

Elvis Mukumu Fokala

Implementing Children's Right to Participation in Family Decision-Making Processes in Africa





Elvis Mukumu Fokala

LLB University of Buea – Cameroon 2005

LLM Centre for Human Rights – University of Pretoria – South Africa 2010

Diploma in International Protection of Human Rights – Institute for Human Rights – Åbo Akademi University - Finland 2011

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Abbreviations and Acronyms

ACERWC	African Committee of Experts on the Rights of the Child
ACHPR	African Charter on Human and People' Rights
ACPF	African Child Policy Forum
ACRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
CA	Court of Appeal
CAT	Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment
CC	Constitutional Court
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women
CERD	International Convention on the Elimination of All Forms of Racial Discrimination
CESCR	International Covenant on Economic, Social and Cultural Rights
CGE	Commission for Gender Equality
CJA	Child Justice Act
CO	Concluding Observation
CRC	Convention on the Rights of the Child
CRC-OP-AC	Optional Protocol to the Convention on the Rights of the Child on the Involvement of Children in Armed Conflicts
CRIN	Child Rights International Network
CRPD	Convention on the Rights of Persons with Disabilities
CSG	Child Support Grant

CTPA	Choice on Termination of Pregnancy Act
ESC	Economic, Social and Cultural Rights
GA	General Assembly
GC	General Comment
GR	General Recommendation
HC	High Court
HRC	Human Rights Committee
ICCPR	International Covenant on Civil and Political Rights
LDA	Lunatics Detention Act
LGMSA	Local Government Municipal Systems Act
MTCT	Mother-To-Child-Transmission
NCHRF	National Commission on Human Rights and Freedoms
NEPA	National Education Policy Act
NEPAD	New Partnership of Africa's Development
NHA	National Health Act
NPA	National Prosecuting Authority
NYDAA	National Youth Development Agency Act
OUA	Organisation of African Union
OHCHR	Office of the High Commissioner for Human Rights
OPP	Office of the Public Protector
PTSAA	Prevention of and Treatment of Substance Abuse Act
SAHRC	South African Human Rights Commission
SASA	South African Schools Act
SC	Supreme Court

TAC	Treatment Action Campaign
UDHR	Universal Declaration on Human Rights
UN	United Nations
UNFPA	United Nations Population Fund
UNICEF	United Nations Children's Fund
WHO	World Health Organisation
Committee on the CRC	UN Committee on the Convention of the Rights of the Child
Committee on the CESCR	UN Committee on Economic Social and Cultural Rights
African Women's Protocol	Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa
African Commission	African Commission on Human and Peoples' Rights

Dedicated
To
My gem, Miss Liora Ngum

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****To God be the Glory****

Abstract

It is only 28 years ago since children's right gained comprehensive legal protection both at the UN level and the African regional level through the adoption of the Convention on the Rights of the Child and the African Children's Charter respectively. Over the years a lot has been written to give context to the provisions of these instruments both at the global level and particularly at the African regional level. This contribution acknowledges and adds to the wealth of literature already written by children's right experts as it pays particular attention to one of the most delicate rights ascribed to children in article 12 of the CRC and article 4(2) of the African Children's Charter protecting children's right to participation. Research on children's right to participation in particular, is still embryonic in Africa and this contribution dares to exploit the unfortunate gap created by such limited research. The author acknowledges that the scarcity of research exploring the applicability of children's right to participation could be based on the diversity of cultural and parenting styles extant in Africa. This contribution also holds that the limited application of children's right to participation in family decision-making processes is also exacerbated by the strong position of parental responsibilities and rights in Africa.

The author introduces the State as an ice breaker into the family environment to protect the best interests of the child especially in cases where decisions taken during family decision-making processes with or without a child's participation is not in the best interests of the child. To justify the rational of state intervention into the family, the author argues that there is nothing like a parent-child relationship without the state because, the state is the source of laws which established such relationships. To demonstrate this, the author introduces the balance model to best define the role of the state, parents and the child in a family decision-making process.

This thesis is divided into two parts, although not expressly. Part one consists of chapters two, three and four. These chapters provide the contextual background to the legal protection of children's right to participation. Each chapter is tailored to feed the preceding chapter as the work unfolds. Chapter four in particular, is in the middle of the two parts, as it attempts, succinctly, to portray, thanks to classical examples from South Africa and Cameroon (reasoning for limitation provided in the introductory paragraph of chapter four), the various practical (legal and policy frameworks) and institutional support provided by state parties to support, facilitate, and redress any issues related to their mandate to promote children's right to participation in general and specifically in family decision-making processes. The second part of this thesis feeds from the context

laid in the first part and consists of chapters five, six and seven. These chapters are complimentary to one another and crucial to the context discussed in the earlier chapters. For example, chapter five analyses the role of the state and the parents in giving children the space and time to participate in family decision-making processes and to give their view due weight. Chapter six builds on such roles in the context of children's right to participate in health and medical decisions concerning them and chapter seven introduces a balance model to enable better and comprehensive attainment of children's right to participate in family decision-making processes in Africa.

Sammanfattning

Det är bara 28 år sedan barns rättigheter erhöll ett omfattande skydd både på FN-nivå och på den regionala afrikanska nivån genom antagandet av konventionen om barns rättigheter och den afrikanska barnstadgan. Under åren har det skrivits mycket som placerat dessa instruments stadganden i ett globalt och afrikanskt sammanhang. Detta bidrag noterar och utgör ett tillägg till den uppsjö av litteratur som redan skrivits av experter på barns rättigheter. Det lägger särskild vikt på en av de mest känsliga rättigheterna som barn tillerkänts, nämligen artikel 12 i barnkonventionen och artikel 4(2) i den afrikanska barnstadgan som skyddar barns rätt till deltagande. Särskilt forskningen kring barns rätt till deltagande är fortfarande i startgroparna i Afrika och detta bidrag utnyttjar den olyckliga lucka som skapats av denna begränsade forskning. Författaren medger att denna brist på forskning kan bero på mångfalden av kulturer och uppfostringsmetoder i Afrika. Detta bidrag hävdar också att den begränsade tillämpningen av barns rätt till deltagande i beslutsprocesser inom familjen förstärks av den starka ställning som föräldrarnas skyldigheter och rättigheter har i Afrika.

Författaren introducerar staten som en isbrytare i familjeomgivningen för att skydda barnets bästa framförallt i fall där beslut som tas i beslutsprocesser inom familjen, med eller utan barnets deltagande, inte är i barnets bästa intresse. Författaren motiverar statens inblandning i familjen med att det inte existerar något förhållande mellan barn och föräldrar utan staten, eftersom staten är källan till den lagstiftning som etablerar dessa förhållanden. För att demonstrera detta introducerar författaren en balansmodell för att bäst definiera statens, föräldrarnas och barnets roll i beslutsprocesser inom familjen.

Denna avhandling är indelad i två delar, om än inte uttryckligen. Del ett består av kapitel två, tre och fyra. Dessa kapitel tillhandahåller den kontextuella bakgrunden till det rättsliga skyddet av barns rätt till deltagande. Varje kapitel är utformat så att det bygger på det föregående kapitlet medan arbetet utvecklas. Framförallt kapitel fyra ligger mellan dessa två delar, då det strävar till att koncist porträttera de olika former av praktiskt (rättsliga och politiska ramar) och institutionellt stöd som konventionsstaterna tillhandahåller för att stöda, främja och rättsligt pröva frågor som rör deras mandat att befärja barns rätt till deltagande i allmänhet och i synnerhet i beslutsprocesser inom familjen. Detta sker med hjälp av klassiska exempel från Sydafrika och Kamerun (motiveringen till avgränsningen tillhandahålls i den första paragrafen i kapitel fyra). Avhandlingens andra del bygger på den kontext som getts i den första delen och består av kapitel fem, sex och sju. Dessa kapitel kompletterar varandra och är avgörande för

det sammanhang som diskuterats i de tidigare kapitlen. Kapitel fem analyserar till exempel statens och föräldrarnas roll i att ge barn utrymme och tid att delta i beslutsprocesser inom familjen och att ge deras åsikter vederbörlig vikt. Kapitel sex behandlar dessa roller ifråga om barns rätt att delta i beslut som rör deras hälsa och medicinska frågor och kapitel sju introducerar en balansmodell för att möjliggöra bättre och mer omfattande uppnående av barns rätt att delta i beslutsprocesser inom familjen.

Chapter One

INTRODUCTION

1. Background

It is probably safe to hold that the inclusion of the right to participation in a children's rights treaty is perhaps the strongest signal of hope and intent by the international community to not only grant children 'rights' but to also grant them the opportunity to have a view in the enjoyment of their rights. At the global level, this right has been given legal context through the provision of article 12 of the CRC and, at the African regional level, through article 4(2) of the ACRWC. Reading both provisions for the first time, one is quickly drawn to the fact that children's right to participation is not a stand-alone right, it is in fact a cluster of rights,¹ more so because its comprehensive interpretation and understanding spills over to include sister provisions such as children's right to freedom of expression and children's right to have their best interest given paramount consideration in any matter that concerns them.

Its relationship with other rights portrays it as a binding force, as a right that is seated right at the epicentre of the broader structure of child law jurisprudence. It could also be looked at as a right which does not only grant children access to other rights but also ensures that they are involved in the implementation of their rights. Indeed, Freeman, writing in 1996, regards children's right to participation as the kingpin of children's rights jurisprudence.² Parkes, in 2013, portrays it as a perfect fit in enabling children to share their views on key issues such as a child's health and education.³ However, despite these glorious depictions it is worth noting that other scholars presented have different perspectives. For instance, Sloth-Nielsen in 2008 classified it as something of a fashion item on the children rights agenda⁴ and Lynch, in 2002, branded it as a right that assigns children with a daunting task.⁵ A point worth noting is that these

¹ See chapters two and three below for further analysis on these related rights.

² M Freeman 'The importance of a children's rights perspective in litigation' (1996) 2(4) *Butterworths Family Law Journal* 84 - 90.

³ A Parkes *Children and international human rights law: The right of the child to be heard* (2013).

⁴ J Sloth-Nielsen 'Seen and heard? New frontiers in child participation in family law proceedings in South Africa' (2009) 2 *Speculum Juris* 1.

⁵ N Lynch 'Restorative justice through a children's rights lens' (2010) 18(2) *International Journal on Children's Rights* 179.

diverging perspectives simply go far to confirm the complicated nature of this right – both in its interpretation and implementation. This thesis regards it as new wine poured into an old bottle.

Generally, children’s right to participation, as portrayed throughout this thesis, is a crucial but ambitious right that might and might not be (comprehensively) available to children. Despite it being more than 25 years since both the CRC and the ACRWC were adopted, it is not difficult, especially through the lens of children’s right to participation, to note that these treaties have not been comprehensively understood and implemented. One other reason and what also forms the crux of this thesis is the fact that this right, unlike some other rights in both treaties, requires implementation both in the public and private spheres. Over the years, a plethora of research has concentrated on facilitating its interpretation in the public sphere, with very little focus on the private sphere, specifically the family environment. Some of these contributions have been analysed below in the literature review section and further in the chapters below.

2. Problem statement

Children’s right to participation is, amongst others, one of the highlights of both the CRC and the ACRWC. Jointly, both instruments are and remain a medium for the realisation of children’s rights in Africa. Other mediums that also highlight this right and likewise are applicable to children have been sporadically considered in the chapters below. Worth noting at this stage, though, is the fact that the inclusion and/or protection of children’s right to participation as a justiciable right in these instruments indicates a strong dash of hope that the right will transcend beyond the statement of legal rhetoric. Subsequently, a comprehensive understanding of what exactly constitutes children’s right to participation in Africa would somehow require a thorough analysis of this right as it applies to children.

Sadly, the commitment and participation of children in statutory child protection systems in most African countries continue to receive narrow theoretical and policy attention. As demonstrated below, although most states have made attempts to incorporate children’s right to participation in national legal and policy instruments, through which they have committed to protect and promote a child’s right to participation amongst all stakeholders within the child protection system, it is acknowledged that the system in most African countries, as also displayed sporadically below, lack a consistent framework for capturing their opinions in the development of policy, law, services and practice.

It is, therefore, obvious that despite the frequent violations of children's right to participation, extant in Africa generally, there has not been much research on the implementation (as has been the case in Europe, for instance) in dissecting this crucial children's right, especially in family decision-making processes that affect their well-being in Africa.⁶ Such a drought of literature and research extensively weakens the level of awareness of the critical need to pay particular attention to this right as it applies to children. It is this gap that this thesis intends to analyse, with specific and thorough examination of children's participation in the private space – the family. The rationale for this interest (family) is influenced by the specific notion of, and respect for, the role families play at the African level in the upbringing of a child - also reflected in several provisions of the ACRWC and the CRC.

3. Research questions

The underlying question which this thesis wishes to answer is to what extent children's right to participation is protected both in international, African and national legal and policy frameworks. It also wishes to answer questions concerning the applicability of such legal provisions within the family, especially during decision-making processes on matters concerning a child. Similarly, this thesis intends to answer other related questions which include:

- a) To what extent is childhood conceptualised and understood in typical African ideologies?
- b) Is there, legally or otherwise, any 'special' African concept of family?
- c) Do children have a right to participate in family decision-making processes on all matters that concern them and to what extent, especially taking into consideration a child's age, should this right be applicable?

⁶ Most of the literature I have reviewed thus far has focused on the situation in specific European countries and the CRC and very little on Africa and the ACRWC. For instance, see H Matthews & M Limb 'The right to say: The development of youth councils/forums within the United Kingdom' 1998 *The Royal Geographical Society*; A Ben-Arieh 'Where are the children? Children's role in measuring and monitoring their well-being' (2005) 74 *Social Indicators Research* and A Ben-Arieh 'The child indicators movement: Past, present, and future' (2008) 1(1) *Child Indicators Research* 3–16.

- d) Is a child's age important in the decision to be included or not to be included in a family decision-making process, and is it equally important in ascertaining the weight given to a child's opinion expressed on a matter which concerns him/her?
- e) International law, African regional law and several African national laws recognise that children do have a right to health – in the context of this thesis, does a child have a right to participate in a health-related family decision-making process on a matter which concerns him or her and to what extent should a child's opinion be taken seriously and when can it be avoided?
- f) Do parents and other adults have a responsibility to help, to ensure a clear message and comprehensive information for a child, and to ensure better quality of a child's participation and decisions?
- g) Following from (question e and f) in case such engagement fails or is not favourably executed in the best interests of the child, should state intervention into the private space of family decision-making processes be encouraged?

These are the main questions which this thesis intends to address. Other minor questions have been raised and answered sporadically as the chapters unfold.

4. Objectives of the study

This thesis takes the view that through the adoption of human rights instruments, and in particular the CRC and the ACRWC, and further domestication of these instruments, African member states had in mind the best interests of the child and the goal to effectively realise their rights in Africa. Generally, as noted from the questions above, the thesis aims at uncovering the role of the state and parents in protecting and promoting children's right to participation in the private space. The study also intends to test the effective implementation of this right alongside children's right to health and access to medical treatment – specifically, the thesis wishes to achieve the following goals:

- h) Show that children are generally entitled to be given satisfactory special treatment and consideration with regard to the enjoyment of their right to participation, especially in issues concerning them directly;
- i) Explore the relevant legislative and other domestic legal guarantees in Africa in general, with a vision to assess the extent to which they conform to international human rights standards for children with regards to their right to participation;

- j) Analyse the centrality of children's right to participation as protected in both the ACRWC and the CRC to include family decision-making processes, analyse the strength and limits of parental authority; recommend a stronger role of the state through state (agencies) intervention;
- k) Examine practical situations through case law, to weigh the extent to which children have participated in decision-making processes within the family and precisely in relation to their right to health and whether they are consonant with current norms of human rights as in (b) above, and
- l) Propose a model through which children could be involved and due weight given to their views in family decision-making processes.

It should be noted that throughout this thesis, the analyses provided on the issues questioned are not intended to suggest the complete collapse of all existing related practices, ideas, institutions, legal and policy frameworks. Rather, the prime intention is to highlight the dynamics of one complex right intended to contribute to children's individual and/or collective freedom and their right to be involved in shaping their own well-being. In summary, this thesis is premised to encourage the gritty protection, promotion and fulfilment of children's right to participate in family decision-making processes. It aims to encourage the synergy in the interest of legitimising children's rights and parental responsibilities, authority and rights, and also, to investigate the role of the state in regulating religious, cultural and political practices that could affect a child's upbringing. Lastly, this thesis affirms the positive place of a child's participation in all matters that concern him or her within the family setting.

5. Significance of the study

The brief for this thesis is to analyse the current legal and policy framework extant in Africa and the practice around children's participation in Africa, and specifically in family decision-making processes in order to underline themes and issues from this context which can assist in the advancement of the implementation of this crucial children's right especially in the family. However, currently it is difficult to provide a synopsis of the practice across Africa, as in some cases this right has been implemented in a partial and intermittent fashion, in most cases influenced by local custom. Certainly, the lack of in-depth research on this subject in particular, and the need to better understand the various roles that children play in society are critical.

However, that does not repudiate the significance of this right both to children and their proper transition from childhood to adulthood, their relationship with other human beings and a candid confirmation of their ability to have a say in both the claiming and enjoyment of their human rights. At the global level, 2017 marks the end of the UN's 15-year plan on children's rights adopted in 2002 during the first ever UN special session on children's rights after the adoption of the CRC. The coincidental overlap of the end of this 15-year plan and the defense of this thesis in 2017 makes this thesis timely and crucial. Also, this study will be significant as it will, from an overview of available literature, legislation and case law, provide an in-depth analysis in the area of children's right to participation at the African regional level with specific focus on their right to health.

6. Literature review

The background for this research is the growing and continuously expanding literature on children's rights, particularly strong from the last decade of the 20th Century to date. Generally, since the adoption of both the CRC and the ACRWC much has been written with regard to the recognition and enforcement of children's rights. Similarly, much research has been conducted on the specific aspects of the four guiding principles of children's rights.⁷ As a result, this review only affords a succinct outline of some of the pertinent work already done in the area, with specific focus on children's right to participation, identifying in the process some of the limitations of the existing literature which, in turn, form the justifications for this thesis. At this point, the literature outlined is not comprehensive but the review process is continuous throughout this thesis, as other pieces of literature are introduced as the thesis unfolds.

The literature reviewed has been obtained from primary and secondary sources. The primary sources comprise authoritative records of law made by law-making authorities on children's rights and with focus on or relation to the rights associated to a child's right to participation. At the international level, there is a plethora of literature reflecting on such subject matters as the evolution of children's rights, the enhancement

⁷ These include: Non-discrimination, Best interests of the child, Right to life, survival and development, Respect for the views of the child.

of the CRC, and the nature of the responsibilities it provokes.⁸ However, some contributions have focused on analysing the specific rights embedded in the CRC, such as the right to participation.⁹ Even though it could be argued that such literature has dealt with the subject this study intends to cover, it should however be noted that most of the analyses are strictly based on experiences in Europe and the implementation of the CRC there. The African experience is passive and lacks in-depth analysis.¹⁰

At the African regional level, since the adoption of the ACRWC and the subsequent creation and appointment of the African Committee of Experts on the Rights of the Child, the ACRWC has benefited from a massive amount of research geared towards tracing its evolution,¹¹ analysing the effects of the transition between the then Organisation of African Unity (OAU) and the African Union (AU),¹² enriching its specific rights and critiquing its objectives.¹³ Some have focused on strengthening children's right to participation within some AU structures such as New Partnership of

⁸ See, for example, G Van Bueren *The international law on the rights of the child* (1995) 136; MS Pais *The Convention on the Rights of the Child* (1997) *United Nations Manual Human Rights Reporting Under Six Major International Human Rights Instruments* 427; Ben-Arieh (n 6 above); H Matthews & M Limb (n 6 above); R Wallace *International human rights text and materials* (2001); Budd *et al* 'Clinical assessment of parents in child protection cases: An empirical analysis' (2001) *Law and Human Behavior* 93-108; E Fuchs 'Children's rights and the global civil society' (2007) 43(3) *Comparative Education* 393-412; J Sloth-Nielsen 'The ratification of the United Nations Convention on the Rights of the Child: Some complications for South Africa' (1995) 11 *South African Journal on Human Rights* 401-420; G Melton & B Wilcox 'Children's law: Toward a new realism' (2001) 25(1) *Law and Human Behavior* 3-12; and D Reynaert 'A review of children's rights literature since the adoption of the United Nations Convention on the Rights of the Child' (2009) 16 *Childhood* 518-534.

⁹ See for example, G Lansdown *Can you hear me? The right of young children to participate in decisions affecting them* (2005); I Coyne 'Children's participation in consultations and decision-making at health service level: A review of the literature' (2008) 45(11) *International Journal of Nursing Studies* 1682-1689; G Lansdown 'The realisation of children's participation rights' in A Percy-Smith and N Thomas (eds) *A Handbook of children and people's participation: Perspectives from theory and practice* (2010) 11-23; I Coyne & M Maria 'Children's participation in decision-making: balancing protection with shared decision-making using a situation perspective' (2011) 15(4) *Journal of Child Health care*.

¹⁰ See for example, Parkes (n 3 above) 113.

¹¹ A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the child and the African Committee of Experts: raising the gauntlet' (2002) 10(2) *International Journal of Children's Rights* 181.

¹² R Murray *Human Rights in Africa: From OAU to the African Union* (2004).

¹³ R Gose *The International Charter on the Rights and Welfare of the Child* (2002); T Kaime *The African Charter on the Rights and Welfare of the Child: A Socio-legal perspective* (2009); D Olowu 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10(2) *The International Journal for Children's Rights* 127-136; UE Ofodile 'The Universal Declaration of Human Rights and the African child today: Progress or problems?' (2010) 25(1) *American University International Law Review* 37-76 and T Kaime 'The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections' (2005) 5(2) *African Human Rights Law Journal* 221-238.

Africa's Development (NEPAD).¹⁴ The author also considers some literature analysing the participation of children in countries such as South Africa,¹⁵ but most of the papers, though substantive, narrowly analyse this key children's right as it applies from the angle of children's participation in family decision-making processes.

7. Research methodology and materials

The research method adopted in this thesis to respond to the questions raised and to meet the objectives set above, is unique. It is based on a collection of legal and other related social science methods. It is multidisciplinary, as it is analysed through the works of earlier contributors on related issues. Indeed, in examining children's right to participation in Africa, the multidisciplinary interpretative approach employed by this research helps to answer questions on issues which are beyond the legal context. For example, the author adopts, from sociology, the study of society as a concept and how the society in which a family, for example, originates or resides, shapes the behaviour of the members or ideologies on which a family is structured.¹⁶ The interrelation between sociology and law has been established through the studies of socio-legal concepts which, according to Cotterell, is a rewarding combination as through socio-legal studies, key legal terminologies intended to 'shape' society or family are analysed in a societal context and their practicality or functionality are examined.¹⁷ Also, because the author deals with and highlights issues concerning typical African cultural and religious ideologies, this thesis also makes use of anthropological concepts, such as socio-cultural anthropology. This concept enables the author to understand and analyse a number of cultural patterns and ideologies and how they contribute to the general understanding and application of children's right to participation in the family in particular, through the interpretation of childhood.¹⁸

¹⁴ B Mezmur & J Sloth-Nielsen 'Listen to us: Arguing the case for child participation in NEPAD' (2009) 17 *African Journal of International and Comparative Law*.

¹⁵ S Moses 'Children and participation in South Africa: An overview' (2008) 16(3) *International Journal of Children's Rights* 327-342.

¹⁶ See, for example, T Cagun *et al. Introduction to sociology* (2006) 7. In their book, they maintain that sociology is the study of 'human social life' and that sociology as a social science has several sub-branches which range from the analysis of communication strategies to the understanding of how the world works through its development of ideologies.

¹⁷ R Cotterrell 'Why must legal ideas be interpreted sociologically?' (1998) 25 *Journal of Law and Society* 171.

¹⁸ F Cloak, 'What is Anthropology?' (1968) 51(5) *The High School Journal* 195-202.

The choice of this collection of methods through the lens of a collection of methods is based on the fact that it is possible that a comprehensive understanding of what constitutes meaningful participation and the right to participation in general, necessitates the interpretative methods of other disciplines. For example, anthropology, sociology and political science have been identified in this thesis as key disciplines that could help strengthen legal provisions. This is also supported by the fact that a purely formal legal or programmatic approach is not sufficient to achieve children's right to participation, for example in the family, especially because children are not the heads of families or main deciders on the ideologies on which most family beliefs are structured. Rather, socially and culturally constructed differences between a child as a member of a family and a member with the right to be involved in family decision-making processes in all matters concerning them must be analysed beyond the law. Indeed, the practical guarantee of the right to participation generally transcends beyond legalistic ideology and practice.

The multidisciplinary interpretative approach which in this case will be a combination of all the methods highlighted above, therefore, supplements the understanding and interpretation of children's right to participation and provides the opportunity to first define its core knowledge, identify and uncover deeper layers of human behaviour especially in the appreciation of a child's capacity to participate in a family decision-making process. There is no specific section in this thesis which decodes these human behaviours, because that is not the strength of the author. However, sporadically, for example, through the works of legalists,¹⁹ sociologists,²⁰ and anthropologists,²¹ the author is able to arrive at some of the conclusions drawn in this

¹⁹ For example, Kaime, (n 13 above); Lloyd (n 13 above); L Lundy 'United Nations Convention on the Rights of the Child and child well-being' in A Bien-Arieh *et al.* (eds) *Handbook of child well-being* (2014) 2439-2462; J Eekelaar 'The role of the best interest's principle in decisions affecting children and decisions about children' (2015) 23(1) *International Journal of Children's Rights* 3-26 and E Munro 'Children, Family and the State: Decision-making and Child Participation. Nigel Thomas' (2002) 29(4) *Journal of Sociology & Social Welfare* 166 169.

²⁰ For example, GK Nukunya *Tradition and change in Ghana: An Introduction to sociology* (2003); A Twum-Danso 'Reciprocity, respect and responsibility: The 3Rs underlying parent-child relationships in Ghana and the Implications for Children's Rights' (2009) 17(3) *International Journal of Children's Rights* 415-43. See other but similar examples further afield; R Richter & U Zartler 'Children participating in family decisions' (2011) 32 *Revista de Cercetare si Interventie Sociala* 7-24.

²¹ RK Hitchcock 'Indigenous children's rights and well-being: Perspectives from Central and Southern Africa' (2013) in DJ Johnson *et al* (eds) *Vulnerable children: Global challenges in education, health, well-being, and child rights* 219-223 and 225-232; RK Ame 'Traditional religion, social structure, and children's rights in Ghana: The making of a *trokosi* child, in DJ Johnson *et al* (eds) *Vulnerable children: Global challenges in education, health, well-being, and child rights* (2013) 240-252.

²¹ Kaime (n 13 above).

thesis. Again, the reliance on these disciplines is justified as, for example, Freeman acknowledges and attests that it is “sensible to move from law to the social sciences (since, after all, law seeks to regulate society, so it had better understand it) and then to the humanities (since law, and especially human rights law, deals with human beings, so it had better understand them)”.²² Succinctly, this method is crucial as it provides, as seen in this thesis, a concise blend between participation from a human rights, legal perspective and related disciplines.

Within its multidisciplinary method, most of this thesis is tailored and dominated by legal methods of research – based strongly on the law in context - legal analyses of existing laws and practice related to decisions made for a child and/or by a child in matters concerning him or her. Legal analysis is the primary method employed. Significantly, such analysis is applied systematically, especially as the author attempts to reflect on the holistic approach of children’s participatory rights, and the specific context of these rights in family decision-making processes on matters that concern children. The systematic nature of this method is facilitated by analysing legal instruments and legal case reviews (international, regional and domestic). Within this legal approach, the author also adopts a comparative perspective which allows him to be critical or analytical about the rules of the subject and to ascertain facts that emanate from thorough evaluation of materials under comparison.

The materials used are obtained from both primary and secondary sources. The primary sources consist of authoritative records of the law made by law-making authorities, such as international and regional instruments on children’s rights with specific focus on children’s right to participation and those related to rights associated with participation. Legislation (including national Constitutions, child statutes, and related legal instruments which also canvass the specific issue of child participation), judicial decisions (both binding and persuasive authorities), and resolutions of the African Commission on Human and Peoples’ Rights (ACHPR) on children’s participation, as well as those of the Committee on the CRC²³ related to Africa, Inter-American and European perspectives are consulted and analysed to give the thesis a broader analysis of this right and a balance to the comparative approach of this thesis.

²² M Freeman ‘On the interactions between law and social science in the understanding and implementation of human rights’ in F Viljoen (ed) *Beyond the law: Multi-disciplinary perspectives on human rights* (2012) 4.

²³ The Committee on the CRC is a body of independent experts that monitors the implementation of the CRC by its State parties. It also monitors the implementation of two optional protocols to the CRC, on involvement of children in armed conflict and on sale of children, child prostitution and child pornography. See generally, <http://www2.ohchr.org/english/bodies/crc/> for a comprehensive description of the duties of this Committee. [accessed 13 January 2014]

State reports to human rights treaty bodies, such as the United Nations Human Rights Council, Committee on the CRC and the concluding observations on the reports are also consulted. Secondary sources comprise all the materials related to children's rights in general in Africa as well as worldwide, published or unpublished. These include books, papers, reports, journal articles, newspaper articles and internet sources.

8. Limitation of the study

The research methodology adopted in this thesis, as indicated in the sub-section above, will assist the author in analysing human rights to participation, as it applies to all children and, as prescribed in the CRC and the ACRWC and further expanded in the Committee on the CRC's GC number 12, without limitation to age. The extent to which the research methods identified above will assist the author, is not limited to the contextualisation of children's right to participation only. They will also be critical in enabling the author to understand the practical aspects of the implementation of the right in a family decision-making context especially in health-related decisions.

This thesis agrees with and supports the no age limit stance of both children's rights treaties because, practically, children of all ages are capable of forming and expressing views in several ways. Indeed, for example, little babies speak a peculiar "language" and adults or parents who can interpret it can provide suitable and sensitive care for the child.²⁴ The no age limit is imposed on children's right to participation and the Committee on the CRC discourages the introduction of any kind of limitation – including disability²⁵ – either in law or in practice that restricts children's right to participation in decision-making processes.²⁶

An inclusive appraisal of children's right to participation, as promoted and protected by the CRC and the ACRWC, inevitably requires a detailed examination of each and every aspect related to children's right to participation ranging from, but not limited to, a rights-based perspective to societal influenced issues such as fashion and trends. However, this thesis is selective; it is limited to family decision-making processes on health-related issues, the role of parents and the state to facilitate children's involvement in such processes. The thesis is also innovative, as it introduces a model

²⁴ Lansdown (n 9 above).

²⁵ See generally, Committee on the CRC, GC No 9 *The rights of children with disabilities* UN doc CRC/C/GC/9 (2006).

²⁶ As above.

which is narrowed and specifically prescribed to facilitate children's participation in family decision-making processes on all matters that concern them. Other aspects, such as piercing and other grey areas, with some health implications but influenced by trends and - probably - childhood adventurous tendencies, will be considered as well. The *raison d'être* for this limitation is based on the special role the family plays and occupies in the general implementation of children's rights and the well-being of children in Africa.²⁷

9. Chapterisation

This thesis is divided into two parts, although not expressly. Part one consists of chapters two, three and four. These chapters provide the contextual background to the legal protection of children's right to participation. Each chapter is tailored to feed the preceding chapter as the work unfolds. Chapter four in particular, is in the middle of the two parts, as it attempts, succinctly, to portray, thanks to classical examples from South Africa and Cameroon (reasoning for limitation provided in the introductory paragraph of chapter four), the various practical (legal and policy frameworks) and institutional support provided by state parties to support, facilitate, and redress any issues related to their mandate to promote children's right to participation in general and specifically in family decision-making processes. The second part of this thesis feeds from the context laid in the first part and consists of chapters five, six and seven. These chapters are complimentary to one another and crucial to the context discussed in the earlier chapters. For example, chapter five analyses the role of the state and the parents in giving children the space and time to participate in family decision-making processes and to give their view due weight. Chapter six builds on such roles in the context of children's right to participate in health and medical decisions concerning them and chapter seven introduces a balance model to enable better and comprehensive attainment of children's right to participate in family decision-making processes in Africa.

²⁷ See for example art. 11 of the ACRWC.

Chapter Two

TRACING THE NARRATIVES OF CHILDREN'S RIGHT TO PARTICIPATION IN AFRICA

1. Introduction

The perception of participation, as briefly indicated in the introductory chapter, is based on opinion seeking, taking initiative and contributing to a decision-making process in certain instances on issues that concern a particular person directly or indirectly. Appelstrand holds that participation is about finding a balance in miscellany.¹ It is not just a means but also a classic means to involve those concerned. The absence of those concerned in a decision-making process on issues that concern them could be regarded as a flagrant violation of their human rights to participation which is strongly protected by several international human rights instruments, such as the ICCPR and CESC. Article 25 of the ICCPR, for example, highlights elements of participation for “every citizen” in making decisions on matters that concern them directly or indirectly through freely chosen representatives. This provision is critical and applies to any form of government that a state subscribes to.

It obligates member states to espouse legislative and/or other acceptable measures as it deems fit and necessary in according its citizens a tangible opportunity to fully enjoy the rights protected in the ICCPR in general and article 25 in particular.² This provision, of course, does not have any limitation or restrict certain groups of people and, in effect, also involves children. However, it is generally implemented especially around political issues such as voting to exclude children, especially as national laws on voting rights have been limited by age which in most cases is beyond childhood. Indeed, at its widest and most generous level, participation encompasses involvement in activities – and there are many different levels of participation – monitored and regulated considerably

¹ M Appelstrand ‘Participation and societal values: The challenges for lawmakers and policy practitioners’ (2002) 4 *Forest Policy and Economics* 281–290.

² Committee on the CCPR, GC No 25, *The right to participate in public affairs, voting rights and the right of equal access to public service* (1996) UN doc CCPR/C/21/Rev.1/Add.7 para 1.

by expectations and relations within society.³ Thus, identifying children as benefactors of this right through its protection in both the CRC and ACRWC has been well received by children's rights advocates. Alderson, for example, regards children's right to participation as the most important right prescribed to children⁴ and Lloyd and Emerson, in 2016, describe it as a central right to the realisation of other children's rights.⁵

At the African level, why, despite ratifying most of these instruments and in particular the CRC and the ACRWC, most African states struggle and, in some cases, selectively implement provisions of these instruments is concerning. Perhaps the most difficult provision yet to be implemented to an accepted standard, despite its centrality in children's rights, is their right to participation. Also, perhaps the level of implementing this right is worst at the family level – to some extent this is justified by the fact that at the family level, parents are key duty bearers who generally consider children as incompetent to effectively participate in all matters concerning them during family decision-making processes. The reasons for this reluctance in implementing children's right to participate in family decision-making processes are many and, in most cases, they are rooted in cultural and traditional perceptions of children and/or childhood within most communities in Africa. Some of these perceptions range from the reference of childhood as an “invisible stage” or “transitory stage”, to specific reference to children as “irrational beings”, and “leaders of tomorrow”. It is tempting to deduce from these perceptions that children are not completely recognised as autonomous human beings or as persons capable of making or contributing substantively to decision-making processes on issues that concern them. In fact, these tags are not specifically African as Parkes, in 2013, writing on children's rights to participation from an international law perspective, laments that for a very long time now children have been viewed as “invisible members of society”.⁶

Inevitably, this perception has an impact on the way in which power functions in adult-child relationships and bears the potential of limiting the credibility of children and/or in some cases denying them opportunities to express their views in the eyes of

³ AB Smith 'Interpreting and supporting participation rights: Contributions from sociocultural theory' (2002) 10(1) *International Journal of Children's Rights* 74.

⁴ See generally, P Alderson *Young children's rights: Exploring beliefs, principles and practices* (2000).

⁵ K Lloyd & L Emerson '(Re)examining the relationship between children's subjective wellbeing and their perceptions of participation rights' (2016) *Children's Indicators Research* 1-18. See also, M Freeman 'The importance of a children's rights perspective in litigation' (1996) 2(4) *Butterworths Family Law Journal* 84-90.

⁶ A Parkes *Children and international human rights law: The right of the child to be heard* (2013) 1.

adults or parents and the law.⁷ Such limitation could strain human relationship and, in some cases, destroy families and possibly weaken democratic processes and/or development within a state. Giving children the opportunity to participate, especially in decision-making processes, on issues that concern them exposes them to a learning curve that has an undeniable potential of absolute necessity to the continued existence and development of every society.⁸ It is therefore critical that adults or parents and the law adopt standards that promote the rights of children to participation especially in family decision-making processes. Such legal provisions, should also emphasize the fact that children's views must be taken seriously, with the commitment of valuing them as complete human beings "now" rather than later.⁹

It is probably in the spirit of classifying and recognising children as full human beings with the ability to make their own decisions and/or to contribute as partners in making decisions on issues that concern them that the UN adopted the CRC in 1989. The CRC is and remains a ground-breaking human rights instrument, not only because it is the first to codify children's rights,¹⁰ but also because to date it is the only UN human rights instrument that went into force within months after its adoption by the UN General Assembly¹¹ and has received almost universal ratification.¹² This phenomenal normative unanimity endorses a collective universal acceptance of children's rights codified in the CRC and also an approval that the rights of a particular group of people

⁷ As above.

⁸ MG Flekkøy & NH Kaufman *The participation rights of the child: Rights and responsibilities in family and Society* (1997)19.

⁹ G Lansdown *Can you hear me? The right of young children to participate in decisions affecting them* (2005) 1. See also, G Lansdown 'The realisation of children's participation rights' in A Percy-Smith and N Thomas (eds) (2010) *A Handbook of children and people's participation: Perspectives from theory and practice* 11.

¹⁰ Prior to the adoption of the CRC, children's rights were protected by the then League of Nations, which adopted the *Declaration on the Rights of the Child* 1924 (available at <http://www.un-documents.net/gdrc1924.htm> [accessed 26 December 2013]). The UN GA adopted the new Declaration on the Rights of the Child in 1959 (available at http://www.unicef.org/barbados/spmapping/Legal/global/General/declaration_child1959.pdf [accessed 26 December 2013]), which was more precise and wider in scope regarding the protection of children. In its Preamble, the latter Declaration stated that "the child, by reason of his physical and mental immaturity, needs special safeguards and care, including appropriate legal protection, before as well as after birth." Both Declarations were non-binding.

¹¹ Within 9 months only – the Convention on the Rights of the Child, adopted 20 November 1989 (entered into force 2 September 1990) GA Res. 44/25 (1989), UN doc. A/RES/44/25 (1989).

¹² With a total of 196 ratifications to date, the CRC is the only international human rights instrument that boasts this number of State Parties on its ratification list. For a full status of ratification, see http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en [accessed 17 October 2013]. See also KA Bentley 'Can there be any universal children's rights?' (2005) 9(1) *International Journal of Human Rights* 109.

are best protected, implemented and monitored in one instrument.¹³ In the same spirit of the overwhelming acceptance of the CRC and the tremendous impact that this instrument had/has on ensuring children's rights in general, the member states of the then Organisation of the African Union (OAU), met and agreed on the legal need and importance of protecting and enhancing the rights and welfare of children in Africa,¹⁴ and adopted the ACRWC in 1989.¹⁵ Unfortunately, unlike the CRC, the ACRWC was not received with such rush. It took almost 10 years for it to be enforced and so far, has been ratified by 47 out of Africa's 54 states.¹⁶

Although some countries are still to ratify the ACRWC, the impact of this instrument joint with the CRC cannot be overemphasised. In fact, it cannot be doubted that the renewed thinking of promoting and protecting children's rights within African states began with the adoption and ratification of these two key human rights instruments. As such, these instruments are critical and progressive instruments in the development of the constantly evolving children's rights jurisprudence in Africa for many reasons. From a broad spectrum, both instruments uphold the civil and political rights as well as the socio-economic and cultural rights of children. Also, both instruments have contributed significantly to a paradigm shift from the traditional perception of children as young human beings in need of help and care "welfare based approach" and childhood as a "passing stage of life" to a "holistic rights based approach, where all children have a right to be involved in all decisions affecting them".¹⁷

¹³ T Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009) 1.

¹⁴ B Thompson 'Africa's charter on children's rights: A normative break with cultural traditionalism' (1992) 41(2) *The International and Comparative Law Quarterly* 433. See also, art. 46 of the ACRWC, which assures that the interpretation of the ACRWC "... shall draw inspiration from International Law on Human Rights, particularly from the provisions of the African Charter on Human and Peoples' Rights, the Charter of the Organization of African Unity, the Universal Declaration on Human Rights, the International Convention on the Rights of the Child, and other instruments adopted by the United Nations and by African countries in the field of human rights, and from African values and traditions".

¹⁵ See, generally, http://www.bayefsky.com/pdf/crc_ratif_table.pdf [accessed 20 October 2013]. Contrary to the CRC, the ACRWC took a longer time to be enforced, as at November 2009, only 47 out of 53 States have acceded to or ratified the Charter. See, generally, http://www.africa-union.org/Official_documents/Treaties_%20Conventions_%20Protocols/List/African%20Charter%20o [accessed 8 July 2011]. Also, it should be noted that the idea of protecting children's rights in Africa was not introduced by the ACRWC or even the CRC for that matter. Prior to both instruments in Africa, the first Declaration on the Rights and Welfare of the Child was adopted by the Assembly of Heads of State and Governments in 1979 and of course not forgetting the UN Declaration on the Rights of the Child 1959 (n 7 above). Also, there had been a number of Declarations and Resolutions adopted by the then OAU organs concerning children, specifically related to development, health and children affected by armed conflict.

¹⁶ The list of countries that have ratified is available at <http://www.achpr.org/instruments/child/ratification/?s=ratification> [accessed 21 October 2016].

¹⁷ Parkes, (n 6 above).

Despite their similarities, there are some normative differences between the instruments that, before the adoption of the ACRWC, were laid down as reasons for the drafting and subsequent adoption of the ACRWC and now delineate the salient features of the ACRWC. From a political point of view, the then OAU decried the limited involvement of African States in the drafting process of the CRC,¹⁸ limited “meaningful African contribution” and limited “traditional values and conceptions of human rights” critical to the African child.¹⁹ From a legal point of view, there was a need to codify in a binding instrument at the African regional level the concerns that were of particular interest and crucial to the African child.²⁰ Some of the concerns identified as critical to children in Africa and narrowly protected and in some cases ignored in the CRC were, inter alia, “the situation of [...] children living under Apartheid”; disadvantages influencing female children; common practices in Africa, such as female circumcision were not clearly stated; certain “socio-economic conditions, such as illiteracy and low levels of sanitary conditions common in Africa needed more addressing”; “[t]he African conception of the community’s responsibilities and duties” was ignored; and “[t]he negation of the role of the family by the CRC in the upbringing of the child, and in matters of adoption and fostering”.²¹ However, as Viljoen correctly points out, these two instruments are not in an “oppositional but rather complimentary relationship” in the context of children’s rights protection in Africa.²²

From these instruments one could identify the significant effort and accomplishments of the working groups in constructing legal norms and recognising

¹⁸ “[B]y 1989 only nine African States had been participating in the activities of the working group” that drafted the CRC. See generally, F Viljoen *International human rights law in Africa* (2012) 392. Regarding other continents’ participation, Europe had sixty-one percent, Latin America had twenty-nine percent and in general, third world countries were poorly represented due to lack of financial resources and qualified personnel to make substantive contributions to the working group. See also, F Viljoen ‘Supra-national human rights instruments for the protection of children in Africa: The Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child’ (1998) 31 *The Comparative and International Law Journal of Southern Africa* 200.

