometimes applied to a limited extent in practice with regard to hearing children.[58] This is also one of the conclusions of another empirical research project, which found that the participation of children in making parenting plans is rather limited.[59] Furthermore, it is unclear to what extent judges take the views of the child into account in arriving at their decision.[60]

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54 M.R. Bruning et al., above n. 12, p. 332.

55 M.R. Bruning et al., above n. 12, p. 330.

56 M.R. Bruning et al., above n. 12, p. 182; only 16% of the parents (N=61) indicated that their child understood the invitation letter without support. Only four out of 18 youngsters who had experienced a child hearing mentioned that the invitation letter was clear and they did not need any support.

57 M.R. Bruning et al., above n. 12, p. 330. See also M.H.L. van den Hoogen and P.J. Montanus, above n. 47, 286–289.

58 M.R. Bruning et al., above n. 12, pp. 176–177; see also H.C.M. Aalders, 'De rechtspraktijk inzake gezagsbeëindiging vanuit kinderrechtelijk perspectief', *Tijdschrift voor Familie- en Jeugdrecht* 2018/63, 61–66; K.A.M. van der Zon and M.P. de Jong-de Kruijf, 'Hoger beroep tegen een uithuisplaatsingsbeslissing en de rol van de minderjarige', *TREMA* 2015, no. 3, 298–307; A. van Triest, 'Het kinderverhoor in het ressort Den Bosch onder de loep', *Tijdschrift voor Familie- en Jeugdrecht* 2004/26, 16–26.

59 V.M. Smits, *Participatie van het kind bij het ouderschapsplan*, Maklu Uitgevers, Apeldoorn/Antwerp 2015, p. 286.

60 V.M. Smits, above n. 59, p. 288.

5. CONCLUSION

The main issue is probably not whether Dutch law meets the requirements of Article 12 UNCRC, but rather how children's participation rights can be improved. There is significant political understanding that this would be a good idea. The debate on child participation should be seen in the context of the general status of children in the law. Child participation rights in Dutch family law proceedings are fragmented and vary depending on the types of proceedings (such as international child abduction, parentage, custody and care, and access). In family law legislation a patchwork construction of instruments and participation tools, which are not aligned, can be observed. In practice, many initiatives to improve child participation in family law proceedings can be seen over the last decade. Judges are more open to hearing children in court and are better trained.

Child participation can be promoted in different ways. It calls for joint efforts by the judiciary, solicitors and academics to rethink current policy, legislation and practice. Research shows that children do have positive experiences in court, but indicates that further improvements are needed. For example, judges could more often hear children younger than 12. Even though there is child-friendly information available on the Internet on the hearing by the court, it is often not easy to find information on children's informal access to court and the possibility of appointing a guardian ad litem. Therefore, work is needed to better inform children about their procedural rights and about what to expect when being heard in court. An issue to be considered is how courts can communicate effectively with children. Invitation letters are one way, but digital and online means could be explored as alternatives, and help avoid children being dependent on their parents handing the letter over to them. The invitation letter (or other mode of communication) should be made more child-friendly in, for example, its use of language. Once that is achieved, ways of improving communication of the outcome of the case to the child should be considered. This is not necessarily a task that rests solely with courts; solicitors could play a role since they are also the ones explaining the decision to the parents. Another issue needing attention is how children are involved in out-of-court proceedings.

There should be greater coherency about the relevance of the age of children in civil law, criminal law and youth law and their right to participate. What can minors be presumed to be accountable for and what rights and duties come with that? This perspective would enable a broader discussion on the role of minors and adults, seen in the context of rising number of divorces, and societal expectations about the increasing influence of children's rights and individualisation. We should critically reflect on the main principle that parents represent children in the legal world. This is probably a good starting point in balancing all the interests involved, which are manifold: individual rights of children and parents, but also costs and efforts balanced against outcomes. Starting from the principle

that parents are usually good representatives of children's interests, a number of scenarios could be identified in which the interests of parents and children are more likely not to align, including in complex separations and divorces. The question then is: what type of participation is preferable? Direct hearing by the court is one of the options that must be available to children, but it is necessary to rethink the other options: the guardian ad litem, giving legal standing to children, informal access to the court, and mediation. The outcome should be less complicated and less of a patchwork, but rather a consistent and effective way of promoting children's participation rights.