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Conclusion

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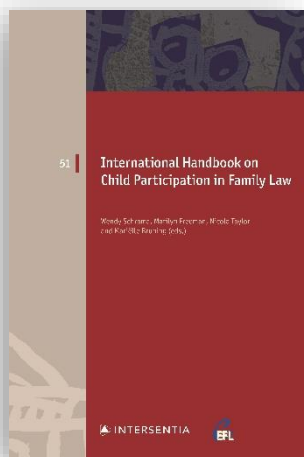
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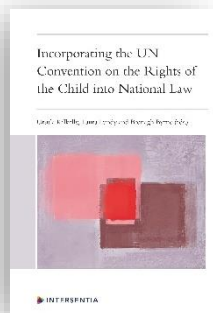
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Ursula Kilkelly, Laura Lundy and Bronagh Byrne (eds.)
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June 2021 | xvi + 366 pp.



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CONCLUSION

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1. INTRODUCTION

This Handbook has provided insights into how children participate in national family law proceedings nowadays and how this relates to relevant developments regarding children's right to participate from the human rights and social science perspectives. Thus, it endeavours to contribute to the growing body of research and literature in the field of children's rights, particularly the child's right to be heard, through both legal and psychological lenses.¹ Bringing together the findings of this Handbook in a concluding chapter has been quite a challenge, since it contains so much information on many relevant dimensions: human rights law, national family law in 17 jurisdictions, private international law and social science research. Collating the various chapters has, however, enabled us to identify several key issues and themes, which we combine with our more general reflections.

To start with a few obvious conclusions: a clear one, as pointed out by many, if not all, of the contributors to this Handbook, is that decisions in family law proceedings can have a substantial impact on children's present and future

¹ This growing body of scientific research on the child's right to participate is sometimes very broad in scope (e.g. A. DALY, *Children, Autonomy and the Courts: Beyond the Right to be Heard*, Brill/Nijhoff, Leiden 2018) and sometimes focuses on specific elements of the child's right to be heard, such as the research project *Rewriting Children's Rights Judgments – From Academic Vision to New Practice* of Helen Stalford, Kathryn Hollingsworth and Stephen Gilmore (Hart Publishing, Oxford 2017).

lives and, for that reason, opportunities for children to participate in these proceedings are essential. Hearing the child's views can significantly improve the quality of the decisions made, as well as assist with the child's adjustment to his/her post-separation living and contact arrangements. A trend is also evident in national jurisdictions, private international law and human rights to pay more attention, and attach greater weight, to child participation to ensure that children have a real say in matters that affect them. A third general conclusion is that the rights of children in this domain are often diffuse and the result of processes developed over time, which has led to fragmentation. Even though this Handbook demonstrates clear developments favouring child participation in family law proceedings, much work remains to be done. We therefore identify a roadmap for future work in this field.

2. HUMAN RIGHTS

Clearly, human rights have had a major impact on the law, with six international instruments containing participation rights for children: the UN Convention on the Rights of the Child, the African Charter on the Rights and Welfare of the Child, the European Convention on Human Rights, the European Convention on the Exercise of Children's Rights (1996), the Council of Europe's Guidelines on Child-friendly Justice (2010) and the Guidelines on Children in Contact with the Justice System of the International Association of Youth and Family Judges and Magistrates.² Their content depends on the specific instrument. No uniform design for child participation is recognised, but key forms of child participation can be distinguished: (i) the right to be heard directly; (ii) the right to be heard indirectly via a representative such as a parent, lawyer, judge or other professional; or (iii) child litigation. Without doubt, Article 12 of the UNCRC is the cornerstone that has catalysed the development of the other international and regional instruments in this regard. The six instruments each set out various conditions that apply in implementing the child's right to participate – these include, for example, that the child must be capable of forming or communicating his/her own views, and that due weight should be given to the child's views. While the phrasing and presentation of the respective conditions vary 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 other factors such as age, capacity, or sufficient understanding or discernment. None of the six instruments provide

² Although the latter guidelines are not 'soft law', as the CoE Guidelines are, they do provide relevant best-practices and are a form of international professional standards; see the chapter by M. BRUNING and C. MOL in this Handbook.

a blueprint for how children's procedural inclusion is best achieved in practice. The practical implementation of how children can and should participate needs more attention. Ideally, this should be more closely based on the existing body of social science research evidence and legal insights.