¹⁹ Kaime (n 13 above) 2.

²⁰ Viljoen *International human rights law in Africa* (n 18 above).

²¹ For details on these issues and the drafting process of the ACRWC, see generally, LG Muthoga ‘Introducing the African Charter on the Rights and Welfare of the African Child and the Convention on the Rights of the Child’, paper delivered at the International Conference on the Rights of the Child, Community Law Centre, University of the Western Cape (1992). See also, A Lloyd ‘Evolution of the African Charter on the Rights and Welfare of the Child and The African Committee of Experts: raising the gauntlet’ (2002) 10(2) *International Journal of Children’s Rights* 181; D Olowu ‘Protecting children’s rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child’ (2002) 10(2) *The International Journal for Children’s Rights* 130; F Viljoen ‘The African Charter on the Rights and Welfare of the Child’ in AT Boezaart (ed.) *Child Law in South Africa* (2009).

²² Viljoen (n 20 above).

children's rights that were never protected before.²³ Also commendable are the mechanisms prescribed in the instruments for the effective protection and enforcement of such fundamental and procedural rights through the establishment of committees and emphasis on state duties.²⁴ These instruments are undoubtedly the catalyst for a paradigm shift in societal attitudes, traditional beliefs, laws and practices across Africa intended to undermine children's ability to reason and make decisions autonomously. Despite these remarkable efforts and the general acceptance of both instruments evident through the number of state ratification at the African regional level, one critical concern is whether African member states possess the political will to effectively and comprehensively protect and enforce these rights at national level.

1.1. Obligations of state parties

Generally, upon ratification of any international law instrument, states take on the obligation under international human rights law to implement it and children's rights are no exception.²⁵ International human rights law prescribes three forms of State obligation: to respect, to protect and to fulfil human rights.²⁶ These forms of obligation "encompass obligations of result and obligations of conduct".²⁷ The notion of results and conduct is what guides the CRC and the ACRWC in their provisions on obligations of states parties to fulfil children's rights. Under both instruments, the obligation of member states is predominantly two-fold, namely the duty to recognise children's rights

²³ See, for example, children's right to participation – art. 4(2), 7 ACRWC and 12(2) CRC; children's right to freedom of expression – art. 7 ACRWC and art. 13 CRC; children's right to freedom of thought, conscience and religion – art. 9 ACRWC and art. 14 CRC and some rights specifically protected by the ACRWC such as children's right to leisure, recreation and cultural activities – art. 12, children's right to protection against apartheid and discrimination – art. 26.

²⁴ See for example art. 26 of the ACRWC which calls on state parties to "... individually and collectively undertake to accord the highest priority to the special needs of children living under Apartheid...", for a similar position (State Duties) see for example art 19 of the CRC which calls on States "... to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence, injury or abuse ...", also see generally Part II of the ACRWC, and Part II of the CRC on the creation of Committees and their duties.

²⁵ See generally, H Steiner *et al* *International human rights in context: Law, politics, morals* (2007) 85–94, and in the specific context of children's rights, see generally, T Liefwaard & JE Doek (eds) *Litigating the rights of the child: The UN Convention on the Rights of the Child in domestic and international jurisprudence* (2015).

²⁶ See generally, Committee on the CESCR, GC No 13 *the right to education* (1999) UN doc E/C.12/1999/10 para 46.

²⁷ See generally, Committee on the CRC, GC No 16 *State obligations regarding the impact of the business sector on children's rights* (2013) UN doc CRC/C/GC/16 para 25.

and the duty to undertake necessary, appropriate and reasonable steps to enforce these rights.²⁸

Through the provisions of both instruments member states are encouraged at all times to demonstrate procedural, psychological, physical and financial urgency in executing their mandate. Also, member states are mandated to continuously revise such strategies with the prime objective of ensuring better translation and implementation, and to find best options to address the continuous rights violations children face in their communities. Specifically, children's right to participation imposes such obligation on states and mandates them to ensure and incessantly review or amend domestic legislations in order to introduce or refresh mechanisms providing children with access to appropriate information, adequate support, and if necessary, feedback on the weight given to their views, and procedures for complaints, remedies or redress.²⁹ It is imperative to note that in fulfilling such an obligation states must show trends of progressive effort in finding synergies to best realise such rights in every society within its boundaries, including the family.

Significantly, both instruments caution that "the best interests of the child" must be the prime underscoring principle driving such state efforts in protecting and enforcing children's rights.³⁰ Also of importance is the firm stance taken in the ACRWC in which it espouses a slightly stronger standard that "cannot be found elsewhere",³¹ obligating that "in all actions concerning the child [...] the best interests of the child shall be *the* primary consideration".³² The contribution made by the ACRWC in relation to the centrality of a child's best interests, is very crucial in interpreting children's right to participation at the African regional level in general and specifically within African families. This is the result of the fact that the instruments are correctly considered as complimentary and not oppositional to each other.³³ The provision, as stated in the

²⁸ See generally, art. 1 of the ACRWC and art. 2 of the CRC. See also Committee on the CRC GC No 5 *General measures of implementation of the Convention on the Rights of the Child* (2003) UN doc CRC/GC/2003/5. Both the state duties to recognise and implement will be analysed throughout this thesis especially in the context of the protection and promotion of children's right to participation.

²⁹ See generally, Committee on the CRC, GC No 12 *The right of the child to be heard* (2009) UN doc CRC/C/GC/12 para 48.

³⁰ See generally, art. 4 of the ACRWC and art. 3(1) of the CRC.

³¹ R Murray *Human rights in Africa: From OAU to the African Union* (2004) 167.

³² See, generally, art. 4 of the ACRWC. The main difference between these similar but different provisions is that while the ACRWC insists on the best interests of the child to be "the primary consideration" the CRC on the other hand insists on the best interests of the child to be "a primary consideration". The use of "the" in the ACRWC makes the primary consideration of the child emphatic and compulsory, while the use of "a" in the CRC represents a mere consideration which is optional. Murray, (n 31 above).

³³ Viljoen (n 18 above).

ACRWC, compliments the “weaker” stance in the CRC³⁴ and makes the principle of the best interests of the child an emphatic and compulsory requirement in the general interpretation and implementation of children’s right to participation at the African regional level.³⁵

In the case of states who are parties to both instruments, Lloyd holds that the provisions of the ACRWC for example are the “bare minimum that will be tolerated...” in the enactment of national laws and international agreements relating to children in Africa.³⁶ However, any national law and/or international agreement that is not in “conformity with the Children's Charter [for example] will only prevail if they are more conclusive to the realisation of children's rights”.³⁷ Notwithstanding, states who are parties only to the CRC for example are not necessarily confined only within the obligations described in the CRC especially because all African States are state parties to the African Charter on Human and Peoples’ Rights (ACHPR) and as a result, through expansive interpretation, its provisions can be applied in national courts in matters concerning children.³⁸

The attempted analysis of state obligations to ensure children’s right to participation above is not exhaustive - other aspects of state obligations will be highlighted as this thesis evolves. This section therefore only provides a foretaste of the role states are required to play in ensuring this crucial right. Also worth noting is the fact that even though state parties bear the obligation to protect, respect and fulfil children’s rights, under the CRC and the ACRWC, its implementation is the responsibility of all sectors of society which includes but is not limited to civil society, governmental and non-governmental organisations and institutions, the family and institutions of learning³⁹ and, of course, children themselves.⁴⁰

³⁴ Murray (n 31 above).

³⁵ See generally, D Chirwa ‘The merits and demerits of the African Charter on the Rights and Welfare of the Child’ (2002) 10(2) *International Journal of Children’s Rights* 157.

³⁶ Lloyd (n 21 above) 185.

³⁷ As above.

³⁸ Olowu (n 21 above) 134.

³⁹ It should be noted that the ACRWC, for example, does not make any reference to the “State” in its protection of children’s right to non-discrimination. This, therefore, implies that the obligation not to discriminate for example is binding not only on the State but also on other members of society.

⁴⁰ See generally, Committee on the CRC, GC No. 5 (n 28 above) para 1.

2. Conceptualisation of childhood

The intention of the UN, the AU and state parties to the CRC and the ACRWC to protect children's rights in Africa (in this case) is vivid through the adoption and ratification of both instruments. As indicated earlier, both instruments, cumulatively at the African level hold the highest number of ratifications received by an international human rights instrument. Indeed, at the corresponding time of writing this chapter, all African States have ratified the CRC and most of the ACRWC.⁴¹ Despite this near general acceptance of both instruments, there is still a great deal of controversy surrounding the participatory principle enshrined in both instruments. Critics have argued that children do not possess the poignant or intellectual competence needed to make sensible choices or to make a substantive contribution in a decision-making process, whereas adults have the responsibility and should paternalistically make decisions on children's behalf.⁴² Although the angle from which this argument stems is accepted based on the fact that adults are said to have a strong rational judgment on issues, the reasoning of this thesis is that the rationale for side-lining children is limited and rooted in the restricted understanding of childhood and the difference that could exist between adulthood and childhood.

The conception of childhood that most adults hold as only natural may actually be a social, historical and/or psychological construction. Indeed, Freeman asserts and articulates the need for such diverse perceptions to be merged in children's rights discourse given that these disciplines enjoy congruent interest and understanding of children.⁴³ Specifically, he points out that sociological arguments relating to the social constructionist notion of childhood will to a great extent provide a measure of clarity in unpacking most of the assumptions that adults have about the nature of children.⁴⁴ Such development is essential in not only developing the concept of childhood but also in taking the children's rights debate, especially the debate on their right to participation in decision-making processes, forward, because it allows classic trends of determining

⁴¹ This is because while every African State is a party to the CRC, seven of them (the Democratic Republic of Congo, Sahrawi Arab Democratic Republic, Somalia, Sao Tome and Principe, South Sudan and Tunisia) are not parties to the ACRWC. For a detailed breakdown of the member states to the ACRWC (n 15 above).

⁴² L Purdy *In their best interest? The case against equal rights for children* (1992) 223–241.

⁴³ M Freeman 'The sociology of childhood and children's rights' (1998) 6 *International Journal of Children's Rights* 440-442.

⁴⁴ As above 442.

the extent to which children's autonomy can be reasonable within the context of sociological findings.⁴⁵

The importance of such debate in contemporary time is justified by Ariès's assertion which locates the fact that during the Middle Ages childhood was not recognised as an important stage of human life.⁴⁶ He justifies his argument by drawing upon historical evidence such as artistic representations of children in a French miniature of the late eleventh century - during which children were merely portrayed as small human beings who possessed the expressions and features of adults. In constructing his argument, he makes a vivid analysis of historical facts which demonstrate that children were often represented in previous societies with adult-like characteristics – recognised on the similar level of competence as adults and only differentiated in size and body features. Based on his book *Centuries of childhood*, the scale of the difference that exists today between children and adults may not have existed at the same magnitude three or more centuries ago. However, he regrets that such a stance did not help the general protection that children need and the furtherance of their well-being.

Indeed, although Ariès does not entirely expunge the ideology that certain characteristics of childhood may have been recognised during the medieval era, he sustains however that childhood was not valued, and not given a distinct place in artistic work.⁴⁷ Through his work, one quickly grapples with the fact that all human beings were regarded as competent and the only difference that distinguished them was based on size and body features. Ariès's conceptualisation of childhood is extremely important in not only ascertaining the historical image of childhood but also in establishing the fact that childhood is a natural phenomenon. Archard concurs with this assertion and adds that the absence of a standardised concept of childhood in medieval times does not mean that it was completely different from what it is perceived to be today. He also argues that even though Ariès shows that there existed some similarities between children and adults that are not vividly visible today, such as the feeling for a child and an adult to be happy in similar outfits, does not verify that medieval societies lacked a concept of childhood – rather, they merely lacked our concept and the reverse is probably equally true.⁴⁸ Unfortunately, not all scholars agree with this claim.

⁴⁵ L Johnny 'Reconceptualising childhood: Children's rights and youth participation in schools' (2006) 7(1) *International Education Journal* 18.

⁴⁶ P Ariès *Centuries of childhood: A social history of family life* (1962) 28-30.

⁴⁷ As above 34-36.

⁴⁸ D Archard *Children: Rights and childhood* (1993) 19.

Unlike Archard, Cunningham, for example, in his 2005 contribution demonstrates that, like today, during the medieval period there was a clear and traceable difference between childhood and adulthood and that such difference transcended beyond size, body features and feelings to include the recognition of age differences.⁴⁹ In supporting his argument, he demonstrates that the medieval period did not only recognise *infantia* (7 years and below) as a critical and separate stage but that religious writings also encouraged parents to raise their children with love and compassion.⁵⁰ This does not only demonstrate that medieval societies may have had affection for children but that there was also a clear concept of childhood based on age difference.⁵¹

This concept of childhood (age distinguished) is what is common in recent times, as in most cases childhood has been known as “the early part of the life-course; the institutional arrangements that separate children from adults and the structural space created by these arrangements that is occupied by children”.⁵² This concept has largely influenced and shaped contemporary constructions of childhood, which enjoin that children should be protected from the cruel happenings of the adult world.⁵³ However, despite being well established and acknowledged as a group within society, children in contemporary time are easily identified through characteristics such as invisible, undefended, unprotected, incapable and immature, in essence, susceptible members of society.⁵⁴

The concept of childhood attempted above is similar to the African ideology of childhood. Contemporary African societies share particular notions of childhood – traversing birth (*infantia*) to teens and confined as a unique period of the life-course. The African conception of childhood could also be described through the African theory of the universe, which, according to Nsamenang writing in 2013, is embodied in the “circular path to human ontogenesis” entrenched in cultural norms rather than biological trends that activate them.⁵⁵ It also presumes that childhood is that stage in human life where smaller human beings are best described as incomplete human beings who are not fully competent to determine and safeguard their interests. Thus, an African

⁴⁹ H Cunningham *Children and childhood in Western society since 1500 2nd edn* (2005) 3-16.

⁵⁰ As above 22-35.

⁵¹ As above.

⁵² A James & A James *Key concepts in childhood studies* (2008) 22.

⁵³ H Hendrick ‘Constructions and reconstructions of British childhood: An interpretative survey, 1800 to the present’ (1997) in A James & A Prout (eds) *Constructing and reconstructing childhood* 34-62.

⁵⁴ See generally, James & James (n 52 above).

⁵⁵ AB Nsamenang ‘Dilemmas of right-based approaches to child well-being in an African cultural context’ (2013) in DJ Johnson *et al* (eds) *Vulnerable children: Global challenges in education, health, well-being, and child rights* 14.

notion of childhood is deep-rooted in a socio-genic progression, which recognises cultural and historical principles characterised by maturity and methodical socialisation as key components to one's ability to reasonably participate in a decision-making process.⁵⁶

Indeed, the African conception of childhood detects that key components that conceptualise childhood, such as its shape and experience, depends on how society, culture and tradition understand them. This of course stamps the fact that as society, culture and tradition evolve – which they do over time – so too might the concept of childhood.⁵⁷ Boakye-Boaten affirms and adds that the African concept of childhood transcends beyond the notion of merely an epoch in a human being's life, and should be understood as part of the social construct of every society.⁵⁸ Literally, the classification of what period of a life-course is considered as childhood has expanded and this is common across the world. Nevertheless, age classification has gained prominence and varies from continent to continent and in some cases from country to country.

At the African regional level, both the CRC and the ACRWC have set the standard and defined a child as any human being below the age of 18.⁵⁹ This is the general rule; the CRC provides an exception in cases where in a particular state legal majority is attained earlier.⁶⁰ This probably whispers the effect that in contemporary Africa, childhood should end at 18 unless under a particular law applicable to the child, majority is attained earlier.

Notably, in the case of early attainment of majority relating to a particular case, for instance the permission to vote or to drive, a child does not lose his or her status as a child. Rather, such a child is still a child and a child competent and privileged with some rights enjoyed by adults to exercise such duties as provided by the law of the state in question. This definition may call into contention different minimum ages, for example on issues related to, but not limited to sexual consent, criminal responsibility, driving,

⁵⁶ As above.

⁵⁷ For further analyses on childhood in Africa, see for example, T Kaime (n 10 above) 59–92. For general reading see also, R Boyd & P Richerson 'Culture and the evolution of human cooperation' (2009) 10(2) *The Philosophical Transactions of the Royal Society* 3281–3288.

⁵⁸ A Boakye-Boaten 'Changes in the concept of childhood: Implications on children in Ghana' (2010) 10(3) *The Journal of International Social Research* 105.

⁵⁹ See generally, arts. 1 of the CRC and 2 of the ACRWC.

⁶⁰ See art. 1 of the CRC.

employment and marriage.⁶¹ In principle since both instruments (the CRC and the ACRWC) place very little emphasis on the exact minimum age applicable to certain issues relating to children, the setting of minimum age is largely the responsibility of state parties in the national Constitutions, Acts of parliament or decrees applicable to children at national level. Indeed, several pieces of legislation in Africa have codified different age groups (some lower than 18 years of age and others above 18 years of age – for example 21 years of age) under different aspects that relate to children.⁶² Reasons for such variation in age classification are many and range from cultural, traditional, social and political factors and also in some cases even influenced by doctrines acquired from former colonial masters.⁶³

Indeed, the CRC and the ACRWC are umbrella pieces of international law applicable to the States that have ratified one or both instruments in Africa. However, the domestication of the age identified for children (18 as cut-off) at the national level has not in all instances been consistent with the CRC and the ACRWC. It is possibly due to this plurality of ways of conceptualising childhood that the Committee on the CRC opted not to limit children's right to participation in matters that concern them. Crucially, a child's ability to participate in decision-making processes should be nurtured concomitantly with their development and this has been ingrained in both the CRC and the ACRWC. Arguably, this is largely based on the belief that granting children the full capacity to participate in decision-making processes is a concept that defies

⁶¹ See also for example art. 38 of the CRC which prohibits the use and recruitment of children below the age of 15 in armed conflict or hostilities and art. 22 of the ACRWC which provides a stricter provision by prohibiting recruitment to the armed forces for all persons below the age of 18. Art. 21 of the ACRWC also require the setting of the minimum age of marriage at 18, while a similar provision is not found in the CRC.

⁶² In the case of marriage, for example, in Niger, under the Civil Code, the minimum age for marriage is 18 for boys and 15 for girls, while in Cameroon, the minimum age for both boys and girls is 21 - but sec. 52(1) of the 1981 ordinance governing Civil Status provides for an exceptional situation where a girl of 15 years or a boy of 18 years can get married under a waiver granted by the President of the republic for serious reasons. This ordinance unfortunately does not give details of instances that would warrant a waiver from the President. For a detail analyses of the dissymmetrical manifestations of the minimum age in Cameroon, see, Akonumbo, A 'Excursion into the best interests of the child principle' in family law and child-related laws and policies in Cameroon' (2010) *The International Survey of Family Law* 63-94.

⁶³ In Cameroon, for example, there is no legal age of majority applicable nationwide. In fact, in civil matters, the French Civil Code of 1804 is applicable to French Cameroon and refers to "anyone below the age of 21 a 'minor' and under the English Common law applicable to Anglophone Cameroon, the age of majority is 18 years, whilst the draft Child Protection Code defines a child as everyone below the age of 18 for electoral and criminal majority, and 21 for civil majority". For details on these inconsistencies and more, see generally, African Child Policy Forum *In the best interests of the child: Harmonising laws on children in West and Central Africa* (2011) available at <http://www.acerwc.org/wp-content/uploads/2012/05/English-ACERWC-Harmonising-Laws-on-Children-in-west-and-central-Africa.pdf> [accessed 13 January 2014].

adulthood and African ideology of the nature of childhood. However, if one assumes that childhood is a construct, as demonstrated above, and also takes into consideration marginal concepts of children as protected by international law, it could be imperative to question whether it is in the best interests of children to be excluded from any decision-making processes – especially within the family on matters that concern them.

Significantly, it would be in the best interests of the child if the age that relates principally to protection issues (for example in cases of forced marriage or recruitment as a child soldier) is set as high as possible and, on the other hand, is reduced as low as possible in connection with participation issues. That should be the case if age is used as the measuring rod to determine capacity, which this thesis is slightly against, arguing that the determinant of capacity in the case of a child should weigh more on a child's maturity than on age. The way in which childhood is contextualised currently, has a severe impact on the manner in which power operates between children and adults in society and, of course, on the allocation of the freedom that children are accorded to participate in decision-making processes especially in the private space.⁶⁴

3. The protection of children's rights to participation

The "right to participation" is not overtly mentioned as such in international children's rights law but rather, there is a general agreement that the concept is multi-faceted and applicable across a variety of activities.⁶⁵ As a result, aspects of participation can be traced through several rights protected in the ACRWC and the CRC. However, in the CRC for example, as seen below, this right is a "stand-alone" right protected under article 12 and in the ACRWC it is firstly mentioned under article 4(2) and in an almost exact wording, nature and scope under article 7 but referred to as the right to freedom of expression.

At a glance, this thesis observes that the protection of this right under the CRC is preferred, because it exerts a stronger protection. This is not only because the phraseology of the right is progressive and includes crucial caveats (the ability to form and express an opinion and the maturity and due weight consideration), but also because as a "stand-alone" right the potential of a critical legal analytical development of the normative content of the right is feasible. However, the ACRWC's article 4(2) does not offer such huge potential. This is visible in the manner in which the right is

⁶⁴ S Moses Children and participation in South Africa: Overview (2008) 16 *International Journal of Children's Rights* 331.

⁶⁵ K Winter 'The participation rights of looked after children in their health care: A critical review of the research' (2006) 14 *International Journal of Children's Rights* 85.

protected and couched under the banner of the best interests of the child. Sloth-Nielsen, writing in 2012, laments that such “second class” codification is problematic because it unfortunately shields the visibility of a right recognised as one of the four general principles of children’s rights – alongside the best interests of the child, non-discrimination and the right to life and development.⁶⁶

In hindsight, although a stand-alone protection of this right would have been preferred, this thesis reckons that the combination of both principles is not completely negative and in many ways, re-affirms the fact that they (both principles) are, rightly so, interrelated – for, it is in the best interests of the child to promote and protect his/her right to participation. In fact, Sloth-Nielsen, in a deeper consideration to her earlier assertion, reasoned that the link between children’s best interests and their right to participation as captured in the ACRWC “elevates the participation right of the child quite significantly to the role of being the beneficiary of a bearer of *party status* in legal proceedings”.⁶⁷ It is such elevated status that this thesis takes advantage of when advocating that a comprehensive recognition and implementation of what is in the best interests of a child is not limited to the public space only but also to the private space which includes the family environment. Sloth-Nielsen further correctly adds that the joint force of the best interests of the child and his or her right to participate – in family decision-making processes, for example – makes the normative context of a child’s right to participation stricter and explicit as opposed to the implicit nature in which it is captured under article 12 of the CRC.⁶⁸

Generally, despite such strong claims, it still does not defeat the fact that a stand-alone provision is preferred for reasons already stated above and because children’s rights are interrelated, there is no need to group legal provisions to justify their connection. However, it is not completely flawed as it is generally thanks to such generous linkages that the right to participation is, justly so, considered as a “cluster of rights”, because it embodies and relates with every children’s right.⁶⁹ The inclusion of this right in mainstream children’s rights instruments provides an undeniable opportunity for international human rights law to operate as a catalyst in propelling fundamental change on the competence and value which society, and specifically the family, places on children’s contribution. It is therefore not surprising that several legal

⁶⁶ J Sloth-Nielsen ‘Children’s rights in Africa’, in M Ssenyonjo (ed) *The African Regional Human Rights System; 30 years after the African Charter on Human and People’s Rights* (2012) 165.

⁶⁷ As above 165.

⁶⁸ As above.

⁶⁹ K Hanson & A Vandaele ‘Working children and international labour law’ (2003) 11(1) *The International Journal on Children’s Rights* 84.

analyses of this right as it applies to children and is protected in the ACRWC and the CRC have heaped praise on its inclusion and hold it as the most innovative and crucial element in understanding children's rights contained in both instruments.⁷⁰ Children's right to participation cuts across all other children's rights and could be regarded as a right which provokes the discussions on related aspects to children, such as childhood (discussed above), questioning the present role of children in society and within families. Extending such rights into the family environment and highlighting its functionality and acceptability through the introduction of the balance model in chapter seven of this thesis remains a critical aspect which will ensure that children enjoy this right comprehensively.

Theoretically, as will be seen in later chapters of this thesis, there is a significant degree of uncertainty regarding the exact meaning, implication and extent for children to participate in all decision-making processes on matters that concern them. This uncertainty is mostly reflected in the wording of the provisions that protect this crucial right. According to Schlemmer, the vagueness of children's rights provision is visible especially in the sense that the CRC for example sometimes remains trapped in general wordings which, in most cases, betray the absence of maturity of the reflection of its content.⁷¹ By implication, the recognition of children as social actors and as principal actors in their own right has not benefitted from thorough analysis even with the inclusion of articles 4(2) of the ACRWC and 12 of the CRC.⁷² This theoretical uncertainty unfortunately bears implications such as determining the maturity and giving due weight to a child's opinion that have hampered the proper understanding and implementation of children's right to participation in decision-making processes within the family, for instance.

Notwithstanding, as indicated above, the inclusion of this right in international human rights law is worth praising – such an act affords children, at least on paper, a better enjoyment of their rights and probably a better life and development. In the wording of the provisions that protect this right, the following articles state:

⁷⁰ See for example, F Ang *et al* *Participation rights of children* (2006); R Bosisio 'Children's rights to be heard: What children think' (2012) 20(1) *International Journal of Children's Rights* 141-154; L Ehlers & C Frank 'Child participation in African context' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 116-122 and G Van Bueren *The international law on the rights of the child* (1995) 145.

⁷¹ B Schlemmer "General introduction" in *The exploited child* (2000) 12–13. See also, B Milne *Rights of the child - 25 years after the adoption of the UN Convention* (2015) 87–90.

⁷² See for example, Freeman (n 41 above) 433-443.

12 (CRC)

States Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.

4(2) (ACRWC)⁷³

In all judicial or administrative proceedings affecting a child who is capable of communicating his/her own views, and opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law (sic).

In the light of these provisions, it is probably clear that the wordings of the provisions do not make any reference, or emphasis for that matter, on children's right to participation within families or in family decisions-making processes. However, research has established and the Committee on the CRC has confirmed that there is an undeniable link and need for these provisions to be interpreted as protecting and encouraging children's right to participation within the family.⁷⁴ Indeed, the Committee on the CRC lays emphasis on the important role a family plays in the implementation of this right and calls on state parties to encourage parents, guardians and child-minders through legislation and policy, to listen to children and give due weight to their views in matters that concern them.⁷⁵

As a result, the contextual interpretation of this right in many ways dictates an inclusive approach. This is justified in the fact that these provisions have been, rightly so, described through the right they protect as bearing the core value to children's rights

⁷³ It should be noted that, unlike the CRC, art. 7 of the ACRWC on children's right to freedom of expression espouses a striking similarity to its art. 4(2).

⁷⁴ See generally, Committee on the CRC, GC No 12 (n 29 above) paras 90–96, in which the Committee emphasised amongst others that “[a] family where children can freely express views and be taken seriously from the earliest ages provides an important model, and is a preparation for the child to exercise the right to be heard in the wider society. [The Committee goes on to encourage stakeholders to ensure that such practice takes place as it further states that] ... State parties should encourage parents ... to give due weight to the view of a child... [and] the media should play a strong role in communicating to parents that their children's participation is of high value for the children themselves, their families and society”.

⁷⁵ Committee on the CRC, GC No 12 (as above) para 93.

protection,⁷⁶ and also one of its common challenges.⁷⁷ All children who are capable of forming and communicating their views have the right to be involved in the decision-making process of all matters concerning them. Unfortunately, both provisions, especially the ACRWC, is not without blemish. In the case of the ACRWC, the fact that the provision requires a child to be capable of communicating his or her views for him or her to be heard has been referred to by some scholars as inappropriate.⁷⁸ Plainly, this condition makes it clear that a child who can form an opinion, which is required by the CRC,⁷⁹ and cannot communicate such an opinion, should not be involved.⁸⁰

However, the normative contextual overlapping of article 4(1) (the best interests of the child) and article 4(2) of the ACRWC is well fashioned in this case. By implication, a comprehensive implementation of article 4(2), irrespective of its limitations when compared to the same provision in the CRC (i.e. the requirements that the child must be able to communicate his or her views, that the child must be a “party to the proceedings” directly or indirectly,⁸¹ and that the views of the child must be considered “in accordance with the provision of appropriate law” in all judicial and administrative proceedings), mandates that article 4(1) is taken into consideration. This intersection in interpretation also extends to a similar situation in the CRC, namely in the case of articles 3 (the best interests of the child) and article 12. However, unlike articles 4(2) of the ACRWC and 12 of the CRC, the notion of the best interests of the child is rather passive since, in most cases, the person who decides what is in the best interests of the child is an adult.⁸²

As a matter of fact, there is thus a potential conflict both in interpretation and application of children’s rights in general between these provisions. It is based on this conflict that Freeman asserts that it would be plausible to argue that a child’s right to form and communicate an opinion in matters that concern him or her “... should stop at the point where adults do not consider such expression to be in the child’s best interests”.⁸³ Even though this could not be regarded as an easy intervention to make, the

⁷⁶ C O’Kane *Children and young people as citizens: Partners for social change, exploring concepts* (2003) 10.

⁷⁷ MS Pais *The Convention on the Rights of the Child* (1997) United Nations manual human rights reporting under six major international human rights instruments 427.

⁷⁸ See for example, Chirwa (n 35 above) 161.

⁷⁹ The CRC is preferred in this respect as it simply requires a child to be able to form an opinion – See Chirwa (as above).

⁸⁰ Chirwa (n 78 above).

⁸¹ In this case, the qualification in the CRC has been regarded as progressive because it merely provides that the views of the child should be given “due weight in accordance with the age and maturity of the child”.

⁸² M Freeman ‘The right to be heard’ (1998/99) 22(4) *Adoption and Fostering* 56.

⁸³ As above.

evolving capacity of adults and children (article 5 of the CRC)⁸⁴ in the opinion of this thesis, although not enough, has the potential to strike a balance which in turn could determine when and how an adult or parent should grade what is in the best interests of child. It therefore goes without saying that just like the best interests of a child can lead to the rejection of a child's opinion, the same best interests, correctly understood, can lead decision-makers to derail from a view made by a child.⁸⁵

Understanding children's right to participation in Africa within the context of these provisions entails two key aspects: forming and expressing an opinion, a wish and/or an affirmation to an opinion within the context of a conversation or decision-making process especially in a matter that concerns the child. Significantly, such expression does not mean that the child replaces the adult(s) in the decision-making to exonerate the latter from their responsibility. A key requirement here will be that a partnership between adults and children is critical in ensuring that a child participates and his or her views are taken into account and given due weight based on his or her maturity – because adults or parents are central in assisting children to protect themselves and make reasonable decisions.⁸⁶

From a contextual viewpoint, relating to the framework of children's right to participation under international law, children's developing capacity and ability to make critical contributions to the development of the family and society in which they live at large, for instance, epitomises only one side of the balance. The other side consists of adults' evolving capacity and willingness to listen to and learn from a child, to appreciate and ponder the child's opinion.⁸⁷ It also involves adults' willingness to revisit their own thoughts and attitudes and to consider solutions that address children's opinion.⁸⁸ Fairly, both parties (children and adults) should demonstrate some level of willingness to listen to one another, in the process respecting and valuing another's opinion as a human being with rights, for concrete and factual communication to be achieved.⁸⁹

⁸⁴ Discussed broadly below in Chapter 3 of this thesis.

⁸⁵ MF Lucker-Babel 'The right of the child to express views and to be heard: An attempt to interpret article 12 of the UN Convention on the Rights of the Child' (1995) 3 *International Journal of Children's Rights* 400.

⁸⁶ C Feinstein & C O'Kane 'Children's and adolescents' participation and protection from sexual abuse and exploitation' 2009, *UNICEF Innocentia Research Centre, Innocentia Working paper 1* available at https://www.unicef-irc.org/publications/pdf/iwp_2009_09.pdf [accessed 16 September 2013].

⁸⁷ UNICEF fact Sheet: The right to participation, available online at www.unicef.org/crc/files/Right-to-Participation.pdf [accessed 15 April 2013].

⁸⁸ As above.

⁸⁹ Bosisio (n 70 above) 143.

The CRC and the ACRWC are two key binding instruments that have legally and overtly acknowledged children's right to participation in Africa. Both instruments espouse the view that children have the right to participate in deciding on issues that concern them, rather than being regarded simply as beneficiaries of adult protection, and that their right to participation mandates that they (children) themselves are eligible to participate in any decision-making process on a matter which affects them.⁹⁰ This is an indubitable critical shift in the paradigm which has defined adults' perception of children now compared to before the adoption of these instruments. More so, because amongst others, a child's right to participation as protected by the CRC and the ACRWC presupposes adults' readiness and willingness to change their opinions and attitudes towards children, especially during decision-making processes on matters that concern children or a particular child in question. Adults (parents) have an implicit and explicit responsibility to promote and protect such rights especially within the family environment.

Undeniably, the catalyst of children's right to participation in Africa rests in the specific provisions of both the CRC and the ACRWC. However, it is also sporadically covered, in the context of specific rights or in the context of some vulnerable groups in the ICCPR, ACHPR, CESC, CERD, CRPD and some national constitutions, Acts of parliament or decrees. The provisions in the CRC and the ACRWC, as analysed above, expedite the fact that the nature and scope of children's right to participation are interrelated. Both provisions also espouse substantive and procedural rights aspects of children's rights in general. It has been recognised that as a substantive right, it empowers children to take part and contribute in decision-making processes on matters concerning their lives.⁹¹ As a procedural right, children's right to participation empowers children to take action in promoting and enforcing all aspects of their rights protected in the CRC and the ACRWC. It also provides children with the tool to promote and protect their rights by themselves.

Through this empowerment, children in Africa, for example, are allowed to attain justice, influence outcomes in decision-making processes and expose abuse of power⁹² within governmental and family⁹³ structures. Parkes adds that as a procedural right, children's right to participation empowers children to contest any misapplications or disregard of their right in society.⁹⁴ Perhaps it is important to stress that from a

⁹⁰ G Landsdown *Promoting children's participation in democratic decision-making* (2001) 1.

⁹¹ Landsdown (n 9 above) 1.

⁹² As above.

⁹³ The family is and remains the first opportunity a child has to exercise their right to participation.

⁹⁴ Parkes, (n 6 above) 31.

procedural right perspective it is possibly only through children's participation in decision-making processes within the family, schools and governmental structures, such as national assemblies and local councils⁹⁵ that children will learn about their rights and duties and respect of others' opinions and decisions. They will most probably also learn that their freedom of expression, for instance, is limited by other persons' freedom of expression and that through their acts other persons' rights might be violated.⁹⁶

Based on the practicalities and requirements of this right, it is important to give credit to the African States who are party to the CRC and the ACRWC and the conceptualisation of children's right to participation in the ACRWC in particular. The ratification of these instruments by African States is bold and significant especially considering the fact that children in Africa, in most cases within the family and some "adults' only fora", are not perceived as capable of constructively participating in decision-making processes.⁹⁷ Possibly as a relief to parents and/or adults within African State parties to these instruments or one of the instruments, it is imperative to recognise that both provisions do not grant children in Africa or anywhere else in the world the right to full autonomy. Landsdown emphasises that children's right to participation "does not give children the right to control over all decisions irrespective of their implications either for themselves or others. It does not give children the right to ride roughshod over the rights of their parents".⁹⁸ Rather, the right simply grants children the opportunity to share their opinion on matters that concern them and could affect their full development and also imposes on adults the responsibility to give such views due weight based on the maturity of the child.

Therefore, the worry that such children's right will empower children and undermine parental authority is discarded, since the extent to which a child's view affects any family-decision on a matter that concerns the child is incumbent on the level of weight parents accord to such views. This is probably why Hart insists that it is crucial for families to be "encouraged to open up traditional practices to the greater involvement of their children as part of a general move towards creating a more democratic society, with greater opportunities and equal rights for all".⁹⁹ Such a move will justify the content of these provisions – which in some ways introduces a fundamental and weighty test to traditional attitudes and opinions in the manner in

⁹⁵ Children's participation at governmental level should be more consultative and related to pending decisions on issues that concern them – this will be elaborated on in detail below.

⁹⁶ Bosisio (n 70 above) 144.

⁹⁷ Chirwa (n 35 above) 160.

⁹⁸ Landsdown (n 90 above) 2.

⁹⁹ R Hart 'Children's participation: From tokenism to citizenship' (1992) 4 *UNICEF Innocenti Essays* 5.

which decisions are made within families. Some communities in Africa have for a long time assumed childhood as a phase during which children are seen and not allowed to be involved in decision-making processes in matters which affect them.¹⁰⁰

3.1. Forms of children's participation

Probably evident in the analyses provided above, the notion of participation alone depicts several shapes, styles and types. From a political perspective, it could take the shape of political participation which in many instances entails political debates, education and voting.¹⁰¹ Relating to children's participation in family decision-making processes, children's participation can conveniently be classified under three categories.¹⁰² First, it could take the form of a collective or collaborative participatory process.¹⁰³ In essence, this process does not require children to take part, rather, it mandates and requires them to be part of the process. The typical characteristic of this process is that it is complimentary in nature and requires that both adults and children collaborate in the process to achieve a common goal or outcome. Also, this process requires a greater partnership between a child(ren) and adults or parents with the typical prerequisite of active leveled engagement at any stage of a decision-making process.¹⁰⁴ It could be initiated by any member of the family but must include all who are directly concerned or could be affected by the outcome - especially children. The collaborative participatory process empowers children or a particular child to influence or challenge an outcome or a process on a matter that concerns the child.

Secondly, another process crucial in ensuring children's participation is through consultation.¹⁰⁵ Unlike the collaborative process, this process is opinion seeking oriented - which might or might not be considered in making a decision. This process is adult initiated and intended to assist adults to gain knowledge through seeking children's opinion on a particular matter that concerns them when making a decision on an issue that concerns children. While this process is also commendable because it empowers children to express their views, and probably give expert opinion on matters that

¹⁰⁰ Landsdown (n 90 above), see also, J Sloth-Nielsen 'Seen and heard? New frontiers in child participation in family law proceedings in South Africa' 2009(2) *Speculum Juris* 1-19.

¹⁰¹ M Riekkinen *Pursuing substantive participation in Russia: A perspective from international legal obligation and comparative law* (2013) 72-118.

¹⁰² For details on these categories, see Landsdown (n 9 above) 14-16. In her contribution, she justifies these categories with substantive examples from different parts of the world, including Uganda.

¹⁰³ As above.

¹⁰⁴ See the balance model in chapter 7 below.

¹⁰⁵ Lansdown (n 9 above).

concern them, it does not give them the opportunity to control or influence the outcome as in a collaborative process.

The third process of participation considered in this thesis is a self-initiated or child-led participatory process.¹⁰⁶ Unlike the other two discussed above, this process grants children total power and control over proceedings and outcomes. It noticeably takes place not in the absence of adults, but rather in their presence. However, the role of adults, if any, is merely supportive with little or no direct influence over the process and outcome thereof. Children or a particular child could take the initiative to, for example, seek medical advice on a health-related issue without necessarily seeking his or her parent's authorisation to do so.¹⁰⁷

All three processes identified and discussed above are crucial and recommended depending on the issue or matter to be decided upon. Noteworthy, the aftermath of any participatory style is extremely crucial because it represents the opinions of those concerned, and is dependent on the method the process adopts. Generally, each process uses an array of different specific methods, each with its own strengths and flaws. However, good practice correctly dictates that whatever the process(es) adopted, it should be tailored to the specific context, with special consideration of the level of engagement required from those concerned. In the case of children, such level of engagement should be measured well beyond their age but with specific regard to their levels of maturity and understanding of the subject matter.

In this way, parents or adults will not question a child's capacity to understand the context of the issue discussed, because children's level of understanding will be dependent on the devotion of parental explanation and disclosure of the information required to trigger a child's understanding of the subject matter and subsequent weight and relevance in his or her opinion. In fact, parents should, in the case where the issue is complex, ensure that the child understands the issue especially if the matter is very central to, and concerns the child in question. Another significant consideration includes the availability of resources (financial and human), and the limitations on implementing probable conclusions. In order words, no decision-making process at the family level should be initiated for the sake of it but must bear every intention of acting on the decision arrived at. This is because not acting on a decision arrived at in a collaborative family decision-making process, for instance, could weaken family trust, unity and to a great extent, parental authority.

¹⁰⁶ As above.

¹⁰⁷ For example, in the case of a pregnancy related decision, see *Christian Lawyers association* discussed in chapter five below.

3.2. Unpacking children's right to participation in Africa

As will be seen in chapter 4, the African legal system, both at the regional and national levels, has embraced children's right to participation with some, for example South Africa and to some extent Ghana, providing provisions stronger than those in mainstream treaties. Generally, the provisions (article 4(2) of the ACRWC and 12 of the CRC) protect children's right to participation without imposing any age limit and the Committee on the CRC discourages state parties from imposing any age limit either in law or in practice which may affect or hinder the effective application of this fundamental right.¹⁰⁸ The no age limitation criterion to this right by the Committee on the CRC is bold and depicts the Committee's commitment to ensure that this right is applicable and enjoyed by all children irrespective of their age. As a guiding principle, this right could be said to provide the yardstick with which state parties could be assessed in their effective and a comprehensive interpretation and implementation of all children's rights. At the family level, it is probably safe to hold that from the provisions in mainstream children's rights treaties only two levels are required to ensure that children effectively participate in family decision-making processes, and these are: a child's ability to form and communicate an opinion which depends on the child's maturity, and parental duty to give due weight to such an opinion expressed by the child.

3.2.1. *Children's ability to form and communicate their opinion freely*

As indicated earlier, both provisions accentuate the fact that a child's ability to form and communicate an opinion is a critical pre-condition for his or her right to participate in decision-making processes on matters that concern him or her. Indeed, both provisions, in asserting this criterion, do not impose any duty on the child; rather they require the duty bearer, parents, to presume and uphold every child's ability to form a view.¹⁰⁹ By implication, the onus is not on the child to prove his or her ability to form a view. Neither is the child obliged to fully understand the crux of the issue affecting him or her. However, the duty bearer should be competent enough to ascertain a child's ability to form and communicate an opinion.¹¹⁰ Also, the insistence on the child's capability to form and communicate his or her own views, Lansdown argues, should not be restricted to verbal communication only. The reason for this view is communication, especially

¹⁰⁸ Committee on the CRC (n 27 above) para 21.

