

# Children and International Human Rights Law

The Right of the Child to be Heard

Aisling Parkes



Routledge Research in Human Rights Law



# **Children and International Human Rights Law**

The Right of the Child to be Heard

**Aisling Parkes**

First published in paperback 2015

First published 2013

by Routledge

2 Park Square, Milton Park, Abingdon, Oxon OX14 4RN

and by Routledge

711 Third Avenue, New York, NY 10017

*Routledge is an imprint of the Taylor & Francis Group, an informa business*

© 2013, 2015 Aisling Parkes

The right of Aisling Parkes to be identified as author of this work has been asserted by her in accordance with sections 77 and 78 of the Copyright, Designs and Patents Act 1988.

All rights reserved. No part of this book may be reprinted or reproduced or utilised in any form or by any electronic, mechanical, or other means, now known or hereafter invented, including photocopying and recording, or in any information storage or retrieval system, without permission in writing from the publishers.

*Trademark notice:* Product or corporate names may be trademarks or registered trademarks, and are used only for identification and explanation without intent to infringe.

*British Library Cataloguing in Publication Data*

A catalogue record for this book is available from the British Library

*Library of Congress Cataloging in Publication Data*

Parkes, Aisling.

Children and international human rights law : the right of the child to be heard

pages cm. – (Routledge research in human rights law)

Includes bibliographical references and index.

1. Children's rights. 2. Convention on the Rights of the Child (1989 November 20) 3. Human rights. 4. Children (International law) 5. Children—Legal status, laws, etc. I. Title.

K639.P36 2013

341.4'8572—dc23

2013003616

ISBN: 978-0-415-458368-8 (hbk)

ISBN: 978-1-138-92114-6 (pbk)

ISBN: 978-0-203-97980-8 (ebk)

Typeset in Baskerville

by Cenveo Publisher Services

# Children and International Human Rights Law

The United Nations Convention on the Rights of the Child 1989 is the most highly ratified of the international human rights treaties in the world, with 193 states parties committed to its implementation. *Children and International Human Rights Law: the right of the child to be heard* explores how this UN treaty has promoted and encouraged the worldwide development of the right of the child to be heard from a law and practice perspective. In particular, the book focuses on Article 12: the principle of respect for the views of the child. In stark contrast to the old adage that children should be seen and not heard, Article 12 provides that all children who are capable of forming views have the right to be heard in all decisions affecting them, with due weight being given to those views in accordance with the dual criteria of age and maturity. From a practical point of view, the implementation of this right has represented a major challenge to those countries that have traditionally held deep-rooted paternalistic beliefs about children and their status under domestic and international law.

In adopting an international perspective, this book compares the extent to which states parties across the world have attempted to implement this legal right of the child within domestic legal systems. It explores the historical and theoretical background of Article 12, and examines how the right for children to be heard affects domestic laws worldwide.

Through a wide and careful examination of comments and recommendations given by the UN Committee on the Rights of the Child, as well as well-known experts in the field of children's rights and child participation, Aisling Parkes offers valuable insight into the implementation of Article 12 (a fundamental right of the child) for institutions and individuals working for and with children.

**Dr Aisling Parkes** is a Lecturer in the Faculty of Law, University College Cork.

## **Routledge Research in Human Rights Law**

Available titles in this series include:

### **The Right to Development in International Law**

The Case of Pakistan

*Khurshid Iqbal*

### **Global Health and Human Rights**

Legal and Philosophical

Perspectives

*John Harrington and Maria Stuttaford*

### **The Right to Religious Freedom in International Law**

Between Group Rights and Individual Rights

*Anat Scolnicov*

### **Emerging Areas of Human Rights in the 21st Century**

The role of the Universal Declaration of Human Rights

*Marco Odello and Sofia Cavandoli*

### **The Human Right to Water and its Application in the Occupied Palestinian Territories**

*Amanda Cahill*

### **International Human Rights Law and Domestic Violence**

The Effectiveness of International Human Rights Law

*Ronagh McQuigg*

### **Human Rights in the Asia-Pacific Region**

Towards Institution Building

*Hitoshi Nasu and Ben Saul*

### **Human Rights Monitoring Mechanisms of the Council of Europe**

*Gauthier de Beco*

### **The Positive Obligations of the State under the European Convention on Human Rights**

*Dimitris Xenos*

### **Vindicating Socio-Economic Rights**

International Standards and Comparative Experiences

*Paul O'Connell*

### **The EU as a 'Global Player' in Human Rights?**

*Jan Wetzel*

**Regulating Corporate Human Rights Violations**

Humanizing Business

*Surya Deva*

**The UN Committee on Economic, Social and Cultural Rights**

The Law, Process and Practice

*Marco Odello and Francesco Seatzu*

**State Security Regimes and the Right to Freedom of Religion and Belief**

Changes in Europe Since 2001

*Karen Murphy*

**The European Court of Human Rights in the Post-Cold War Era**

Universality in Transition

*James A. Sweeney*

**The United Nations Human Rights Council**

A Critique and Early Assessment

*Rosa Freedman*

**Children and International Human Rights Law**

The Right of the Child to be Heard

*Aisling Parkes*

Forthcoming titles in this series include:

**Jurisdiction, Immunity and Transnational Human Rights Litigation**

*Xiaodong Yang*

**For Dad and Karen**

# Preface

In 2002, when I first began exploring the nature and scope of Article 12 of the UN Convention on the Rights of the Child (CRC) 1989, there was very little debate and discussion surrounding this topic, particularly at international level. Indeed, child participation was only in the very early stages of development and was just beginning to receive recognition internationally. It was regarded as one of the biggest challenges of the CRC and still remains so to this day.

Now, over 10 years on, how the landscape has changed for the better! The children's rights scene generally has evolved to such an extent that children's rights are part and parcel of everyday law and practice. However, while in both theory and practice child participation as a concept is very much accepted nowadays, it is clear that there are still some lingering misconceptions concerning what child participation actually requires in practice. As a result, child participation runs the danger of being tokenistic in certain areas.

This book not only seeks to explore the extent to which Article 12 of the UN Convention on the Rights of the Child 1989 has been implemented internationally to date, but it also aims to highlight models of best practice in the more traditional areas affecting a child's life, such as the family, in school and in legal proceedings, as well as at national and international levels. Moreover, the most common barriers to participation will be pinpointed and the methods according to which these barriers can be removed will be proposed. Finally, given the fact that much of what Article 12 means for child participation is well known at this stage, novel areas where child participation may prove to be of huge benefit now and in the future will be addressed.

*Aisling Parkes*  
*May 2013*



# Foreword

The Convention on the Rights of the Child (CRC), adopted by the United Nations in 1989, is a widely ratified instrument of international law. The CRC recognises the importance of children's rights to have their basic needs met – in areas such as health, education and family support – while also recognising children's protection from harm and their right to be involved in decision-making that affects them. The CRC was ground-breaking in its recognition of children as autonomous rights-holders and children's status as individuals worthy of respect clearly underpinned the development of the standard set out in Article 12. Article 12(1) is a strongly worded provision which requires states to assure to children capable of forming their own views the right to express those views freely in all matters affecting them; it requires those views to be given due weight in accordance with the child's age and maturity. Article 12(2) links this requirement with the child's right ('opportunity') to be heard in any judicial and administrative proceedings affecting the child in a manner consistent with the procedural rules of national law. Article 12 is an unusual provision in that it has value both as a substantive right – it recognises the child's right to have his or her views taken into account in matters that affect him or her – as well as playing a significant procedural role. It is a measure of the provision's importance that it, alone, is responsible for the requirement that decision-making about children must involve children themselves if it is to be CRC-compliant. In this way, Article 12 has symbolic importance and it is regularly abbreviated as the 'right to participate', 'the right to be heard' or the 'right to a voice', despite the inadequacy of these terms in communicating the full reach of the provision. These summarising concepts are useful, nonetheless, in developing a common language among those across disciplinary and professional boundaries who work with and for children. At the same time, there is much to be gained from a legal analysis of the text of Article 12 and from looking at the application and interpretation of the provision within the broader context of the CRC as a whole. Surprisingly, there has been relatively little such analysis undertaken in the CRC's 23 year history.

This book by Dr Aisling Parkes, based on her doctoral research completed at University College Cork with the support of the (Irish) Department

of Children and Youth Affairs, fills this gap with considerable expertise. In particular, it undertakes an analysis of all aspects of Article 12, considering its meaning, its interpretation and, crucially, its implementation in a range of settings. The right in Article 12 applies in all matters affecting the child and, consistent with this breadth, the book considers its application across children's lives – considering Article 12 in the family, school and educational settings and where children come into conflict with the law. The book is predominantly a legal text – based and focused on the Article 12 provision – and it is appropriate therefore that it should examine the extent of the duty to implement the provision under Article 4 of the CRC. In this regard, the book makes an important contribution to the debate as to what legislative and constitutional measures can be used to advance the Article 12 right, while the challenges of implementing it in judicial settings is clear from the chapters on family and criminal law proceedings. The absence of consensus as to whether direct or indirect representation is preferable in the implementation of Article 12 may simply reflect the terms of Article 12(2), but it also suggests there is still some way to go to achieve the right balance between child participation and protection in this area. The Council of Europe Guidelines on Child-friendly Justice, adopted in 2010, may help with this process although it is clear that in this, as in many other areas, there are very many practical challenges associated with the translation of the theory of Article 12 into practice.