A more general reflection to emerge from the insights of the various Handbook chapters concerns how human rights instruments set general norms that then have to operate across diverse cultures, societies and contexts. Therefore, it is to be expected that children's participation rights are quite general, although the ECtHR case law is at times specific. The human rights domain (instruments, bodies, monitoring systems, documents, etc.) could perhaps play a more significant role in this regard by providing, at regular intervals, up-to-date knowledge about children's right to participate in legal proceedings to governments, professionals and academics. Imagine, for instance, that the UNCRC Committee develops a revised General Comment on child participation which is based on the actual, state-of-the-art knowledge in the social and legal sciences and incorporates jurisdictional developments like some of those discussed in the country chapters of this Handbook. This could have the potential to strengthen children's right to be heard, and enable research to be undertaken that could further support implementation of the child's right to be heard, as this is currently not always possible in some jurisdictions.

Another way of strengthening the child's right to participate is by updating children's participation rights in international instruments on the basis of contemporary knowledge and insights. International human rights treaties tend to be less likely to be regularly reviewed and reformed (which is why they adopt their very general approach), but this is not a reason for not reflecting more deeply upon this option despite the challenges it presents for the international community in reaching new agreements and consensus.

3. PEDAGOGICAL INSIGHTS

The social science chapter illuminated historical developments and the shift in child images and status over time. This changed position of children lies at the heart of the participation rights they now enjoy. In a relatively short period of time, from the latter part of the 20th century, immense changes have occurred in the societal position of children and our expectations of their competence and autonomy. Further, the chapter showed that child participation, and how we perceive this, involves a balancing act between the goals of protection versus empowerment of children in the legal arena. This balance has shifted over time in the direction of more child involvement as a result of prioritising child empowerment. Furthermore, social science research seems to indicate that the majority of children who participated in decisions about their post-separation arrangements felt good about being consulted and heard. This implies that

child participation impacts children's development and wellbeing but, at the same time, this domain is still somewhat unknown territory. From the national perspectives, it may be deduced that in many countries little research has actually been undertaken regarding how children feel about (non-)participation, reflect on it and benefit from it. It is also unclear how the best interests of the child relate to the views of the child. Children's participation rights would flourish if more research occurred worldwide on how participation affects children and which factors impede, or promote, good outcomes in terms of (i) the person/agency involved and the training needed; (ii) location/venue; and (iii) information and feedback. The legal dimension of child participation requires the legal system and practice to take into account any differences between children. A focus on an autonomy-supportive environment has been demonstrated to benefit children in many ways. The chapter also identified a number of barriers to effective child participation. Providing sufficient, understandable information to children is an indispensable requisite: informing children adequately both before and during the proceedings can increase their level of participation. Moreover, a safe environment from the child's perspective is important, as are the professional skills of the judge, lawyer, social worker or other professional who talks with the child. As can be deduced from the national perspectives reported in this Handbook, there is room for improvement in this respect.

4. PRIVATE INTERNATIONAL LAW

Child participation rights are not often at the core of research on private international law, but Part II of the Handbook provided various relevant insights on this issue. Private international law is a diverse area of law, where the rules and sources tend to depend on the specific type of proceedings, such as divorce, parental authority or child abduction. For each topic specific sets of rules apply, which might involve rules from various sources such as UN treaties, EU regulations and domestic law, stemming from different law-makers (UN, EU, nationally). It is important to note that private international law plays a different role in promoting child participation rights as opposed to substantive family law at a national level. In general, child participation rights in family law proceedings are a matter for national family and procedural law. However, the Handbook authors highlighted a growing trend towards greater attention being given to child participation in private international law in interaction with human rights. While the fragmented area of private international law interacts with human rights instruments on child protection, international child abduction, parental responsibility and maintenance, the way in which this occurs depends on the topic and the relevant body. The older 1980 Hague Convention on the Civil Aspects of International Child Abduction, which predates the UNCRC, pays less attention to child participation rights than more recent instruments,

such as the 1996 Hague Child Protection Convention. In the more recent EU Brussels IIbis and IIter Regulations, children's right to have a say and be heard are reinforced in child abduction and parental responsibility cases.

In sum, there seems to be a tendency to include participation rights more frequently in private law instruments, but only those concerned with international families with private international conflicts. These create indirect duties and involve careful nudges by supranational legislators to better respect children's right to participate. In this sense, this might create incentives to cautiously move national procedures in a positive direction to provide more opportunities for child participation. In fact, for some private international law topics, better safeguards are evident for child participation rights in family law disputes for cross-border families than for families whose dispute or issue is tied to 'just one' jurisdiction.