¹⁰⁹ As above para 20.

¹¹⁰ As above para 21(2).

amongst some disabled children and tiny babies could take several forms, including art, body language, facial expression and action.¹¹¹

In order for a child's opinion in a decision-making process to be recognised as full participation, it is required that such an opinion must be expressed freely.¹¹² A family decision making-process presents a child with the perfect environment, an environment probably worth the category of a *golden space* due to the familiarity of the environment and persons to whom the children could express their views on all matters that concern them usually without fear or pressure. However, because human behaviour and attitude are generally difficult to regulate or speculate with precision, the outcome of children's views within the family environment remains an interesting debate both in law and related social sciences.

Generally, accepted participatory norms dictate that, in the case of a child, he or she should not suffer from any form of pressure, constraint or influence that might hinder the free expression of an opinion and/or lead to the manipulation of the child's mood or feelings.¹¹³ Such an opinion should be without interference and a child must have the liberty to communicate his or her opinion(s) or not.¹¹⁴ In fact, psychologists insist that for a child's opinion to be obtained, the child must be granted the opportunity to think and/or ask questions freely in peace and quiet.¹¹⁵ This is very vital, because it is only in such an environment that shy children will also have the opportunity to exercise their right to participation.

Noteworthy, as demonstrated in chapter 6 of this thesis, to some extent, especially in health-related issues such as surgery, children do require an impartial additional guidance from adults to be able to form and express their opinions. Ang *et al.* avow and insist that in such circumstances it is critical for the adult (school, government or community leaders) and parents to strike a balance between letting children form and express their views freely and providing appropriate guidance.¹¹⁶ In obtaining such a

¹¹¹ G Lansdown *The evolving capacities of the child*, (2005) 20.

¹¹² It should be very similar to adults, 'free of influence' when they exercise their right to participation. See for example, Riekkinen (n 101 above) arguing the case of adult participation.

¹¹³ MS Pais 'Child participation' 2000 *Documentação e Direito Comparado* 95.

¹¹⁴ Legally speaking, and based on the provisions of art. 19 of the ICCPR, which protects everyone's right to freedom of expression, "... this right includes the right to hold opinions without interference and to seek, receive and impart information and ideas through any media regardless of frontiers".

¹¹⁵ L Runeson *et al.* 'Children's participation in the decision-making process during hospitalization: an observational study' (2002) *Nursing Ethics* 597. See also P Lanier *et al.* 'Parent-child agreement of child health-related quality-of-life in maltreated children' (2016) *Children Indicators Research* 3 in which they support this aspect by purporting that it should be promoted because "children have 'access' to their own personal experience".

¹¹⁶ Ang *et al.* (n 70 above) 15.

balance, adults will have to act beyond just listening¹¹⁷ to children - to grooming their willingness (within themselves) to allow their initial stance to be modified or completely depleted, if necessary, by a child's opinion on a matter that concerns the child.

3.2.2. *The due weight criterion and assessing the age and maturity of the child*¹¹⁸

There is constant growth in the recognition of the fact that no one suddenly becomes a responsible citizen after attaining a certain age or maturity. In fact, it has been proven that the quality of a responsible citizen is attained through learning and participating experience within the family, school and society in general.¹¹⁹ The inclusion of the terms *age and maturity*¹²⁰ in children's right to participation, for example, should not be seen as a limitation on their rights to participation but rather as a caveat which guides states parties' and/or parental or adult interactions with children to be more sensitive to the implementation of their rights to participation in, for example, family decision-making processes.¹²¹

In fact, the inclusion of the *due weight* criterion is a crucial indication that age and maturity alone cannot determine the importance of a child's opinion.¹²² However, in practice, in some African countries, age has continuously been used as a crucial basis in deciding what weight is given to the views of a child, such that older children's views are considered weightier than those of younger children.¹²³ Irrespective of age, a child's opinion is a key factor in decision-making processes, especially on matters that concern him or her – it is therefore insufficient to listen to the child but it is crucial to take what he or she says seriously.¹²⁴ This, of course, does not mean that whatever children say must be complied with or that the views of young or female children will automatically

¹¹⁷ See for example, A Clark 'Listening to and involving young children: a review of research and practice' (2005) 175(6) *Early Child Development and Care* 491 in which she holds that "listening begins with the understanding that listening is an active rather than a passive process. This exchange is not about extracting information from children in a one-way event but is a dynamic process which involves children and adults discussing meanings".

¹¹⁸ Notably, the ACRWC makes no mention of this caveat. However, since both instruments apply to most States in Africa, this caveat is very crucial to the complete understanding and implementation of children's right to participation in Africa.

¹¹⁹ See generally, UN report *The state of the world's children: A fair chance for every child* (2016) 41-51 available at http://www.unicef.org/publications/files/UNICEF_SOWC_2016.pdf [accessed 8 September 2016].

¹²⁰ See generally, art. 12(2) of the CRC.

¹²¹ Committee on the CRC, GC No 5 (n 38 above) para 12.

¹²² Committee on the CRC, GC No 12 (n 29 above) para 29.

¹²³ See for example, BK Twinomugisha *Fundamentals of health law in Uganda* (2015) 208 – 212 for the practice in Uganda.

¹²⁴ Committee on the CRC, GC No 12 (n 122 as above) para 28.

be given less weight; rather, it requires that their views must be considered properly and taken into account.¹²⁵

Besides children's combined age and maturity, the CRC, or any human rights instrument for that matter, and the Committee on the CRC do not set out standards to be considered in giving due weight to a child's opinion. Willow, in 2010, draws attention to some crucial factors essential and useful in deciding the amount of weight to be given to a child's opinion.¹²⁶ These include: the extent to which a child's decision will affect the child and other children; the strength to the child's views and correspondingly the detriment to the child, if such views are ignored; if the views are complied with, how will this affect the child's rights and the rights of other children generally; and if the views are not complied with, to what extent can they be followed in part?¹²⁷ These factors are indeed critical to the general consideration given to children's views and point to the fact that respecting a child's right to participation generates basic human components of competence, respect and tolerance to other fellow human beings. Indeed, the weight given to children's opinion should be based on their level of understanding of the issues involved and not on their age linked to their presupposed maturity.¹²⁸ This is so because human values such as competency, respect and tolerance do not grow homogeneously according to rigid stages of growth – rather, the social perspective, the nature of the decision, the background of the child and the level of support an adult provides to a child are key determinants of the capacity of a child's understanding of the issues affecting him or her.¹²⁹

4. Conclusion

In a nut shell, children's right to participation is a complex right and perhaps the reason why a comprehensive implementation of this key children's right in both the public and private space (family) remains an open conversation. Indeed, the fashion in which it has been ascribed to children is no doubt praiseworthy, but whether it has been understood and implemented as required by the international community in general and the ACERWC and Committee on the CRC in particular has left most scholars with more

¹²⁵ As above para 53.

¹²⁶ C Willow *Children's right to be heard and effective child protection. A guide for Governments and children rights advocates on involving children and young people in ending all forms of violence* (2010) 40.

¹²⁷ As above.

¹²⁸ Lansdown (n 90 above).

¹²⁹ As above 3.

questions than probably anticipated, as will be seen in the following chapters. Indeed, prior to the contribution of Herbots and Put in 2015,¹³⁰ the definition of, or the diagnostics of what constituted children's right to participation, how it should be understood, was based on methods and models of implementation,¹³¹ and not necessarily on the core content of the right as protected by international law and to a reasonable extent, national laws. However, the respect expected to be derived from the protection of this right in contemporary children's rights instruments ought to be based on the fact that although it existed before the adoption of these mainstream children's instruments, its identity, scope, and protection can be matched with any acceptable and balanced participatory procedure which most probably formed the basis for the recognition of the right to participation.

It has indeed been protected in several legal instruments at the global, regional and national levels.¹³² Its wide protection also demonstrates that the expected comprehensive implementation of the right as it applies to children bears no reticent connotation of distorting moral or political structures extant in society. Rather, it bears the possibility to strengthen them – through enhancing inclusivity and development. It is almost inevitable to presume that a child's development, just as that of any adult for that matter, unfolds in response to the environmental influence to which he or she is exposed. In fact, it goes without saying that the protection, promotion and fulfilment of children's right to participation mandate that it is related to other children's rights for the effective and proper development of a child to be attained.

¹³⁰ K Herbots & J Put 'The participation disc: A concept analyses of (a) child ('s right to) participation' (2015) 23(2) *International Journal of Children's Rights* 154–188. See also chapter 7 below.

¹³¹ See chapter 7 below.

¹³² See chapter 4 below.

Chapter Three

IT IS NOT A ‘STAND-ALONE’ RIGHT

1. Introduction

It is probably common knowledge within human rights discourse that no human right, irrespective of its benefactor, content and scope under international and human rights law is meant to be interpreted as a stand-alone right. Indeed, in the very definition of human rights and what they entail, international human rights law, for example, is very firm on the fact that the understanding and implementation of human rights must be inclusive, because human rights are interrelated.¹ In the particular case of children’s rights, the debate might be a little stronger because unlike the different categories of human rights, children’s rights are governed by four guiding principles² of which their right to participation is one of them. Indeed, children’s right to participation is not only a right, it is also a guiding principle according to which other children’s rights are protected, promoted and fulfilled.

2. Other children’s participatory rights in the CRC and the ACRWC

It is important to emphasize again that children’s right to participation is not confined to the provisions of articles 12 of the CRC and 4(2) of the ACRWC only, although there is a proclivity to assume this is the case.³ As a guiding principle of children’s rights in Africa, children’s right to participation as protected by these two front line children’s human rights instruments does not only epitomise the foundation of these crucial children’s rights but also serves as a pivot on which all children’s rights are

¹ See for example, A Clapham *Human rights: A very short introduction* (2007) 1-36; H Steiner *et al International human rights in context: Law, politics, morals* (2007) 475-496 and A Skelton ‘Children, young people, UNICEF and participation’ (2007) 5 *Children’s Geographies* 165-181.

² See chapter 2 above.

³ MG Flekkøy ‘A Framework for children’s participation’ in Verhellen E (ed) *Understanding children’s rights: Collected papers presented at the fifth international interdisciplinary course on children’s rights* (2000) 131. In her paper, she emphasises the fact that art. 12 of the CRC, for example, is the most significant participation article.

implemented. Noteworthy, its prime objective is to encourage state parties to grant opportunities to all children to learn, understand and apply democratic principles in all areas of their lives, including but not limited to the family, schools and their community in general.⁴

The inclusion of children's right to participation in the CRC and ACRWC, and the identification of this right as one of the four key pillars of children rights, depicts a clear indication that the drafters of both instruments moved away from the authoritarian approach adopted in the preceding children's rights declarations⁵ to a more democratic approach which recognises the right of everyone to participation, especially on matters concerning them. Essentially, the indivisible and interdependent nature in which human rights and children's rights in particular apply to children makes it critical to analyse these provisions together with other children's rights protected in these instruments. The indivisibility and interdependence in the interpretation and application of, generally required for human rights, is critical especially when attempting to completely gauge the extent to which children are allowed to exercise their right to participation at all levels of society and especially within the family setting.⁶ For example, other or related children's rights to participation are codified separately throughout the CRC and ACRWC and other human rights instruments, such as the CRPD, ICCPR and the CDESCR, as seen below. Although its scope can be related to every other children's right, a handful of these rights accentuate a stronger relation and have been classified by some scholars, for example Flekkøy, as the conditions and the requirements to enhance and facilitate children's right to participation.⁷

⁴ See for example, L Krappmann 'The weight of the child's view (Article 12 of the Convention on the Rights of the Child)' (2010) 18(4) *International Journal of Children's Rights* 501-513.

⁵ G Lansdown *Can you hear me? The right of young children to participate in decisions affecting them* (2005) 1. See also, G Lansdown 'The realisation of children's participation rights' in A Percy-Smith and N Thomas (eds), (2010) *A Handbook of children and people's participation: Perspectives from theory and practice* 11.

⁶ Committee on the CRC, GC No 12 *The right of the child to be heard* (2009) UN doc CRC/C/GC/12 para 2, which, referring to the specific provision of art. 12 of the CRC provides that "[t]he right of all children to be heard and taken seriously constitutes one of the fundamental values of the Convention. The Committee on the CRC has identified participation as one of the four general principles of the Convention, the others being the right to Non-Discrimination, the right to life and development, and the primary consideration of the child's best interests, which highlights the fact that this article establishes not only a right in itself, but should also be considered in the interpretation and implementation of all other rights".

⁷ Flekkøy (n 3 above) 131-132.

2.1. Conditions

2.1.1. Freedom of expression

Children's right to freedom of expression is perhaps, in terms of its scope and intended resultant outcome, more closely related to children's right to participation than any other right. Legally, it is protected by articles 7 of the ACRWC⁸ and 13 of the CRC.⁹ Article 13 of the CRC, for example, extrapolates a much stronger protection of children's right to freedom of expression than the ACRWC does – this is because it includes children's right to seek, receive and impart information and ideas of all kinds, regardless of frontiers.¹⁰ Article 7 of the ACRWC, on the other hand, simply affords any child capable of communicating his or her views the right to express those views freely. The difference in scope is not the issue because these instruments are complimentary in their application in Africa.¹¹ However, children's right to freedom of expression could face similar, if not the same, implementation challenges as children's right to participation, because both rights are central in the protection and promotion of children's ability to have a view on all matters that concern them.

Indeed, at first glance, children's right to participation as protected in the CRC appears as a sheer replication of their right to freedom of expression, since the latter grants children the opportunity to express their opinions, an opportunity equally provided to children by article 12 of the CRC. The difference between the two provisions lies in the fact that article 12 offers an extra dimension to their right to freedom of

⁸ Art. 7 provides that “[e]very child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws”. It is worthy nothing that these rights are so related that the wording of the ACRWC is almost identical to that of art. 12(1) of the CRC.

⁹ Art. 13 provides that “1. [t]he child shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of the child's choice. 2. [t]he exercise of this right may be subject to certain restrictions, but these shall only be such as are provided by law and are necessary: (a) For respect of the rights or reputations of others; or (b) For the protection of national security or of public order (*ordre public*), or of public health or morals”.

¹⁰ Undeniably, the non-limitation on the type of information children can have access to, is brave and indicates the ardent intention of the CRC to grant children full access to information on all matters that concerns them and to allow them to express their opinion thereof.

¹¹ F Viljoen *International human rights law in Africa* (2012) 392.

expression.¹² This is evident in the fact that children’s right to participation transcends beyond mere recognition of children’s right to seek, receive and impart information of all kinds – in fact, their right to participation highlights their right to express views freely, and further to have those views taken into consideration and given due weight in all matters concerning the child everywhere, including within the family. The inclusion of the requirement that the views of the child should be given due weight is cardinal to the whole process of participation, as it emphasises the fact that simply expressing an opinion is not enough, and calls on parents for example to listen to such expressions and give them due consideration based on the issue for which a decision is due.¹³

Generally, the underlying intention of children’s right to freedom of expression is to grant children the right to hold and express opinions through any media – and this expression could take the form of drawing, writing or speaking. It emphasises children’s right not to be hindered or refrained by adults (the state and society) and parents in general in the opinion a child holds and/or wishes to express.¹⁴ These are very central issues related to children’s right to participation and constitute one of the reasons why children’s right to freedom of expression is considered as a condition to facilitate their right to participate, for example, in family decision-making processes. Indeed, as a condition, it is not ignorant of the fact that a child, in some cases, could be represented directly or indirectly in proceedings that concern him or her.¹⁵ This consideration is critical because, for example, it gives children who can express themselves through other means than verbal ones the opportunity to be represented by experts who understand and can explain their views to a broader audience. Significantly, every child, irrespective of his or her size, age, disability or creed should be granted the opportunity to express himself or herself in the “language” he or she can best speak. It is the duty of parents or legal guardians who can interpret “language” to translate it to a broader audience, if necessary, and to give it due weight. It probably goes without any saying that the intricacies that such broad assertions hold could in most cases require further skills in parenting. Although, broadly, tracing such skills is very critical to the general debate on children’s rights to participation, the objective of this thesis is not to concentrate on

¹² MS Pais ‘The Convention on the Rights of the Child’ (1997) *United Nations manual human rights reporting under six major international human rights instruments* 94. Worth noting, on the other hand, article 7 of the ACRWC requires children to express their opinions freely, which in a way reflects a stronger replication of children’s rights to participation – but it is limited in that it does not (on paper) include the consideration of their views in all judicial and administrative proceedings concerning a child.

¹³ See Lundy (n 43 below).

¹⁴ Committee on the CRC, GC No 12 (n 6 above) para 81.

¹⁵ See, for example, art. 5 of the Optional Protocol to the Convention on the Rights of the Child on a communications procedure.

finding such balance (attaining such skills) but to analyse ways through which children's opinions can best be listened to within family decision-making processes on matters that concern the child. Indeed, this thesis capitalises on this last assertion as it analyses in detail - especially in chapter seven where it introduces the balance model of participation in family decision-making processes - the role parents and the state should play in ensuring that children enjoy their right to participation in family decision-making processes.

Generally, children's right to participation imposes a positive obligation on states to establish significant legal frameworks and mechanisms to facilitate children's active participation in decision-making processes on matters that concern them and for their views to be taken into account.¹⁶ Despite their slight contextual differences, in tandem, both rights grant children, especially those who cannot express themselves verbally, the opportunity to do so in other forms, including works of art, writing or in print. Indeed, because articles 13 of the CRC and 7 of the ACRWC jointly outline alternative means for children to express themselves, these articles supplement articles 12 of the CRC and article 4(2) of the ACRWC in the application and interpretation of children's right to participation in Africa.¹⁷

2.1.2. Freedom of thought, conscience and religion, and leisure, recreational and cultural activities¹⁸

Children's right to participation in Africa is further strengthened by their right to freedom of thought, conscience and religion¹⁹ and also by their right to leisure, recreational and cultural activities²⁰ as it grants them the opportunity to think, participate in the artistic, cultural and religious life of their community and to express themselves in those activities.²¹ These rights should contribute immensely to facilitating

¹⁶ As above.

¹⁷ J Fortin *Children's rights and the developing law* (2009) 42. See also, Committee on the CRC, GC No 12 (n 6 above) para 80 which states that "[a]rticle 13, on the right to freedom of expression [...] is a crucial prerequisite for the effective exercise of the right to be heard. [This article establishes] that children are subjects of rights and, together with article 12, [it asserts] that the child is entitled to exercise those rights on his or her own behalf, in accordance with her or his evolving capacities".

¹⁸ See generally arts. 9 and 12 of the ACRWC and art. 14 of the CRC.

¹⁹ As above.

²⁰ Art. 12 further adds that "States Parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

²¹ R Hart 'Children's right to participate: Some tools to stimulate discussion on the issue in different cultures' in Verhellen E (ed) *Understanding children's rights: Collected papers presented at the second international interdisciplinary course on children's rights* (1997) 227.

the implementation of children's right to participation. However, in practice, the fact that the relationship between children's right to participation as defined in this thesis could mean that children express their views on, for example, their choice of religion is almost impossible because generally, children do not have a right to religion. This is regardless of the position of, articles 9 of the ACRWC and 14 of the CRC which affords children the right to form views and beliefs. However, as discussed above, it cannot be ignored that on paper these provisions are critical rudiments to the actual implementation of children's right to participation especially in decision-making processes on all matters that concern them.

In fact, at the African level, there exists the possibility that this condition could clash with parental duty to guide a child to learn and participate in cultural and religious activities, as commonly, parents would prefer that children participate in the way they (the parents) dictate.²² What could send through a contradictory vibe in the codification of certain provisions in the ACRWC for example is that whilst one holds that a child has the right to express his or views on issues relating to beliefs, the same instrument obligates parents to direct the path of children to participate in religious and cultural practices. However, through these rights, applied here as a condition to facilitate children's participation, as a condition it requires adults (parents) to quell their continuous dominance and domineering approach on matters that concern children or in their attempt exercise their creativity and to grant them the freedom to think and to express themselves in various ways. Indeed, article 12 of the ACRWC emphasises the crucial contribution play, recreation, physical and cultural activities play in a child's development and socialisation. Also, the Committee on the CRC calls on state parties to consult children in designing such activities and that their preferences and capacities should be considered²³- thus, encouraging participation.

2.1.3. Freedom of assembly and association

Both articles 8 of the ACRWC and 15 of the CRC protect children's right to freedom of assembly and association, thus recognising and granting them the opportunity to be part of a forum within which they can freely express their views and interact with other children and/or members of their community. This right encourages the aspect of children to also form tangible relations out of the biological or legal family environment. Indeed, Pais asserts that this right gives children the chance to express

²² See for example, arts. 20 & 21 of the ACRWC.

²³ Committee on the CRC, GC No 12 (n 6 above) para 115.

political opinions and/or engage in political processes and participate in decision-making processes.²⁴

2.2. Requirements²⁵

2.2.1. *The best interests of the child*

It has been proven and accepted through extensive and thorough research that the best interests of the child principle is and remains one of the key corner stones of children's rights implementation.²⁶ Indeed, it pre-dates the CRC and the ACRWC.²⁷ This principle has been described by many as a "golden thread" that runs through the CRC and ACRWC and should seat at the epicentre of any planning, interpretation and implementation of children's rights. It is this very strong link and binding force that this principle exhorts with children's rights in general and particularly its strong relationship with children's right to participation that makes it a crucial requirement in the implementation of children's right to participation. Indeed, almost like a rhyme, it is in the best interest of a child for a child to be allowed to participate - in family decision-making processes in a matter that concerns him or her.

Indeed, empirical and/or theoretical studies conducted over the years have pointed to the fact that any attempt to allow or to disallow a child from expressing his or her views must be guided by his or her best interests.²⁸ These studies have established the fact that the best interests of the child and his or her right to participation are clear examples of two children's rights and principles that complement one another. Further,

²⁴ Pais (n 12 above) 97.

²⁵ These requirements are based on certain aspects of children's rights protected in both instruments and identified under four categories.

²⁶ It should be noted that the best interests of the child principle is one of the guiding principles in the implementation of children's rights. Others are: Non-discrimination; The life, survival and development of the child; Child participation; providing for the responsibilities that every child has with regard to his or her society, the state and the international community. See generally, Committee on the CRC, GC No 14 *on the rights of the child to have his or her best interest taken as a primary consideration* UN doc, CRC/C7GC714 paras 41-45.

²⁷ Unlike most provisions in the CRC and the ACRWC, the best interests of the child had formal recognition in the 1959 Declaration on the Rights of the Child - para 2, and elsewhere. It is also recognised in the CEDAW - art. 5(b) and 16(1)(d).

²⁸ See for example, K Lloyd & L Emerson '(Re)examining the relationship between children's subjective wellbeing and their perceptions of participation rights' (2016) *Child Indicators Research* 1-18; J Eekelaar 'The role of the best interest's principle in decisions affecting children and decisions about children' (2015) 23(1) *International Journal of Children's Rights* 3-26 and A Lewis 'Silence in the context of 'child voice' (2010) 24 *Children and Society* 14-23.

the best interests of the child is a crucial requirement for a child's right to participation, not only because it aims to ensure a child's best interests, but also because it strengthens the functionality of a child's right to participation and decisions arrived at that must benefit the child, by facilitating the critical role of a child in all decision-making processes on matters that affect his or her life.²⁹

The responsibility of parents and/or adults to ensure the best interests of the child mandates that they should not ignore the irreplaceable contribution a child can make to the greater understanding of his or her welfare. Indeed, it is probably common knowledge that making a decision on what is deemed in the best interests of the child, obligates that all necessary information relating to that particular issue is acquired.³⁰ It follows, therefore, that any reluctance in drawing from the principal source (child) for information about what a child wants, needs and believes could jeopardise the entire initiative of ensuring his or her best interest. Crucially, whatever the decision attained is, it is in the best interests of the child to be informed in a manner commensurate with his or her age and maturity why his or her decision was considered or rejected – this practice will go a long way in strengthening a child's critical mind and trust. Actually, the Committee on the CRC warns that “[a]ny decision that does not take into account the child's views or does not give their views due weight according to their age and maturity, does not respect the possibility for the child or children to influence the determination of their best interests”.³¹

2.2.2. The evolving capacities of the child and adult³²

One other accepted requirement in the implementation of children's right to participation is that parental or adult control and guidance over children diminish as their capacities evolve in life. However, it is important to note that parental or adult guidance over a child in decision-making processes varies according to the capacity of the child, irrespective of his or her age and also depends, largely so, on the type of decision and/or opinion that is required from a particular child at a particular time and place. The evolving capacity of a child is a key component to the development of his or

²⁹ See generally, Committee on the CRC, GC No 12 (n 6 above) paras 70–74.

³⁰ Exceptions in this case will apply when a child is completely unable to contribute to a decision-making process due to acute ill health (e.g. when the child is in a coma).

³¹ See generally, Committee on the CRC, GC No 14 (n 26 above) para 53.

³² See generally, art. 5 – CRC which calls on State parties to respect the responsibilities, rights and duties of parents and adults “...to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention”.

her capacities; his or her empowerment to take greater responsibilities and confidence in making informed choices in life.³³ This requirement dictates that there is great need for adults to be consistent in their evaluation and balancing of all aspects necessary to make a particular decision on a matter that concerns a specific child or group of children. A child's evolving capacity, guided by adults, has the potential to develop a child's reasoning and decision-making ability.

Remarkably, the encouragement given to children in Africa to develop their capacities varies. Indeed, most children in African cities and those born in "rich families" spend most of their childhood in full-time education during which they are socially and economically dependent on their parents, since work and schooling are "strongly" discouraged. As a contrast, most children in rural areas in Africa experience something completely different. For instance at the age of 10, Tonga children (as perhaps is the case with most children in Africa) in Zimbabwe take part in household agricultural activities, some are livestock owners and cash earners, and often own and control both land and livestock – boys would be expected to own a house while girls would be considered capable of managing the household in the absence of the eldest woman.³⁴ This is certainly not what children's right to participation as analysed in chapter two above and further throughout this thesis is all about, because, given the opportunity to express their opinions, children from both situations would have the opportunity to participate in such decisions rather than just flow with events as probably dictated by society, customs and adults.

Since the family is the first point of social contact for a child, it is crucial for parents and, where applicable, legal guardians to continuously encourage and facilitate the child to freely express himself or herself from an early age. Indeed, article 9(2) of the ACRWC bestows on parents, and where applicable, legal guardians, the "... duty to provide guidance and direction in the exercise of [children's rights] having regard to the evolving capacities ... of the child". A child's evolving capacity is just one side of the equation. Balancing the equation would, however, require adults (parents, legal guardians, government) to be willing not only to listen to the child, but also to understand and consider the views of the child, and to reconsider his or her own opinions and attitudes and provide possible solutions that attend to a child's views in the child's best interest.³⁵ It is crucial to strike this balance because, after all, children are entitled to protection in

³³ G Lansdown *The evolving capacities of the child*, (2005) 3.

³⁴ P Reynolds *Children in Zimbabwe: Rights and power in relation to work* (1995) 1(3) *Royal Anthropological Institute of Great Britain and Ireland* 17.

³⁵ UNICEF fact Sheet: *The right to participation*, available online at www.unicef.org/crc/files/Right-to-Participation.pdf [accessed 15 April 2013]. See also chapter 7 below.

accordance with their relative immaturity.³⁶ The Committee on the CRC avows and adds that every child has a right to “direction and guidance, which have to compensate for the lack of knowledge, experience and understanding of the child and are restricted by his or her evolving capacities”.³⁷

2.2.3. Freedom of information

Generally, access to information is a key requirement for anybody to make an informed decision or provide consent in a particular situation. The case of children is not different. In fact, both the CRC and the ACRWC are persistent (even though the CRC accentuates a much stronger protection) on this requirement as it applies to children in the enjoyment of their right to participation. A child’s right to freedom of information reinforces his or her right to participation. Indeed, the CRC holds that State parties should recognise the important function performed by the mass media to ensure that the child has access to information and material from a diversity of national and international sources, especially those aimed at the promotion of his or her social, spiritual and moral well-being and physical and mental health³⁸ and to develop appropriate guidelines for the protection of the child from information and material injurious to his or her well-being, bearing in mind the provisions of a child’s right to freedom of expression³⁹ and parental responsibilities for the upbringing and development of a child.⁴⁰ Indeed, Pais holds that it is through providing a child with adequate information on a particular issue(s) concerning him or her, that a child obtains the necessary tools, confidence and maturity required to express his or her views and possibly influence decisions.⁴¹ It is this linkage between providing adequate information to a child and the confidence and capability in expressing himself or herself in matters that concern him or her that makes this requirement crucial and essential in the implementation of children’s rights to participation in Africa. Indeed, the Committee on CRC highlights that the more a child knows, the more he or she acquires experience and understands issues and their implications.⁴² Even though this assertion by the Committee seems general, it is intended and limited only to information on issues that concern a child and not information on issues that concern adults only. In this regard,

³⁶ Lansdown, (n 33 above) ix.

³⁷ Committee on the CRC, GC No 12 (n 6 above) para 84.

³⁸ See art. 17 of the CRC.

³⁹ See art. 13 of the CRC.

⁴⁰ See art. 18 of the CRC.

⁴¹ Pais, (n 11 above) 96.

⁴² Committee on the CRC, GC No 14 (n 26 above) para 44.

it is logically the responsibility of parents, legal guardians or other legally responsible persons to be progressive, thus starting from providing guidance and direction which would later transform into reminders and advice, and later to partners in decision-making as the child develops.

2.2.4. Space, voice, audience and influence⁴³

Lastly, beside children's evolving capacities and access to adequate information, 'one' other key requirement for the effective implementation of their right to participation in Africa is the allocation of space (the opportunity to express their views), voice (assistance in expressing their views), audience (to listen to their views) and influence (the consideration of their views).⁴⁴ Engaging meaningfully with children in Africa, for example, strongly points to these four components. The creation of a conducive space for children, for example, will go a long way in building self-confidence and freedom to express views that are adequate and appropriate in a particular issue that concerns them. The allocation of a child-friendly space has huge psychological impetus on abetting a particular child to air his or her view(s) calmly and with certainty. Certainly, the creation of space without an audience to listen to a child's views would be insignificant because, as analysed above, a child's view, in a matter that concerns him or her needs to be given due weight. This can only be achieved if there is an audience who can seriously consider children's views as necessary contributions to the conclusion that may be attained on issues that concern them. At the level of the state, this is a requirement that most state

⁴³ See generally, the provisions of arts: 12, 13, 14, 15 and 16 of the CRC and arts: 4(2), 7, 8, 9 and 12 of the ACRWC. For further details on this requirement, see L Lundy "Voice' is not enough: Conceptualising article 12 of the United National Convention on the rights of the Child' (2007) 33(6) *British Educational Research Journal* 933. According to Lundy, there is an overlap amongst these four components and especially between space and voice, and audience and influence. Also, they depict the fact that there is an explicit chronology in the implementation of children's right to participation. The first stage is ensuring the child's right to express a view. Following on from this is the child's right to have the view given due weight. However, in recognition of the fact that the decision-making processes are rarely static, the model acknowledges that, once the child is informed of the extent of influence, the process may begin again. Finally, the model represents the fact that children's right to participation can only be understood fully when it is considered in the light of other relevant provisions in the CRC, in particular their rights to non-discrimination (art. 2), the protection of their best interests (art. 3), their right to guidance (art. 5), and their right to freedom of expression (art. 13). Although Lundy refers only to the CRC, her comments are just as relevant in respect of the corresponding provisions of the ACRWC (arts. 3, 4(1), 9(2)(3) and 7 respectively.

⁴⁴ Lundy (as above) 933.

parties to the CRC and the ACRWC have met through involving children in parliament sessions both at national and provincial levels.⁴⁵

3. Other participatory rights under other international and regional instruments related to children's right to participation

Elsewhere, besides the rights mentioned in the CRC and the ACRWC and several others not articulated above, children's participatory rights also enjoy coverage in other international human rights instruments. Notably, article 25 of the ICCPR,⁴⁶ articles 13 and 15 of the CESCRC and article 7 of the CRPD protect children's right to participation. In fact, the context of the CRPD is worth a special mention, as it expands the scope of both the CRC and the ACRWC to protect disabled children's right to participation. Also, children's right to participation enjoys significant protection under some African regional human rights instruments. A case in point is the African Charter on Human and Peoples' Rights (ACHPR). The ACHPR protects, in article 7(1)(a), the right of every individual to have his or her cause heard (including children); to receive information in article 9(1) and subsequently in article 9(2) to express and disseminate his or her opinion within the law. Also, article 8 protects everyone's right to freedom of conscience, and to free practice of religion, and article 13(1) protects the right of "[e]very citizen ... to participate freely in the government of his country, either directly or through freely chosen representative". Although these provisions are significant in the broad analysis of children's right to participation, it is common knowledge that a stronger protection of this right as it applies to children can be found in the CRC and the ACRWC.

The protection afforded by these instruments is enough to ensure that children do enjoy this right in family decision-making processes. However, recognising children as equal beneficiaries to these other treaties takes nothing away from the fundamental aspect and protection of children's right to participation; rather, it

⁴⁵ BD Mezmur & J Sloth-Nielsen *Advocating for child participation in NEPAD* (2008) 19 - 21. Available at <<http://www.africanchildinfo.net/documents/ADVOCATING%20FOR%20CHILD%20PARTICIPATION%20IN%20NEPAD%20-%20Final%20Copy.pdf>> [accessed 26 December 2013]. See also, L Ehlers & C Frank 'Child participation in African context' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 116-122.

⁴⁶ Attention, however, should be paid to the provision of art 25(b), which protects the right to vote. In most African countries children are not allowed to vote – the youngest voter is 18 in some African countries.

strengthens such rights. Indeed, instead, their consideration bears the potential of redirecting parental perceptions of children's rights as not only protected in an instrument intended for children but also found and applicable in instruments intended for adults. This accentuates key international human rights law doctrines, such as the doctrine that human rights is for every human being irrespective of their creed, race or age.

4. Conclusion

At the international and regional levels, it seems, at least from the analysis provided above, that children's right to participation, especially in family decision-making processes, is a necessity in the proper development of a child. In fact, it is deducible that the nature and scope of children's right to participation, as the right and a guiding principle, should give meaning and guide the effective implementation of all children's rights – without discrimination based on disability⁴⁷ or creed. As a right, it obligates state parties, society and parents to grant children the opportunity to participate in all decision-making processes on matters that affect them.

In all, these conditions and requirements are merely basic aspects which are required for children to best enjoy this right. At the family level, parents or legal guardians have a significant part to play in ensuring that this right is delivered to children when needed. Indeed, a combination of both the requirements and conditions stated above will ensure that a child is meaningfully engaged in the decision-making process of a matter which concerns him or her. However, the protection of this right is not without challenges; cultural, traditional, gender and age based discrimination could frustrate its implementation, especially at the family level. This is because meaningful engagement is of core significance in promoting active participation and gives content to a child's right to participation while embracing other related participatory principles, such as transparency and accountability.⁴⁸ To ensure such attainment, international law has not limited the protection of this right only in these mainstream children's rights instruments, as it can also be traced in other international human rights instruments not

⁴⁷ See also, art. 7 of the CRPD.

⁴⁸ It should be emphasised that the aspect of meaningful engagement has been richly developed under Socio-economic rights jurisprudence and considered broadly as a process that creates a voice for the marginalised and impoverished. For details, see for example, L Chenwi 'Meaningful engagement' in the realisation of socio-economic rights: The South African experience' (2011) 26 *South African Public Law Journal* 128–156.

directly attributed to children but equally important to children. As will be noticed in the chapter below, despite its broad recognition and acceptance, it remains a challenge for this right to be implemented within the family and this thesis intends to confirm this fact and to make possible suggestions on which this right, dominantly expressed within politics,⁴⁹ should be groomed within family decision-making processes. In the chapter that follows, this thesis attempts an analysis of the domestication of children's right to participation.

⁴⁹ See art. 25 of the ICCPR.

Chapter Four

A COMPREHENSIVE LEGAL AND POLICY REFORM OF CHILDREN'S RIGHT TO PARTICIPATION

1. Introduction

Legal and policy reforms at national level are, jointly, a key component to the effective implementation¹ of the specific intent of any provision under international law. In the case of children, the translation of children's rights in general into reality in Africa, is largely dependent on the national action of the state parties to the CRC and the ACRWC as well as other treaties that include rights relevant to children.² Indeed, article 4 of the CRC, for example, calls on state parties to take all appropriate legislative, administrative and other measures to implement the rights recognised in the Convention. The Committee on the CRC in interpreting the scope of article 4 declares that the request that states parties take appropriate measures, to ensure that the rights in the Convention are given legal effect within domestic legal systems "should be considered of fundamental importance for the implementation of the Convention".³ Such measures, the Committee continued "should include effective remedies for the parents and other

¹ The Committee on the CRC has defined implementation as "the process whereby States parties take action to ensure the realization of all rights in the Convention for all children in their jurisdiction." See Committee on the CRC, GC No 5 (2003) *General measures of implementation of the Convention on the Rights of the Child*, UN doc. CRC/GC/2003/5 (2003) para 1. Implementation, in the context of international human rights law, has also been defined by the UN OHCHR as "moving from a legal commitment, that is, acceptance of an international human rights obligation, to realization by the adoption of appropriate measures and ultimately the enjoyment by all of the rights enshrined under the related obligations". See United Nations, *Report of the High Commissioner for Human Rights on implementation of economic, social and cultural rights*, UN doc. E/2009/90 (2009) para 3.

² See generally, L Lundy *et al* 'Incorporation of the United Nations Convention on the Rights of the Child in Law' in M Freeman (ed.) *The future of children's rights* (2014) 305. See also, J Donnelly *Universal human rights in theory and practice (2nd edition)* 171 in which he asserts that, "the fate of human rights – is largely a matter of national, not international, action".

³ Committee on the CRC *Report on the twenty-second session* UN doc CRC/C/90 (1999) para 291(d).

relevant individuals or groups, and be in accordance with Article 27 of the Vienna Convention on the Law of Treaties”.^{4 5}

The ACRWC echoes similar measures in its article 1(1), in which it calls on state parties “to adopt such legislative or other measures as may be necessary to give effect to the provisions of [the] Charter”. Although similar to the provision of article 4 of the CRC mentioned above, the weight of the obligation to state parties in the ACRWC is different and weaker as compared to the weight of the obligation in the CRC. The ACRWC uses “or” as opposed to “and” as is the case in the CRC. The use of “or” in the ACRWC gives state parties the option to either take only legislative measures or other measures, whereas the CRC is stricter, as it requires state parties to adopt both legislative and other measures in implementing the CRC. Both measures are crucial and relevant in the effective implementation of children’s rights and should be embraced concomitantly. It is crucial that African states, in implementing children’s rights in general, take all appropriate measures into consideration. Goonesekere holds that any legal reform with the ordinary objective of “putting the law in place” is insufficient to achieve both harmonisation of national legislation with the CRC [and the ACRWC] and to give any effect to the appropriate implementation of children’s rights.⁶ Sloth-Nielsen concurs and rightly points out that a comprehensive domestication of the CRC and the ACRWC is not only the preserve of a parliamentary activity through the enactment of laws but also the jurisprudence and activities emanating from the courts.⁷ Also beyond the courts other institutions, both state and private owned, are crucial actors in ensuring the comprehensive domestication of children’s rights.

Cautiously, international human rights treaties do not, in general, prescribe how state parties are to give effect to their duties at national level – but it requires them to take all appropriate measures in doing so.⁸ Hence, it is entirely up to states to devise the method within their discretion in the implementation of the treaties they have ratified,

⁴ Art 27 of the Vienna Convention provides *inter alia* that, “A Party may not invoke the provisions of its internal law as justification for its failure to perform a treaty”.

⁵ Committee on the CRC (n 3 as above).

⁶ See generally, S Goonesekere *Protecting the world’s children: Impact of the Convention on the Rights of the Child in diverse legal systems, Introduction and Overview* (2007).

⁷ J Sloth-Nielsen ‘Children’s rights in Africa’, in M Ssenyonjo (ed) *The African Regional Human Rights System; 30 years after the African Charter on Human and People’s Rights* (2012) 171.

⁸ See generally, Human Rights Committee, GC No 3 (1981) *Article 2 Implementation at the National Level* UN doc. HRI/GEN/1/Rev.1 at 4 (1994) para 1. See also, CRC Committee *Report on the twenty-second session* UN doc CRC/C/90 (1999) para 291.

subject to the satisfaction of those duties in practice.⁹ According to Doek, the preferred method chosen by a state, at the African regional level, at the minimum, entails "... activities of a government to ensure that national laws and related administrative regulations are in full compliance with the CRC, the African Charter and the [three] optional protocols to the CRC (where ratified)".¹⁰ These children's rights treaties provide a platform for African state parties to adopt an approach based on the full recognition of children as rights holders guided by the principles and provisions protected therein. As such, they remain fundamental reference points for the content and process of any legal reform a state might pick.

Generally, the collective acceptance of children's rights (through the ratification of these treaties) at the African level guarantees the foundational phase of any legal reform that may take place within a state in respect of protecting and promoting children's rights and children's right to participate in a family decision-making process in particular. Such assurance has been recognised by most children's rights advocates as depicting a manifestation of the necessary benefits of the general protection of children's rights, especially in the family. Pupavac, for example, seems convinced that the interest in children displayed through the ratification of the CRC, can be regarded as "transcending political and social divides and able to mobilize societies to confront social problems".¹¹ On the one hand, evidence of the veracity of this assertion can be found in the fact that for the first time, thus far, there was a mass acceptance (through ratification) of an international human rights instrument within a short space of time (nine months)¹² – thus depicting general acceptance, one voice and stance in protecting and promoting children's rights in general. However, on the other hand, the lack of a universal consensus on how to formulate and accept a united structure on the form

⁹ Committee on the CESC, GC No 3 (1990) *The nature of States Parties obligations* UN doc. HRI/GEN/1/Rev.6 at 14 (2003) para 4. See also, Human Rights Committee (n 8 above).

¹⁰ J Doek *Harmonisation of laws on children: Some practical guidance* (2007) 2 available at <https://app.box.com/s/ca19481c7d5dc225abff> [accessed 30 December 2014].

¹¹ V Pupavac 'Misanthropy without borders: The international children's right regime' (2001) 25(2) *Disasters* 95.

¹² The first countries to ratify the CRC during the nine months period were: Bangladesh (3 August 1990), Belize (2 March 1990), Benin (3 August 1990), Bhutan (1 August 1990), Bolivia (26 June 1990), Chile (13 August 1990), Ecuador (23 March 1990), Egypt (6 July 1990), El Salvador (10 July 1990), France (7 August 1990), The Gambia (8 August 1990), Ghana (5 February 1990), Guatemala (6 June 1990), Guinea (13 July 1990), Guinea-Bissau (20 August 1990), Honduras (10 August 1990), Kenya (30 July 1990), Mauritius (26 July 1990), and Mongolia (5 July 1990). On a different note, the closest treaty ratification to this milestone is that of the CRPD (also very crucial to the protection of disabled children's rights), which entered into force 16 months after adoption. At the corresponding time, it now has an impressive 150 State Ratification. Its track record leaves me with no doubt that it would gain a universal ratification in no distant time.

the protection and promotion of children's rights should take,¹³ and especially how to enforce such rights at the family level, is worrying and makes Pupavac's assertion to some extent questionable.