Beyond the sectoral challenges in education, family law and the courts, the book also makes a strong contribution to the application of Article 12 in decision-making spaces. Thus, it looks at the extent to which the provision is implemented in local, national and international decision-making and, linked to this, the book contains a valuable account of the role of national human rights institutions in this area. The meaning of Article 12 has been fleshed out by the United Nations Committee on the Rights of the Child in its various documents and the process by which this is done is examined here too in a useful analysis of the extent to which bodies charged with enforcing and monitoring children's rights are themselves Article 12-compliant.

Although the book's primary function is to present an analysis of Article 12 from a legal perspective, the book draws on literature from other disciplines (including education, sociology and psychology) where relevant. In this way, the book highlights the challenges associated with Article 12 where a coherent, legal analysis is an indispensable starting point, but implementation requires the insights, perspectives and involvement of a range of other disciplines and actors. Having come into force in 1990, the CRC is now in its third decade of implementation. It is a measure of its impact that concepts such as 'the right of the child to a say' are now a common part of the dialogue on children's issues. Moving on from this, however, the undeniable priority, now, is implementation.

Against this backdrop, this book combines an important analysis of the meaning of Article 12 with a detailed study of its application. Its true merit

lies in its assessment of the extent to which Article 12 is implemented across children's lives, by those who are charged with this duty under the CRC. Here, the book brings together an array of information and analysis on the implementation of Article 12 from national, regional and international perspectives. It is my hope that by creating a wider understanding of the challenges and the potential associated with Article 12, its implementation can be brought a step closer. Aisling Parkes is to be warmly congratulated for the contribution that she has made to this important process.

Professor Ursula Kilkelly  
Dean, Faculty of Law,  
University College Cork  
January 2013

# Acknowledgements

I would like to express sincere and heartfelt thanks to Professor Ursula Kilkelly, Faculty of Law, UCC for all her time, patience, invaluable advice, insightful thoughts and extensive children's rights expertise over the past few years. I would also like to extend my gratitude to the former National Children's Office (now the Department of Children and Youth Affairs) who generously funded the formative research on which this book is based. I am very grateful to Professor Dominic McGoldrick, who prompted me to edit my PhD and publish this book in the first place.

I am very grateful to Routledge particularly Katie Carpenter, Claire Sissen, Nicola Prior and Mark Sapwell who have been very patient, understanding, most professional and very efficient with the publication of this book.

A special word of thanks and appreciation to Frank Martin and Professor Maeve Conrick for their friendship and unreserved support. I would particularly like to thank Professor Nuala Finnegan, Head of the School of Hispanic Studies, UCC for her refreshing positivity and very kind, yet strong, words of encouragement and ongoing inspiration for completing this book.

Thanks to my good friend, Noreen Delea for the final push to completing this book! Thanks also to all my friends and colleagues in the Faculty of Law, UCC who gave me support and encouragement along the way.

Completion of this book would not have been possible without the ongoing support and encouragement of my family. A very special thank you must go to my Dad and my sister Karen who, as always, were a brilliant support to me especially when times got tough.

# Abbreviations

ACHR	African Charter on Human Rights and People's Rights 1980
ACRWC	African Charter on the Rights and Welfare of the Child 1990
CAT	Convention against Torture, Inhumane or Degrading Treatment or Punishment 1984
CEDAW	Convention on the Elimination of all forms of Discrimination against Women 1979
CERD	Convention on the Elimination of Racial Discrimination 1965
COE	Council of Europe
CRC	UN Convention on the Rights of the Child 1989
CRG	Constitution Review Group 1996
ECECR	European Convention on the Exercise of Children's Rights 1996
ECHR	European Convention on Human Rights 1950
EU	European Union
ICESCR	International Covenant on Economic, Social and Cultural Rights 1966
ICCPR	International Covenant on Civil and Political Rights 1966
NDP	National Development Plan
NPA	National Plan of Action
NGO	Non Governmental Organisation
NHRI	National Human Rights Institution
PRSPs	Poverty Reduction Strategy Papers
SYFA	Safeguard Youth From Aids Programme
UN	United Nations
UNCRPD	UN Convention on the Rights of Persons with Disabilities 2006
UNGASS	UN General Assembly Special Session on Children