In thinking of ways to promote children's involvement in international cases, the nature of private international law, with its scattered topic-related nature and the diverse law-making bodies, must be taken into account. This makes it more difficult to create and implement a coherent system of child participation rights; on the flipside, it binds more jurisdictions than just one.

5. NATIONAL PERSPECTIVES AND COMPARATIVE ANALYSIS

National jurisdictions have developed children's rights in family law proceedings. However, it has been human rights that have sparked the impetus to take a closer look at the position of children in this field and to strengthen children's participation rights. This could perhaps partially be related to the historical shift of the position of the child described in the chapter on pedagogical insights, which inspired law reform in legislation and practice in many countries.

The comparative analysis shows that the delineation between various types of family law proceedings differs between jurisdictions and also that child participation opportunities are often 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, at other times, they may only be available for a very specific type of proceedings. The question is whether this makes sense. Given the colourful palette of options available under domestic laws, the logic is not always easy to identify. This can be explained by different jurisdictions having different child participatory options on offer because this reflects their legislation, history and/or the types of professionals they have available to meet and talk with the child. We think this needs more attention since a child's right to have a say should not depend on the type of family law dispute which affects him/her. In addition, further research is

recommended to encourage jurisdictions to improve their child participatory approaches anchored in different contexts and with different backgrounds. Therefore we mark this as an issue for further research.

In all 17 jurisdictions the hearing of a child by a court is possible. In the majority of these jurisdictions this is an oral meeting, but in some countries children can express their views in writing. It is encouraging that a direct mode of participation for children is available nowadays in all 17 jurisdictions from different geographical regions and different legal families (such as common law and civil law), especially since states belonging to the common law tradition often used to favour indirect hearing of children.³ This indicates, to us, the pleasing global trend towards children being taken more seriously in legal proceedings. In most of these countries, both an age limit as a minimum standard in combination with the possibility of younger children being heard directly on the basis of open criteria such as ‘maturity’ or ‘discernment’ are included in domestic legislation and policy practice. Age limits differ between these countries, but it is clear that in several of the 17 countries young children – i.e. children younger than 12 years of age – are being invited to contribute to judicial meetings. There is still much to be learned about hearing children younger than 12 years of age. Future research is much needed and should also focus on child-friendly methods to encourage effective participation for children in the age range of four to 12 years old (elementary school age). The concept of child-friendly justice should also be reconsidered since it is plausible that this concept could be different for various groups of children, for example very young children from four to eight years of age compared to children from 12–18 years of age. We expect that in the near future younger children will increasingly be included in family law proceedings and will be offered more options to be heard.

Furthermore, the national perspectives and comparative analysis illustrate that not only domestic legislation but also national policy and practice are decisive in how children are being heard in family law proceedings and from what age children are being heard. In some countries the minimum age in legal practice for children to be heard is lower than the age limit included in domestic legislation. This indicates that when conducting comparative legal research, both legislation and legal policy and practice should be incorporated.

On the other hand, in relation to representation of the child in family law proceedings, many different modes were identified in the country chapters. These representatives are mostly lawyers, but non-legal representatives were also evident, such as lay persons, relatives, recommended citizens, psychologists

³ A. DALY, *Children, Autonomy and the Courts: Beyond the Right to be Heard*, Brill/Nijhoff, Leiden 2018, p. 194.

and pedagogical experts. The purpose of representation also varies between representing the child's views/wishes and/or the child's best interests/welfare. The aims of child representation (views or interests or both) is a topic for further scientific research and debate.

Child participation could be seen as a middle ground between two other options: the child as a litigating party or the parents representing their child in the legal arena. Taking into account the nature of family law proceedings, where – in particular in post-separation and divorce contexts – parents can, and often do, focus on their own interests, which might easily conflict with each other and with the best interests of the child, the right of the child to express his/her views is crucial. In other scenarios outside family law, parents can more easily be presumed to be able to represent the child and act in his/her best interests. Child participation is also a middle ground in the sense that it does not affect the idea that parents can represent the child in the legal arena; it leaves parental responsibilities untouched. One step further lies a new horizon of child litigation. Currently, even though the status and position of children have altered significantly, these changes do not go as far as granting independent party status to children. In general, parents (or those with parental responsibilities) legally represent children in the legal domain, also in family law proceedings, but backed up by child participation rights. The lack of party status for children in family law proceedings was common across the 17 national jurisdictions. When thinking about future developments to further children's right to participate in legal proceedings and improve their access to justice, children having independent party status is worthy of greater consideration as a future step in the evolution of children's rights: from participation to being part of the proceedings.