At the national level, as displayed in this chapter, several state parties have adopted strategies to ensure the successful implementation of children's rights in general and within the family in particular in their respective countries. In fact, some have enacted legislation that supports and strengthens the rights enshrined in the CRC and the ACRWC as well as children's rights in other treaties that they have ratified. However, as the Committee on the CRC puts it, "this inclusion does not automatically ensure respect for the rights of children".¹⁴ The Committee further adds that "[i]n order to promote the full implementation of these rights, including where appropriate the exercise of rights by children themselves, additional legislative and other measures may be necessary".¹⁵ The recognition of the possible "exercise of rights by children" is critical because it speaks directly to an acceptable extent to rights, such as children's rights to participate in family decision-making processes. This is worth noting, because it is not only the crux of this thesis but more so a right which gives children the possibility to access other rights through participating in, for example, family decision-making processes on matters that concern them.

From this background, the purpose of this chapter is first to appraise the legal and administrative reforms that African states have adopted to ensure the promotion and protection of children's right to participation in general and in the family in particular. If possible, emphasis will be placed on the extent to which states recognise such rights for children within the family. Secondly, the chapter attempts a detailed comparative analysis of both the legal and administrative reforms in South Africa and Cameroon. The rationale of this second part is to highlight the differences both in structure and implementation of children's rights that could be found in Africa. The countries are not directly representative of the entire continent, but both share characteristics such as bi-jural legal systems, Civil law in the case of Cameroon, Common law, Islamic law (Shari'a) in the case of Cameroon, and languages, cultural and religious practices which are traceable in most parts of the Continent. Also, based on the statistics provided by the

¹³ T Kaime *The Convention on the Rights of the Child: A cultural legitimacy critique* (2011) 18. However, there are common denominators across cultures and governmental systems which in turn validate a common contextual development of the CRC. One of such is the general knowledge of children's rights and the inclusion of such on governmental agendas. Indeed, today, any discussion on children's rights is almost ludicrous without reference to the CRC. This is the case irrespective of the cultural or traditional context in which such discussions take place.

¹⁴ Committee on the CRC, GC No 5 (n 1 above) para 21.

¹⁵ As above.

ACPF¹⁶ and UN reports analysed in this chapter, the countries represent the worst group and the best group at the African regional level in terms of child protection legislation, implementation and budget allocation.

2. Integrating children’s right to participation in national laws in Africa¹⁷

Generally, children’s rights have had a gaugeable influence on the legal and policy frameworks in Africa. Although a comprehensive integration, formulation, modification, specialisation and application is far from complete, the extent and speed at which African states have domesticated children’s rights after the adoption of both the CRC and the ACRWC deserves some credit.¹⁸ There is substantial disparity, however, between African states and jurisdictions in the extent to which they have domesticated children’s rights to participation in their respective legislations and in the guidelines for practice, and how they have met their obligations under international children’s rights law. Indeed, such effort has also been manifested in shifting the trend of the concept of children’s rights protection in Africa from the general inclusion of specific children’s rights in Constitutions¹⁹ to the enactment of Acts of law and decrees specifically dealing with a range of children’s rights. This shift does not only highlight the intent of African states to domesticate children’s rights but it also shows the lengths to which they are willing to go to ensure that besides mainstream international children’s rights instruments, children’s rights enjoy a wider coverage at domestic level.

Indeed, the recognition and acceptance of both the CRC and the ACRWC at the African regional level is a clear indication of states parties’ commitment to protect and promote the rights of children in Africa. Specifically, unlike the CRC and the ACRWC,

¹⁶ The African Child Policy Forum, *The African report on child wellbeing: Towards greater accountability to Africa’s children* (2013) 39–47.

¹⁷ It is worth noting that the countries listed in this sub-section is not exhaustive of national laws that protect children’s right to participation – others have been mentioned throughout this thesis.

¹⁸ The ACERWC is cognizant of the need to improve the scope of a comprehensive protection of children’s rights at the national level and aspires, through its recent publication on *Africa’s agenda for children: Fostering an Africa fit for children by 2040* – and specifically goal No 2 which provides that: “An effective child-friendly national legislative, policy and institutional framework is in place in all member States”.

¹⁹ In fact, 36 Constitutions can be identified in which Children’s rights feature. These include Algeria, Angola, Benin, Burkina Faso, Burundi, Cameroon, Ivory Coast, Democratic Republic of Congo, Egypt, Equatorial Guinea, Ethiopia, Gabon, Gambia, Ghana, Guinea, Kenya Lesotho, Madagascar, Malawi, Mozambique, Namibia, Niger, Sao Tome et Principe, Senegal, South Africa, Sudan, Togo, Uganda, Zambia and Zimbabwe.

many of the children's rights Acts²⁰ that have been enacted by several African states make explicit mention of children's right to participation, including the extension of such rights in the family environment. This drives home the point that even though it is not explicitly mentioned in mainstream children's rights instruments, this crucial children's right is deeply rooted in legal discourse both at the global and African regional level. The need to consider children's opinions in matters that concern them, in family decision-making processes for example, is indeed a legal obligation to all African State parties to the instruments mentioned above.

Encouragingly, even though the ACRWC was born out of concerns from African states based on the lack of adequate African representatives in the drafting process of the CRC and the lack of enough African ideologies included in the rights it protects, both instruments share striking similarities in some of the rights they protect at the African regional level.²¹ These similarities, coupled with the fact that they are meant to protect children's rights, has led many scholars to confirm that both instruments complement one another in protecting children's rights in Africa. This thesis adds that its existence at the African regional level puts Africa in a better child protection situation (on paper), not only because unlike in other regions there exists two binding exclusively dedicated children's rights instruments in Africa, but more so because they provide a wider coverage of issues related to children at the regional level not covered elsewhere.²²

With an estimated total of 43 per cent of its population under the age of 15, the assertion of children as the leaders of tomorrow is more intensely true in Africa than elsewhere in the world.²³ However, as analysed above, ensuring the well-being of a child and his or her rights in general is not about nurturing him or her to be a leader of tomorrow but also as a leader of today.²⁴ Unfortunately, this has been characterised by children being abused as labourers, soldiers and sex-workers. Worse, the relaxed and slow-paced implementation of children's rights in some African states vindicated, to some extent, by culture and tradition (displayed in this thesis) often aggravates the

²⁰ Discussed sporadically in this chapter and throughout this thesis.

²¹ See, for example, the protection of children's right to privacy.

²² Jointly, both instruments accentuate a higher standard to children's rights protection. Credit must be given to both instruments, but specifically to children in Africa – the ACRWC provides valuable weight to the CRC in its provisions on culture, tradition, religious practices and customs.

²³ This percentage contrasts largely with the world's percentage which as of 2013 stood at 29 per cent. See generally, Population Reference Bureau, World Population Data Sheet 2013, http://www.prb.org/pdf13/2013-population-data-sheet_eng.pdf [accessed 3 January 2014].

²⁴ UNICEF, *State of the world's children 2011: Adolescence: An age of opportunity* available at http://www.unicef.org/sowc2011/pdfs/SOWC-2011-Main-Report_EN_02092011.pdf [accessed 4 January 2014].

vulnerability of children in Africa. Such characteristics are also easily identified within the family which in many ways dictates and instructs whether children are included in decision-making processes on matters that concern them.

Noteworthy, all is not doom and gloom. In fact, there are glimpses of both formal and informal recommendable examples of children's participation in decision-making processes in Africa. This section is intended to highlight such recommendable examples in selected (random) countries and also to highlight in detail the efforts made by the countries under scrutiny in this study in their attempt to protect children's right to participation. A greater detail of instances of respect for children's views within family decision-making processes will be analysed in the chapters that follow.

To start with, from a cultural perspective, several aspects of some African traditions make it possible for children to have access to useful information, to learn from the wisdom of elders, and to participate in decisions within the family (more so on matters that concern the child) and their communities in general.²⁵ Indeed, classic African practices such as storytelling, folklores, songs and sitting around fire sites provide a relaxed and conducive environment for children in particular to express themselves and for their parents and other adults to listen and consider their views. Unfortunately, such practices have become formalities in some communities and abandoned in others over time. Even though still very popular in rural areas and/or poor families, city families and/or rich families are increasingly falling behind.

From a statutory point of view, some countries have transcended beyond the ratification of the CRC and ACRWC and their Constitution²⁶ to codify children's rights at the national level with express provisions protecting children's right to participation in general and in the family in particular. For example, the Rwandan Law relating to Rights and Protection of the Child against Violence²⁷ is designed specifically to protect children in Rwanda and it obligates that before any decision is made regarding a child in an administrative or judicial proceeding, the views of the child must be heard, either

²⁵ Through classic African traditional practices such as sitting around the fire-site, sharing folklore, stories and songs, elderly (adult) people always gave children the opportunity to participate actively. In fact, among the Lomwe people of Malawi, children are encouraged to participate in decision-making within the family and through other forms of participation such as song and dance, recitals and role play, communicating directly to parents and communication through intermediaries. Although encouraging, this is not always "indicative that children's views were taken into account. It nevertheless provides evidence that children were not only seen but also heard". See Kaime (n 13 above) 131.

²⁶ See for example, secs 33 (freedom of thought, opinion, conscience, religion, belief and public demonstration), 34 (freedom of the press and freedom of information) and 35 (freedom of association) of the 2003 Constitution of Rwanda.

²⁷ Law No. 27/2001 of 28 April 2001, available at: <http://www.refworld.org/docid/46c423cb2.html> [accessed 4 January 2014].

directly or indirectly through a representative.²⁸ This law also specifically calls on parents and guardians to grant children the opportunity to participate in family decision-making processes on matters that concern his or her welfare including good living conditions, healthcare and education. In doing so, the law encourages families to allow the child to develop physically, in his or her thinking ability, intellectually, culturally and in life in general.²⁹

This example is also reflected in other African states. For example, in Botswana, children aged between 11 and 18 years were consulted during the review of the Children's Act in 2001,³⁰ during which their perspectives regarding how the legislation should be changed were listened to.³¹ Even though this is a display of children's participation in a public matter, it is encouraging that the children involved could share their views on how they would like their rights to be protected through the Children's Act in Botswana. Indeed, this Act has a devoted provision on children's participation which mandates the participation of children who are "of such age, maturity and level of understanding as to be able to participate in decisions" on all matters that concern them.³² The Act does not create any specific context in which such rights should be promoted and protected – its broad context is, however telling of the state parties' intention to ensure that such right is practiced in every decision-making process and the family is no exception. Elsewhere, in Sierra Leone, children between the ages of 12 and 18 were not only consulted, but were equally allowed to produce and present their own version of the State report on Children to the Committee on the CRC in 2006.³³ Remarkably, this was before the State adopted its Child Right Act in 2007, which generously flaunts a range of children's participatory rights.³⁴ However, based on the focus of this thesis, article 45 of the Child Right Act of Sierra Leone³⁵ is worth highlighting as it grants children the right to participate towards family cohesion and the responsibility to respect parents. Granting children in Sierra Leone, such an opportunity to influence the protection of their rights at the family level, is a bold statement which accentuates the fact that children's rights are protected even at the

²⁸ As above art. 9.

²⁹ As above art. 14.

³⁰ The end product of this process was the passing into law of the *Botswana Children's Act 08 of 2009*, available at <http://www.scribd.com/doc/83322125/Botswana-Children-Act-08-of-2009> [accessed 4 January 2014].

³¹ The African Child Policy Forum, (n 16 above) 23.

³² See generally, art. 9(1) of the Act.

³³ Committee on the CRC, *Consideration of Reports Submitted by States parties under Article 44 of the Convention – Sierra Leone* - UN doc CRC/C/SLE/3-5 para 87.

³⁴ See for example arts. 23–46 of the *Child Right Act, 2007*.

³⁵ As above.

family level. Indeed, through such rights children will also get the opportunity to express their views on matters that concern them in family decision-making processes.

Also, in line with the CRC and the ACERWC, Mozambique has adopted a children's Act which mandates that the views of the child must be heard and given weight in all situations where the child faces instances of the administration of justice.³⁶ The protection in Mozambique is limited, as it does not make any direct reference to the recognition of such right within the family. However, broadly speaking, its recognition within the administration of justice could, for example, redress such gaps for example in child custody matters. Unlike Mozambique, the Ghanaian Children's Act specifically mandates that no child capable of forming views shall be denied the right to express those views in a matter that concerns him or her and this includes family decision-making processes.³⁷ However, the State (and this is also common in most African states), reporting to the Committee on the CRC in 2012, highlighted the fact that there is compelling media reports to the fact that children in some Ghanaian communities and families are still seen and not heard.³⁸

In the United Republic of Tanzania, the principle that the views of the child have to be respected has also been translated into a statutory obligation by the State party. In this context, the 2011 Zanzibar Children's Act, in section 5, obliges the State to ensure that the "views expressed by the child may be given due consideration". In terms of section 11 of the 2009 Law of the Child Act of the Mainland, a child has the "right of opinion and no person shall deprive a child capable of forming views the right to express an opinion, to be listened to and to participate in decisions which affect his well-being". Other states that have enacted children's codes include Togo (who enacted their Children's Code in 2007), The Gambia (who enacted a broad Children's Act in 2005³⁹), and Benin⁴⁰ and Sierra Leone (who enacted their Children's Acts in 2007⁴¹). These Acts

³⁶ See generally, *Promotion and Protection Law on Child Rights* No 7/2008, of 9 July 2008.

³⁷ See generally, sec 11 of the Act No. 560 of 1998. In its recent (2016) State report submitted to the ACERWC, the State party emphasised that this provision also extends to children expressing their views in family life. The report is available on http://www.acerwc.org/download/ghana_initial_report_under_the_acrwc/?wpdmdl=8775 [accessed 21 November 2016].

³⁸ Committee on the CRC, *Consideration of reports submitted by States Parties under Article 44 of the Convention – Ghana (2012)* UN doc CRC/GHA/288/3-5 para 76. It is worth noting that though the state presented this unfortunate finding, it was quick to highlight that "traditions die hard, despite that fact that general recognition of children's views may be increasing".

³⁹ See generally, Children's Act 38 of 2005.

⁴⁰ See generally, Code de l'enfant du Bénin de 2007.

⁴¹ For a comprehensive update on the countries that have domesticated the CRC and the ACERWC, see, http://www.africanchildforum.org/clr/Harmonisation%20of%20Laws%20in%20Africa/other-documents-harmonisation_16_en.pdf [accessed 6 January 2014].

enjoy a nationwide application status within the boundaries of the countries examined above and so, too, is the case in several other African states. What is worth emphasising here is the fact that most of these laws are generally required to be applicable without restrictions. However, reality has a different perspective as will be indicated in the forthcoming chapters. Conversely, exceptions to such nationwide status in the application of laws (related to children in this case) lie in countries that practice strict federal systems of government such as Nigeria.

The transition from a military rule of government to a democratic and civilian rule of government in Nigeria was not *per se* a peaceful one. However, since in place, the latter system of government has been hailed for its effort in ensuring “peace” in Nigeria and enacting laws that are pro-democracy and human rights centred. One such law is the Child’s Rights Act.⁴² Through this Act, specific children’s rights, such as their right to participation, have been protected. Indeed, the Act requires the courts, for the purpose of any specified proceedings, to appoint a *guardian ad litem* for the “child concerned to safeguard the interests of the child, unless it is satisfied that it is not necessary to do so”. Also, the courts can “consult the wishes of the child in considering what order ought to be made in protective proceedings”.⁴³ It should be noted that these rights afforded to children in Nigeria never existed in national laws prior to 2005. Generally, the Act, particularly the specific provision protecting children’s right to participation, along with similar provisions in the CRC and the ACRWC, are worth celebrating because they give children in Nigeria the right to have an influence on matters that concern them in family decision-making processes.

Nonetheless, unlike the other examples mentioned above, this Act has struggled to enjoy a nationwide impact. This is due to the federal system of government on which Nigeria operates coupled with the fact that children’s rights protection is on the residual list of the Nigerian Constitution, giving states exclusive responsibility and jurisdiction to make laws relevant to their specific situations. Indeed, not every state in Nigeria has accepted the Act, let alone acknowledges the specific aspect and context of children’s rights to participate in the decision-making processes on matters that concern them.⁴⁴ Resultantly, the promotion of this historic Act in the context of Nigeria has not and will not in a great rush attain the impact which is expected of it.

⁴² See generally, Child’s Rights Act 2003.

⁴³ As above, secs 72 – 91.

⁴⁴ For example, Nigerian States especially those in the North have rejected the Act, claiming it contradicts Islamic laws. The good news though is Federal Government Institutions such as courts (even those based in States that have not accepted the Act) have the mandate to implement the Act and entertain cases related to the Act.

In all, the countries highlighted above are a *snapshot* of the current status quo of African states who have attempted to domesticate children's right to participation especially in the family. It is encouraging to note that every African state has ratified the CRC and most the ACRWC, as will be noted later in this thesis. However, regrettably, the legislative assurance or certainty in the domestication of children's rights is far from certain in some African countries.⁴⁵ In Mali, for example, the process to enact a child-related law has not yet been instituted. However, in the absence of any domestic law expressly protecting children's rights, the government has successfully involved children in parliament sessions and has continuously implemented the principle of children's right to participation through awareness-raising campaigns over the years. The Committee on the CRC has commended such sessions and campaigns in its concluding observation on Mali, but raised concerns about the traditional societal attitudes that have contributed to limiting the ability of children in Mali to express their views freely within the family, schools, communities, courts and other institutional settings.⁴⁶

3. Structural Practicality

3.1. Legislative and administrative procedure in South Africa and Cameroon

The impressive acceptance and enactment of laws at national level in Africa intended to strengthen children's right to participation is not surprising. Indeed, the rush at which the CRC was ratified by African states⁴⁷ and the zeal that the then OAU (now the AU) had in adopting an African specific children's rights instrument are both strong indicators of why children's rights legislations are popular on the continent. Also, these are factual indicators to the fact that African member states are willing to ensure that the rights are delivered to children. However, there is a significant disjuncture between the intent and actual implementation and outcomes of the laws in question. From a general point of view, children's right to participation has not been satisfactorily schematised as an obligatory state funded democratically prescribed process in political and social spaces in

⁴⁵ The ACERWC is aware of this limitation and has undertaken in its agenda 2040 to ensure that there is a comprehensive ratification, domestication and implementation of children's rights by 2020.

⁴⁶ Committee on the CRC, 'Concluding observations of the Committee on the Rights of the Child: second state party report: Mali' UN Doc CRC/C/MLI/CO/2 para 33.

⁴⁷ Currently, all 54 African states have ratified the CRC and Ghana, is on record as the very first Country globally to ratify the CRC on 5 February 1990.

Africa and, consequently, it remains principally an *ad hoc* one.⁴⁸ As indicated and objectively justified in chapter one, this sub-section intends to provide an in-depth analysis of the situation in South Africa and Cameroon. The majority of the issues discussed below, in general, highlight the strengths and weaknesses of the measures put in place within these countries to guarantee the implementation of children's rights in general and their right to participation in particular within family decision-making processes.

3.1.1. The status of children's right to participation under South African legislation

Following South Africa's transition from apartheid to democracy, the notion of childhood and which members of society are considered children and in need of legal protection changed drastically. The emergence of a human rights protection framework for all children became a reality with the adoption of the Constitution in 1996,⁴⁹ and South Africa's ratification of the CRC in 1995 and the ACERWC in 2000. These legal guarantees are surrounded and supported by an array of legislative, policy and institutional frameworks such as the Children's Act⁵⁰ and institutions such as the South African Human Rights Commission (SAHRC), the Commission for Gender Equality (CGE), the Office of the Public Protector (OPP) and the children's court.

Despite these developments in South Africa underscored above, and discussed further below, children in South Africa, as in Cameroon and many other African countries, are not necessarily only affected by the operation of a variety of "modern" laws.⁵¹ It is reported that the lives of a considerable percentage of children in South Africa are also governed by a plurality of religious and customary laws and practices extant in South Africa.⁵² Some cultural practices, such as male circumcision and virginity testing for girls, offer little or no options for children to express their views, as children are only required to obey.⁵³ The truth is, even though these practices are required by culture, the

⁴⁸ S Moses "Children and participation in South Africa: An overview" (2008) 16 *International Journal of Children's Rights* 333–337.

⁴⁹ Constitution of the Republic of South Africa, 1996.

⁵⁰ Act 38 of 2005.

⁵¹ Most African States practice civil, common and Muslim laws. This is the case with Ivory Coast, Nigeria, and Ghana. See generally, *In the Best interest of the Child, Harmonising Laws on children in West and Central Africa*, available at <http://www.acerwc.org/wp-content/uploads/2012/05/English-ACERWC-Harmonising-Laws-on-Children-in-west-and-central-Africa.pdf> [accessed 13 January 2014].

⁵² R Songca 'Theorising children's rights as a multi and inter-disciplinary field of study' (2012) in F Viljoen (ed) *Beyond the law: Multi-disciplinary perspectives on human right* 151. For details on the various cultural practices extant in South Africa, visit South African History Online available at <http://www.sahistory.org.za/topic/defining-culture-heritage-and-identity> [accessed 29 April 2015].

⁵³ See generally, the African Child Policy Forum report (prepared by Julia Sloth-Nielsen) *Harmonisation of laws relating to children – South Africa* 9–11.

final decision whether to commit or not to commit them is made at the family level and generally, children are afforded neither space nor time to express their views.

A limitation of the impact of such cultural and religious laws and practices that could restrict children's right to participation, especially in the family, is afforded in the Constitution. The 1996 Constitution expressly recognises such diversity of laws and practices co-existing in South Africa. Nonetheless, the relevant provision⁵⁴ provides that the freedom to practice such religious and customary laws is only permitted to the extent that those laws are consistent with the fundamental rights protected generally in the Bill of Rights and specifically under section 28 of the Constitution (which protects the rights of children). Also, by extension, section 15 (on freedom of religion, belief and opinion) of the constitution also calls families to practice cultural and religious practices that are not repugnant to children's rights treaties, or related treaties duly ratified by South Africa.

The laws enacted at the national level in South Africa (the Constitution and other children's laws) analysed below are progressive laws and have contributed immensely to South Africa's impressive ranking in 2008 (top 10 in Africa)⁵⁵ as a child-friendly country.⁵⁶ A follow-up ACPF report in 2013 shows that South Africa maintained its child-friendly status.⁵⁷ The outstanding performance of South Africa is also motivated by the allocation of adequate budgets both at national and provincial levels, for sectors targeting children. This is also supported by the fact that the state has mechanisms in place to ensure that those budgetary allocations are translated into better child well-being outcomes.⁵⁸ In 2015, the then South African Finance Minister, during the inaugural national budget speech presented to Parliament, remarked that the expenditure on "health and social protection will continue to grow steadily ... Health spending will reach R178-

⁵⁴ See, sec 15 – freedom of religion, belief and opinion of the Constitution of South Africa.

⁵⁵ The other countries in the top 10 list are, Mauritius, Tunisia, Egypt, Cape Verde, Rwanda, Lesotho, Algeria, Swaziland and Morocco.

⁵⁶ African Child Policy Forum (2008), *The African Report on Child Wellbeing: How child-friendly are African governments?* Addis Ababa: The African Child Policy Forum 7. See also, A Bequele *Monitoring the commitment and child-friendliness of governments: A new approach from Africa* (2010) 34 Child Abuse & Neglect 7.

⁵⁷ See, ACPF's report (prepared by A Bequele *et al*) *The African Report on Child Wellbeing 2013 Towards greater accountability to Africa's children xv* Available at <http://a-dtap.awepa.org/wp-content/uploads/2013/12/ARCW2013-English.pdf> [accessed 10 January 2014].

⁵⁸ As above.

billion in 2017/18 ... [South Africa has] seen a marked reduction in child mortality over the past five years, supported by improved access to antenatal services”.⁵⁹

It is also welcoming that in her second periodic report to the Committee on the CRC submitted under article 44 of the CRC, the government of South Africa expressly indicated that it has also encouraged the respect of the views of the child in schools, families and in judicial and administrative matters concerning a child.⁶⁰ It is worth noting that the respect for the views of the child is also protected by law in South Africa, as demonstrated below.

The Constitution of the Republic of South Africa, 1996

The 1996 Constitution of South Africa is one of the first in Africa to give recognition to a host of rights, including specific provisions on children’s rights, in its Bill of Rights.⁶¹ Noticeably, articles 9 (equality), 10 (human dignity), 11 (life), 12 (freedom and security of person), 15 (freedom of religion, belief and opinion), 16 (freedom of expression), and 18 (freedom of association) are all applicable to children not only because these are also protected in the CRC and the ACRWC but also because they are central to their right to participation, as seen in chapter three of this thesis.⁶² It is probably safe to hold that this array of rights along with some government social policies for children,⁶³ such as the

⁵⁹ At the corresponding time, the Minister of Finance was Mr. Nhlanhla Nene. For details on this speech, go to: <http://www.mediaclubsouthafrica.com/economy/4165-south-africa-s-budget-2015-the-full-text#ixzz3Yn41oVDq> [accessed 30 April 2015]. See also the 2017 budget speech presented to parliament by the then Finance minister Mr. Pravin Gordhan at the corresponding time when this thesis is being updated as the minister reports on further increases – 20 – 22 available at <http://www.heraldlive.co.za/wp-content/uploads/2017/02/speech.pdf> [accessed 4 April 2017].

⁶⁰ Committee on the CRC, Consideration of report submitted by South Africa under article 44 of the CRC, CRC/C/ZAF/2 para 121.

⁶¹ One recent Constitutional development that has followed in South Africa’s footsteps is the Kenyan Constitution of 2010 (see, for example, s 53), available at http://www.lcil.cam.ac.uk/sites/default/files/LCIL/documents/transitions/Kenya_19_2010_Constitution.pdf [accessed 12 May 2015].

⁶² See for example the *Teddy Bear Clinic case* (2014 (2) SA 168 (CC) para 38, in which J Khampepe asserted that “In my view, the correct approach is to start from the premise that children enjoy each of the fundamental rights in the Constitution that are granted to “everyone” as individual bearers of human rights”.

⁶³ For details on these social policies for children, see Child Gauge 2016 available at http://www.ci.org.za/index.php?option=com_content&view=article&id=1166&Itemid=922 [accessed 4 April 2017].

Child Support Grant,⁶⁴ the Foster Child Grant,⁶⁵ and the Care-dependency Grant⁶⁶ have improved, on a general note, the situation of children in South Africa compared to that of children in Cameroon, for instance, analysed below.

Section 28(1) of the Bill of Rights provides specifically for children's right to a name and nationality from birth; to family, parental or appropriate alternative care; to basic nutrition, shelter, basic health care services and social services; to protection from maltreatment, neglect, abuse or degradation; to protection from exploitative labour practices; to be protected from providing services that are inappropriate or place their well-being, education, physical or mental health or spiritual, moral or social development at risk; to be detained only as a last resort and then with special rights; and to legal representation. Section 28(2) accentuates that the child's best interests are to be rendered paramountcy in every matter concerning the child. The importance of having a separate provision protecting children's rights, in addition to general rights provisions, is that at least, in theory, it recognises children as legitimate rights holders. Although not included in the list of children's rights under section 28, children's rights to participation in decision-making processes on matters that concern them, is widely recognised and legally protected in South Africa through other legislations and international treaties that South Africa has ratified.

⁶⁴ The South African Child Support Grant (CSG) was first introduced in 1998. Over the past 16 years, South Africa's social grant programme has evolved into one of the most comprehensive social protection systems in South Africa. The CSG is an important instrument of social protection in South Africa, reaching over 10 million South African children every month. For details, see, *The South African Child Support Grant Impact Assessment: Evidence from a survey of children, adolescents and their households* (2012), available at http://www.gov.za/sites/www.gov.za/files/dsd_The%20South%20African%20child%20support%20grant%20impact%20assessment%20report.pdf [accessed 15 April 2015].

⁶⁵ Under this grant, a foster child is a child who has been placed in someone's custody by a court as a result of being orphaned, abandoned, at risk, abused, or neglected. Details on this grant can be found here <http://www.sassa.gov.za/index.php/social-grants/foster-child-grant> [accessed 15 April 2015].

⁶⁶ This grant is intended for a child who has a severe disability and is in need of full-time and special care. Details on this grant can be found here: <http://www.gov.za/services/child-care-social-benefits/care-dependency-grant> [accessed 15 April 2015].

International children's law in South Africa

The consideration of international law in the interpretation of the Bill of Rights is mandated under section 39(1)(b) of the Constitution.⁶⁷ Also, section 233 of the Constitution requires courts to afford preference to “any reasonable interpretation of ... legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law”. Taking into consideration both provisions, the absence of an express inclusion of children's rights to participation in the Constitution does not diminish or distort the implementation of the right. Besides, by ratifying the CRC and the ACRWC, South Africa has assumed obligations in relation to ensuring that children are granted the opportunity to participate and for their opinions to be taken into consideration in all matters that concern them, both in the public and the private space (family).

In addition to the CRC and the ACRWC, South Africa has ratified other international treaties which also obligate the State to ensure children's right to participation. These include the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW) (1995), the ACHPR (1996), the ICCPR (1998), the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT) (1998), the CRPD (2007), the African Women's Protocol (2004) and the Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts (CRC-OP-AC) (2009). These

⁶⁷ The Constitution, in encouraging the courts to consider international law, does not indicate whether the international law considered should be binding or not. However, the Constitutional Court has held that this would include a consideration of both binding and non-binding international law. See *Government of the Republic of South Africa v Grootboom* 2000 (11) BCLR 1169 (CC) para 26 where the Constitutional Court restated its position in *S v Makwanyane and Another* 1995 (3) SA 391 (CC) para 35 as follows “... public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which [the Bill of Rights] can be evaluated and understood, and for that purpose, decisions of tribunals dealing with comparable instruments, such as the United Nations Committee on Human Rights, the Inter-American Commission on Human Rights, the Inter-American Court of Human Rights, the European Commission on Human Rights, and the European Court of Human Rights, and, in appropriate cases, reports of specialised agencies such as the International Labour Organisation, may provide guidance as to the correct interpretation of particular provisions of [the Bill of Rights]”. See also, J Dugard ‘The role of international law in interpreting the Bill of Rights’ (1994) 10 *South African Journal on Human Rights* 213, in which Dugard underlines that the main advantage of section 39(1)(b) (previously sec 35(1) in the interim Constitution) is that courts will not have to go through the processes of verifying whether such laws are binding and acceptable at the national level but will merely apply what is reasonable and acceptable in the context of a particular case before the court. The indication of a compulsory consideration of international law – both binding and non-binding – in the interpretation of the Bill of Rights is breath-taking and highlights the extent to which the State is willing and committed to protecting rights.

instruments, alongside the specific provisions which relate to children's right to participation, have been indicated earlier in chapter two.⁶⁸

In a recent development, in 2015, the State ratified the CESC. ⁶⁹ According to Nolan, the CESC is a crucial treaty in the general protection of children's ESC rights – not only because the ESC rights, as captured in the CRC, for example, are drawn from the CESC but also because these rights are very critical to children as a vulnerable group. Further, the CESC grants a broader protection of ESC rights to 'everyone' than the CRC.⁷⁰ The two factors, according to Wringe, which underscore the importance of ensuring a better protection of ESC rights to children are their vulnerability and their lack of skills or capacity to negotiate their stake in accessing these rights for themselves within their communities.⁷¹ The ratification of this treaty adds more weight to the government's effort to effectively ensure children's ESC rights in South Africa. It also puts children in South Africa in a better position to claim the rights protected in the CESC in the same way as they would the rights protected in the other international treaties listed above. In the context of this thesis, these rights are also very crucial because they give children better options to have a legitimate claim to be involved in a family decision-making process on matters that concern them, for example, their right to health which is also a recognised ESC right and discussed in this thesis.

Other children's laws in South Africa

It would be fair to assert that the South African Constitution discussed above sets an encouraging precedence in the general protection of children's rights in South Africa, and provides a legal basis, drawing from international law, in protecting children's right to participation applicable in the family as well. Moreover, several laws, policies and programmes, as illustrated below, have subsequently been enacted that elaborate on children's rights, including further provisions on their right to participation in family

⁶⁸ See the section on other children's participatory rights under other International and Regional Instruments.

⁶⁹ The importance of ratifying the CESC, especially relating to children, cannot be overstated. For example see, L Chenwi 'Putting flesh on the skeleton: South African judicial enforcement of the right to adequate housing of those subject to evictions' (2008) 8(1) *Human Rights Law Review* 105–137; S Liebenberg, 'The value of human dignity in interpreting socio-economic rights' (2005) 21 *South African Journal on Human Rights* 1–31, and D Brand, 'Introduction to socio-economic rights in the South African Constitution' in D Brand & C Heyns (eds) *Socio-economic rights in South Africa* (2005) 1–56.

⁷⁰ See generally, A Nolan 'Economic and social rights, budgets and the Convention on the Rights of the Child' in M Freeman (ed) *The future of children's rights* (2014) 121–150. See also P Proudlock 'Children's socio-economic rights', in T Boezaart (ed) (2009) *Child law in South Africa* 291–308.

⁷¹ C Wringe *Children's rights: A philosophical study* (1981) 135–6. See also, A Nolan *Children's socio-economic rights, democracy and the courts* (2011).

decision-making processes on all matters that concern them. The laws that have been enacted expressly recognise children's right to participate in decision-making processes within the school, community, and government. Unfortunately, such protection has been dominantly within the public space and the family decision-making process has enjoyed very limited recognition. However, just as in the case of Cameroon below, some of the laws that are analysed in this sub-section are intended to show the extent to which children's right to participation has been protected in the public space, as this thesis hopes that the next step will be to extend such laws as well into the family space.

For instance, the National Education Policy Act (NEPA),⁷² which is designed to regulate the procedures for the determination of national education policy, is one such law. In it, the Minister of Education is mandated to consult with national student representative bodies as part of the policy development process.⁷³ This requirement is laudable because for the first time, students and learners⁷⁴ in South Africa are accorded, equally and without any distinction, the opportunity to be consulted in the designing of national education policies in South Africa. Even though this Act grants enormous power to the Minister to select and constitute the consultative groups, it provides students (especially children) in South Africa with an undeniable and value-added responsibility to participate in the designing of national education policies.

Another legislative development in South Africa aimed at ensuring children's right to participation within schools is the South African Schools Act (SASA).⁷⁵ This Act provides for the regulatory framework within schools and obliges learner participation in both the governance and disciplinary processes, in this way encouraging inclusivity. Specifically, this Act obligates compulsory consultation of learners during the development of a code of conduct. Further, when facing suspension, they must be given the space (fair hearing) to present their views to the school governing body, the membership of which includes learners as well.⁷⁶ The importance of complying with the above is illustrated in the case of *Antonie v Governing Body, Settlers High School and Others*.⁷⁷ The case was brought before the Cape High Court by a learner, after she had been suspended for five days by her school's governing body for breaching the school's

⁷² National Education Policy Act (NEPA) 27 of 1996.

⁷³ As above, sec 5(1).

⁷⁴ Art. 1, of the South African Schools Act defines a learner as "any person receiving education or obliged to receive education".

⁷⁵ South African Schools Act (SASA) 84 of 1996.

⁷⁶ See generally, SASA secs 8, 9, 23 & 24.

⁷⁷ *Antonie v Governing Body, Settlers High School and Others* 2002(4) SA 738 (CPD).

code of conduct (wearing dreadlock hairstyle under a cap).⁷⁸ The court set aside the decision of the school's governing body, highlighting in the process that it failed to give adequate recognition to the right of the learner to freedom of expression and a fair hearing. A child's right to freedom of expression, as analysed in chapter three⁷⁹ is closely related to his or her right to participation. Participation involves not just hearing of someone's view but giving due consideration to the view, which the governing body failed to do in this case.

Perhaps a more related Act to the trend of analysis in the context of family decision-making processes in this thesis is South Africa's Choice on Termination of Pregnancy Act (CTPA - 1996).⁸⁰ The Act protects the right of pregnant minors ("any female under the age of 18 years")⁸¹ to consent to an abortion, provided that the medical practitioner or registered midwife or registered nurse advises her to consult with her parents, guardian, family members or friends before the pregnancy is terminated.⁸² Remarkably, the Act further stipulates that "termination of the pregnancy shall not be denied because such minor chooses not to consult" her parents, guardian, family members or friends.⁸³ It should be noted that this Act is not only ground-breaking because it repealed a similar but restrictive law promulgated during apartheid,⁸⁴ but also because of its progressiveness and nation-wide coverage regardless of the cultural, traditional and/or religious beliefs or practices that may exist in South Africa on this issue. The Act also allows for a high level of protection for a pregnant minor who may have fallen pregnant because of sexual abuse, as the mandatory consent of an adult is not required if the minor chooses to terminate the pregnancy.⁸⁵ Through the protection of a child's right to make a decision in a pregnancy-related case, the Act accentuates a child's ability to make personal and reasonable decisions and when the child chooses to

⁷⁸ See also, *Radebe and Others v Principal of Leseding Technical School and Others* [2013] (1821/2013) ZAFSHC 111.

⁷⁹ See section on other children's participatory rights in the CRC and the ACRWC.

⁸⁰ Act 92 of 1996.

⁸¹ As above, sec 1, which defines a minor

⁸² As above, sec 5(3), see also sec 5(1) which requires the informed consent of the pregnant woman and no one else as a critical aspect in the termination of pregnancy. The inclusion of this provision empowers pregnant children equally.

⁸³ As above.

⁸⁴ The preamble of the Act provides that "[t]his Act ... repeals the restrictive and inaccessible provisions of the Abortion and Sterilization Act, 1975 (Act No. 2 of 1975), and promotes reproductive rights and extends freedom of choice by affording every woman the right to choose whether to have an early, safe and legal termination of pregnancy according to her individual beliefs".

⁸⁵ RE Mhlanga 'Abortion: Developments and impact in South Africa' (2003) 67(1) *British Medical Bulletin* 118-119.

collaborate with his/her parents in a family decision-making process on a very critical matter such as pregnancy termination.

In fact, the acceptance of this provision and its legality was tested in the case of *Christian Lawyers Association v Minister of Health*.⁸⁶ In this case, the complainants challenged the constitutionality of the CTPA and whether it complies with the constitutional right of the child to parental or family care in section 28(1)(b) of the Constitution. The High Court based its decision on the legislative requirement of informed consent and held that valid consent can only be obtained from a person with the intellectual and emotional capacity to interpret and understand the intricacies that surround such a choice – a capacity the court acknowledges children do not have.⁸⁷ However, the court proceeded to state that the CTPA serves in the best interest of a pregnant girl child because it is flexible to recognise and accommodate the individual position of a girl child based on her “intellectual, psychological and emotional make up and actual majority”.⁸⁸

Other relevant pieces of legislation include the Local Government Municipal Systems Act (LGMSA),⁸⁹ which grants the local community⁹⁰ the right to participate in the planning, review and monitoring of municipal services.⁹¹ This was closely followed by the National Health Act (NHA),⁹² which obligates the inclusion of children in local health planning and requires that consent to research and experimentation conducted on them be given by their parents or legal guardians and the child if the child, is capable of understanding.⁹³

⁸⁶ *Christian Lawyers Association v Minister of Health* 2004 (10) BCLR 1086 (T). For more analyses of the facts of this case, see H Kruger ‘Traces of *Gillick* in South African jurisprudence: Two variations on a theme’ 2005 (46)1 *Codicillus* 1-14.

⁸⁷ *Christian Lawyers Association* (as above) para 1093H.

⁸⁸ As above, 1105F.

⁸⁹ Local Government Municipal Systems Act (LGMSA) Act 32 of 2000.

⁹⁰ The term local community is generic and thus includes children. Art 1 of the Act states: “local community’ or ‘community’, in relation to a municipality, means that body of persons comprising - (a) the residents of the municipality; (b) the ratepayers of the municipality; (c) any civic organisations and non-governmental, private sector or labour organisations or bodies which are involved in local affairs within the municipality; and (d) visitors and other people residing outside the municipality who, because of their presence in the municipality, make use of services or facilities provided by the municipality, and includes, more specifically, the poor and other disadvantaged sections of such body of persons.”

⁹¹ See generally, LGMSA (n 89 above) ch 4.

⁹² National Health Act 61 of 2003.

⁹³ As above, sec 71.

To date, one of the most progressive of the laws that have been promulgated is the Children's Act.⁹⁴ Generally, this Act provides the legislative framework for a comprehensive child protection strategy which contains provisions necessitating the consideration of children's opinions in all matters that affect them. The Act stipulates that children's right to participation extends to "all proceedings, actions and decisions by any organ of state in any matter concerning a child or children in general".⁹⁵ It goes on to add that "[e]very child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must "be given due consideration".⁹⁶ Noteworthy is the Act's meticulous classification of children – it emulates the concept of the CRC and the ACRWC without introducing any age checkpoints to a child's ability to express his or her view and to participate in "any matter" concerning him or her. The inclusion of "age and maturity" in section 10 of the Act should not be considered as a limitation but as a barometer in weighing a child's opinion. The broadness of this Act is what distinguishes it from other legislation passed in South Africa. In fact, the content of the Act is neither too broad nor too narrow; it is purely intended to protect, amongst others, children's right to participation in "all matters" that concern them.

Closely followed, is the Prevention of and Treatment of Substance Abuse Act (PTSAA),⁹⁷ which obligates authorities to consult children in the treatment of substance abuse - most of the provisions encouraging children's participation are delineated and corroborated throughout the PTSAA with reference to sections in the Children's Act. For instance, the Act's requirement for children to be included in discussions aimed at identifying solutions to substance abuse problems for the prevention and early intervention programmes is linked to section 148 of the Children's Act; probably as a regulatory mechanism.

Also, linked to the Children's Act is the Child Justice Act (CJA).⁹⁸ This Act grants children the right to be heard when they are in conflict with the law in all processes that concern them.⁹⁹ The chain reaction created by linking other laws to the Children's Act

⁹⁴ Children's Act 38 of 2005. Generally, the Act covers a vast array of issues relating to children in South Africa, including the family, matters relating to adoption, marriage (forced marriage), health care, medical procedures and treatment, social services and justice.

⁹⁵ As above, sec 6(1)(a) read with sec 10.

⁹⁶ As above, sec 10.

⁹⁷ Prevention of and Treatment of Substance Abuse Act (PTSAA) 70 of 2008.

⁹⁸ Child Justice Act (CJA) 75 of 2008.