# Contents

<i>Preface</i>	xvii
<i>Foreword</i>	xix
<i>Acknowledgements</i>	xxii
<i>List of abbreviations</i>	xxiii
<b>Introduction</b>	1
<i>Article 12 of the CRC</i>	2
<i>Objectives of the book</i>	3
<b>1 Article 12 and child participation</b>	5
<i>The UN Convention on the Rights of the Child 1989</i>	5
The general principles of the CRC	6
Reinforcing the need to respect the views of children	7
<i>The UN Committee on the Rights of the Child</i>	9
General Days of Discussion and General Comments	10
<i>Regional developments</i>	11
European Union	11
Council of Europe	12
<i>The importance of child participation</i>	13
<i>Defining Article 12</i>	14
The relationship between Article 12 and child participation	15
<i>Models of participation</i>	15
The original ladder of citizen participation	16
Hart's 'ladder of child participation'	17
Treseder's idea of participation	19
Shier's typology for child participation	20
Lundy's model of participation	23
The ideal model of child participation?	23

Essential characteristics of an Article 12 model  
of participation 24

*Conclusion* 25

## **2 The nature and scope of Article 12 of the CRC**

27

*Article 12 – the drafting process* 27

*The nature and scope of Article 12* 31

Article 12(1) 31

Article 12(2): child participation in judicial and  
administrative proceedings 37

*Article 12: the most important participation article* 39

Other CRC participatory rights 39

*Forms and conditions of participation: Articles 13, 14 and 15* 40

The right to freedom of expression under Article 13 40

Articles 14 and 15 41

*The requirements of participation* 41

Evolving capacities of the child under Article 5 41

Article 17 and the right to freedom  
of information 42

*The indivisibility of CRC rights* 42

Article 12 and Article 2 42

Article 12 and Article 3 43

*Conclusion* 44

## **3 Implementing Article 12 in practice**

45

*Article 4: general measures of implementation* 45

*Implementation of Article 12 in domestic law* 47

Constitutional law reform 47

*Constitutional incorporation: the Irish context* 49

Historical background 49

*Legislative reform and Article 12* 52

Codified child law 53

Sectoral law reform 54

*Continuous change: the need for comprehensive review* 55

*Child participation in the law reform process* 56

*Problems and barriers to implementation* 57

Legislative enforcement 57

Article 3 and the best interests principle 58

Age limits 59

Traditional attitudes 60

Balancing children's rights with state party traditions 63

Declarations and reservations 64

*Breaking down barriers: education* 66

Training and awareness-raising 68

*Conclusion* 69

#### **4 Child participation in family decision-making**

71

*The importance of listening to children in the family* 72

Implementing Article 12 in the family 72

Parental guidance and responsibilities 73

*Barriers to respecting the child's views in the family* 74

Article 12: encouraging a lack of respect for parents? 74

The family as a private sphere 76

Children as active partners in the family 77

*Educating parents about the benefits of child participation* 78

Respecting the views of children in all family decisions  
affecting them 79

Legal minimum age of consent to medical treatment 82

*Conclusion* 86

#### **5 The voice of the child in family law proceedings**

89

*International legal basis for child participation in family  
law proceedings* 90

*Two alternative forms of participation under the CRC* 91

Direct involvement 93

Indirect participation – child representation 98

Examples of GALs 100

Separate legal representation 103

Tandem model of representation 107

*General Comment No 12* 109

*Regional initiatives* 110

Political developments 110

Regional instruments 110

Judicial endorsement of Article 12 at regional level 111

Practical obstacles to child participation in family law  
proceedings 113

*Conclusion* 120

Direct participation 120

Indirect participation 120



## 6 Listening to children in school

123

*The right to education: a universal right of the child* 124

*Regional provisions* 125

Council of Europe 125

European Convention on Human Rights 1950 (ECHR) 126

European Union 129

*Benefits of child participation in school* 129

Education: 'child-centred, child-friendly and  
empowering' 130

*The classroom: a laboratory for democracy?* 131

*Influence of Article 12(1) and 12(2) on education* 133

Article 12(1): respect for the views of the child  
in education 133

Article 12(2): inclusion of children in proceedings of a judicial or  
administrative nature 136

*School councils: an effective facilitator of child participation  
in education?* 138

Powers of the school council 139

Establishment 140

Selection/election processes 141

The education system of the Netherlands 142

*Child-friendly schools* 144

Socio-educational contract 144

*Obstacles to the child's right to be heard within the school* 145

The practical effects of war 146

Non-discrimination: the denial of access to education and  
associated rights 146

Raising awareness 147

*Conclusion* 148

## 7 Listening to children in conflict with the law

151

*Beyond the boundaries of Article 12? Children below the age  
of criminal responsibility* 151

A possible solution? The presumption of *doli incapax* 154

*Articles 37 and 40 CRC: the child's right to due process* 154

The right to be informed 156

Use of an interpreter to facilitate freedom of expression 157

Arrest 157

*Youth justice proceedings* 158

Article 12(2): the right of the child to be heard directly or  
indirectly 159