In comparing direct participation modes, indirect participation modes and child litigation, a difference can be discerned in the criteria used to determine whether a child is allowed to participate. Age and maturity are often used for direct modes of participation and for litigation by the child. It is of less relevance for the indirect modes and representation modes of participation, where only a number of jurisdictions apply such criteria. This is an interesting finding calling for further attention: does it make sense to have different approaches in this respect?

Child participation rights are promising if one looks at statutes and laws, but in practice there is a world to win, as is remarked on by many country chapter authors. It will be a challenge for future research, policy and practice to promote the implementation of the right to participate. This is even more compelling when consideration is given to the incorporation of these rights for children with different backgrounds and younger ages, or with disabilities, and for other children who might need extra attention or support to effectively participate and be heard in family law proceedings.

6. FUTURE DEVELOPMENTS

As well as the ideas identified above, what could future work focus on? Perhaps most important is the development of a coherent framework of child participation. A recurring observation is the rather fragmented nature of child participation rights in law in all the sources studied in this Handbook: human rights, private international law and, most clearly, in substantive family law, with child participation often developing on a step-by-step basis; change taking place through a gradual process instead of via significant major reform. Future work could aim at developing a more coherent framework that includes all the modes of child participation (direct, indirect and child litigation). Social science research findings are essential, as well as empirical legal research, to build such a framework, which should include who, how, why, when and under what conditions children have a right to participate in family law proceedings.

Recent developments regarding child participation in family law proceedings should initiate new thinking about the other trends that may emerge over the next decade. We can speculate that the position of the (older) child will become more independent from the parents and that there will be more focus on the child's position in the legal domain. One of the interesting dilemmas is how to balance children's rights and interests with the rights and interests of parents. The child's right to participate is often appropriately used by parents to influence the legal dispute between them. At times, however, the child's right to participate is used by parents to influence the parents' own personal or legal interests. Case law of the ECtHR illustrates this.⁴ A more child-focused approach is advocated based on the Handbook chapters, which hopefully can contribute to less instrumentalisation of children's rights for parents' purposes. This also requires a fresh look at the fact that in many jurisdictions children are mainly represented in the legal domain by their parents. Overall, this general principle is a sound one, except in those cases where conflicts of interests easily exist or can arise, namely in family law disputes and, in particular, in complex divorce- and separation-related issues. There are better ways to disentangle these rights and interests by appointing a separate person or body to advance the child's views and interests, as indeed some jurisdictions already do.

Another interesting dilemma for future research is the balance between the best interests of the child and the views of the child. There seems to be little attention so far to the potential tension between these two perspectives. If a child expresses views as to his/her wishes that contradict his/her best interests, how do – and should – courts weigh the child's views and decide the outcome? Child participation rights have a procedural nature, but they should also have

⁴ For instance, ECtHR *Iglesias Casarrubios and Cantalapiedra Iglesias v Spain* (Appl. No. 23298/12), 11 October 2016.

a direct impact on substantive outcomes. The current focus on the procedural right, which still seems predominant, should evolve towards a combined right for children of a procedural and substantive nature for some of the family law issues. We could imagine such a trend for topics that particularly affect the personal status of the child, such as adoption, name and gender. A substantive right in family law would require a child's consent. This would automatically imply the child's right to express a view. In some jurisdictions, for minors of a specific age this is already required in relation to topics like adoption.

Finally, it has been our pleasure to co-edit this Handbook and to work with such a talented and expert group of contributing authors who have shared their perspectives on child participation in family law proceedings in international and domestic contexts. This Handbook promotes a humane and constructive approach to child participation that benefits the child and also improves the quality of the decision-making process for parents, family justice professionals and the courts. The Handbook brings together the latest thinking on human rights, private international law and social science, as well as the approaches to legal policy and practice in 17 jurisdictions with a comparative analysis of the global similarities and differences. Since child participation rights are primarily vested in national legal systems, more work needs to be undertaken internationally to capture this diversity, including in those countries with customary and religious laws. This way countries can learn from each other and look to implement and refine those particular modes of participation that are most effective.