⁹⁹ The Act actually mandates the magistrate to encourage the participation of a child before making any decision(s) on any issue that concerns the child – see for example s 47(7).

echoes unity in these laws both in theory and practice (including interpretation). It also reaffirms the foundational concept of children's rights as indivisible in fact and law.

Last and not least among South Africa's collection of progressive children's participatory right protection is the National Youth Development Agency Act (NYDAA).¹⁰⁰ The Act requires the participation of all youth (between 14 and 35 years old)¹⁰¹ in democratic processes, community and civic decision-making processes, and development at all levels.¹⁰²

Although it is different, the protection of children's right to participation is consistently developed in all these national laws, policies and programmes applicable in South Africa. Indeed, these pieces of legislation, although very limited in their protection of children's right to participation in family decision-making processes, have, from a general view point, nonetheless paved the way for an expected expansion and recognition of children's right to participation which extends to family decision-making processes in South Africa.

Institutional development in South Africa

Besides the cluster of laws enacted by South Africa identified above, there are several institutions in South Africa, both public and private, that act as watchdogs to South Africa's constitutional democracy. At the national level, the famous of these institutions are regulated by chapter 9 of the Constitution - credited for the creation of the so-called chapter nine institutions.¹⁰³ Although state funded, these are 'independent' watchdogs

¹⁰⁰ National Youth Development Agency Act (NYDAA) 54 of 2008.

¹⁰¹ It should be noted that it is beyond the scope of this thesis, based on the definition of 'youth' provided in the Act, to rely on the age group specified. Rather, the author will limit further analysis of this provision as it applies to children between the ages of 14 to 18 years old.

¹⁰² See generally, sec 4 of the NYDAA.

¹⁰³ These include: The Office of the Public Protector (OPP), the South African Human Rights Commission (SAHRC), the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities (CRL Rights Commission), the Commission for Gender Equality (CGE), the Auditor-General and the Independent Electoral Commission (IEC). Sec 181(2) of the Constitution states that 'these institutions are independent, and subject only to the Constitution and the law, and they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice'. Section 181(3), on the other hand, underscores the need for their independence, and calls on all other organs of state to assist and protect these institutions and to ensure their independence, impartiality, dignity and effectiveness. Furthermore, s 181(4) prohibits any person or organ of state from interfering with the functioning of these institutions. Section 181(5) states that these institutions are accountable to the National Assembly and requires them to report on their activities and the performance of their functions at least once yearly. Importantly, as per ch 9 of the Constitution, all these institutions, though interrelated in their task, have independent tasks.

to South Africa's constitutional democracy.¹⁰⁴ Three of these institutions - the SAHRC, the CGE and the OPP - are relevant to the general investigation and monitoring of children's rights violations. These institutions have national coverage with offices in all nine provinces of South Africa.¹⁰⁵ They are centrally mandated to expose unlawful and corrupt practices and to uncover failures of the executive, the legislature or government officials, for example on issues related to children's rights violations.¹⁰⁶

They also play an educational role through the promotion of the values of openness, accountability and respect for children's rights, in government and amongst ordinary citizens.¹⁰⁷ As De Vos points out, they have the "duty to reveal weaknesses and problems by collating and publishing information" on matters that relate to, for example, children's rights violations.¹⁰⁸ The OPP, for example, has over the years investigated and published reports on issues that are related to children's rights.¹⁰⁹ The CGE has also carried out several studies and investigations on human rights violations, predominantly on violations on the rights of the girl child in the broader context of gender.¹¹⁰

The most well-known of the three institutions indicated above is the SAHRC. This institution has conducted more research and investigations on children's rights in

¹⁰⁴ See for example, P de Vos 'Balancing independence and accountability: The role of chapter 9 institutions in South Africa's constitutional democracy', available online at https://www.academia.edu/3005430/Balancing_Independence_and_Accountability_The_Role_of_of_Chapter_9Institutions_in_South_Africa_s_Constitutional_Democracy [accessed 3 January 2015].

¹⁰⁵ These provincial offices have greatly facilitated accessibility to these institutions. For the provincial offices of the CGE, see <http://cge.org.za/contact-2/>, for the SAHRC, see, <http://www.sahrc.org.za/home/index.php?ipkContentID=2&ipkMenuID=2> and for the OPP, see, http://www.pprotect.org/contact_us/provincial_regional_offices.asp.

¹⁰⁶ For further details on the mandate of these institutions see, ch 9 of the South African Constitution. See also J Cherry *et al* "The role of chapter 9 institutions and the Pan South African Language Board", available at <http://www.thepresidency.gov.za/docs/pcsa/social/legacy/chapt4a.pdf> [accessed 17 April 2015].

¹⁰⁷ The SAHRC, for example, has conducted several seminars and workshops on children's rights. It also has as one of its main focus areas "Children's rights and basic education".

¹⁰⁸ P de Vos (n 104 above) 173.

¹⁰⁹ See for example, "Report of the Public Protector in Terms of Section 182(2)(b) of the Constitution of the Republic of South Africa, 1996 and Section 8(1) of the Public Protector Act, 1994", available at http://www.pprotect.org/library/investigation_report/Report%20No.%2038%20Signed.pdf [accessed 17 April 2015].

¹¹⁰ See for example, Report by the CGE, (2012) *Combatting domestic violence against women and children in the Western Cape by Increasing Access to Shelters and Improving the Quality of Services*, available at <https://drive.google.com/file/d/0B43RY8hVdugGZ25SX1NmTVpfWW8/view> [accessed 24 April 2015].

general than any other chapter nine institution.¹¹¹ The SAHRC is also unique because it has the mandate to summon human rights abusers and to conduct hearings and make recommendations to the government and the legislature.¹¹² Since its inception, and as an institution established to support constitutional democracy, the SAHRC has monitored the realisation of children's rights in South Africa through investigating complaints alleging violation of children's rights and embarking on numerous advocacy and research initiatives.¹¹³ Reporting in 2011, the SAHRC held that more attention should be given to South African children's meaningful participation in the decisions taken on matters that concern them to ensure that the conclusions arrived at truly reflect their needs and have the desired impact.¹¹⁴

Also, the State has created special courts for children only.¹¹⁵ The children's court affords an opportunity for children to participate during proceedings on matters that concern them. Generally, the court's competence is on matters related to children who are in need of care and protection and to make decisions about children who are abandoned, neglected or abused. Other courts, such as High Courts, the Supreme Court of Appeal and the Constitutional Court in South Africa have also dealt with a considerable number of children's rights related cases.¹¹⁶ In fact, as demonstrated above the courts are mandated to listen to the views of the child on matters that concern the child. Such practices have been discussed in detail in the preceding chapters, especially in the context of state intervention into the family environment to settle or investigate issues related to failed or absent children's participation in matters that concern them at

¹¹¹ This could be as result of many issues, but the most common is that the SAHRC has identified children's rights and basic education as one of its key focus areas. Visit for example, the SAHRC page on general reports, available here <http://www.sahrc.org.za/home/index.php?ipkContentID=17&ipkMenuID=20> [accessed 27 April 2015] and <http://www.sahrc.org.za/home/index.php?ipkContentID=121&ipkMenuID=104>.

¹¹² See for example the SAHRC's *Report of the Public Hearing on the Right to Basic Education* available at <http://www.sahrc.org.za/home/21/files/Reports/Right%20to%20basic%20education%202006.pdf>. See other Public hearings reports of the SAHRC here, <http://www.sahrc.org.za/home/index.php?ipkContentID=15&ipkMenuID=19> [accessed 29 April 2015].

¹¹³ C Murray "The human rights commission et al; what is the role of the South Africa's Chapter 9 Institutions?" (2006) 9(2) *Potchefstroom Electronic Law Journal* 122 -197.

¹¹⁴ SAHRC Report, (2011) South Africa's Children: A review of equity and child rights (see section on Message by *Commissioner Lindiwe Mokate*) Available at http://www.sahrc.org.za/home/21/files/SA%20CHILDREN%2024%20MARCH%202011%20SAHRC%20_%20UNICEF%20REPORT.pdf [accessed 27 April 2015].

¹¹⁵ See generally, ch 4 of the Children's Act, 2005 (Act No 38 of 2005).

¹¹⁶ Some of the cases dealt with by these courts have been analysed in this thesis.

the family level. Also, the Children's Act grants a child the competence to approach the court in person or through a representative.¹¹⁷

Elsewhere, a steering committee has been created at the National Prosecuting Authority (NPA)¹¹⁸ to monitor and improve the NPA's implementation and commitment to the principle of First Call for Children in an effort to promote the well-being of children. Through this committee, the NPA is giving children political priority and visibility, implementing and monitoring the impact of coordinated and effective action, and promoting children's rights to protection, development, survival and participation in society.¹¹⁹

Another crucial institution which promotes children's rights is Parliament. The Children's Parliament¹²⁰ sessions create a platform for children's participation in democracy and affords them an opportunity to express their views on policies as well as programmes and strategies intended to realise their rights. In 2014, the children used the opportunity to voice their concerns on a range of issues, such as poor education especially for disabled children, sexual violence and abuse, lack of safety in their homes and alcohol and substance abuse.¹²¹

3.1.2. The status of children's right to participation under Cameroonian legislation

From a geo-political and legal point of view, Cameroon has factual differences from the situation in South Africa and such differences have been highlighted in this sub-section with the main focus on highlighting its strength in the protection and promotion of children's rights in general and their right to participation in particular. From a legislative point of view, Cameroon has little legislative protection in place for children. As will be indicated in this sub-section, the limited legislative protection afforded to children in Cameroon weakens their claims and protection of their rights in general and their right to participation in particular at the national level. Further, the struggles of

¹¹⁷ See generally art. 53(2) of the Act.

¹¹⁸ Established under sec 179 of the Constitution, the NPA is governed by the National Prosecuting Authority Act (Act No. 32 of 1998). The Constitution, read with this Act, provides the NPA with the power to institute criminal proceedings on behalf of the State, to carry out any necessary functions incidental to institution of criminal proceedings and to discontinue criminal proceedings. It is accountable to the Minister of Justice and Correctional Services.

¹¹⁹ Committee on the CRC, Consideration of report submitted by South Africa under art. 44 of the CRC, CRC/C/ZAF/2 para 233.

¹²⁰ The Children's Parliament is co-hosted by the Nelson Mandela Children's Fund, the Department of Social Development and the Parliament of South Africa. In total, the children's parliament is made up of 108 (12 per province) children aged between 11 and 17 years old.

¹²¹ See generally, The Nelson Mandela Children's Parliament 2014, available at <http://www.nelsonmandelachildrensfund.com/what-we-do/youth-parliament/> [accessed 1 May 2015].

Cameroonian children are aggravated by several bureaucratic challenges hindering them from thriving beyond the normal “difficult childhood”. These include, but are not limited to, inadequate implementation of the limited existing sectoral laws and policies intended to assist children, unsatisfactory budgetary allocation for services related to children, such as education and health care, compounded by an endemic mismanagement of resources by officials.

Indeed, it is therefore not surprising that the ACPF¹²² has categorised Cameroon as a “less child friendly”¹²³ State in its 2008 report, which considers African States’ legal and policy frameworks for child protection, States’ budgetary allocation to services related to children, and noticeable successes at state level for children’s rights protection.¹²⁴ Cameroon’s less child friendly status is not based on its per capita income, but on its failure to put in place appropriate child-friendly legal and policy frameworks to protect children from abuse and exploitation.¹²⁵ Four years after the ACPF’s report, the 2012 United States Department of State Bureau of Democracy’s Human Rights Report on Cameroon paints a rather regrettable picture.¹²⁶ In that report, child abuse amongst others is highlighted as a major problem.¹²⁷ Remarkably, when the ACPF reported again in 2013, Cameroon was still classified a less child friendly State and further labelled as one of the countries that “showed a sharp fall in ranking” from the 2008 index. Its sharp fall was chiefly based on limited significant efforts to improve access to basic services to achieve positive child-related outcomes¹²⁸ and shrinking spending on sectors such as health and education that benefit children, as well as relatively low performances with regard to domestication of international children’s rights treaties compounded by limited efficient and effective translation of resources into better child well-being outcomes.¹²⁹

¹²² The African Child Policy Forum is an independent, not-for-profit, pan-African institution of policy research and dialogue on the African child. The Forum has a rich track record in data analysis and comparative and analytical research on children’s rights in Africa.

¹²³ As per the ACPF’s report (2008) the other countries were, Congo (Brazzaville), Angola, Cote D’Ivoire, Zimbabwe, Equatorial Guinea, Sudan, Sierra Leone, Benin and Ethiopia.

¹²⁴ See also, ACPF’s report (2008), *The African report on child wellbeing: How child-friendly are African governments?* Addis Ababa: The African Child Policy Forum 7. See also, A Bequele, “Monitoring the commitment and child-friendliness of governments: A new approach from Africa” (2010) 34 *Child Abuse & Neglect* 34–44.

¹²⁵ As above ACPF’s report (2008).

¹²⁶ See generally, United States Department of State Bureau of Democracy 2012 report on human rights in Cameroon available at <<http://www.state.gov/documents/organization/204309.pdf>> [accessed 26 January 2014].

¹²⁷ As above 29.

¹²⁸ See ACPF’s report (prepared by A Bequele *et al.*) *The African Report on Child Wellbeing 2013 Towards greater accountability to Africa’s children* (n 57 above).

¹²⁹ As above 53.

From a legislative point of view, the progress of human rights protection and promotion in Cameroon has been questioned by many in the international community.¹³⁰ Most children in Cameroon are the most marginalised, oppressed and vulnerable to diseases, poverty and death.¹³¹ The physical and mental ability of children living in such perilous conditions cannot be said to be at its best and, at the minimum, requires that special protections are set up to enable them to age and mature properly. This condition is perhaps common knowledge to the government and society in general in Cameroon. Yet, Cameroon has a poor human rights protection (laws) and fulfilment (implementation) record, especially concerning its children.¹³²

This record is aggravated by the severe lack of legislative protection for children, compounded by its complex legal system. Cameroon has a unique legal system (mix-jurisdiction)¹³³ in Africa, which is a reflection of her colourful past of colonisation combined with an enormous resource of customary law (including Islamic law). The country is composed of about 250 ethnic groups with an equal number of tribal languages.¹³⁴ Most notably, common law (applicable in English-speaking Cameroon) and civil law (applicable in French-speaking Cameroon) co-exist. In most cases, the differences that exist between these two legal systems are so glaring that they are in some cases completely at odds with one another “because of their differing language, constitutional backgrounds and methodologies, treatment and interpretation of laws, and judicial training”.¹³⁵ For instance, the two legal systems do not seem to agree on who

¹³⁰ See generally, Committee on the CRC, Written replies by the Government of Cameroon to the list of issues prepared by the Committee on the Rights of the Child in connection with the consideration of the second periodic report of Cameroon (CRC/C/CMR/2).

¹³¹ M Dicklitch ‘Failed democratic transition in Cameroon: A human rights explanation’ (2002) 24 *Human Rights Quarterly* 152–176. See generally *The State of The World’s Children 2012*, available at http://www.unicef.org/sowc2012/pdfs/SOWC%202012-Main%20Report_EN_13Mar2012.pdf [accessed 20 January 2014].

¹³² See generally, ACPF’s report (prepared by A Bequle *et al.*) *The African Report on Child Wellbeing 2013 Towards greater accountability to Africa’s children* (n 57 above). Read also the interview granted by the former High Commission for Human Rights (Ms Navi Pillay) in Yaoundé at the end of her first visit to Cameroon in which she said: “The next step for Cameroon is to focus on rigorous implementation of recommendations from treaty bodies, special procedures and the Universal Periodic Review, so as to put in place a strong and inclusive human rights protection system for the benefit of its entire population”. Full transcript of the Interview available at <http://www.un.org/apps/news/story.asp?NewsID=45329#.VUjFamNfZ8E> [accessed 5 May 2015].

¹³³ For further readings on Cameroon’s mix-jurisdiction, see for example, M Azevedo, *Cameroon and its national character* (1984). C Anyangwe *The Cameroonian judicial system* (1987), CM Fombad, ‘An experiment in legal pluralism: The Cameroonian Bi-Jural/Uni-Jural imbroglio’ (1997) 16(2) *University of Tasmania Law Review* 209.

¹³⁴ EN Ngwafor *Family law in Anglophone Cameroon* (1993) in OM Inglis (ed) 1.

¹³⁵ S Cziment “Cameroon: A mixed jurisdiction? A critical examination of Cameroon’s legal system through the perspective of the Nine interim conclusions of worldwide mixed jurisdictions” (2009) 2(2) *WINTER 2009* 1.

a child is. Under the French Civil Code of 1985 (applicable in French Cameroon), a child is anyone below the age of 21 years¹³⁶ and under common law a child is anyone below the age of 18 years.¹³⁷ Generally, a glance at Cameroon's judicial track record leaves one with no option but to concur with Fombad that, though sporadic, Cameroon does not entirely recognise conflicts of laws within its mix-judiciary system¹³⁸ when applying laws from the common and civil systems.¹³⁹

The Constitution of Cameroon

The 1996 Constitution of Cameroon¹⁴⁰ is a classic prototype of an aged ideological constitution existent in the 21st century, marred by huge rights-based gaps and proliferated with rigid governmental arms¹⁴¹ regulations. The rights protected in the Constitution are all inscribed in the preamble¹⁴² of the Constitution. These are the right to education, health, freedom of expression and communication, life, and Non-Discrimination. By extension, the Constitution admits to concur with the provisions of the UDHR, the UN Charter and the ACHPR¹⁴³ and any other instrument ratified by Cameroon.¹⁴⁴ The protection of children's rights in the Constitution is almost non-

¹³⁶ See generally, art. 488 of the Civil Code (legal capacity, consent, medical counselling without parental consent, sexual consent). A minor may, however, be emancipated by court order or automatically by marriage.

¹³⁷ Even though the State is aware of the impact of this difference in the definition of a child and has cleared this ambiguity in stating that in ratifying the CRC, Cameroon endorses the definition of the child given therein (any person below 18), the State also acknowledges the possible challenges it may face in the application of this definition within its bi-jural system.

¹³⁸ Two examples of the confused nature of the application of laws in Cameroonian courts, in coming to grips with conflicts of laws are as follows. In *Lelpou v Lelpou* (Suit No BHC/SW/73 - unreported) a divorce suit was brought before the Buea High Court (in the Anglophone legal district) by two Francophones working within that court's jurisdiction, concerning a monogamous marriage contracted in accordance with the civil law in Yaoundé (in the Francophone legal district). The husband asked the court to dissolve the marriage on the ground that the parties had been living apart for five years. The court, without taking into account the fact that the parties were Francophones and that their marriage was contracted according to the civil law, thus raising a problem of conflict of laws, mechanically applied the relevant sections of the Matrimonial Causes Act (1973), that is the *lex fori*, and not the *lex causae*. In the same way, the Douala High Court (in the Francophone legal district) in *Affaire Mme Neba nee Juliette Bih c. Neba Arron Suh* (Judgement civil No 335 du 3 Avril 1989, de TGI Douala – unreported) mechanically applied the French Civil Code to a divorce petition brought by two Anglophones concerning a marriage contracted under the English common law, without alluding to any possible conflict of laws.

¹³⁹ Fombad (n 133 above) 221.

¹⁴⁰ Amended in 2008 by Law No. 2008-1 of April 14, (to Amend and Supplement some Provisions of Law No. 96-6 of January 18, 1996 to Amend the Constitution of June 2, 1972.)

¹⁴¹ The executive, the legislature and the judiciary.

¹⁴² Art. 65 states that the Preamble is part and parcel of the Constitution.

¹⁴³ Preamble of the Constitution.

¹⁴⁴ See generally, art. 45: all ratified treaties shall override national laws.

existent and the Constitution does not clarify the ambiguity in the definition of a child in both common and civil law systems. However, and safely so, the State, in its report to the Committee on the CRC concurred with the definition in the CRC and regards a child to be any person below the age of 18.¹⁴⁵ Also, as per article 45 of the Constitution, treaties override national law. Consequently, the definition in ratified treaties will override national law.¹⁴⁶

Apart from the child's right to education captured under paragraph 18 of the preamble, which states that "the State shall guarantee the child's right to education. Primary education shall be compulsory. The organization and supervision of education at all levels shall be the bounden duty of the State", the Constitution bears no other right directly ascribed to children. As a result, one way of deducing any form of protection for children in the Constitution is through reading into expressions generally used in the Constitution like 'everyone', 'all citizens', 'every person'.¹⁴⁷ These expressions are inclusive and, thus, indeed mean everyone and by extension underline one of the key objectives of the ACRWC and the CRC, which is that children are human rights holders alongside adults. However, as the Committee on the CRC rightly points out, the test must be in the application of the rights and whether they are truly realised for children and directly invoked before the courts.¹⁴⁸

Another approach to relate the rights protected in the Constitution to children is through an expansive interpretative approach¹⁴⁹ with children as beneficiaries. This method of interpretation will give a wider coverage of these rights and include children as beneficiaries of the rights without distorting the textual context in the Constitution. The obvious responsibility of legal representatives in courts will be to stretch the normative content of these rights, convince the court and then in the process claim these rights for children. This, in the opinion of this thesis, could be the plausible way to maneuver over such loose constitutional rights existent in the Cameroonian

¹⁴⁵ Committee on the CRC, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention – Cameroon* UN doc CRC/C/28/Add.16 para 19.

¹⁴⁶ See generally, sec 45 of the Constitution of Cameroon which states that: "Duly approved or ratified treaties and international agreements shall, following their publication, override national laws, provided the other party implements the said treaty or agreement".

¹⁴⁷ These terminologies are the most popular expressions used in the Constitution. The terms are of course inclusive and indeed mean everyone – but key to the general development of rights denotes specific protection of specific groups of people. The term 'children' does not exist in the Cameroonian Constitution, rather it is engulfed in these phrases.

¹⁴⁸ Committee on the CRC, GC No 5 (n 1 above).

¹⁴⁹ This approach gives a wider effect to a legal provision both subjectively and objectively. For details on this method of interpretation see, S Dothan 'In defence of expansive interpretation in the European Court of Human Rights' (2014) 3(2) *Cambridge Journal of International and Comparative Law* 508- 231.

Constitution. Thus, any attempt to relate or suggest such rights (initially intended for adults) to children, for example, is barely a matter of technical ability. Indeed, such interpretation can only draw from treaties duly ratified by Cameroon as per article 45 of the Constitution.

The effectiveness of the rights protected in the Preamble (especially freedom of expression and communication – because they relate closest to their right to participation), read with the knowledge of the provisions of articles 45 and 65 of the Constitution provides for the justiciability of children’s right to participation in Cameroon. This is because the formal recognition of ratified international treaties over national laws is timely and crucial in such cases and provides protection for children’s rights in general and compensates for their limited coverage in national laws. Decisively, article 45 simply mandates that in case of conflict of laws in Cameroon, the provisions of the CRC and the ACRWC should prevail.

International children’s law in Cameroon

Perhaps because the State is conscious of its children’s rights legislative lacuna at the national level, Cameroon has ratified some significant instruments that protect children’s rights. Indeed, Cameroon’s ratification of the ICCPR (1984), the CESC (1984), the Convention against Torture and Other Cruel Inhuman or Degrading Treatment or Punishment (CAT) (1986), the CRC (1993), CEDAW (1994), the ACRWC (1997), the CRPD (2008), African Women’s Protocol (2012) and the CRC-OP-AC (2013) portrays pre-emptive intentions from the State to protect its citizens and especially children.¹⁵⁰ Through article 45 of the Constitution, which recognises ratified international law instruments at the highest echelon of legally binding instruments in Cameroon – with or without national law protection, ratified international laws are prioritised in courts of law and in the general protection of children’s rights in this case. Hence, thanks to article 45 (which insinuates Cameroon’s monist approach to international law) and the ratification of these instruments, children can now claim, through a legal representative,¹⁵¹ their rights through direct application and interpretation of the provisions of any of these international treaties in proceedings on matters that affect them. The benefits of the ratification of these international treaties are enormous. Indeed, rightly so, the legislative improvement of the protection of

¹⁵⁰ All these instruments, as indicated earlier in chapter two [See the section on other children’s participatory rights under other International and Regional Instruments], are relevant to the general protection of children’s rights and their right to participation.

¹⁵¹ MD Afuba ‘The constitutional protection of civil and political rights in Cameroon’ (2006) *University of Botswana Law Journal* 68-69.

children's rights in Cameroon has expanded through such ratification. Suggestively, adherence to these instruments can and should be seen as a quick fix attempt by the government to fill the legislative gap extant at national level due to the severe shortage of laws that protect children's rights in Cameroon and in particular their rights to participation.¹⁵²

Other children's laws in Cameroon

Unlike the South African Constitution, where a cluster of children's rights has been protected, as demonstrated above, the Constitution of Cameroon, as analysed above and under this section, is different and rather paints a "care free picture" and almost does not recognise children as right holders. However, the Cameroonian Constitution is a foundational legislation within its legal system and article 45 makes international children's treaties ratified by Cameroon as points of reference in the protection of children's rights at national level. Also, unlike South Africa, some of the national laws enacted in Cameroon or borrowed from neighbouring Nigeria do not specifically or directly protect children's right to participation.

However, several laws (decrees, orders, ordinances and ministerial instructions) have been adopted that protect issues related to children in Cameroon.¹⁵³ Unfortunately, some of these laws are outdated¹⁵⁴ or imported – outdated laws from neighbouring Nigeria and applicable mostly in Southern (common law) Cameroon.¹⁵⁵ In the second half of the 20th century, four pieces of legislation intended to protect children were promulgated into law in Cameroon: these are Circular on pre-trial detention of minors,¹⁵⁶ Circular on juvenile delinquents and runaway children,¹⁵⁷ Circular on

¹⁵² There is no specific national law in Cameroon that codifies children's right to participation. However, aspects of children's right to participation are mentioned sporadically in other national laws regulating issues such as marriage, divorce and others.

¹⁵³ Committee on the CRC, *Consideration of reports submitted by States Parties under Article 44 of the Convention – Cameroon* (n 145 above).

¹⁵⁴ For example, the 1804 Napoleonic Civil Code, the Act of 24 July 1889 of the protection of ill-treated and abandoned children, the Act of 19 April 1898 on the punishment of violence, assault, acts of cruelty and offences against children, the Decree of 30 November 1928 establishing special courts and the probation system for minors, the Decree of 30 October 1935 on the protection of children, the Decree of 23 September 1954 on the family record book.

¹⁵⁵ For example, Juveniles Courts Rules, CAP 32 of the 1958 Laws of the Federation of Nigeria. The irony here is that Nigeria has long consolidated and improved its child law legislation in the Child's Right Act of 2003.

¹⁵⁶ No. 9062/DJAS of 15 July 1967.

¹⁵⁷ No. 300018/DJAS/of 8 July 1968.

methods of investigation in relation to the adoption of children¹⁵⁸ and Circular on the authorization of temporary child custody.¹⁵⁹ These were also captured in the State's report of 2009 to the Committee on the CRC as current legal protection accorded to children in Cameroon.¹⁶⁰ Unfortunately, access to these laws is almost impossible and any attempt to quote them as protecting children's right to participation will be mere speculation. It is, based on the context of children's right to participation analysed in chapter two and three, expected that in matters relating to custody, a child's opinion is vital to arrive at any decision.¹⁶¹ Technically, some of these laws could be excused especially as they were promulgated before the CRC and ACRWC. Equally, the drafters had no real international law (child law) foundation to rely on when drafting these laws.

However, an effort was made to incorporate children's right to participation in some of Cameroon's aged legal instruments. The inspiration to do so was probably based on the influence from ICCPR (article 25), which led to the adoption of Ordinance No. 81/02 of 19 June 1981¹⁶² and the French Civil Code.¹⁶³ Through these instruments, children's right to participation is guaranteed, directly or through a representative (parent, guardian, legal representative), in legal and administrative proceedings, in cases related to custody, divorce or separation proceedings in marriage and in hearings in the Council Chamber. For example, with regard to marriage, according to article 52(1) of Ordinance No. 81/02, "[n]o marriage may be celebrated if the girl is below the age of 15 years or the boy below the age of 18 years, except under an exemption granted by the President of the Republic for serious reasons."¹⁶⁴ Within this provision, clear legal derogations from mainstream treaties (CRC and ACRWC) ratified by Cameroon are glaring. Not only does it discriminate against the girl child in terms of her marriage age, it also puts her in a difficult situation where, if married earlier, it is the President of the Republic who decides and not the girl child whether the marriage takes place or not.¹⁶⁵ Thus, despite its recognition of children's right to participation, it is limited in some instances. Surely, the involvement of the President or any other individual for that matter to make such a critical decision on a child's behalf as to enter into marriage is a

¹⁵⁸ No. 522/MSAP/DAS/BDI of 27 June 1974.

¹⁵⁹ No. 81/0018/LC/MINAS/SPFI of 18 September 1981.

¹⁶⁰ Committee on the CRC, *Consideration of reports submitted by States Parties under article 44 of the Convention – Cameroon* (n 145 above).

¹⁶¹ See *Tarh v Tarh* (n 178 below).

¹⁶² On the organisation of the civil register arts; 52(1) and 64(1).

¹⁶³ See generally, art. 238.

¹⁶⁴ See also, art. 488 of the Civil Code.

¹⁶⁵ Probably not surprising that this is the case, especially considering the fact both legislations were applicable in Cameroon before the CRC and the ACRWC were adopted.

violation of children's right to autonomy and participation. Also, it contradicts Cameroon's commitment to the ACRWC, which prohibits child marriage¹⁶⁶ and the very reasoning of the Committee on the CRC in its General Comment No. 18, which provides that:

As a matter of respecting the child's evolving capacities and autonomy in making decisions that affect her or his life, in exceptional circumstances a marriage of a mature, capable child below the age of 18 may be allowed provided that the child is at least 16 years old and that such decisions are made by a judge based on legitimate exceptional grounds defined by law and on the evidence of maturity without deference to cultures and traditions.¹⁶⁷

Although the Committee on the CRC expresses a lenient view in terms of the age of marriage as per the ACRWC, as elaborated below, article 52(1) of Ordinance No. 81/02 in Cameroon still violates such a requirement by expecting a girl of 15 to enter into a marriage without her consent but with that of another. This practice is still prevalent in Cameroon because despite the ratification of the CRC and the ACRWC, the provisions of these instruments (though not uniform) have not been infiltrated into the national legal system.

In 1990, the State promulgated two laws related to ensuring children's right to participation: The Act on freedom of social communication,¹⁶⁸ and the Act on freedom of association.¹⁶⁹ Although not directly intended to protect children, both Acts protect some aspects of children's right to participation through guaranteeing their freedom of association and social communication (the link between these rights and children's right to participation has been analysed in chapter three).

Sadly, two other pieces of legislation which could perhaps be identified as central to protecting children's right to participation and possibly clear the inconsistencies in the age of marriage and other related issues – because they do so much better than the laws mentioned above and are contemporary or recent developments – are still in draft stages. These laws (the Persons and Family Code and the Child Protection Code), which when adopted will be the main domestic instruments on children's rights in Cameroon, extensively address a number of issues ranging from the best interests of the child to the protection of the family environment.¹⁷⁰ It is hopeful that once promulgated these pieces

¹⁶⁶ Art. 21.

¹⁶⁷ CEDAW and Committee on the CRC, *Joint general recommendation/general comment No. 31 of the Committee on the Elimination of Discrimination against Women and No 18 of the Committee on the Rights of the Child on harmful practices* CEDAW/C/GC/31-CRC/C/GC/18 (2014) para 19.

¹⁶⁸ No. 90/53 of 19 December 1990.

¹⁶⁹ No. 90/53 of December 1990.

¹⁷⁰ See for example, secs 5, 18 & 42 of the draft Child Protection Code.

of legislation would clarify several derogatory clauses within the Cameroon child protection system.

Even though national laws have not really protected children's right to participation in Cameroon, in practice, children's right to participation has been ensured sporadically and, regrettably, much so from a tokenistic approach.¹⁷¹ In fact, the plurality of laws (both general and outdated – highlighted as protecting children's right to participation extant in Cameroon) have not helped to ensure factual children's rights in general and their right to participation in particular in Cameroon. Equally, it has not really helped to clarify Cameroon's legal system enigma of conflicts of laws. Worth noting, though, the State has for a long time made some attempts to unify its laws and ensure the protection of children's rights.¹⁷² It is probably common knowledge that a unitary codification or, at the minimum, a comprehensive piece of contemporary child law enacted in Cameroon will bring benefits to the entire child justice system. It will enable easy accessibility and propel proper development of its provisions and children's rights in general. It will also, from a Cameroonian perspective, undoubtedly establish a spring board from which the contextual normative expansion of critical children's right(s) – such as their right to participation – is developed and provide a better protection to children.

The State is, of course, aware of such benefits of a unified¹⁷³ child protection law and has promised to ensure this happens.¹⁷⁴ However, the process is painfully slow and this is due to the lack of proper coordination of the justice system pertaining to

¹⁷¹ “*Tokenism* is the final rung of non-participation under Hart's Ladder, where children are *prima facie* given a voice but in reality, are given very little or no input into what the subject should be or the manner in which it is communicated”. For details on this approach, see A Parkes *Children and international human rights law: The Right of the child to be heard* (2013) 17; R Hart ‘Children's participation: From tokenism to citizenship’ 1992 (4) *UNICEF Innocenti Essays* 5; R Hart ‘Children's right to participate: Some tools to stimulate discussion on the issue in different cultures’ in Verhellen E (ed) *Understanding children's rights: Collected papers presented at the second international interdisciplinary course on children's rights* (1997); SR Arnstein ‘A ladder of citizen participation’ (1969)35(4) *Journal of the American Institute of Planners* 216-224.

¹⁷² See generally, Fombad (n 133 above) and CM Fombad *International encycopaedia of laws, Constitutional law: Cameroon* (2011).

¹⁷³ Cameroon has, for example, unified its Criminal Procedure Code 2006 – this process is not new to the state.

¹⁷⁴ See, Committee on the CRC, Written replies by the Government of Cameroon to the list of issues prepared by the Committee on the Rights of the Child in connection with the consideration of the second periodic report of Cameroon (n 130 above) paras 5–9.

children.¹⁷⁵ Most, if not all, of the laws intended to unify child law in Cameroon are still in their draft stages and stuck in the shelves at the Ministry of Justice and the Ministry of Social Affairs.¹⁷⁶

As already mentioned, children's right to participation is to some extent (on paper) protected at the national level in Cameroon – this is all thanks to the ratification and incorporation of the CRC and ACRWC in the national legal system. The test undoubtedly is in the practical aspects or implementation of the right.¹⁷⁷ Instances where children's views have been heard have mostly been in custody cases. For example, on appeal in *Tarh v Tarh*¹⁷⁸ the Bamenda Court of Appeal set aside an earlier decision granting custody of the children of a failed marriage to their mother because the trial judge failed to consider the views of the children involved. In doing so, Ndoping J held that it is imperative for the opinion of children to a failed marriage to be heard in determining which of the parents should be given custody.¹⁷⁹ The impression at this stage is that this is the furthest the courts in Cameroon have gone in protecting children's right to participation in the context of custody.¹⁸⁰ The participation of children in *all matters* that concern them within the family is farfetched, because the family is still a closed environment and private. Resultantly, any introduction of such "powers" to children to participate in all matters concerning them will be foreign and might be rejected at first mention. In fact, precisely how this is going to develop at the level of practice and procedure remains a matter of speculation.

¹⁷⁵ The only substantive attempts so far made by the State to unify its laws is through the Labour Code, the Penal Code, the Highway Code, the General Tax Code and the Criminal Procedure Code (CPC) of 2007. For example, prior to 2007, when the CPC came into effect, criminal procedure in Anglophone Cameroon was based on the Nigerian common law. Likewise, criminal procedure in Francophone Cameroon was based on French Civil Law. See also, EN Njungwe 'International standards on juvenile justice: Implications of the New Criminal Procedure Code on the Administration of Juvenile Justice in Cameroon' (2008) 2 *Cameroon Journal on Democracy and Human Rights* 59 & 67. See also, A Akonumbo 'Excursion into the best interests of the child principle' in family law and child-related laws and policies in Cameroon' (2010) *The International Survey of Family Law* 63-94.

¹⁷⁶ A Akonumbo 'Implementation framework for children's rights and welfare standards: Profiling the harmonisation status of child law' (ACPF report) (2008) 24.

¹⁷⁷ In fact, the State has alluded to the fact that attempts to ensure children's right to participation are likely to face obstacles due to the gerontocratic nature of traditions in Cameroon in which children are only regarded as human beings in the making until they reach maturity. See, Committee on the CRC, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention – Cameroon* (n 145 above) para 53.

¹⁷⁸ *Tarh v Tarh appeal No. BCA/19/87* (unreported).

¹⁷⁹ As above.

¹⁸⁰ Noteworthy and credit to the learned Judge, this was before the ratification and adoption of the CRC and the ACRWC.

Institutional development in Cameroon

Unfortunately, at the time of writing this thesis, Cameroon did not have a host of state funded institutions who act like human rights violations watch-dogs at the national level, as does South Africa.¹⁸¹ However, in 1990, the State established the National Commission on Human Rights and Freedoms (NCHRF) and at the national level this is the main state funded organisation with the mandate of a human rights watch-dog.¹⁸² At least on paper, it is an independent institution that can advise, observe, evaluate, discuss, debate, promote and protect issues of human rights and freedoms in Cameroon.¹⁸³

As the leading national human rights commission in Cameroon, the NCHRF is a central institution in protecting children's rights in Cameroon and enjoys national coverage with regional offices in six of Cameroon's 10 regions.¹⁸⁴ To facilitate its work on promoting children's rights, the NCHRF has established a sub-working group to promote the rights of vulnerable groups (including children) in Cameroon.¹⁸⁵ In its 2013 activity report, the NCHRF reported on conducting educational activities in schools on the rights of the child.¹⁸⁶ It also conducts hearing sessions on issues such as child support in cases where the parents are divorced. Indeed, during such hearings the NCHRF takes the child's views into consideration and makes decisions that are generally in the best interests of the child.¹⁸⁷ Besides these functional reports on the NCHRF generally found on its webpage, the NCHRF unfortunately does not (but for its 2013 activity report) publish reports of its inquiries or interventions to protect human rights, thus making it difficult to evaluate the extent to which it has promoted and protected children's rights in general or in particular their right to participation in Cameroon.

¹⁸¹ This is typical of most African countries and especially those classified on the same or a lower rank of human rights protection in Africa by the statistics of the ACPF (n 122 above).

¹⁸² The NCHRF was established through *Act No. 2004/016 of 22 July 2004, amended in 2010*.

¹⁸³ International Human Rights Instruments, *Common core document forming part of the reports of States parties – Cameroon* UN/doc/HRI/CORE/CMR/2013 para 86.

¹⁸⁴ See generally, <http://www.cndhl.cm/index.php/organisation-de-la-cndhl> [accessed 7 May 2015].

¹⁸⁵ For details on this working group, see, <http://www.cndhl.cm/index.php/les-sous-commissions/sous-commission-n-3> [accessed 5 May 2015].

¹⁸⁶ NCHRF's 2013 activity report, available at <http://www.cndhl.cm/index.php/rapports-edh-et-rapports-d-activites>, and <http://www.cndhl.cm/index.php/protection-et-promotion-des-droits-des-enfants> [accessed 5 May 2015].

¹⁸⁷ In a telephone conversation with an official at the Commission, on Monday 4th May 2015, he attested to the fact that the Commission has conducted several of such hearings and made decisions that compel the father, especially, of children from a divorced marriage to provide financial support to their child(ren). However, he also admitted that the process has not been completely smooth, especially in cases where a parent fails to make such a contribution and the other refuses to act on the Commission's recommendation to approach the courts for financial reasons.

Elsewhere, in 2009, the State reported to the Committee on the CRC that a National Commission to Protect Children at Risk, Juvenile Delinquents and Abandoned Children¹⁸⁸ had been created¹⁸⁹ in the department of the Ministry of Social Affairs with the mandate to draw and oversee monitoring and implementation strategies of the national children's policy.¹⁹⁰ However, in the same report, the State is quick to highlight the difficulties it faces in ensuring the smooth running of this Commission specifying in the process lack of funds and personnel.¹⁹¹ Institutionally, the non-functioning of this Commission, worsened by the fragile impact of the NCHRF on the protection and promotion children's rights, puts children in Cameroon in a thin situation regarding the fulfilment of their rights.

At the level of the judiciary, unfortunately, there is no court specifically assigned to hear matters that concern children. Resultantly, depending on the matter, and especially in issues related to custody, children in Cameroon are generally heard in the chambers of the Courts of First Instance, High Court or Court of Appeal, and in rare cases at the Supreme Court of Appeal.¹⁹²

However, one other institution that has made some progressive thesis in the promotion of children's right to participation is the National Assembly (Parliament). Since 1998, the State instituted children between the ages of 9 and 18 in parliament sessions. This is intended to be a platform for dialogue between children and decision makers and contribute to the effective implementation of their right to participation.¹⁹³

¹⁸⁸ The Commission serves as an umbrella entity to enhance the interaction between the various stakeholders in the interest of improved coherence, efficiency and impact of the National Children's Policy.

¹⁸⁹ Pursuant to Decree No. 90/524 of 23 March 1990.

¹⁹⁰ Although reported in 2009, a similar Commission had been promulgated by law *Decree No. 90/524 of 23 March 1990* establishing the National Commission to Protect Children at Risk, Juvenile Delinquents and Abandoned Children. Several other institutions have also been created, including the National Committee to Combat Drug Abuse; the National Committee for the Social and Economic Rehabilitation and Reintegration of Disabled Persons; the National Commission on Health and Safety at Work; the National Prison Administration Commission; and the Technical Committee to monitor the implementation of International Human Rights Instruments.

¹⁹¹ Committee on the CRC, *Consideration of reports submitted by States Parties under Article 44 of the Convention – Cameroon* (n 145 above) para 41.

¹⁹² For details on the jurisdiction of these courts, see, the Justice and Peace Commission Archdiocese of Bamenda Report on *The Judicial System in Cameroon* available at <http://www.justiceandpeacebamenda.org/attachments/article/24/The+Judicial+System+in+Cameroon.pdf> [accessed 5 May 2015], see also the webpage of the Ministry of Social Affairs [www.minas.gov.cm] resume on *Children in Conflict with the Law* available at http://www.minas.gov.cm/index.php?view=article&id=167%3Aenfant-en-conflict-avec-la-loi&format=pdf&option=com_content&Itemid=189&lang=en [accessed 7 May 2015].

¹⁹³ Details on the *Rules for Selection of Junior Parliamentarians*, visit, http://www.minas.gov.cm/index.php?option=com_content&view=article&id=154&Itemid=180&lang=en [accessed 7 May 2015].

These sessions have been progressive and consistent since the inception in 1998 and are generally held every June 16.¹⁹⁴ Usually, during such sessions ministers¹⁹⁵ also present their plans and projects to young parliamentarians (children) and they pose questions to the minister.¹⁹⁶

This process has indeed been practiced in Cameroon for over a decade now. However, the impact of this parliamentary process is far from having any meaningful and/or direct thesis to the lives of children, as in most cases the discussion is formalistic in nature and mainly theoretical with no real target within a reasonable time.¹⁹⁷ The process (sessions) has been helpful as, to some extent, it has instilled a sense of child-centred initiative at the national level, such as the national plan of action for children's rights and awareness in some general ministerial planning and budgeting.¹⁹⁸ It has also registered some sporadic success stories in Cameroon; for example, child parliamentarians are reported to have strongly advocated for the eradication of compulsory fees for primary education and a raise of salary for government employees (including teachers).¹⁹⁹

In the State's initial report submitted to the Committee on the CRC, the State indicated instances where it fulfilled children's participation in parliament. One such instance is when children presented the CRC to parliamentarians during an ordinary session of the national assembly in 1991 requesting for its ratification and two years later (in 1993) the State ratified the CRC.²⁰⁰ This is theatrical and, in many ways, does not necessarily constitute children's participation. As mentioned earlier in chapter two, children's right to participation transcends beyond a mere request and entails meaningful engagement and dialogue on all matters that concern children. Perhaps a debate or discussion on the content of the treaty would have strengthened the State's claim for children's participation in the ratification of the CRC. Irrespective, the process

¹⁹⁴ This is also the day of the African Child.

¹⁹⁵ The last session was held on 16 June 2012 under the theme "Rights of children with disabilities: Duty to protect, respect, promote and fulfil", during which the Ministers of Social Affairs, Public Health, Secondary Education and Women's Empowerment and the Family equally presented their plans related to their effort in protecting disabled children.

¹⁹⁶ Committee on the CRC, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention* – (n 137 above) para 52.

¹⁹⁷ See generally, S Kamba 'Forgotten or included? Disabled children's access to primary education in Cameroon' (2013) 1 *African Disability Rights Yearbook* 27 – 48.

¹⁹⁸ As above.

¹⁹⁹ ACPF's report (prepared by A Bequele *et al*) *The African Report on Child Wellbeing 2013 Towards greater accountability to Africa's children* (n 57 above) 26.

²⁰⁰ Committee on the CRC, *Consideration of reports submitted by States Parties under Article 44 of the Convention – Cameroon* (n 145 above) para 51.

in itself is laudable but the impact of the process on the children (including other children in Cameroon) who submitted the treaty in parliament and made the request is questionable.

Although it could be argued that Cameroon's weak institutional protection of children's rights is as a result of the lack of personnel and funding as the State alluded to in its 2009 report to the Committee on the CRC, one other possible reason which might have contributed to the ineffectiveness of institutions in Cameroon is the legal rifts discussed earlier in this chapter extant in Cameroon (due to its mixed-jurisdiction). Indeed, the State did not mention this in its report to the Committee on the CRC as one of the reasons why institutions such as those indicated in the earlier paragraphs face operational challenges. However, this is not far from the truth. Indeed, such institutional challenges have not helped and to some extent contributed in creating tension in Cameroon's children's rights protection schemes and any further attempts in protecting, sanctioning, analysing and harmonising child law in Cameroon. Also, if fully functional, these institutions would probably, through their education and training programmes, clarify the difference in the definition of a child and ensure a better protection of children's rights at grassroots level in particular. The mere existence of these different laws and their conflicting definition of a child (though addressed through a consideration of international law, taking into consideration article 45 of Constitution) has a potential to pose a problem in the protection of children's right to participation as any attempt to identify, select or admit children to participate in decision-making processes both within the private and public space could lead to unnecessary confusion, especially because most court decisions in Cameroon make little or no reference to international law, although they are required to do so, especially in cases of conflict of the laws extant in Cameroon.

4. Conclusion

Generally, it is encouraging to note that most African states have domesticated provisions of these instruments (specifically children's right to participation) in their national constitutions and others through acts of parliament. However, the majority of African states have been reluctant to develop effective mechanisms to make this right a reality especially in the family environment. Worth noting is the acceptable concept adopted in most children's rights acts enacted by African states with no express limitation on where and how such rights can and should be enjoyed by children. In fact, as seen above, some have expressly encouraged the enjoyment of such rights within the

family. The adoption of a consolidated children's rights statute at national level depicts a valuable opportunity for these states to incorporate and protect children's right to participation. The problem is hardly at the level of the enactment of laws or creation of institutions but at the level of implementation. Implementation is key because it gives meaning to the laws enacted, provides a measuring rod in the general evaluation of the institutions created, and is the final determinant in the general protection of rights, as it ensures that the rights protected are delivered to its rightful legatee. However, Goonesekere acknowledges that in some developing countries, legislative reforms may be viewed with cynicism as, in practice, law enforcement is generally weak, public awareness of the rights enshrined in such treaties and to some extent national laws, is low or worse, non-existent. She goes on to add that "... legal procedures are either inaccessible or ineffective to give relief and remedies from injustice and abuse of power" in most developing countries.²⁰¹

Respect for children's views in all matters affecting them is one of the most difficult principles to comply with, especially in family settings. This is not only because of the resistance to adhere demonstrated by most parents in Africa, as seen in the preceding chapters, but also because of the challenges of knowing how to go about it.²⁰² It is also because of the high walls surrounding families built by traditions, culture, religion and even the law, as discussed further in the next chapters. In instances where children are allowed to enjoy their right to participation, their views are not always received with the degree of serious consideration they deserve and require. Most children in Africa (just like in most communities in the world) grow up in communities where adults are perceived as being always wise and children as immature and sometimes foolish.²⁰³ Such perceptions are major challenges to the general implementation of their right to participation.

In the chapters that follow, this thesis will attempt an analysis of the implementation of children's right to participate in family decision-making processes. In the process, this thesis will also, amongst others, provide insights into the span of parental directives and guidance and state interference in family matters. The rationale is to substantively analyse the extent to which the right to participation as it applies to children is practiced in family decision-making processes, and the relationship between the roles played by the state, parents and children before, during and after such processes.

²⁰¹ S Goonesekere *Children, law and justice: A South Asian perspective* (1998) 355. Though she writes in Asian context, the logic is equally true and applicable in the African context.

²⁰² P Parkinson & J Cashmore *The voice of a child in family law disputes* (2012) 87-88.

²⁰³ AB Nsamenang 'Dilemmas of right-based approaches to child well-being in an African cultural context' (2013) in D Johnson *et al.* (eds) *Vulnerable children: Global challenges in education, health, well-being, and child rights* 18-21.

Chapter Five

THE FAMILY, THE STATE AND PROTECTION OF CHILDREN'S RIGHT TO PARTICIPATION

1. Introduction

The significance of the provisions protecting children's right to participation in both the CRC and the ACRWC analysed in the earlier chapters will definitely serve no purpose if they are not implemented. In fact, the institutions analysed in chapter four will have no real impact if they are not utilised for the purposes for which they were set up, in this case as institutions with a certain mandate to redress and facilitate children's right to participation in general and specifically their right to participate in family decision-making processes. Traditionally, implementation trails ratification, it gives life to legal provisions and the case of children's right to participation is no exception. Indeed, the rule of treaty law prescribes that upon ratification, a state party accepts the obligation to give effect to that treaty's provision at the domestic level.¹ Specifically, article 29 of the Vienna Convention mandates that unless a different intention appears from the treaty or is otherwise established,² a treaty is binding upon each party in respect of its entire territory.³ The territorial coverage of a ratified treaty is crucial in ensuring that the rights protected are delivered to everyone within a given territory – the state. In the case of international children's rights law, such rights are delivered to every child within a state party's territory irrespective of whether he or she is a citizen of that particular state or not.⁴ Also, the Committee on the CRC has stressed that a satisfying implementation of children's rights must be seen by state parties as fulfilling their legal obligations to each

¹ See generally, art. 14 (Consent to be bound by a treaty expressed by ratification, acceptance or approval) of the *Vienna Convention on the Law of Treaties* (1969). See also, chapter two of this thesis. See also, Committee on CESCR, GC No 3 on *the Nature of States Parties Obligations UN doc. HRI/GEN/1/Rev.6 14* (2003) para 4; Human Rights Committee, GC No 3 para 4.

² Which is not the case with the mainstream children's rights treaties under scrutiny in this thesis.

³ *Vienna Convention on the Law of Treaties* (1969).

⁴ See generally, Committee on the CRC, GC No 5 paras 12 & 30 - the obligation of States to respect and ensure the rights set forth in the Convention to each child within their jurisdiction without discrimination of any kind.

and every child within the state.⁵ In so doing, state parties must ensure that their effort is guided by the four general principles of children's rights – one of which is children's right to participation.⁶

Children's right to participation has been, rightly so, identified as one of the most critical children's rights, yet challenging and least implemented⁷ especially within the family. Many reasons account for such challenges and have been identified and analysed below. However, the family remains the first and probably the most important and appropriate environment that provides all children with the platform to start learning how to express their views on matters that concern them. As acknowledged by the Committee on the CRC, "[a] family where children can freely express views and be taken seriously from the earliest ages provides an important model, and is a preparation for the child to exercise the right to be heard in the wider society".⁸

The Committee on the CRC's assertion above is crucial, since most children in Africa are nurtured into adulthood chiefly within the margins of the family environment, and by extension, assisted by other social institutions such as schools and religious institutions.⁹ Legally, the importance attached to the family is also strengthened in the preambles of both the CRC and the ACRWC. For example, the CRC declares that the family is a fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children.¹⁰ Thus, for the full and harmonious development of a child, he or she should grow up in a family environment, in an atmosphere of happiness, love and understanding.¹¹ Despite this strong recognition given to the family, as the natural unit and fundamental group of society in which a child should grow, both the CRC and the ACRWC – and the case is equally true with other international and national laws in Africa¹² – fail to provide any concise definition of what exactly a family is. Rather, such laws have dwelled on the different

⁵ Committee on the CRC, GC 5 paras 11-12.

⁶ As above.

⁷ MS Pais 'The Convention on the Rights of the Child' (1997) *United Nations Manual Human Rights Reporting under Six Major International Human Rights Instruments* 427.

⁸ Committee on the CRC, GC 12 para 90.

⁹ B Rwezaura 'Law, culture and children's rights in Eastern and Southern Africa' in W Ncube (ed) *Law, culture, tradition and children's rights in Eastern and Southern Africa* (1998) 289.

¹⁰ See, the preamble of the CRC para 5.

¹¹ See generally, the preamble of the CRC para 6 and of the ACRWC para 6.

¹² See for example; art. 58 of the 2002 (amended) Constitution of the People's Democratic Republic of Algeria, art. 17 of the 2001 Constitution of Senegal, art. 5 of the Constitution of the Republic of Cote d'Ivoire, art. XIX of the Constitution of Uganda and art. 20 of the 1998 Constitution of the Republic of Madagascar.

family structures arising from various cultural patterns and emerging family relationships.

The UN Human Rights Committee (HRC) has indeed confirmed that the concept of family is complex as it asserts that “the concept of family may differ in some respects from State to State, and even from region to region within a State, and that it is therefore not possible to give the concept a standard definition”.¹³ Indeed, other international human rights mechanisms have expressed similar opinions.¹⁴ For example, the Committee on Economic, Social and Cultural Rights (Committee on the CESCR) has affirmed that the concept of family must be understood “in a wide sense” in harmony with appropriate local context.¹⁵

Surely, it is common knowledge that in contemporary Africa, a family is a term which in everyday use means different things and in many instances the understanding and usage (of the term family) defies strong determinants such as marriage,¹⁶ consanguinity and adoption. This understanding is telling and true in the conceptualisation of the family in both the CRC and ACRWC. According to these treaties, the family includes extended family members, the community and applies in situations of nuclear family, separated or divorced parents, single parent family, common law family and adoptive family.¹⁷ The rationale supporting this concept has been well captured by Nukunya in 2003, where he refers to the situation in Ghana by proclaiming that “procreation of children is the responsibility of parents, but the training of the children is not exclusively theirs ... in an extended family the parents’ roles are shared by others”.¹⁸

The length and breadth of such scope in the conceptualisation of family, makes it difficult at any point in time to think that a child could be without a family. Indeed, unless something extremely unthinkable or unimaginable happens to the parents and

¹³ UN Human Rights Committee (Committee on the CCPR) GC No 19: Art. 23 (*The Family*) *Protection of the Family, the Right to Marriage and Equality of the Spouses* para 2.

¹⁴ See for example, the Committee on the Elimination of Discrimination against Women, (Committee on the CEDAW) GR No 21 *equality in marriage and family relations*, CEDAW/A/49/38 paras. 13 and 18, and GR No. 29 *Economic consequences of marriage, family relations and their dissolution*, CEDAW/C/GC/29 para 24.

¹⁵ Committee on CESCR, GC No 4 *The Right to Adequate Housing* CESCR/E/1992/23 para 6; GC No. 5 *Persons with Disabilities* CESCR/E/1995/22 para 30.

¹⁶ See for example, *Okpeitcha v Okpeitcha* (2002) AHRLR 33 (BnCC 2001) in which the learned judge described his wife and children as his family.

¹⁷ See for example, the Committee on the CRC, Outline to the Day of General Discussion *The Role of the Family in the Promotion of the Rights of the Child* UN Doc CRC/C/24 27 – 28.

¹⁸ GK Nukunya *Tradition and change in Ghana: An introduction to sociology* (2003) 51. Even though the author made his study in the Ghanaian context, it is equally true in the rest of the African continent.

extended family members of a child, the initial phase of a child's life is principally spent in the family. The family is not only the first point of social exposure for a child,¹⁹ it is also an ideal platform for a child to learn to express himself or herself freely and to do so at all times in all decision-making processes on matters that concern him or her. Significantly, it is not only these treaties that recognise the role of the family in Africa; the ACHPR echoes the fact that the family is the natural unit of society and calls on state parties to protect it, because it is "the custodian [of] moral and traditional values recognized by the community".²⁰ Further, the state has a duty to assist the family in preserving such moral and traditional values.²¹

1.1. The family

From the brief analysis of the concept and role of family indicated above, the question still remains – what is a family? As there is no prescribed definition of the 'term' or 'concept' family under international human rights law, this chapter will not attempt any definition or analysis of the composition of family structures.²² The Committee on the CCPR holds that the challenge in providing a systematic definition of the family is because "the concept of family may differ in some respects from State to State, and even from region to region within a State, and that is therefore not possible to give the concept a standard definition".²³ The Committee on the CDESCR however advises that the concept of family should be understood "in a wide sense"²⁴ and "in accordance with appropriate local usage",²⁵ thus locating its definition in local context and acceptability of what it refers to, or consists of, within a State or community.

In relation to children, the family is a unit that must ensure they are protected. It may include a variety of arrangements that could provide children with the appropriate

¹⁹ As above para 2.2.

²⁰ See, art. 18(2) of the ACHPR.

²¹ As above.

²² For details on forms of families, family forms based on era, household forms and marriage forms extant in Africa, see generally, E Okon 'Towards defining the 'right to a family' for the African child' (2012) 12 *African Human Rights Law Journal* 376 - 383.

²³ Committee on the CCPR, GC No 19; art 23 (The Family) *Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990 para 2.

²⁴ Committee on the CDESCR, GC No 4 *The right to adequate housing* (Art. 11 (1) of the CDESCR), 13 December 1991, E/1992/23 para 6.

²⁵ Committee on the CDESCR, GC No 5 *Persons with disabilities*, 9 December 1994, E/1995/22 para 30. See also Committee on the Elimination of Discrimination against Women (Committee on CEDAW), GR No 21, paras 13 and 18, and GR No 29, para 24; Committee on the CRC, GC No 7, para 15; See also, Human Rights Council's *Report of the Working Group on the issue of discrimination against women in law and in practice* A/HRC/29/40, paras 23-24.

care and development prescribed by international children's rights law. As indicated below, it could be in any form, but not limited to, the nuclear family, the extended family, and other traditional and modern community-based arrangements, provided these are consistent with the rights and the best interests of children.²⁶ It must be child-centered, friendly and acceptable. Equally, the notion of "family environment" is also given a wider perspective in the CRC²⁷ and the ACRWC.²⁸ Elsewhere, according to articles 4 and 44(2) of the Convention on the Protection of the Rights of all Migrant Workers and Members of their Families the family is any group, under applicable law that "produces effects equivalent to marriage".

Therefore, it can be concluded that the composition of the family is not as important as the result expected from it. From a children's rights perspective, the result must be aimed at ensuring that the best interest of the child is the paramount consideration at all times and in all matters concerning the child. The recognition of all these different types of families is indeed more accurate in Africa than probably elsewhere in the world.²⁹ According to Oheneba-Sakyi and Taky, different family structures have existed in Africa from time immemorial and are still extant despite various 21st century challenges such as economic crises.³⁰ Irrespective of its composition, in Africa the family (including extended relatives) has a responsibility to nurture its children.³¹

Legally, the responsibility of family members to care for a child has been codified in some countries in Africa. For example, the South African Children's Act allocates a role to the extended family in the protection of children's rights by its definition of a child's family members.³² Such extended responsibility inevitably generates another intersection with a number of rights of the child protected by international children's rights law, particularly, the right to parental care, the scope of such care, when the extended family is required to care, the right for a child to grow up with parents, the best interests and welfare principles and the right of the child to participation. The extension of parenthood beyond biological and adoptive lineage, from a children's rights perspective, also warrants that any such analysis of children's rights protection within

²⁶ Committee on the CRC, GC No 7, para 15.

²⁷ Committee on the CRC, GC No 14, para 66.

²⁸ See, art. 18 of the ACRWC.

²⁹ See generally, Y Oheneba-Sakyi & BK Taky (eds) *African families at the turn of the 21st Century* (2006).

³⁰ Y Oheneba-Sakyi & BK Taky 'Introduction of the study of African families: A framework for analysis' in Y Oheneba-Sakyi & BK Taky (ed) *African Families at the Turn of the 21st Century* (2006) 1–18.

³¹ I, for example, spent most of my childhood with my paternal grandparents, then with my maternal uncle and with my paternal uncle before I moved to living alone in my final year in high school. Throughout my stay with these relatives, they took care of me; they taught me life lessons and many other necessary things.

³² Children's Act 30 of 2005 art. 1(1).

the family in Africa must take all these questions into consideration. Although Kaime acknowledges that there could be obstacles in ensuring that children's rights in general are protected within African families, he also sees flashes of hope in this respect, as he affirms that "[p]arents no longer see children's rights discourse as a conspiracy drawn up by misguided government types intended to spirit away their authority over children".³³

2. The African common position on children's right to participate in family decision-making processes

A typical African family is planned largely around the lives of its children. In most cultures around the continent, just as the case may be elsewhere,³⁴ children represent continuity and the future. As such, several cultural practices in Africa are embodied with rituals, traditional and contemporary institutions designed to ensure children's survival and affluence in a manner commensurate with the beliefs of the family and society. In return, children are viewed as crucial players to family survival – with responsibilities towards their families and societies to respect their parents and elders, to preserve and strengthen African cultural values in their relation with other members of their communities, and to work for the unity of the family and to assist [their parents] in time of need.³⁵ The aspect of providing assistance to the family is noted here as a reciprocation of the responsibility parents bear when providing care to a child.³⁶

³³ T Kaime 'Vernacularising' the Convention on the Rights of the Child: Rights and cultures as analytic tools' (2010) 18 *International Journal of Children's Rights* 650. See also, T Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009) 183. This was based on his fieldwork, assessing the awareness of children's rights in the Magombo and Ndalama villages in Malawi.

³⁴ See for example, R Bosisio 'Children's rights to be heard: What children think' (2012) 20(1) *International Journal of Children's Rights* 147 in which he indicated that, in Italy, children are regarded as "fragile and vulnerable subjects who require protection from themselves and the world".

³⁵ See, art. 29(1) and 31 of the ACRWC and art. 29(1) of the ACHPR. For a detailed analysis of this duty of African children, see, J Sloth-Nielsen & BD Mezmur 'A dutiful child: The implications of Article 31 of the African Children's Charter' (2008) 52(2) *Journal of African Law* 159–189.

³⁶ See for example, T Mangena & S Ndlovu 'Reflections on how selected Shona and Ndebele proverbs highlight a worldview that promotes a respect and/or a violation of children's rights' (2014) 22(3) *International Journal of Children's Rights* 667, in which they reveal that traditionally within the Shona and Ndebele communities in Zimbabwe and also true across the Continent, "parents are motivated to give good care to their children because they know that, in Shona 'Chirere chigokurerawo' (bring it well, tomorrow it will look after you too), and in Ndebele, 'Ukuzala yikuzimbela/ukuzala yikuzelul'amdolo' (to bear children is to extend one's knees)".

To a large extent, the African cultural and legal system makes an attempt through such provisions in the ACRWC to strike a balance between respect, responsibility, benefiting from care and providing care. The mutual respect in the duties and responsibilities between parents and child in an African family is further apparent in article 20 of the ACRWC, which enjoins parents to ensure that a child's best interests is central in their childrearing endeavour. Such mutuality has positive consequences in that it elevates a child beyond an object upon whom protection and welfare is bestowed to a subject on whose shoulders lies the responsibility to ensure the overall well-being of the family.³⁷ Uniquely, this responsibility does not vanish as the child grows into adulthood, as the ACHPR³⁸ exposes similar responsibilities and enjoins African 'children' to continue caring and assisting the family in time of need.

Also, the duty of children to respect their parents and to assist them in time of need embodies some aspects of children's right to participation, in this case, collaborative participation, as it embodies aspects that would encourage a child's involvement in family decision-making processes. However, the strength of such involvement depends to a large extent on the real level of recognition they [children] are given within the family environment. As per article 9 of the Cultural Charter for Africa³⁹ which is in tandem with the ACRWC, such recognition should consist of children's active participation in African cultural life. This provision highlights what could be referred to as the initiation phase of nurturing children in Africa, as it could be read to highlight the fact that children in Africa have a right to be involved in the cultural life of their family and from that involvement, learn about key tenets of African cultural life and to ensure continuity of the same.

Remarkably, it is worth noting that children are not generally thrown into participating in these cultural matters mainly as 'children'. Indeed, they are involved because based on the legal provisions stated above, they have a right to be involved and more so, because they are crucial members of the family especially in terms of ensuring continuity. The prospect of continuity is a very influential and crucial aspect in parenting in Africa. For example, letting their child/ren participate in such cultural life could be considered as shaping future custodians of certain family practices and beliefs. Indeed, the mere recognition of their right to participate in African cultural life and their actual

³⁷ R Intudi 'The application of the International Convention on the Rights of the Child in Africa: When the law is tested by reality' (2007) in A Alen *et al.* (eds) *The UN Children's Rights Convention: theory meets practice* 23.

³⁸ See, art 29(1).

³⁹ Resolution CM/Res.371 (XXIII) adopted by the Twenty-third Ordinary Session of the Council of Ministers and by the Assembly of Heads of State and Government of the OAU (June 1974, Mogadiscio), available at http://www.au.int/en/sites/default/files/CULTURAL_CHARTER_AFRICA.pdf [accessed 8 April 2015].

participation led Kaime, writing in 2010, and concurring with Armstrong, to affirm that “the African conception of human rights has manifested itself in the recognition that children are a valuable part of the society”.⁴⁰ Nsamenang relates to this assertion and adds that such recognition is fortified by typical traditional African family participative pedagogies designed in a manner that rapidly and systematically transforms children into “cultural agents of [their] own developmental learning from an early age”.⁴¹

Surely, from the above it can be denoted that children are not completely lost in the translation and interpretation of the family and human rights in Africa. Children play a critical role in guaranteeing the continuity of the family, its beliefs and practices. In many ways, such recognition justifies the typical African perception of children which proclaim and uphold children as “the leaders of tomorrow”⁴² and the “future of tomorrow”.⁴³ Naturally, such proclamations are correct because at some stage in their lives children will become adults and take on key positions of responsibility in society. However, the traditional context in which these assertions are applied in some traditions in Africa emasculates children’s capacity and competence to have an opinion in a matter that concerns them.⁴⁴ Crucially, children’s right to participation is not intended to only prepare children for the future, as it jointly requires parents to journey along into a child’s future by letting him or her participate in all decisions-making processes on all matters of concern to him or her. From this perception, such proclamation could be regarded as limited, not necessarily in their expression but, more so in their practice. Indeed, they could be seen as drawbacks in the general enhancement of children’s right to participation, especially if applied jointly with yet another common African ideology which regards its children as “irrational beings”.⁴⁵ In fact, unlike the earlier ideologies, the reference to children as “irrational beings” holds the single ability to hinder children

⁴⁰ Kaime (n 33 above) 39.

⁴¹ AB Nsamenang, ‘Dilemmas of right-based approaches to child well-being in an African cultural context’ (2013) in D Johnson *et al* (eds) *Vulnerable children: Global challenges in education, health, well-being, and child rights* 15.

⁴² In Swahili, it simply translates as, *Watoto ni taifa la kesho*... the translation of such phrasing into African languages goes a long way to show how it is recognised and practiced.

⁴³ For example, the Swazi proclaim that *bantfwana bangulimba loya embili*; the Nyanja declare *ana ndiwo tsogolo lathu*; the aBanya’rwanda insist *abana nibo Rwanda rwejo*. Literally translated, all of these expressions mean that “children are the future” and they convey the notion that children must be well protected and nurtured otherwise without them, society will die. See Kaime (n 33 above).

⁴⁴ This is very common among the Grass field clans in the North-West region of Cameroon. See also, Nsamenang (n 41 above) for a general perspective.

⁴⁵ AP Ndofirepi & A Shumba ‘Conceptions of “Child” among traditional Africans: A philosophical purview’ (2014) 45(3) *Journal of Human Ecology* 233-242.

from participating in, for example, family decision-making processes on matters that concern them on the basis that they are presumed to be irrational in their thoughts.

The contrast that exists within these ideologies is telling, and to some extent extant in the contextual normative meaning of children and their competence to participate in decision-making processes on issues that concern them in the family. As the future, it would be logical that children are included in decision-making processes, especially on matters that concern them. In the context of children's rights in general and their right to participation in particular, such inclusion has an unquestionable significance in shaping responsible citizens who will be able to ensure the continuity of the family, as required by the ACRWC. Contrarily, the ideology referring to children as irrational beings should not have a place in contemporary society, especially because the ability to be rational is not and should not be defined by age only, but jointly with the environment and the exposure a child gets.⁴⁶

Woodhead has argued that three prominent elements influence children's ability to be rational: the environment (physical and social) the customs (including traditions) and childrearing practices (including values of the parents).⁴⁷ Woodhead's argument could also be understood to mean that the human ability and level of rationality can be better understood as a product of these factors, rather than strength triggered and perfected by age. This reasoning is further justified by the fact that adults also possess the ability to be irrational. For example, an adult who, for some reasons not medically linked, rejects a medically recommended blood transfusion in a life-threatening health-related situation, could not be said to be rational and the same goes for an adult who rapes a child.⁴⁸ Worth noting, the underlying logic in affording children the right to participation lies in the dominant construction of the fact that children are human beings with rights and the ability to participate in all matters that concern them. Their ability to participate is irrespective of their rational logic based on age, culture or race. Generally, they have a right to participate in a decision-making process on a matter that concerns them first before anything else and including their age.

⁴⁶ J Gardner 'The mark of responsibility' (2003) 23(2) *Oxford Journal of Legal Studies* 157-171.

⁴⁷ M Woodhead 'Reconstructing developmental child psychology. Some first steps' (1999) 13 *Children and Society* 3-19.

⁴⁸ See for example, the Kenyan case of *George Hezron Mwakio v Republic* [2010] eKLR. In this case, an adult man dragged a child (a 15-year-old girl) through a sisal plantation near the Kenyan-Tanzanian border before raping her – the act was classified as 'aggravated' and he was sentenced to serve 30 years of imprisonment.

2.1. Legal balancing

From a legal perspective, the right to participation for every human being is a key right that affords every person the platform to have an opinion in a matter that concerns him or her.⁴⁹ Indeed, as leaders of tomorrow or the future of tomorrow, it is plausible to grant a child the opportunity to interact, corporate, be consulted and/or participate in decision-making processes on matters that concern him or her now rather than later. Naturally, it is in so doing that the child will develop crucial leadership skills, such as the ability to make decisions and listen to others. This is a position which African states have recognised through their ratification of both the CRC and ACRWC, without any reservation to children's right to participation.⁵⁰

Also, the vast domestication of children's rights in general in Africa, as seen earlier in chapter four, to some extent minimises any fears that African State parties have no true interest in protecting such rights. Rather, such vast domestication should be seen as a validation of the rationale of the legal provisions protecting these rights and the intention of African State parties to ensure that children's right to participation, for example, is protected within its territory and in the family in particular. Such guarantees should also be extended to the programs (highlighted sporadically throughout this thesis) that State parties have developed at national level as efforts to ensure that children participate in family decision-making processes.

Cantwell,⁵¹ speaking in 2014,⁵² declared that the rationale for the protection of children's right to participation is to elevate a child to the same level as adults to participate in proceedings on matters that concern him or her now rather than later. In view of the reasoning of some of the African ideologies and concepts regarding childhood highlighted earlier in chapter two and this section, this rationale is disputable. The reason for this is the fact that, although they recognise children as key members of the family with rights,⁵³ typical African traditional practices and ideologies bear no underlying intention or gritty ambition of equating children with adults or even

⁴⁹ See generally, Committee on the CRC, GC 12.

⁵⁰ See for example, CRC Status of ratification available at <https://treaties.un.org/Pages/HistoricalInfo.aspx> [accessed 8 April 2015].

⁵¹ N Cantwell was the coordinator and general spokesperson for the NGO Ad Hoc Group throughout the drafting of the CRC. See also, N Cantwell 'Words that speak volumes: A short history of the drafting of the CRC' in *18 Candles the Convention on the Rights of the Child Reaches Majority 21*, available at <http://www.ohchr.org/Documents/Publications/crc18.pdf> [accessed 13 March 2015].

⁵² During an armchair session at a children's rights conference commemorating the 25th anniversary of the CRC in Leiden, (the Netherlands). Details of this conference can be seen here: <http://law.leiden.edu/organisation/private-law/child-law/25yearsarc/> [accessed 26 March 2015].

⁵³ Kaime (n 33 above).

considering them as adults during decision-making processes within the family, if they are involved.⁵⁴

This is generally because, in African societies, parents in particular regard childhood as a *training phase* for growing into adulthood and the challenges thereof.⁵⁵ Although progressive in the sense that parents could be held responsible (which of course they should) for providing such training to children by involving them in decision-making processes on matters that concern them, it should be noted that such ‘training’ is mainly instructive⁵⁶ rather than collaborative,⁵⁷ thus espousing the strength of parental authority and control.⁵⁸ For example, a study conducted by Save the Children in Ethiopia in 2003 revealed that parents in the North of Vollo usually talk to their children about domestic issues but mainly in the sense of making their children listen and follow what they (parents) do rather than requesting their opinion on the activity concerned.⁵⁹ Practically, collaborative participation to ensure family continuity is a form of participation which parents do not hesitate to implement, especially because it bears with it the aspect of strengthening family beliefs and practices, and African parents are generally interested. Although it is probably common knowledge that parental authority

⁵⁴ The Swazi proverb mentioned (at n 42 above) is a key practice in the siSwati culture which is telling and refers to children as the future of tomorrow who need protection at present and nothing more.

⁵⁵ P Alston (ed) *The best interests of child: Reconciling culture and human rights* (1994) 90.

⁵⁶ It should be noted that the issue of competence with regards to children’s ability to participate in decision-making processes on matters that concern them is not supposed to be in an instructive form. Interestingly, this is not uniquely African as several other scholars from other parts of the globe have highlighted the same practice elsewhere. For example, the Irish experience in I Coyne *et al.* (2006) *Giving children a voice, investigation of children’s experiences of participation in consultation and decision-making in Irish hospitals* 9-17. See also, Save the Children’s report on *Children’s Rights in Ethiopia: A Situation Analysis* (2003) 1.

⁵⁷ Collaborative participation is one of the generally recommended methods of ensuring children’s right to participation – see for example G Lansdown *Promoting children’s participation in democratic decision-making* (2001) 15 in which she remarked that “[d]eveloping structures for discussion, and the development of collaborative solutions with children are important parts of the process of participation and democracy”.

⁵⁸ “A good illustration of the effectiveness of culturally appropriate procedures and arguments is provided by the manner in which some communities in the south of Malawi have attempted to deal with the practice of *fisi* (hyena) during girls’ initiation ceremonies. The practice entails that, at the end of formal *instruction* during the initiation period, the *fisi* goes into the compound where the initiates are ensconced to ‘examine’ whether they are able to practise the concepts and theories which they have been taught regarding sex and sexuality.” T Kaime ‘The Convention on the Rights of the Child and the cultural legitimacy of children’s rights in Africa: Some reflections’ (2005) 5(2) *African Human Rights Law Journal* 221–238.

⁵⁹ Save the Children’s report on *Children’s Rights in Ethiopia: A Situation Analysis* (2003) 19. Available at http://resourcecentre.savethechildren.se/sites/default/files/documents/childrens_rights_in_ethiopia_a_situation_analysis.pdf [accessed 21 July 2016].

and control gradually drops as a child matures,⁶⁰ in the context of traditional African ideologies a child is always a child.⁶¹ Thus, to some extent a ‘child’ is continuously in this *training phase* even after the age of 18. After childhood, such parental control could also be based on the fact that a particular ‘child’ lacks enough capacity or knowledge of a particular practice.

However, the allocation and acceptance of this right to children in mainstream and domestic children’s rights instruments in Africa and the programs that state parties have developed in terms of these instruments are a strong signal that perceptions might change some day and they are changing already to grant children full access in decision-making processes as human beings with the capacity to make valuable contributions as rational beings, based on their maturity and ability to form and communicate their opinion freely in the family.⁶² The Committee on the CRC calls on state parties to encourage families to ensure “the promotion of positive, non-violent and participatory forms of child-rearing”, which gives due weight to the views of children according to their maturity on matters that concern them.⁶³ While this could be noted as a strong and positive call from the Committee, it is easier said than done because for such values to be practiced acceptably in the family environment, it would require a massive shift of perceptions. It would require a shift from the traditional views that regard childhood as a passive stage, and children as irrational and incompetent, to accepting and recognising them as human beings worth making substantive contributions in all decisions on matters that concern them. Indeed, the maintenance and inclusive involvement of children in family decision-making processes in Africa should start with educational approaches designed to bring children’s rights into the family not as an opposing concept to already existing parental duties but as a compliment to such parental duties with the intention to enhance family unity and continuity.

⁶⁰ See for example, *MEC for Education, Kwazulu-Natal v Pillay* 2008 1 SA 474, where Langa CJ remarked that “[t]he need for a child’s voice to be heard is perhaps even more acute when it concerns children [in the later part of childhood] who should be increasingly taking responsibilities for their own actions and beliefs” (para 56).

⁶¹ TC Nhenga-Chakarisa ‘Who does the law seek to protect and from what? The application of international law on child labour in an African context’ (2010) 10 *African Human Rights Law Journal* 175. See also, W Ncube *Law, culture, tradition and children’s rights in Eastern and Southern Africa* (1998) 100.

⁶² See generally, chapter two of this thesis for details on the conditions.

⁶³ Committee on the CRC, GC No 8, *The right of the child to protection from corporal punishment and other cruel or degrading forms of punishment*, UN doc CRC/C/GC8 paras 12 & 41.

3. Bringing children's rights into the family

Based on the section above, it would be preposterous to speculate or conclude at first instance that children's rights are not practiced and respected in the family. In fact, the section above demonstrates in the affirmative that they are practiced, although it questions the method and intent of which children are generally permitted to participate in African cultural life. Irrespective, the family has, is and will always be the first place where children will on the one hand enjoy the most protection of their basic rights, such as their right to food, sleep and play and, on the other hand, where such rights could be violated without notice.

Research indicates that over the years, legal scholars have given enormous attention to the susceptibility of children to abuse,⁶⁴ the protection and implementation of their rights,⁶⁵ children's duty to love and honour their parents, and parental duty to care and provide for their children.⁶⁶ However, little attention has been paid to perhaps the most critical child-rearing environment in the general children's rights discourse, which is promoting the effective protection of children's rights in the family.⁶⁷ Several reasons could account for this limitation and, ranging from parental reluctance or lack of interest to approach the courts (thereby giving both the judiciary and legal scholars less to write home about) to the established fact that the family is a private entity. Whether such a gap in literature is deliberate or simply an omission is irrelevant, because whatever structure or legal means is adopted to significantly promote, for example, children's right to participation in family decision-making processes should be aware of the stringent privacy, cultural and religious walls that have surrounded most families from time immemorial. It

⁶⁴ L Duggan *et al.* 'The credibility of children as witnesses in a simulated child sex abuse trial' in J Ceci *et al* (eds) *Perspectives on Children's Testimony* (1989) 71-99.

⁶⁵ See for example, L Westra *Child law: Children's rights and collective obligations* (2014).

⁶⁶ See for example, J Fortin *Children's rights and the developing law* (2009) 319-363.

⁶⁷ This thesis unfortunately is not tailored to provide an in-depth analysis of this aspect either. But others, for example, Kaime (n 33 above), Fortin (as above) and C Breen *Age discrimination and children's rights: Ensuring equality and acknowledging difference* (2006) have all analysed the protection of children rights in the family through their research.

should also take into consideration the various forms of family structures extant in Africa⁶⁸ and the general protection or privacy terms on which most families are structured.⁶⁹

Legally, it is perhaps possible that constitution drafting committees in most African states considered the possible challenges that may be encountered by legislation to penetrate the family environment and requiring certain child-rearing standards from parents and relatives.⁷⁰ Although the factual protection of individuals or vulnerable members within the family is challenging, mainstream children's rights instruments are firm in their obligations assigned to state parties, to ensure that rights are protected and delivered to their rightful benefactors even in the family. As seen in chapter four, African states have encouragingly met their obligations (on paper) and at the very least recognised children as rights holders especially in the protection of, for example, their right to education and health. However, just like most children's rights, the protection of their rights in the family requires a blend between theory and practice. Theoretically, such rights are available but the practical aspect of ensuring that children as rights holders, especially within the ambits of their right to participate in family decision-making processes within the family, is limited.

Indeed, numerous aspects frustrate the implementation of this right in the family and the most central of them have also been codified in legal text which protects the family as a private entity in some constitutions.⁷¹ For example, the Constitutions of Cameroon (the preamble), the Federal Republic of Nigeria (article 10) and Egypt (article 10) all protect the family as a private entity which should be void of any interference. Such

⁶⁸ In Zimbabwe, for example, there are two dominant family structures, namely the nuclear family and the traditional (extended) family. The others are the single parent family, child-headed families and elderly-headed families. For more on these family structures, see Committee on the CRC, *Consideration of reports submitted by states parties under article 44 of the convention: Zimbabwe UN doc CRC/C/ZWE/2* para 215 – 217.

⁶⁹ See for example, [at the global level] art 12 of the Universal Declaration which provides that “[n]o one shall be subjected to arbitrary interference with his privacy, family, home or correspondence, nor to attacks upon his honour and reputation. Everyone has the right to the protection of the law against such interference or attacks”. At the national level, art 22(1) of the Constitution of the Federation of Nigeria, which provides that “(1) [e]very person shall be entitled to respect for his private and family life, his home and his correspondence”; art 10 of the 2014 Constitution of Egypt which provides that “[f]amily is the basis of society and is based on religion, morality, and patriotism. The state protects its cohesion and stability, and the consolidation of its values”.

⁷⁰ R Chisholm *Softening the blow changing the custody to residence* (1998) 4, available at file:///C:/Users/efokala/Downloads/chisholm2001.pdf [accessed 4 November 2015] in which he said it is helpful to note that it is as difficult to those making legal decisions to listen to children as the case with parents because in both instances it is crucial to understand what is happening before making any decision on the lives of children.

⁷¹ See generally, the Constitution of Cameroon (preamble), the Constitution of the Federal Republic of Nigeria (art 10) and the Constitution of Egypt (art. 10).

declarations are very strong and have been very influential both in the way parents perceive their authority within the family and the way the state could intervene to protect abused family members, including children. Worse, children's right to participation is not protected in these Constitutions and these countries practice constitutional democracy which makes the Constitution superior above all other legal texts. In this regard, instituting children's rights in general in the family, especially in instances where they have been abused, would require the state to take stakes beyond legal text.

However, with the exception of South Africa, for example, where the need to protect children's rights have been expressly extended into the family through constitutional provisions⁷² and expanded in its Children's Act as parents and members of the extended family have been given legally binding roles to ensure children's rights within the family, the implementation is still not smooth.⁷³ Notwithstanding, it is certainly a signal that directives are beginning to change and that presumed parental roles, protection and enjoyment of children's rights within the family in most African states have started gaining stronger recognition and protection.⁷⁴

3.1. Is the family a private space?

Concepts such as family privacy, family as a private space, and the notion that the state cannot or should not intervene in private areas as it could result in invasion of privacy, are indeed concepts that are also protected by law.⁷⁵ Noticeably, there is a huge amount of literature and human history challenging the fact that states should not interfere in family affairs or in the private relationship between parents and children.⁷⁶ This could conveniently gain justification from the fact that the initial obligation to respect and protect children's rights, generally lies with the state – which is of course transposed through national laws to citizens.

The relationship between the state and its citizens could possibly be grouped under two channels. These are the vertical (state and citizens, individuals or groups) and

⁷² See generally, art. 28 of the Constitution which provides that “every child has the right to family care or parental care or to appropriate alternative care when removed from the family environment”.

⁷³ South African Children's Act (2005) art. 1(1) & ch 3.

⁷⁴ See ch 3 of this thesis.

⁷⁵ See for example, Human Rights Council' reports, *Protection of the family: role of the family in supporting the protection and promotion of human rights of persons with disabilities* (2016) UN Doc A/HRC/32/L.35. See also, BB Woodhouse 'The dark side of family privacy' 67 *The George Washington Law Review* 1247–1999.

⁷⁶ See for example, AJ Kleinfeld 'The balance of power among infants, their parents and the State' (1970) 4(4) *Family Law Quarterly* 63–84. See also, SJ Baskin 'State intrusion into family affairs: Justifications and limitations' (1974) 26(6) *Stanford Law Review* 1383-1409.

horizontal (citizens and individuals) channels. The vertical legislative responsibility bestowed on citizens by states seems workable at least to the extent that it is generally acceptable and citizens (individuals or groups) are aware that any breach could lead to legal sanctions. The challenge, though, is with the horizontal relationship between citizens and/or individuals within groupings (private space - family) or society in general. For example, within the family, it could face considerable strain, especially regarding the respect of family members' rights. Generally, parental dominance prevails; in some cases, dominance is based on seniority and in some, on gender. Either way, it is a complex environment and it is such nuance in the authority, powers and dominance within the family space in particular which complicates the proper implementation of children's right to participate in family decision-making processes. However, with an established record that considerable levels of human rights violations take place in homes, (i.e. in the family environment⁷⁷), it is logical to hold that a comprehensive protection of human rights should include the protection of every human being everywhere in society and the family is no exception.

However, based on the reasons presented in this chapter and sporadically throughout this thesis, the comprehensive introduction of children's rights protection within African families is farfetched. The most central one seems to be the stringent hierarchical order that dominates most family structures in Africa. Generally, families are concerned with guaranteeing stability and this is usually implied to mean preserving the very conservative systems of parental authority which have undermined children's ability to participate in decision-making processes over the years. The inclusion of children in decision-making processes, parents could argue, would create tension in the family environment and destabilise the much-needed stability in the family.

All the same, the enactment of children's rights in several international human rights treaties (specifically in the CRC and the ACRWC) and the domestication of children's rights in several African states, establish a direct relationship between the state and children in areas not limited to protecting a child from abuse and violation of his or her rights within the family. This relationship is true, especially in the context that most states, have established what is generally referred to as "hotline or emergency numbers" which can be used by any member of the family, including children, to report any form of abuse happening within the family to a state agency such as the police.⁷⁸ The legal recognition of such a relationship mandates a certain level of collaboration between the

⁷⁷ See for example, E Egede 'Bringing human rights home: An examination of the domestication of human rights treaties in Nigeria' (2007) 51(2) *Journal of African Law* 249-284.

⁷⁸ Commonly known in, for example, South Africa as 10111, Angola as 113, and Egypt as 122.

family and the state in child-rearing, which to a reasonable extent challenges the presumption that parents have complete ownership over their child/ren or that the State is not allowed to intervene in family matters.

To this end, the introduction of children's rights law and the domestication, education and dissemination of children's rights in Africa have shifted perceptions (to some extent even traditional and religious perceptions) and brought awareness of children's rights within the family in some African homes.⁷⁹ For instance, Lloyd, writing in 2002, points to the fact that both the CRC and the ACRWC have "... regards to and respect for cultural practices ... but prevents cultural practices which may be harmful or prejudicial to a child's health and bans other practices such as child marriage".⁸⁰ Legally, interference in the family space is allowed to the extent that such interference is not unlawful.⁸¹ Although it is far from it, a comprehensive protection of children's rights within African families is fast becoming more a reality than a dream and the position of African children within their respective families, as seen in the next chapter, is also gaining prominence. As a result, parental authority over their children is becoming consultative rather than autocratic and the impact of the actions of the state to protect children's rights in the family is gradually been felt.⁸²

It is, but not absolute

The shift to the recognition of rights of "vulnerable" individuals within the family did not start with children's rights, but more so with the claiming of women's rights within the family. Historically, the claiming of such rights began because it was necessary to protect the rights of abused women within family walls and the *private space* debate kept it out of any authoritative intervention.⁸³ Indeed, state intervention was not resistance free and any interference by state authorities to protect an abused woman was classified as state intervention into the private family space. Today, interference to protect abused

⁷⁹ See for example, T Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (n 33 above), and T Kaime *Convention on the Rights of the Child: A cultural legitimacy critique* (2011).

⁸⁰ A Lloyd 'Evolution of the African Charter on the Rights and Welfare of the Child and The African Committee of Experts: raising the gauntlet' (2002) 10(2) *The International Journal of Children's Rights* 23.

⁸¹ See for example, art. 16(1) of the CRC and art. 10 of the ACRWC.

⁸² Kaime (n 40 above).

⁸³ See for example, F Olsen 'The myth of the State intervention in the family' (1985) 18(4) *University of Michigan Journal of Law Reform* 839-840; O Jonas, 'Gender equality in Botswana: The case of Mmusi and Others v Ramantele and Others' (2013) 13(1) *African Human Rights Law Journal* 299-244; F Banda 'Building on a global movement: Violence against women in the African context' (2008) 8(1) *African Human Rights Law Journal* 1-22.

women is no longer regarded as state intervention into the private family space, because legally women's rights have been given full recognition in law through their protection in CEDAW. Through CEDAW, women are now beneficiaries of an array of rights both within the public and private space and the state has a mandate to ensure that such rights granted to women are protected and promoted even within the family. At the African regional level, just like is the case with children's rights, women's rights in Africa has been fortified by the adoption of a specific African regional instrument on women's rights - the African Women's Protocol.

Through both instruments women have been granted several rights, including the right to inheritance, the right to self-determination, and the right to participate in all decision-making processes, including family decision-making processes on all matters concerning them.⁸⁴ Although very similar, the contextual application of children's right to participation in family decision-making processes is different because, as demonstrated throughout this thesis, children are generally presumed to be incompetent and this could last throughout childhood and possibly frustrate their inclusion in family decision-making processes, let alone the chance to express their views on matters that concern them.

However, the competence of women, once questioned, has now (in most parts of the continent) been lifted and this is, in most cases, not only due to the recognition of their right to meaningfully participate in family decision-making processes but also based on the fact that through the enjoyment of their rights, women in Africa are now beneficiaries of several privileges, such as financial independence generally ascribed to men only. Indeed, based on this thesis, women now fall into the category of parents and as parents they have the responsibility to also ensure that children enjoy their right to participate in family decision-making processes on all matters that concern them.

4. Scope of parental directives and guidance and state intervention⁸⁵

4.1. Parental directives and guidance

The allocation of parental responsibilities and rights to, amongst others, provide children with directives and guidance in, and during the enjoyment of their right to participation is protected throughout the CRC and the ACRWC. The award of directives and guidance

⁸⁴ See for example, para 8 of the preamble of CEDAW and Art. 9 of the African Women's Protocol.

⁸⁵ The terms – intervention, interference and intrusion will be used interchangeably through this chapter.

to parents is critical, as it points to and strengthens the fact that a comprehensive protection and enjoyment of children's rights is not void of adult contribution or assistance.⁸⁶ Also, both instruments⁸⁷ emphasize and recognise the dynamic composition which surrounds most families in Africa. Chiefly, article 5 of the CRC is significant in that it tacitly recognises the reality that what constitutes a family varies from country to country and in some cases from clan to clan, as it overtly refers to the influence of "local custom" as a measure for a state party's obligation to respect the responsibilities, rights and duties of parents to ensure that children's rights are protected in the family.⁸⁸

The importance of such recognition is that it leaves no gap for escape or excuse that may exist in the case of non-protection of children's rights in the family. However, placed in an ideal world, it must also be noted that article 5 does not seem to have the impact expected in terms of being one of the measuring rods which should guide states' assistance to parents according to their local customs. This is true, especially when related to the protection of children's right to participate in family decision-making processes. Indeed, many state parties have alluded to cultural and traditional attitudes (local customs) as one of the main barriers to the implementation of children's rights to participation, especially in the family.⁸⁹

Irrespective, the responsibility of parents to ease children to enjoy their right to participate in a family decision-making process in particular, remains unchanged under both the CRC and the ACRWC. Traditionally and legally, parents are considered to have a natural right to control and nurture their children.⁹⁰ Although parental rights and control of the family has developed strong roots in family law, its core intent provides concrete justification for protecting children's interests⁹¹ and in

⁸⁶ M Freeman 'The rights to be heard' (1998/99) 22(4) *Adoption and Fostering* 56.

⁸⁷ Especially the ACRWC.

⁸⁸ Art. 5 provides that "States Parties shall respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognized in the present Convention." See also, A Parkes *Children and international human rights law: The right of the child to be heard* (2013) 73.

⁸⁹ For example, see, Committee on the CRC, Consideration of reports submitted by States Parties under Article 44 of the Convention: Cameroon *UN doc CRC/C/28/Add.16* para 53; Ghana *UN doc CRC/C/GHA/3-5* paras 76 – 77; The Gambia *UN doc CRC/C/GMB/2-3* para 78.

⁹⁰ See for example, art. 20 of the ACRWC which provides that, "Parents or other persons responsible for the child shall have the primary responsibility of the upbringing and development the child and shall have the duty": – to ensure the best interest of the child and to secure the child's development.

⁹¹ Baskin (n 76 above).

particular their right to participate in family decision-making processes on matters that concern them.

Modern theories of child welfare, offer persuasive support to children's rights and suggest that legal systems should strengthen the relationship between parents and children - in the context that it enhances an environment of shared, positive and responsible dialogue.⁹² Accordingly, the Committee on the CRC admits that

[t]he Convention recognizes the rights and responsibilities of parents, or other legal guardians, to provide appropriate direction and guidance to their children, but underlines that this is to enable the child to exercise his or her rights and requires that direction and guidance are undertaken in a manner consistent with the evolving capacities of the child.⁹³

The position of the Committee mentioned above is not innovative but firm and highlights what should, from a rights protection basis, bind a parent-child relationship. The Committee's obstinacy to generate a link between parental responsibilities and rights and children's right to participate in family decision-making processes consistent with their evolving capacities could be viewed as modern. This is especially true because traditional African family practices, as indicated earlier in this chapter, are generally not construed to give children the chance to participate in family decision-making processes on *all* matters that concern them. Nevertheless, from the Committee's position above, it is deducible that parental responsibility is two-dimensional when respecting children's right to participate in family decision-making processes. First, it is the responsibility of parents to ensure that a child freely expresses his or her view on a matter that concerns him or her. Washak holds that the full and justified execution of such duty should be based on grounds that a child has not been imperiled to external influence and he or she has received all required information to facilitate and enhance his or her ability to make an informed contribution.⁹⁴ Secondly, the dimension of responsibility espoused by the Committee's reasoning above is the parental responsibility to give due weight to the views of the child expressed during a family decision-making process on a matter concerning the child. Such

⁹² For instance, see, Committee on the CRC, GC No 12.

⁹³ Committee on the CRC, GC No 12, para 91. See also art.18 of the CRC.

⁹⁴ RA Washak 'Payoffs and pitfalls of listening to children' (2003) 52(4) *Family Relations* 373, 375.

weight, Lester and Brazelton warn, should not be based on homogenous reasoning since children's capacities are not homogeneously linked to their biological age.⁹⁵

Further, articles 20 of the ACRWC and 18 of the CRC are construed to emphasize the much-needed role of parents and/or legal guardians in the upbringing and development of children and the assistance that must be provided by states to parents accordingly. Viewed through the lens of these articles, parents are portrayed here as passive beneficiaries of rights in a legal instrument intended for children. Such parental rights are engulfed in their responsibility package. According to Eekelaar, the causal cogent of the granting of parental responsibility is two-folded as "a factual recognition of the state of affairs, and also a normative granting of approval by the state to a given situation".⁹⁶

Reasoning along with Eekelaar, Freeman purports that parental responsibility in Eekelaar's logic "is a status which consists in, and is co-extensive with, practical actions".⁹⁷ Actions which generally cannot be provided by law, especially because the law cannot respond swiftly to a child's immediate need, such as provide water to a thirsty child. However, the legal concept of parental responsibility rests upon a dogma which purports such responsibility as the ordering of relationships in the natural world. Truly, it is the law that regulates parental duty to respond to a child's immediate need through its recognition of parental responsibilities and rights. Indeed, the legislative perception of parental responsibility is telling when analysed in the eyes of the South African Children's Act, which holds that it is the "... responsibilities and rights that a person may have in respect of a child, [which includes] the responsibility and the right to care for the child; to maintain contact with the child; to act as guardian of the child; and to contribute to the maintenance of the child".⁹⁸

Based on such legal codification, parental responsibilities and rights to care for their children, cannot reasonably be refuted by the argument that the intricate underlying rationale of such responsibilities and rights has something to do with protecting parental interests, the interest they have in their children and espousing their

⁹⁵ BM Lester & TB Brazelton 'Cross-cultural Assessment of neonatal behaviour' in DA Wagner and HW Stevenson (eds) *Cross-cultural perspectives on child development* (1982) 20-53; D Frank & S Zeisel 'Failure to thrive' (1988) 6 *Paediatric Clinics of North America* 1187-1206; and C Landers *Early child development summary report*, (UNICEF, 1989) 6. See also G Lansdown *The evolving capacities of the child*, (2005). See also P Parkinson & J Cashmore, *The voice of a child in family law disputes* (2012) 81, in which a parent said "I don't claim to be an expert but what I would say is that ... all of this has to be tempered on the child, the individual, and so I could even say from my three, Daniel, at age 7 is far more aware in many respects than Matthew at age 11 ...".

⁹⁶ J Eekelaar 'Parental responsibility: State of nature or nature of the state?' (1991) *Journal of Social Welfare and Family Law* 37.

⁹⁷ M Freeman 'Whose life is it anyway?' (2001) 9 *Medical Law Review* 271.

⁹⁸ Sec 18(2) South African Children's Act (2005). See generally, sec 18 of same for further details.

domination over their children. Archard, writing in 1993, reasoned that if parents do have "... a right to rear it is plausible to think that it is derived from and is consequently dependent upon the prior duty to give a child the best possible upbringing".⁹⁹ The best possible upbringing and development of a child must be comprehensive (which includes material, mental, physical soundness amongst others) in order to enhance the proper development of children. For this to happen, parental domination, especially during family decision-making processes on matters that concern a child, must be reduced to the minimum and the space given to a child to express his or her opinion on a matter that concerns him or her broadened as widely as possible based on the maturity of the child. Confidently, this is a perception advocates for children's right to participate in family decision-making processes will agree with.¹⁰⁰

However, to ensure that such balance is struck, parents should heed to the fact that "[c]hildren's levels of understanding are not uniformly linked to their biological age [... the level of access to] information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child's capacity to form a view. For this reason, the views of the child have to be assessed on a case-by-case examination".¹⁰¹ The knowledge required in ensuring such case-by-case examination is in most cases difficult and indeed probably the reason why it is not surprising that both the CRC and the ACRWC introduce the state as a key role player to provide assistance to parents where possible.

4.2. State intervention

Throughout the CRC and the ACRWC, the state is recognised as the main duty bearer with the responsibility to ensure that the rights protected in these instruments are delivered to children. Even in instances where parents have been assigned duties, the state is still assigned to provide support and assistance to parents to facilitate their childrearing duties. It is this link in duty implementation that makes state intervention in the family a possibility. State intervention in the family could be classified into positive and negative interventions. Positive is that which is generally accepted and would strengthen family

⁹⁹ D Archard *Children: Rights and childhood* (1993) 130.

¹⁰⁰ See generally, art. 12 of the CRC and 4(2) of the ACRWC and for an expansive reading see Committee on the CRC, GC No 12.

¹⁰¹ Committee on the CRC, GC No 12 para 29.

unity, protect the vulnerable or punish offenders,¹⁰² and negative is that which could destroy or weaken family unity and bonds. State intervention to ensure children's right to participate in family decision-making processes could be a mixture of both.

From a family law perspective, the dilemma is whether the state is capable of providing sufficient assistance and whether the state should even intervene in family matters?¹⁰³ Generally, the family condones some level of protective intervention by the state – this is the case irrespective of the African cultural or religious beliefs they practice. It is perhaps irrelevant how resistant or susceptible to state intervention a family could be, as international human rights law generally imposes obligations on states first, before others, to ensure the respect and protection of human rights within its territory, and the family is no exception.¹⁰⁴ In contemporary legal literature, most scholars concede that there are times when state intervention in the family is absolutely relevant.¹⁰⁵ Some such instances, most scholars claim, include cases of divorce or legal separation or where the human rights of co-family members are perpetually abused.¹⁰⁶

¹⁰² For instance, a family will be quick to accept or invite the state to intervene to order the non-custodial parent to provide pecuniary maintenance for his or her child or children if that would not happen without a court order. For example, in the decision of the high court of Lesotho in *Seotlo v Seotlo CIV/APN/262/82* in which the state (through the judiciary) ordered the non-custodial partner to “maintain the ... two minor children (of a dissolved marriage) in the sum of R75.00 per month and such amount to be paid to the office of the Registrar of the High Court” (para 3). Also, even in the case of a dissolved marriage, as was the case in the Namibian case of *FN v SM (CA 77/2011) [2012] NAHC 226*, the court, if satisfied with the evidence submitted, can intrude without objection on grounds of domestic violence from the acts of one of the partners of a previous marriage to protect the affected parties and in some instances, rescind certain rights and privileges it had earlier granted to the abusive party during the divorce hearing. In this case, the court rescinded an earlier interim protection order and replaced it with a final protection order in terms whereof – amongst others – the respondent was “ordered not to commit any further acts of violence against his minor children; and custody of the minor children born between the appellant and respondent [was] granted to the appellant for the duration of this order, subject to reasonable access by the respondent of alternate weekends and school holidays ...”.

¹⁰³ See generally, Olsen (n 83 above) 835, BB Woodhouse ‘The dark side of family privacy’ (1999) 67 *George Washington Law Review*. 1247.

¹⁰⁴ See, for example, two Kenyan cases: *C.K. (A Child) (through Ripples International as her guardian and next friend) and others v Commissioner of Police / Inspector General of the National Police Service and others, petition 8 of 2012 [2013] eKLR* where, as recognised by the Court, the State has a duty under Articles 19 and 34 of the CRC to protect children from all forms of abuse. This decision properly found the State accountable for its failure to fulfil this duty. See also, *Agnes Wanjiru Kiraithe & another v Attorney General & 2 others petition no. 536 of 2013 [2014] eKLR*, in which the State had to intervene in a community's (family) practice of FGM to protect the children concern.

¹⁰⁵ Parkes (n 88 above) 76-77. See also, Baskin (n 76 above) 1390-1391, in which he argues that two main reasons justify such interference - the best interests of the child and the doctrine of *parens patriae*. The latter is a doctrine that grants the inherent power and authority of the state to protect persons who are legally unable to act on their own behalf – *Black's law Dictionary (eighth edition)* 1144.

¹⁰⁶ For instance, see, Baskin (n 76 above) 1383-1409.

However, such intervention is still very difficult in African families as the family still enjoys, as it should, some degree of privacy and non-intervention by third parties. Families generally prefer to resolve family disputes within the family. On one hand, this could be regarded as progressive as it strengthens family unity in the sense that it encourages and fortifies family bonds through keeping family matters private and shielding “wrongdoers” from “public shame”; on the other hand, such family practices disguise and condone human rights violations in the family. Different views have been expressed about why the state should or should not intervene in the family. There are, of course, several instances where family members hold strong views and the state concurs that the state should not intervene.¹⁰⁷ For example, in the South African Constitutional Court case of *DE v RH*,¹⁰⁸ based on whether the Court should intervene and sanction a supposed adulterous partner in a collapsing marriage, the court held that

... global trend was moving towards the abolition of civil claims based on adultery. Even in South Africa, it is clear that attitudes towards the legal sanction of adultery have been softening. Marriages are founded on love and respect, which are not legal rules, and are the responsibility of the spouses themselves. In the present case, the breakdown of the marriage was as a result of a failure by the spouses themselves to sustain their marriage and thus it would be inappropriate for the courts to intervene.¹⁰⁹

The decision of the Court in the case above is very interesting and it will send strong signals across a continent which still, rightly so, holds marriage values quite high and based on legal, religious and customary terms.¹¹⁰ Olsen, however, holds that claims for non-intervention in most cases have been qualified by the caveat that the state should intervene to correct inequality and abuse in the family (i.e. protective intervention¹¹¹), and in this case there was no abuse, especially as the marriage had irretrievably broken down. Reasoning along with Olsen, the decision of the Court is not cast in stone on all family matters. Indeed, protective intervention is exactly what most courts in Africa have adopted in several cases in their attempt to intervene in family related issues to resolve inequality and human rights violations. For example, another interesting and

¹⁰⁷ See generally, J Dwyer *Misused concepts and misguided questions: Fundamental confusions in family law debate* (2013) *Faculty Publications*. Available at <http://scholarship.law.wm.edu/facpubs/1788> [accessed 17 November 2015].

¹⁰⁸ *DE v RH CCT (2015) 182/14*.

¹⁰⁹ *DE's case (as above)* paras 37 & 42–47. Extract from the summary of the case available at <http://www.saflii.org/za/cases/ZACC/2015/128.html> [accessed 19 November 2015].

¹¹⁰ From a customary law angle, this will not cause so much fuss. This is because most customary practices across the continent do not rebuke adultery since it condones polygamy – adultery under customary law could be quickly defended with intent to marry. See EN Ngwafor *Family law in Anglophone Cameroon* (1993) 108.

¹¹¹ Olsen (n 103 above) 835.

topical family issue in African traditional and cultural discourse is property inheritance. In most cultures, such practice is decided within a family and across masculine lineage.¹¹² However, the state (through the judiciary) has intervened in the family space on several occasions, in many different countries, to correct this inequality or injustice and to protect women's or girl-children's right to inheritance. For instance, in the Nigerian case of *Mojekwu v Iwuchukwu*,¹¹³ the Nigerian Supreme Court held that the *Lli-Ekpe* custom which prohibits women from inheriting property is repugnant to natural justice, equity and good conscience. In its reasoning, the court passed a decision contrary to the cultural practice in the *Lli-Ekpe* community and allowed the widow (respondent) the right to inherit her late husband's property.

Similarly, and equally groundbreaking, is the South African Constitutional Court decision in *Bhe and Others v Khayelitsha Magistrate and Others*¹¹⁴ in which the court passed a decision similar to that in *Mojekwu v Iwuchukwu*, setting aside the cultural norm which prohibited the girl-child from inheriting property, and granted her such rights. These cases and others in many ways have reshaped the cultural mindset of property inheritance along masculine (boy-child) lineage in some part of Africa. Intrinsically, the decision on who inherits rests in the family – thus, the intervention of the courts to correct any injustice or inequality that exist in the family in this regard is a justification of the extent to which the state can intervene in family matters to protect the vulnerable (in this case a girl-child) in the private space. However, it would be interesting to ascertain whether the state could still intrude in the family even in the absence of any form of abuse or inequality.¹¹⁵

From an international law perspective, several treaties promulgated in the early 1990s reflect an expanded understanding of state responsibility that include the responsibility “to ensure the prevention, investigation, and punishment” of human

¹¹² A very common practice in the *Lli-Ekpe* custom in Nigeria – see also, E Fokala ‘The relevance of a multidisciplinary interpretation of selected aspects related to women's sexual and reproductive health rights in Africa’ (2013) 17 *Law, Democracy & Development* 186.

¹¹³ *Mojekwu v Iwuchukwu* 2004 (4) *Nigeria SC* 1.

¹¹⁴ *Bhe and Others v Khayelitsha Magistrate and Others* (CCT 49/03) [2004] ZACC 17; 2005 (1) SA 580 (CC); 2005 (1) BCLR 1 (CC).

¹¹⁵ See for example, art. 17(1) of CCPR prohibiting unlawful and arbitrary interferences with family privacy and 17(2) which promises everyone the right to protection against such interference; see also arts 16(3) & 23(1) of the Universal Declaration of Human Rights which affirms that “the family is the natural and fundamental group of society and is entitled to protection by the state”.

rights violations that occurred in private as well as public space.¹¹⁶ Such established state responsibilities have many times been confronted with parents who also claim legal responsibilities and rights bestowed by the same international treaties. A classic case here is the CRC and the ACRWC which both harbour an avalanche of parental responsibilities and rights – probably more than any other treaty does. Certainly, parental responsibilities and rights are key components to the very existence of children’s rights. It would not be wrong, either, to suggest that such responsibilities and rights represent one of the underlying and veiled main bargaining chips with which these instruments have attracted huge acceptance – as they are also very visible in national laws related to children.¹¹⁷

However, caution should be taken when the state constructs a legal parent-child relationship in its systematisation of national laws as “... it confers various rights and powers on the persons to whom it gives the legal status of parent”.¹¹⁸ In most cases, such legal provisions bequeath on parents considerable autonomy to educate and provide directives and guidance to their children as they deem fit.¹¹⁹ In fact, in the South Africa case of *S v M*¹²⁰ Sachs J in his attempt to define the scope of parental responsibilities and rights as protected by section 28 of the South African Constitution, which confers a number of rights on children, held that the purpose -

... is to ensure that parents serve as the most immediate moral exemplars for their offspring. Their responsibility is not just to be with their children and look after their daily needs. It is certainly not simply to secure money to buy the accoutrements of the consumer society, such as cell phones and expensive shoes. It is to show their children how to look problems in the eye. It is to provide them with guidance on how to deal with setbacks and make difficult decisions. Children have a need and a right to learn from their primary caregivers that individuals make moral choices for which they can be held accountable.¹²¹

¹¹⁶ For example, international instruments such as the *Declaration on the Elimination of Violence against Women* prohibit states from tolerating custom and tradition as a justification for the violation or women’s rights. Regional instruments, such as the African Women’s Protocol (2005), also call on states to address injustices and the abuse of women’s and girls’ rights in Africa. For example, article 4 of the Protocol provides that states must take steps to “adopt ... such ... legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of violence”.

¹¹⁷ See, ch 2 of this thesis.

¹¹⁸ Dwyer (n 107 above) 243.

¹¹⁹ For example, in the Republic of Tanzania, sections 8 and 16 of the Law of the Child Act (2009) for Mainland and Section 10 of the Zanzibar Children’s Act (2011): parents have a common responsibility to take care and protect their children through the provision of food, shelter, clothing, education, medical care, liberty and right to play and leisure. Through both laws, every parent or person legally responsible for a child bears the duty to ensure that the best interests of the child are his basic concern at all times.

¹²⁰ *S v M (Centre for Child Law as Amicus Curiae)* 2008 (3) SA 232 (CC).

¹²¹ As above para 134.

In most cases, state intervention is generally overlooked and in some instances rejected with absolute resentment. However, once given some thought it becomes apparent that there is no such thing as a parent-child relationship in law, without state intervention.¹²² The state is the source of regulations and laws, and in most cases such laws create legal relationships. The parent-child relationship is no exemption. Obviously, even within the creation of such relationship there exists factual limitations – to some extent also created by the state (through the law) – which identify the extent to which the state can intrude in the family. Elsewhere, in the celebrated United States Supreme Court case of *Prince v Massachusetts*¹²³ Rutledge J, held that “it is cardinal ... that custody, care and nurture of the child reside first in the parents, whose primary function and freedom include preparation for obligations the state can neither supply nor hinder”.¹²⁴ Rutledge J’s reasoning is sincere and points to the fact that state intervention is unavoidable, yet it also has some factual limitations.¹²⁵

Over the years, legal scholars, for example through the writings of Goldstein, Freud and Solnit, have argued that -

[t]he child’s need for security within the confines of the family must be met by the law through its recognition of family privacy as the barrier to state intrusion upon parental autonomy. These rights – parental autonomy, a child’s entitlement to autonomous parents and privacy – are essential ingredients of the family integrity.¹²⁶

Family integrity is very significant in children’s rights discourse. Actually, it is a fundamental requirement to provide a child with a friendly and happy family environment and for the child’s upbringing and development to continuously progress on an acceptable trajectory. It is crucial to the point that when or if it is broken or weakened by excessive state intervention, it has the possibility of frustrating a child’s needs and affecting a child’s developmental progression.¹²⁷ Indeed, it should be noted that from the standpoint of a child’s psychological, emotional and intellectual well-being, parental decision making enjoys major advantages over those of an outsider – the state.¹²⁸

Much authority of this nature supports the general proposition that, except where there is some legislation or authoritative public policy to the contrary in a given society,

¹²² See for example, Dwyer (n 107 above) 240.

¹²³ *Prince v Massachusetts* (1944) 321 U.S. 98.

¹²⁴ As above para 166.

¹²⁵ In most cases, such limitations are based on the lack of state presence to immediately and probably physically provide or protect the child at all times.

¹²⁶ Goldstein *et al.* *The best interest of the child* (1996) 91.

¹²⁷ As above 89.

¹²⁸ Baskin (n 76 above) 1385.

parental directives and guidance extend to all areas of a child's life. Examples of such traditional parental authority over children extend to naming a child, custody and control of religion and education. Surely, the parental duty to provide a favourable environment probably grants parents the right to censor the books read and movies watched by a child – and in most cases children have no choice and opinion in this regard.¹²⁹ Equally, as acknowledged by Lord Fraser in *Gillick v West Norfolk and Wisbech*,¹³⁰ parental directives and guidance “exist for the benefit of the child and they are justified in so far as they enable the parent to perform his [or her] duties towards the child, and towards other children in the family”.¹³¹

Therefore, only in the most extreme cases where there are satisfactory reasons that a child's welfare is not met and the court confirms that the parents have failed in the execution of their duty to care for a child will the state be in a position to intervene. Generally, non-intervention is the norm, but intervention is allowed in exceptional cases especially when it is intended to protect a child.¹³² In Eritrea, parents are the first duty bearers to their children – the place where protection starts – and at the same time the child also belongs to the community (the state).¹³³ In South Africa, the Children's Act recognises that parents have shared responsibilities and rights in respect of their child.¹³⁴

The responsibilities and rights of unmarried fathers came under review in the case of *FS v JJ and Another*.¹³⁵ In that case, the court held that biological fathers acquire automatic parental responsibilities and rights in the circumstances listed in section 21(1) of the South African Children's Act.¹³⁶ In terms of the South African Children's Act, as interpreted in *FS v JJ and Another*, irrespective of their marital status, married or unmarried fathers and mothers of a child also bear the responsibility to provide appropriate directive and guidance to a child, especially in the context of enhancing their right to participation in family decisions-making processes on matters that concern the child. The decision in this case also re-enforces the fact that the parent-child relationship is a macrocosm of an asymmetry of power which of course also exists as a measure to

¹²⁹ P Parkinson & J Cashmore, *The voice of a child in family law disputes* (2012) 89.

¹³⁰ *Gillick v West Norfolk and Wisbech A.H.A* [1986] AC 112 para 170.

¹³¹ As above para 170.

¹³² See for example, art 16(1) of the CRC and art. 10 of the ACRWC.

¹³³ See generally, Committee on the CRC, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Eritrea* UN doc CRC/C/ERI/4 147-149.

¹³⁴ See generally, ch 3 of the South African Children's Act which deals with termination, extension, suspension or restriction or parental responsibilities and rights for mothers and fathers – married and unmarried, and makes provision for parenting plans for co-holders of parental responsibilities and rights, in addition to other protection measures in the event of rights violations.

¹³⁵ *S v J and another* 2011 (3) SA 126 (SCA) 8.

¹³⁶ As above paras 24–25.

ensuring children's right to participation in decision-making processes in the family in Africa.

5. Methods of state intervention in the family – the state should find its way

In contrast to the shrewdness of bestowing parents with directives and guidance in promoting children's right to participate in family decision-making processes, is the undesirability of the alternative, state intervention. In fact, despite benefitting from clear legal recognition and the duty bequeathed on state parties to provide assistance to parents, in this way giving the state the green light to intervene in the family as demonstrated above, it is however interesting that there is no uniform approach designed to facilitate such state intervention, especially in their effort to protect children's rights in general and their right to participate in family decision-making processes in particular. Indeed, taking into consideration the difficulty international law has in specifically defining a family, or the broadness of its attempted definition, or its firm classification of the family as a private entity deserving protection from the state, it is not surprising that international law does not prescribe any *modus operandi* for states to intervene in the family. Resultantly, gaps still exist in knowledge and practice concerning the proper policies and standards that should govern state intervention in the family, especially in the context of protecting children's rights to participation in family decision-making processes.

However, article 4 of the CRC, interpreted in the light of state intervention in the family, could be considered as a directive provided by international children's law to state parties on how to intervene in the family, as it could be read to instruct states to adopt both legislative and administrative means of intervention. Legally, such means should be visible through national laws as anticipatory signs to parents for possible state intervention if such children's right to participate in family decision-making processes in all matters that concern them, for example, is violated.¹³⁷ The Committee on the CRC has, however, cautioned states that in adopting such legislative and administrative methods of intervening in the family, states should take into consideration the fact that in many cases, only children themselves should indicate whether their rights are being fully recognised and realised.¹³⁸

¹³⁷ See for example, art. 42 of the CRC which places responsibility on governments to make children's rights known to adults and children.

¹³⁸ Committee on the CRC, GC 5 para 50.

The Committee advises that interviewing children (with appropriate safeguards) could be adopted as substantive methods of finding out, for example, to what extent their right to participation is respected within the family, especially in decision-making processes on matters that concern them.¹³⁹ Since there is no prescribed method of intervention, this approach is critical because it is through such methods that a state's findings could be accurate in order to enable the development of appropriate standards to protect children's rights in a particular family, or a cluster of families with similar structures. Surely this approach re-enforces the fact that it is technically up to states to devise an approach, specifically on how to provide assistance to parents and encourage children's participation in family decision-making processes on matters that concern them. Article 41 of the CRC, however, provides the yardstick to measure the acceptable extent to which such legal and administrative procedures could stretch, as it holds that they must encourage better protection of children's rights in general than the CRC does.

The general rule is therefore that any state intervention resulting from reported child abuse must be child-centered, either to reinforce the protection prescribed in both the CRC and the ACRWC, or to offer better protection to the child. Indeed, it is open-ended and the reason why it is not surprising that several states in Africa have tailor-made their own approach on how to intervene in the family space to ensure that children are given the space to participate in decision-making processes on matters that concern them. One such method is through the design of campaigns and educational materials. Eritrea, for example, reporting to the Committee on the CRC in 2012, indicated that through its Ministry of Labour and Human Welfare and in collaboration with a host of other stakeholders such as the police, the Attorney General's Office and civil society organisations, has developed and disseminated promotional materials which reflect the [joint provisions of the CRC and the ACRWC] on child abuse and proper child upbringing in the family.¹⁴⁰ In the same light, the United Republic of Tanzania has also developed community-based family manuals for training parents and empowering them to give their children the chance to express their views in family decision-making processes.¹⁴¹ Probably due to the lack of any specific method, any progressive methods, like those adopted by Eritrea and Tanzania, are welcomed and will to a certain extent facilitate state intervention to protect children's rights in the family. However, campaigns and educational methods are

¹³⁹ As above.

¹⁴⁰ Committee on the CRC, *Consideration of reports submitted by States Parties under Article 44 of the Convention, Eritrea* (n 133 above) para 176.

¹⁴¹ Committee on the CRC, *Consideration of reports submitted by States Parties under Article 44 of the Convention, United Republic of Tanzania* UN doc CRC/C/TZA/3-5 para 56

indirect means of intervention and may only affect future children's rights violations in the family, if the parents chose to adhere.

From a legislative perspective, countries such as Gambia, through its Children's Act, have explicitly placed an obligation on parents to care and provide for their children, and have gone further, through its department of social welfare, to develop a communication strategy on children's rights and protection. This strategy is intended to raise public awareness and shift perceptions towards children and promote respect for their views on matters that concern them.¹⁴² Indeed, despite the inclusion of this obligation in its Children's Act, the State admits that it lacks a clear and concise strategy to intervene in the family and assist parents and legal guardians to ensure the protection of children's rights in general and their right to participation in family decision-making processes in particular.¹⁴³ This is indeed the reality – whatever suggestion the Committee on the CRC may have – most (if not all) states lack a clear and concise strategy to intervene in the family in their attempt to protect children's rights.

Perhaps it is not unrealistic to expect that administrative and/or legislative procedures should enable state intervention in the family that would establish an effective and efficient means to protect children's rights in general. The point is, legislative and administrative means will provide the basic guidelines which will shape the state's approach. For example, in cases where there are pre-existing and established legislative and administrative methods and check points of state intervention in the family – for example in divorce or legal separation cases – it is easier for states to find their way into the family to find settlement. However, in cases with no such pre-existing methods of intervention, the state might find it difficult to intervene into the family space to influence any differences in this regard. An example is the case where a child makes a choice, based on contemporary fashion trends, to have a tattoo or a piercing on sensitive parts of his or her body. Surely, taking into consideration the meaning of 'participation' and how it has been codified legally, it will be complex to establish whether intervention would be possible in such less dramatic family decision-making processes. The fact that parental consent is required for such choices to be implemented complicates the matter even further.

However, in another scenario, state intervention in the family could be frustrated by certain preconceived perceptions (not necessarily based on lack of legal regulations)

¹⁴² Committee on the CRC, *Consideration of reports submitted by States Parties under Article 44 of the Convention, Gambia* UN doc CRC/C/GMB/4 para 76. Several other countries in Africa have also adopted such legislative methods. See, for example, South Africa, Nigeria, Cameroon, Mozambique analysed in chs 2 and 3 of this thesis.

¹⁴³ As above para 105.

as to when state intervention is right or wrong. For instance, on the one hand, a state charging a parent with child abuse for asking a child to wash dishes as a disciplinary measure resulting from the violation of an agreement reached in the family wherein the child also participated, could be interpreted as an overstretched state intervention in the family. On the other hand, state prosecution of a parent for intentionally stabbing his or her child to death, because the child ignored a family decision which included the child, will most probably receive universal approval and will likely not be considered as state intervention in the family. The rationale here is that dish washing as a punitive measure in a home is more intricate and could be educative (a child's duty to ensure his or her environment is clean) than killing a child (in contravention of his or her right to life), which internationally has been classified as murder with established methods and procedure of state intervention.

The challenge is basically the fact that there is no pre-existing state designed administrative or legislative agreement on family roles. Thus, any form of state intervention to resolve such punitive measures as dish washing is complex and will in most cases receive resistance from families. However, state intervention would be permitted if the punitive measure is excessive and prevents the child from enjoying other rights, such as his or her right to education.¹⁴⁴ The point is, this situation speaks to the fact that a uniform method of state intervention should not be encouraged; rather, states should adopt a child-centered case-by-case approach with a minimum effect on family unity. Such intervention should be open – if not, it will be weighty to suggest that states should devise a specific method that suits all traditional or cultural practices extant within its territory in Africa. A case-by-case approach must be within the margins of certain standards defined by states which must be concomitant with the general principles of children's rights protection. Olsen holds that the state should adopt an approach which adjudicates borderline cases in its attempt to intervene in the family to correct or protect children's rights, because in doing so the state will necessarily influence the family¹⁴⁵ and in the process, correct any wrongs that may exist in the family regarding the protection of a child's right to participate in decision-making processes on matters that concern him or her.

Surely, absolute control or upbringing of a child is not completely within the authority of parents only. It is both within the authority of the state and parents – primary authority lies in the hands of parents and secondary authority is with the state.

¹⁴⁴ See for example, ID Cherney 'Mothers', fathers' and their children's perceptions and reasoning about nurturance and self-determination rights' (2010) 18(1) *International Journal of Children's Rights* 79–91.

¹⁴⁵ Olsen (n 103 above) 854.

A satisfactory upbringing of a child and the protection of his or her right to participation in family decision-making processes, for example, would require a great level of complementarity between these levels of authority. For example, the state has through legislation empowered parents to be the primary keepers and caregivers of their children, to name, love and ensure that their children enjoy their rights in general and their right to participation in particular in the family. The state comes into the family only when such authority bestowed on parents is not observed or abused.

5.1. Barriers to ensure children's right to participation in the family¹⁴⁶

Children's right to participation, despite its firm rootedness as a key children's right, with probably the most potential to elevate children (for example, mentally and rationally) to the same level as adults when they participate in family decision-making processes on matters that concern them,¹⁴⁷ still faces enormous implementation challenges and the family seems to be the beehive of such challenges. Most African families have for many years been surrounded with barricades hindering children from participating in family decision-making processes, built on reasoning such as that children's participation in family decision-making processes will undermine parental authority and control, encourage disrespect for parents, expose children to dealing with technical issues which could overburden them,¹⁴⁸ waste time, and put children at risk, amongst other things.¹⁴⁹ This thesis will not attempt an analysis of all these barriers on the basis that they, and many more, have been discussed and analysed to a great extent by several scholars who have attempted to encourage children's right to participation in

¹⁴⁶ It should be noted that none of the barriers highlighted here are particular to Africa – what I attempt here is finding an Africa experience to the barriers.

¹⁴⁷ See for example, P Alderson & J Montgomery *Health care choices: Making decisions with children* (1996); C Willow *Hear! Hear! Promoting children and young people's democratic participation in local government* (1997).

¹⁴⁸ There is unfortunately no study yet, at the African regional level, which supports this assertion – it is based on the analysis of African families provided earlier. However, Parkinson and Cashmore have captured this succinctly through interviews with parents in Australia. Through the interviews clear instances on how parents could and would like to protect their children are highlighted, especially as they argued that some information is too heavy and could overburden children. For more on this see Parkinson & Cashmore (n 61 above) 62-89.

¹⁴⁹ A Franklin & P Sloper 'Listening and responding? Children's participation in health care within England' (2005)13 *International Journal of Children's Rights* 21.

the family. Most of these barriers are visible within the African setting just as the case is with family structures in other continents.¹⁵⁰

However, this thesis is selective and limits the analysis of such barriers to two aspects which bare strong unique African characteristics – barriers based on the undermining of parental authority and control and barriers based on religious and/or cultural beliefs. With regard to religious and/or cultural beliefs, it is probably common knowledge that a majority of family structures, practices and directives adopted by families on the Continent are either influenced by one of these or both. The importance of promoting and strengthening African cultural beliefs and practices is very visible in the ACRWC, as it, for example, implores states to ensure that a child's education preserves and strengthens positive African cultural and traditional practices.¹⁵¹ With regard to parental authority and control, it is worth mentioning that the respect of elders (parents) is also protected in the ACRWC¹⁵² and cuts across almost every facet of a child's upbringing – including how you receive something from an elder, how you sit next to an elder and how you behave next to elders.

5.1.1. Undermining parental authority and control

Parental authority, control of the household, and the level of respect demanded within a family in Africa is probably second to none in the world. This is irrespective of whether such families are based in the rural or urban areas, or formally educated or not. In fact, it goes beyond decision-making processes and is well established even in salutations (the way you greet an elderly person).¹⁵³ This is so entrenched in African parenting that it should not, at any point, surprise anyone if African parents are quick to brandish this aspect as a reason for not encouraging children's right to participate in family decision-making processes on matters that concern them. Children's right to participation, as analysed below in chapter six, does indeed require children to partake and express their

¹⁵⁰ For a detailed and comprehensive analysis of these barriers, see for example, G Lansdown *Can you hear me? The right of young children to participate in decisions affecting them* (2005) 17-18. See also, G Lansdown 'The realisation of children's participation rights' in A Percy-Smith & N Thomas (eds), (2010) *A Handbook of children and people's participation: Perspectives from theory and practice* 11; Parkes, (n 84 above) 74-76; U Kilkelly & M Donnelly *Participation in health care setting: Perspectives of children, parents and health professionals* ch 9, 6.

¹⁵¹ See generally, art. 11 of the ACRWC.

¹⁵² See art. 31 of the ACRWC, which provides that "Children have responsibilities towards their families and societies, to respect their parents, superiors and elders, to preserve and strengthen African cultural values in their relation with other members of their communities".

¹⁵³ Just to add that this is not negative but it is the African way and such salutations are not uniform across the continent – it varies from country to country and in some cases from community to community.

views on matters that concern them. However, it does not require them to lead the process or to discard any person (parents in particular) from such processes. Such commonly held misconceptions are rooted in fear of losing control - in most cases African parents (rightfully so) regard staying in control as a natural obligation they have to protect and care for their children.

For example, in an unreported South African case, parents who had very conservative beliefs and principles on the manner in which they brought up their children faced a massive blow when their daughter, 16 at the time, approached the High Court in Cape Town to request to be “freed” from her parents to live a semi-independent life from them because she was unhappy with the conservative manner in which her parents administered her upbringing. In her submission, she complained that she was unhappy because her parents restricted her from speaking to boys, using her cellphone to reach out to friends, going out with friends after school, and reading what she likes, for example *Harry Potter*, which her parents found to be inappropriate.¹⁵⁴ After the hearing, the learned judge in this case granted her request - permission to live semi-independently with a school friend and her family (host family) until she attains the age of 18. Her parents were, however, granted access to her for two to three hours a week at a neutral venue and were allowed to phone her between 8:00 and 8:30 pm on a Tuesday and Friday.¹⁵⁵

Details of how these parents dealt with the removal of their daughter from their care and the subsequent impact of the abrupt limitation of their parental authority is not reported. However, psychology would probably dictate that any parent(s) would be traumatised for a while, if not until they received their child back under their control and care.¹⁵⁶ The ability of the court, in this case to hear this child, evaluate her opinion and pass judgement based on what was in her best interests should not go unnoticed

¹⁵⁴ It should be noted that this case was unreported; however, scholars have referred to and analysed the merits of the case in several child law related articles. For example, M Bekink ““Child Divorce”: A break from parental responsibilities and rights due to the traditional socio-cultural practices and beliefs of the parents’ (2012) 15(1) *Potchefstroom Electronic Law Journal* 179. Remarkably, she made an attempt (which failed) to obtain copies of the legal arguments presented in court and the order given from the learned judge or the attorneys who represented the girl. The reason she could not get such information as she reported was based on the sensitivity of the matter and the client’s instructions. She however relied on media reports which she obtained through Legal brief, accessed through <http://www.legalbrief.co.za/article.php?story=20100610091458403> [accessed 15 June 2010] in her analysis.

¹⁵⁵ Further access such as holidays were also granted but alternated with the foster parents.

¹⁵⁶ DC Browne ‘An evaluation of foster parents’ attitudes towards birth parents’ (2002) 3(1) *Irish Journal of Applied Social Studies* 84-95, in which she also adds that it could even get worse if the relationship between both parents (foster and birth) is not cordial.

as it is laudable, bold and in tandem with children's right to participation. However, it is such decisions, such 'powers' given to children through their right to participation that scares parents and promotes the fear that such children's rights undermine parental authority and control. In fact, it is possible to also establish such fear in parents' upbringing. It is possible that during their childhood parents were not involved in any decision-making processes on matters that concerned them. The parents portrayed in this case were possibly brought up in a conservative home and as a result they could only offer to their daughter the upbringing they know best. Possibly, this unfortunately exposes their inexperience and lack of technical know-how in involving their daughter and evaluating her opinion in the decisions they made on matters that concerned her.

Notwithstanding, there are some limitations to parental fears that the promotion of children's right to participate in family decision-making processes could undermine parental authority and control. This is very possible especially in a case where a parent voluntarily requests the court to appoint other persons as foster parents, thus relieving them of their parental authority and control. This was the case in Uganda in the *Matter of Salem Mukiibi and Ashaf Ssemakula (Minors)* and the *Matter of an Application by Hoffman Edward and Olivia Nakawungu Hoffman, Brother-Law and Sister*,¹⁵⁷ (the Hoffmans) in which the court evaluated the application of a single parent (mother of Salem and Ashaf) requesting the Hoffmans (whom she and her children were familiar with) to be appointed as foster parents to her two children, because she could not afford to maintain them. Before the court made its decision to remove the children, it also evaluated the application of the Hoffmans to be foster parents and most importantly to listen to the views of the children.¹⁵⁸ This is in no way a claim that the parent in this case was completely happy that her children were removed from her care – because most parents would not be happy – but the point to underscore here is the fact that she could not resist her children's right to participate in such decision-making process, because their participation had a stronger probability to compliment her reasoning and application which in all fairness was in their best interests. However, it is possible that the mother would have resisted state intervention to facilitate this

¹⁵⁷ See generally, *Re: Salem Mukiibi and Ashaf Ssemakula (Minors); In Re: An Application by Hoffman Edward and Olivia Nakawungu Hoffman, Brother-in-law and Sister, Respectively (Family Cause No 061 of 2005) ((Minors))* [2005] UGHC 30 (21 October 2005);

¹⁵⁸ After gathering all the facts, the Judge made the following order, "In the circumstances, I will grant this application and appoint Hoffman Edward and Olina Nakawungu Hoffman legal guardians of Salem Mukubi and Ashaf Semakula both minors. The guardians shall have legal custody of the infants and be at liberty to take the infants to any part of Uganda or outside Uganda, so long as the infants remain in their minority or until further orders issued by this court."

process, if it had not been initiated by her although it was in the best interests of the children.

Indeed, it is through such cases that one can concur with the fact that recent trends and developments in child rights jurisprudence, and especially in their right to participation have begun shifting perceptions to a child-centered approach which in many ways has minimised and in some cases completely discarded any excuse that may arise from parents.¹⁵⁹ For example, applicable societal and rights-based reasoning that no parents shall have a choice, with regard to having their children attain a certain level of education, is now enforceable in all African states. If not through national laws, this obligation is regulated by the CRC and the ACRWC. Generally, such legislative directives and infringement on parental authority and control are without regard to any parent's specific wish, culturally or religiously motivated – it is regarded as reasonable and proper both to the family, society and in the furtherance of persuasive state interest to educate its future leaders.

5.1.2. Religious and cultural grounds

These are perhaps the two most contentious behavioural influencers that design and probably direct most families in Africa. Jointly, they have the ability to indoctrinate patterns on which most family goals and practices follow.¹⁶⁰ In a South African Constitutional Court decision in *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs*, Sachs J stated that religion "... is part of the people's temper and culture, and for many believers a significant part of their way of life".¹⁶¹ Perhaps Sachs J's strongest position on the impact of religion and culture on African families and the way it affects the position of children was made in an earlier judgement he delivered in *Christian Education South Africa v Minister of Education*, in which he held that

¹⁵⁹ A Skelton 'Parental responsibilities and rights' in T Boezaart (ed) *Child Law in South Africa* (2005) 62.

¹⁶⁰ It is common knowledge in Africa and perhaps elsewhere that the natural rights of parents instruct them to guide and supervise the child and includes the parental right to implant particular religious and cultural values in their child/ren. See, for example, *Simleit v Cunliffe* 1940 TPD 67; *Landmann v Mienie* 1944 OPD 59; *Oosthuizen v Rex* 1948 (2) PH B65 (W); *Wolfson v Wolfson* 1962 (1) SA 34 (SR); *Engar and Engar v Desai* 1966 (1) SA 621 (T); *W v S* 1988 (1) SA 475 (N) at 494–95; *Mentz v Simpson* 1990 (4) SA 455 (A); *Stassen v Stassen* 1998 (2) SA 105 (W) at 107 and *V v V* 1998 (4) SA 169 (C) at 176G. See also, JMT Labuschagne *et al* 'Parental rights to participate in a child's personality development and its religious and moral upbringing and the child's right to freedom of choice: Observations on the field of tension caused by the irrational in a human rights dispensation' (2004) 25(1) *Obiter* 41, 48-51.

¹⁶¹ *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) para 90.

[t]he right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity ... For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong...¹⁶²

What is right or wrong in most instances within most African homes is justified by the position of what is believed to be so either through the influence of religion or culture.¹⁶³ It hardly needs to be validated that religious and cultural practices are also strong promoters of parental rights, control and authority over their children. Although both are not necessarily on par in terms of certain practices - for instance female circumcision¹⁶⁴ - both do promote, to a great extent, the respect of adults and the love and care for children. It is basically the height of such recognition and respect for adults which is, of course, not literally a problem but for the fact that it has in most instances minimised or weakened to some extent the place of a child and his or her involvement in family decision-making processes on matters that concern him or her.

Religious and cultural factors could frustrate state interference, if such intervention collides with what parents hold as correct based on their religious or cultural practices – a classic case here is the practice of early child marriage. For example, in Gambia, while the legal provisions condemning early child marriage - Section 24 of the Gambian Children's Act¹⁶⁵ which declares subject to the provision of any applicable personal law any marriage entered into by a child shall be voidable and Section 25 which prohibits parents and guardians from betrothing children in marriage – look strong at first glance, they are constantly violated based on religious and traditional grounds.¹⁶⁶ Indeed, “any applicable personal law” includes Shari'a law¹⁶⁷ and since the majority of Gambians

¹⁶² *Christian Education South Africa v Minister of Education* 2000 (4) SA 757; 2000 10 BCLR 1051 (CC) para 36.

¹⁶³ See for example, T Kaime *Convention on the Rights of the Child: A cultural legitimacy critique* (n 79 above). This thesis is not taking a stance whether such measures are wrong or correct – it just portrays what is African.

¹⁶⁴ It is noteworthy that most religious practices do not condone female circumcision and the reverse is true with cultural practices. However, research shows that the practice is rapidly phasing out.

¹⁶⁵ See generally, Children's Act part IV, s 24 which states that, “Subject to the provisions of any applicable personal law, no child is capable of contracting a valid marriage, and a marriage so contracted is voidable”.

¹⁶⁶ See also, the Report of the AU Special Rapporteur on Child marriage in Africa – Report on the Mission to Niger 28–29 July 2016 - in which the similar challenges are highlighted in Niger.

¹⁶⁷ Shari'a law is generally highly designed on religious practices and permits marriage upon physical maturity, which often occurs well before age 18.

practice Islam and fall under Shari'a law, child marriage remains a common traditional and religious practice and girls are married off well before they are 18 without their consent or involvement in such decision-making practices.¹⁶⁸

Further afield, in the cases of *Prince v Massachusetts*¹⁶⁹ and *Wisconsin v Yoder*,¹⁷⁰ Jehovah's Witnesses and Amish respectively defended their parental decision-making from state interference by arguing that parents' religious beliefs isolate their childrearing practices from state interference. The court, however, rejected this defence related to the United States of America's child labour laws in *Prince* and accepted it relative to compulsory education laws in *Wisconsin*. One should also take note of the decision of the ACERWC in *talibé children*.¹⁷¹ Although brought against the government of Senegal, the reason for referring to this case at this stage of the thesis is not the question whether Senegal violated the provisions of the ACRWC or whether the State applied limited protection of certain children's rights as prescribed by the ACRWC, but on the choice of the *talibé* parents based on their religious and cultural beliefs to send their children to Qur'anic schools, taught by marabouts. It is therefore critical in the present context that we construe the decision of the *talibé* parents broadly in an attempt to realise their intended purpose. First, there is nothing wrong in sending their child to school – educating their children is of course part of their parental obligation. Secondly, it should be noted that the choice of the school at which a child gains such education is entirely a family decision. However, it should be noted that the decision here to send the *talibé* children to this Qur'anic school was most probably influenced by their religion and culture. Based on the facts of the case, once in the custody of the marabouts, the *talibé* children were forced to work on the streets as beggars for several hours (6 to 8 hours) a day, leaving them less than 5 hours for their Qur'anic studies (which was the reason why they went to the school in the first place), and required to meet daily portions of goods acquired from begging. Failure to meet such quotas resulted in hidings and punishments at the hands of the marabouts.

Without a blink, traces of children's rights violations are clearly visible in this case and as one reads through the decision, one cannot help but notice that the State did little to intervene to correct this wrong. One reason for such reluctance from the State, one would suggest, could be based on the possible tension that exists when intervening in a

¹⁶⁸ This is very common in many other states or regions in the Continent where Shari'a law is also applicable. See also, ES Nwauche 'Child marriage in Nigeria: (Il)legal and (un)constitutional' (2015) 15 *African Human Rights Law Journal* 421-432. See also, M Rajabi-Ardeshiri 'The rights of the child in the Islamic context: The challenges of the local and global' (2009)17(3) *International Journal of Children's Rights* 478-489.

¹⁶⁹ *Prince* (n 123 above).

¹⁷⁰ *Wisconsin v Yoder* (1972) 406 U.S. 98.

¹⁷¹ *Centre for Human Rights (University of Pretoria) and La Recontre Africaine Pour la defense de Droit de L'homme v Senegal Decision: No 003/com/001/2012*.

family to protect children's rights from an abuse strongly influenced by a parental decision made on religious and cultural grounds. In fact, the State found it difficult to probe the parental decision of the *talibés* to send their children to such a school or even to interrupt the existence of the school and exercise arrest of the marabouts, since the school has strong traditional and religious bearings on the *talibés*.

6. Conclusion

This chapter has attempted an analysis of the interesting relationship between the family and the state in the efforts to protect children's right to participation. It has also analysed the position of African children within the family and society, and possible barriers that could frustrate both state intervention and the general protection of children's rights to participate in family decision-making processes in Africa. The issues raised in the chapter are not exhaustive as much remains to be done, especially in view of the external circumstances surrounding modern African families and the tensions arising therein, be they economic, social or cultural. The chapter also questions the privacy of the family which over the years has stretched parental rights and conferred on parents the trusted ability to make correct and informed judgments with respect to the responsible upbringing of children.

Relatively little academic research has focused on children's right to participation in family decision-making processes. This may be justified by the now outdated concept that "private relations" were regarded as sacred in international human rights law. In the case of children, this was the case until the adoption of the CRC and the ACRWC, and the recent explosive interpretation that children's right to participation has gained. This right was originally considered to concern vertical relations between the state and its citizens, rather than horizontal relations between private groupings (family) and individuals.¹⁷² As Okin correctly observes, the state has the responsibility, not only to grant special rights or exemptions and protection to some groups (e.g. cultural and religious groups), but it should extend such rights and exemptions within the family and enforce them when need arises.¹⁷³ Indeed, Rawls concurs and warns that "if the private sphere [the family] is alleged to be a space exempt from justice, then there is no such thing ... as equal rights ... and the

¹⁷² U Kilkelly & M Donnelly *The child's right to be heard in the health care setting: Perspectives of children, parents and health professionals* (2006) available at http://www.dcy.gov.ie/documents/research/The_Childs_Right_to_be_Heard_in_the_Health_care_Setting.pdf [accessed 13 February 2016].

¹⁷³ SM Okin 'Mistress of their own destiny' 112 *Ethics* 229-230.

basis of children as future citizens [is] inalienable and protects them wherever they are”.¹⁷⁴ The recognition of the impact that the family has on children’s lives and the acknowledgement that the child’s rights are also protected within the family environment in these instruments have helped to shift attention on to the protection of children’s rights in the private sphere. This is supported by the fact that both articles 12 of the CRC and 4(2) of the ACRWC make no distinction between private or public space regarding the child’s right to participate in decision-making processes in matters that concern him or her.¹⁷⁵ Unfortunately, challenges still exist to ensure the comprehensive protection and enjoyment of children’s right to participation in family decision-making processes. One such is the frustration faced by states in finding inroads in the family compounded by parental authority and control still extant within the family environment. Some of these hypotheses will be tested in the next chapter which appreciates children’s right to health and their right to participate in health-related decision-making processes. The chapter will attempt to highlight the strength of parental views, the views of medical practitioners and children’s views in deciding on his or her health-related treatment.

¹⁷⁴ J Rawl ‘The idea of public reason revisited’ (1997) 64 *University of Chicago law Review* 791.

¹⁷⁵ G Lansdown *Promoting children’s participation in democratic decision-making*, Innocenti Insight, No. 6. (2001).

Chapter Six

MEDICAL AND HEALTHCARE-RELATED DECISIONS

1. Introduction

Bluntly, the right to health, if not addressed properly, is arguably a human right with the highest possible resultant to death than any other human right.¹ It is not a stand-alone right, but it is arguably a right that, if not protected and promoted satisfactorily, could be identified as the final check to human existence. For example, poor education, poor nutrition, and poor housing conditions will all lead to poor health, and if not remedied, the result will be death. In relation to children, this is true especially because children's right to medical treatment, for example, is located mainly within the interrelation between their rights to life and health.² Certainly, it will be preposterous to conceive that any human being can claim to be happy or feel comfortable without the knowledge that they can access health and medical treatment in time of need. The right to health, as it is generally referred to, is a right of assurance and it is not more important to adults than it is to children. The significance of good health to all children is well established in article 24 of the CRC and article 14 of the ACRWC.

Through both instruments, children in Africa have a right to enjoy the highest attainable standard of physical, mental and spiritual health³ and to access healthcare services and facilities.⁴ A comprehensive interpretation of this provision, to a large extent demands the consideration of allied provisions such as article 19 of the CRC,⁵ which places state parties under the duty to intervene in the family during medical and health-related decision-making processes when the interest of children is at risk.

¹ See generally, the 1946 Constitution of the WHO, whose preamble defines health as "a state of complete physical, mental and social well-being and not merely the absence of disease or infirmity". The preamble further states that "the enjoyment of the highest attainable standard of health is one of the fundamental rights of every human being....".

² C Breen *Age discrimination and children's rights: Ensuring equality and acknowledging difference* (2006) 48.

³ See generally, art. 14 ACRWC.

⁴ See generally, art. 24 CRC.

⁵ See also art. 16 of the ACRWC.

Article 3(1)⁶ of the same instrument requires that such decisions or interventions should be in the best interests of the child and article 12's⁷ approval of children's right to participate during such decision-making processes especially at the family level.

Notwithstanding, in practice, African children's enjoyment of their right to health faces huge challenges generally, not only because they are children, but also because some health facilities are very expensive, inaccessible, poor in quality⁸ and understaffed. In Africa, for example, the challenges that have marred children's right to a satisfactory health and healthcare vary across the continent and in some cases range from poor policies to excessive parental influence which sometimes frustrates a child's participation in medical and healthcare decision-making processes. Further, the challenge that children face in ascertaining the right to health is complicated by the intimate involvement of health professionals.⁹ Within African healthcare practices, shared decision-making processes are not generally common between a patient who is a child, parents and/or health professionals.¹⁰ Despite the fact that both international law and medical practice encourage patients' involvement in healthcare decision-making processes, patient-doctor confidentiality and patient autonomy, the case of children is different as parental and doctors' opinions in some cases are so strong and in the best interests of the child that the opinion of the child is not requested. Through an examination of randomly selected court cases that relate to children's right to health, this chapter intends to examine the extent to which children's right to participate in family healthcare decision-making processes has been encouraged or observed in the midst of parental or doctors' opinions.

⁶ See also art. 4(1) of the ACRWC.

⁷ See also arts. 4(2) and 7 of the ACRWC.

⁸ U Kilkelly 'Health and children's rights' (2015) in W Vandenhoe *et al.* (ed) *Routledge International Handbook of Children's Rights Studies* 216.

⁹ Kilkelly (as above).

¹⁰ This is generally because children in most African families are regarded as the property of their parents. B Thompson 'Africa's Charter on Children's Rights: A normative break with cultural traditionalism' (1992) 41(2) *International Comparative Law Quarterly* 432; 438-39; KCJM Arts 'The international protection of children's rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child' (1993) 5 *African Journal of International and Comparative Law* 139, 158: observing that '[t]he doctrine of parental authority over children is strongly present in contemporary Africa and children are often regarded as the property of their parents or legal guardians' and GS Kamchedzera 'The rights of the child in Malawi: An agenda for research on the impact of the United Nations Convention in a poor country' (1991) 5(3) *International Journal of Law, Policy and the Family* 241.

2. Children's right to health in Africa

Children's right to health, as it is protected and promoted in Africa, is well established and recognised in all African states. Nevertheless, the resources and the cultural, traditional and religious differences within states have increasingly either frustrated the realisation of this right or carved different approaches to its realisation. From a legal perspective, the modalities governing a successful implementation of this right are provided for in the mainstream human rights instruments applicable in Africa and ratified by African states. For example, equally relevant to children, other human rights instruments such as article 25 of the Universal Declaration, article 12 of CESCRC and article 16 of the ACHPR contain similar provisions protecting the right to health.

However, a stronger protection is afforded in the CRC¹¹ and ACRWC, which protect some unique health-related aspects and are more elaborate and specific as compared to the other instruments. These include: a call for the reduction of infant and child mortality; and the provision of necessary medical assistance and healthcare to all children, with emphasis on the development of primary healthcare. Indeed, not only these provisions are central to children's right to health. Other provisions, equally relevant and related to children's right to health, include but are not limited to children's right to life protected in articles 6 of the CRC and 5 of the ACRWC, which calls on states to protect children's right to survival and development, articles 3 of the CRC and 4(1) of the ACRWC which also require the best interests of the children to be the primary consideration to all health-related matters concerning children, and articles 12 of the CRC and 4(2) of the ACRWC, which call on children's opinions to be considered in all decision-making processes in healthcare-related matters that concern them.

Generally, children's enjoyment of their right to health in Africa, and the decision to afford children in Africa this right, is not necessarily straight forward. This is because, in many regions across the continent, both traditional and modern means of accessing healthcare exist. Indeed, it is probably common knowledge that in Africa there are alternative means to access healthcare using modern and traditional scientific methods.¹² It is equally common knowledge that international law generally does not discourage the use of traditional medicine as a form of healthcare, because it regards the

¹¹ Through art. 23 of the CRC, for example, the health of disabled children is also highlighted.

¹² See for example, the Zimbabwean *Traditional Medical Practitioners (Professional Conduct) By-laws, 1997 (No. 245 of 1997)* which regulates the professional conduct of traditional healers which also encourages and protects traditional practices and beliefs embedded within cultural traditional practices as recognised and upheld in the legal system.

right to health as containing both freedoms and entitlements.¹³ However, it discourages any form of harmful traditional practice meted on children.¹⁴ The presence of alternative means of healthcare is a very factual issue in Africa and should be encouraged as part of a family healthcare decision-making process, especially in cases where parents hold such options in fulfilling a child's right to health. In most cases, the preference between traditional and modern scientific methods of healthcare remains an integral part of most family decision-making processes in Africa. Usually, the decision of which healthcare method to pick for a sick child is based on what parents suspect to be the child's illness without adequate diagnostics.

2.1. Implementing children's rights in medical and healthcare

As will be seen later, the mere ratification, legislation, and policy domestication of children's right to health, does not reasonably translate into implementation of children's right to health. Indeed, for a satisfactory level of implementation to be met, legislative and policy instruments at national level must be accompanied by, amongst other things, institutions, health practitioners (including pediatricians), equipped hospitals, and children's consent or involvement in family healthcare decision-making processes. This is because the effect of any family health-related decision-making process requires the presence of a comprehensive or a minimum standard¹⁵ health system for the expected result, which generally is healing, to be achieved. As indicated above, from a legal perspective the involvement of children in such processes is not completely rejected, as several states have demonstrated their willingness to permit such involvement by recognising its importance in the general protection of children's right to health.

Further, as indicated later in this chapter, some states have gone further to institute age limits when such involvement is possible and when it is compulsory. As a build-up to the age debate and the question when it is necessary for a child to participate in such family decision-making processes, this sub-section examines the role of the state in providing the basic requirements (for example infrastructure, personnel and medication), parental responsibility and children's participation in health-related decision-making processes, missed chances, and the impact of children's participation.

¹³ See, Committee on the CESCR, GC 14 para 8.

¹⁴ See, art. 24(3) of the CRC.

¹⁵ In terms of infrastructure, personnel, medication and equipment.

2.1.1. The role of the State

The purpose of the inclusion of this sub-section is to highlight state obligations related to children's right to health and the efforts undertaken by African state parties to meet such obligations. Truly, international children's law imposes huge obligations on member states to ensure the implementation of the provisions of children's rights treaties. In health-related matters, such obligations transcend beyond legislation, infrastructure, training and employment of staff to obtaining specific results, such as reducing or eradicating child mortality.

As analysed earlier in chapters four and five of this thesis, the obligations ascribed to states under the CRC and the ACRWC also extend to the family both in principle and in practice. Indeed, state parties to mainstream children's rights instrument have an obligation to provide parents with the necessary support to ensure the healthy development of their child. In context and practice, state obligation goes beyond mere recognition and protection of a child's right to health to ensuring that it is actually delivered to each and every child, when needed. Generally, a comprehensive implementation of children's right to health is complex. As a result, minimum standards have been identified and codified in both the CRC¹⁶ and the ACRWC¹⁷ and elaborated by the Committee on the CRC.¹⁸ Further, to assist states in measuring the level of acceptable medical and healthcare, the Committee on the CRC has identified four crucial guidelines that qualify the role of the state in ensuring children's right to health. These are availability, accessibility, acceptability and quality.¹⁹

Selected national legislation and policies protecting children's right to health

It is probably safe to indicate that the adoption of both the CRC and the ACRWC, as well as the general call for state parties to domesticate the provisions of these instruments, have propelled children's health rights protection to a fair level. However, much still has to be done. In fact, although most state parties in Africa have protected children's health rights in their constitutions and related national legal and policy

¹⁶ See, art. 24.

¹⁷ See, art. 14.

¹⁸ See for example, GC No 4 (2003) *Adolescent health and development in the context of the Convention on the Rights of the Child* UN doc. CRC/GC/2003/4 and GC No. 15 (2013) *On the right of the child to the enjoyment of the highest attainable standard of health* UN doc. CRC/C/GC/15.

¹⁹ For an in-depth analysis of these guidelines and equally appropriate in the context of children, see for example, RA Atuguba 'The right to health care in Ghana: health care, human rights and politics' (2013) in ZA Zuniga *et al.* (eds) *Advancing Human Rights to Health* 110.

reforms,²⁰ the high rate of child mortality due to poor healthcare has, to be fair, been on a decline in the last five years (2010 – 2015) but remains relatively high as compared to other regions in the world.²¹ It is equally worrying to note that the causes of such high child mortality rates, for example inadequate drinking water and poor sanitation, are preventable.

That aside, on paper, across the continent, the protection of children's right to health is very encouraging as a plethora of legal and policy text exists which governs healthcare in general and children's health in particular.²² Indeed, according to the Committee on the CRC, translating children's rights into acceptable healthcare practices requires the guarantee of legislative, administrative and other measures within available resources in domestic law.²³ In Zimbabwe, for example, the Public Health Act makes provision for healthy attributes and encourages the promotion of good infant nutrition and breastfeeding and the setting of standards on the composition and quality of infant foods and adequate feeding.²⁴ It also goes further to sanction the prevention and suppression of infectious and sexually transmitted diseases.²⁵

In Kenya, the promulgation of the Constitution in 2010 registered a milestone for the right to health, especially because the previous constitution did not protect this right. The 2010 Constitution contains a more extensive and progressive Bill of Rights and has made the right to health for all children justiciable.²⁶ Also, the Republic of the Gambia's 1997 Constitution unequivocally guarantees the right of every child to basic health service.²⁷ The State, in its 2007 Health Master Plan,²⁸ promises to also declare maternal

²⁰ Just like any other children's rights, the protection of this right in national laws provides a fundamental legal basis for action and unlocks the potential for litigation and enforcement.

²¹ See generally, WHO statistics, which projects that between the years 2010 and 2015 child mortality in Africa has been on a decline. For details and a comparative view of the statistics from other regions, see <http://apps.who.int/gho/data/view.main.CM1300N?lang=en> [accessed 20 March 2016]. See also, UNFPA, *State of the world's midwifery, 2014 – A Universal Pathway. A woman's right to health* (2014), https://www.unfpa.org/sites/default/files/pub-pdf/EN_SoWMy2014_complete.pdf [accessed 23 March 2016].

²² For details on the impressive list of all national legislative protection of children's health rights, see; <http://www.africanchildforum.org/cfr/Legal%20Instruments/African%20Regional%20Instruments.html> [accessed 26 April 2016].

²³ Committee on the CRC, GC No 4 para 9.

²⁴ See generally, the Zimbabwean *Public Health Act (Chapter 15:09)*.

²⁵ As above.

²⁶ Sec 53(1)(c), Kenyan 2010 Constitution.

²⁷ The Constitution of the Second Republic of the Gambia art. 28(2).

²⁸ See the Gambia's National Health Policy available at http://www.statehouse.gm/National_Health_Policy_2012-2020_MoHSW-Gambia.pdf [accessed 21 March 2016].

and child healthcare to be free of charge for all Gambians.²⁹ This gesture from the government is well received especially on a Continent where a benefit from such social welfare systems could be regarded as ‘winning a lottery’.

Similar trends are traceable in other African countries, as for example Ghana, through its Children’s Act promises free medical care to all children and pregnant women, pre and up to three months post birth,³⁰ Botswana, through section 15(2) of its Children’s Act, promises state assistance to children from poor homes to access health care,³¹ and Tanzania promises free health services to children.³² These state efforts are commendable and provide evidence of a good track record across the Continent.

Such efforts by state parties also demonstrate the seriousness of children’s health rights on governments’ agendas in Africa. In fact, all legislative reforms enacted by African states have contributed in one way or the other to the translation of children’s right to health. Usually, such efforts are built around confirming or expanding individual entitlements and parental obligations by adopting regulatory frameworks which speak to the realities within a state.

Selected other measures undertaken by states

Besides statutory protection of children’s right to health in Africa, it is worth noting that most African states have taken encouraging measures, well beyond statute, to ensure that statutory provisions are implemented in practice. Such efforts are in most cases measured in the form of infrastructure and personnel, equipment and drugs. Indeed, one of the main reasons why such efforts by states are important is probably that unlike most children’s rights, where state obligations have been generally worded as an obligation on states to take all administrative, legislative and other measures in

²⁹ Worth noting, as per the Gambia’s report to the Committee on the CRC in 2011, this symbolic gesture is also already being implemented in the Gambia. See generally the Committee on CRC, *Consideration of reports submitted by States Parties under Article 44 of the Convention: Gambia UN doc CRC/C/KEN/3-5* para 65.

³⁰ Sec 8(2) of the Ghanaian Children’s Act. Burundi, Botswana, South Africa, Tanzania, Uganda, and Zambia also offer free health care to children. However, within each state there exist some limitations. Details of these have been listed in the ACPF’s combined reports - *In the best interests of the child – harmonising laws in Eastern, Southern, West and Central Africa from 2001 – 2007*. Available at http://www.africanchildforum.org/clr/Harmonisation%20of%20Laws%20in%20Africa/Publications/supplementary-acpf-harmonisation-es_en.pdf and http://www.africanchildforum.org/clr/Harmonisation%20of%20Laws%20in%20Africa/Publications/supplementary-acpf-harmonisation-wc_en.pdf respectively [accessed 25 April 2016].

³¹ Children’s Act 2009.

³² National Health Policy of 2007, which also includes ‘Free maternal health care to all mothers and pregnant women including those who get pregnant at early stage of age 12 to 18 years’.

protecting those rights, the provision on children's right to health in both the ACRWC and the CRC permeates states with some specific targeted obligations.³³ For example, state parties have a duty, amongst others, to reduce or diminish infant and child mortality.³⁴ It is, however, in an attempt to ensure that these targets are met that states are required to undertake other measures to ensure that children's health rights are delivered to them when required. One such measure, this thesis argues, is that state ability to intervene into any family decision-making process (through a state agent – doctor) requires the presence, at state level, of a qualified medical doctor to make decisions that are medically in the best interest of the child, even if such decisions are contrary to parental opinion.

Elsewhere, in terms of accessibility (measured by walking distance) and visibility of healthcare facilities, some progress has also been registered as several African states have improved on health infrastructure. Kenya, for example, reporting to the Committee on the CRC in 2013, indicated that there had been a significant increase in primary healthcare facilities from 4912 to 7111 between the years 2005 and 2010, mostly in the rural areas.³⁵ Such progress to facilitate the accessibility and visibility of healthcare facilities has also been registered in several countries across the continent.³⁶ The availability and accessibility of infrastructure also adds value to family decision-making processes, as they might be necessary also to decide where it will be appropriate for a child to be treated. Although many scholars and health practitioners have conspicuously highlighted the fact that such progress is not commensurate with the increasing demand for such services, especially by children, the effort made by states should not go unnoticed because it is indeed progress.³⁷

³³ See for example, art. 22 CRC on Children seeking refugee status and art. 15(2) ACRWC on Child Labour.

³⁴ See arts. 24(1)(a) of the CRC and 14(2)(a) of the ACRWC.

³⁵ Committee on the CRC, *Consideration of reports submitted by States Parties under Article 44 of the Convention: Kenya UN doc CRC/C/GMB/2-3* para 150. It is very possible that these facilities have increased from 2010 to this day. See Eritrea's report to the Committee on the CRC, *Consideration of reports submitted by States Parties under Article 44 of the Convention, Eritrea UN doc CRC/C/ERI/4* para 189 where the state indicates, generally, access to health care facilities has been reduced to approximately 10 kilometres' maximum in rural areas.

³⁶ See, ACPF statistics of progress in budgetary commitment in health care in Africa available in its 2008 report on *the African Report on Child Wellbeing: Towards greater accountability to Africa's Children* 57.

³⁷ M Pieterse 'Legislative and executive translation of the right to have access to health care services' (2010) 14 *Law, Democracy & Development* 231-255.

3. Parental responsibility and right

In reality, irrespective of the measures taken by states to protect children's right to health, the recognition of the rights and duties of parents must be appreciated, because it is central to ensure that children benefit from and participate in decision-making processes on health-related matters that concern them. Indeed, it must be emphasised from the onset that children cannot have complete access to and enjoyment of their right to health without some kind of parental or guardian influence or authority. A child's health standard occupies a central part of parental duty in children's rights jurisprudence, with the aim that it must ensure the proper development of a child, irrespective of their location and/or condition.³⁸

As demonstrated throughout children's rights instruments and chapter five of this thesis, there are three fundamental commitments designed by law and policy in international and African children's rights jurisprudence that best guide parental authority in family health-related decision-making processes: to promote and protect the best interests of the child, to ensure a child's well-being, and to prepare or empower a child to take African cultural virtues in the future. Thus, any decision made by parents, or any decision-making process which involves children, intended to promote or protect children's right to health, must be in the best interests of the child and ensure the proper development of the child.³⁹

It is based on these fundamental commitments that traditionally, without exception to country or community, parents always seize the upper hand in making decisions for their children's medical and health-related issues. Parental authority and influence concerning a child's healthcare decisions is well established in law and stronger if the child is young or immature. Reasons for this position in law are plenty and, in principle, based on practical necessity. In Uganda, for example, the Children's

³⁸ The Committee on the CRC has interpreted children's right to health by addressing its GC No 15 to a range of stakeholders working in the field of children's rights and public health – including parents and children themselves. See generally, GC No 15, para 3.

³⁹ Arts. 3 of the CRC and 4(1) of the ACRWC require African parents, in reaching a decision relating to their child to give primary consideration to his or her best interest. This obligation should not be too difficult for African parents to accomplish. As demonstrated in chapter two of this thesis, African cultural practice obligates parents to care for and support their children since they are the future.

Act⁴⁰ bestows on every parent the responsibility to care for his or her child⁴¹ and it is the duty of every parent or guardian to ensure a child's well-being.⁴² These provisions are firm in their recognition and assignment of parental duty and further supported by a constitutional provision which provides that “[s]ubject to laws enacted in their best interests, children shall have the right to know and be cared for by their parents or those entitled to bring them up”.⁴³ In Ethiopia, article 20(3) of the Civil Code alludes to the power of the guardian of a minor to submit him or her to an examination or treatment beneficial to the health of the minor. Similarly, article 257(1) and (2) of the Revised Family Code provides respectively that the guardian shall watch over the health of the minor and shall take the necessary measures for the recovery of the minor in case of sickness. In other countries, such as Tanzania, parents have a shared responsibility to take care and ensure the protection of a child through provision of medical care.⁴⁴ In Egypt, parental consent is recognised especially in cases of organ transplant,⁴⁵ and in Nigeria, parental consent is an integral part of a child's healthcare.⁴⁶

Parental opinion is indeed an integral part of a child's healthcare. However, it gains stronger recognition in instances where a child is severely unwell or incapacitated and lacks the necessary capacity to contribute adequately to a medical treatment decision. In other words, where the child is able, parental opinion takes second place. For example,

⁴⁰ Several other pieces of legislation in Uganda grant parents the right to care for and make decisions (health-related) on their child's behalf. A plethora of such provisions can be found in the Children's Act: for example, sec 5(2) enjoins parents to care for their children as it provides that “[a]ny person having custody of a child shall protect the child from discrimination, violence, abuse and neglect”. Further, sec 5(1)(f) guarantees children the right to medical care, and sec 7 requires parents to protect their children from social or customary practices that are harmful to their health. Last but not least, according to sec 157 of the Penal Code Act, any parent or guardian who fails to care and provide for his or her child - for example medical care - commits an offence.

⁴¹ See generally, sec 6(1) of the Children's Act.

⁴² As above, sec 5(1).

⁴³ See, art. 34(1) of the Constitution of Uganda.

⁴⁴ See generally, secs: 8 and 16 of the Law of the Child Act No. 21 of 2009 consolidates all the laws relating to children.

⁴⁵ Through sec 116 of Child law No 12 of 1996 (amended by law no. 126 of 2008) anyone who fails to recognise parental consent, especially in an organ transplant shall be punished by imprisonment.

⁴⁶ See generally, sec 39(c)(i) of the Code of Medical Ethics in Nigeria (2004) which provides that “[t]hose within the ages of 16 to 18 years have a statutory right of their own to consent to procedures and this takes precedence over parental objections, but does not invalidate the right of others to consent on their behalf. However, where the child of this age group objects and parental consent is obtained in an emergency situation, appropriate treatment or procedure can be given”.

in *Gillick v West Norfolk and Wisbech Area Health Authority & Another*,⁴⁷ Mrs Gillick's objection to the provision of contraceptives to her daughters without her prior knowledge and consent so long as they were below 16 years was overruled by the court, as Lord Fraser ruled that:

It seems to me verging on the absurd to suggest that a girl or boy aged fifteen could not effectively consent, for example to have a medical examination of some trivial injury to his [or her] body or even to have a broken arm set. Of course, the consent of the parents should normally be asked, but they may not be immediately available. Provided the patient, whether a boy or girl, is capable of understanding what is proposed, and of expressing his or her own wishes, I see no good reason for holding that he or she lacks the capacity to express them validly and effectively and to authorize the medical man to make the examination or give the treatment which he wishes.⁴⁸

This case does not repudiate the parental right and responsibility to have an opinion in a child's healthcare treatment; rather, it confirms the position of mature and able children to be involved in their healthcare decision-making processes. It also highlights several instances where parental authority which is not readily available should not prohibit treatment of a child. It also emphasises that even in instances where parental authority is readily available, the well-being of a child should come first.

Indeed, the situation in some parts of Africa, irrespective of the laws enacted which grants children the right to contribute to their healthcare decision-making process, is different and parental view still dominates such processes. As will be discussed later in *Esanubor*,⁴⁹ such domination only becomes an issue if it is not in the best interests of the child. Parental responsibility and right, as protected by law, read together with the best interests of the child and children's right to participation, establishes that parents do have a responsibility and right to ensure the healthy development of their child and for their child to participate in such decision-making processes at the family level. However, where parental opinion is not intended to ensure the best interests of the child, it will be set aside.⁵⁰

Besides, the prevailing underlying spirit of parental decision-making in children's related medical and healthcare decisions is masked under the fact that parents are

⁴⁷ (1985) 3 All ER 402. This case is also available through http://www.hrcr.org/safrica/childrens_rights/Gillick_WestNorfolk.htm. [accessed 15 July 2016]. For in-depth analysis on this case see M Freeman, 'Rethinking Gillick', (2005)13(1-2) *International Journal of Children's Rights* 201-217.

⁴⁸ Gillick (n 47 above) 405.

⁴⁹ *Esanubor v Faweya* [2009] All FWLR (Pt 478) 380 (CA). See also *Re O (A Minor)* (Medical Treatment) (1993) 2 FLR 149; *Re S (A Minor)* (Medical Treatment) (1993) 1 FLR 396.

⁵⁰ Kil Kelly, (n 9 above) 225. See also, C Bridge 'Parental beliefs and medical treatment of children' (1994) *Butterworth's Family Law Journal* 131.

capable to and should act in a child's best interest.⁵¹ Therefore, at the minimum, in the absence of a child's opinion to a health-related decision, parental opinion, if reasonable and in the child's best interests, is encouraged. In fact, in cases of an illness or accident at home, such parental responsibility and rights, start within the family (family decision-making process) and range from noticing or accepting that a child is unwell, deciding to take the child for treatment to consenting to treatment. However, it should be noted that during a family decision-making process, parental and children's right to participate is elastic in nature, as it can be limited, especially if it is not based on the child's best interest.⁵² This was established in *Esanubor* (where parental opinion was discarded) and further through the decision in *Gillick* where Lord Scarman held that "parental right [to decide for a child in medical and health care related decisions] must be exercised in accordance with the welfare principle and can be challenged, even overridden, if it be not".⁵³

Rightly so, it could be argued that the legislative protection and "gift" of parental responsibility to act in a child's best interest across Africa also grants parents the "right" to seize such moments and make decisions on the behalf of a child who is ill.⁵⁴ Indeed, the significant number of interventions which are undertaken by parents discussed in this chapter is justified by the strong passionate bond between parents and their children and strengthened by the legal position of parents as proxy decision-makers or legal representatives. In fact, the easy way out and, seemingly, what is commonly practiced in Africa right now is that in health-related matters, decisions are likely to be made by parents. Only in exceptional cases, usually influenced by the age of the child (discussed below), is a child allowed to be involved.

The strength of parental views in health-related decisions is also justified in article 18 of the CRC, which ascribes an unconditional duty to parents to be the primary care

⁵¹ See for example, Freeman (n 68 above) in which he holds that the importance of parental responsibility in respect of their involvement in a child's health-related decision-making process rests on two facts, first, that parents must behave dutifully towards their child and secondly that the responsibility to bring up a child belongs to parents.

⁵² A host of court cases have justified the centrality of this principle in child law jurisprudence. See for example; *Kaiser v Chambers* (1969) 4 SA 224 (C) at 228G, where the Court made no mistake as it referred to the best interests of the child as a 'golden thread which runs through the whole fabric of our law relating to children'. See also *Bethell v Bland* 1996 (2) SA 194 (W); *Krasin v Ogle* [1997] 1 All SA 557 (W); *Madiehe (born Ratilhogo) v Madiehe* 1997 (2) All SA 153 (B); *Van Pletzen v Van Pletzen* 1998 (SA) 95 (O); *Meyer v Gerber* 1999 (3) SA 650 (O); *Kirsh v Kirsh* [1999] 2 All SA 193 (C); *K v K* 1999 (4) SA 691 (C); *Lubbe v Du Plessis* 2001 (4) SA 57 (C); *Van Rooyen v Van Rooyen* [2001] 2 All SA 37 (T) and *McCall v McCall* 1994 (3) SA 201 (C).

⁵³ See, *Gillick* para 184. See also, *Esanubor* (n 49 above).

⁵⁴ BK Twinomugisha *Fundamentals of health Law in Uganda* (2015) 208.

providers to their children. This provision also recognises the natural position of parents and doctors in medical treatment decisions, because parents and doctors always have their own opinions. In the case of parents, their presence is justified for two main reasons: first, as parents to the child, they share a special bond and secondly, they will be indirectly affected by any medical decision and procedure on a child's health. To some extent this parental position also justifies why it is difficult to find instances where such processes have been out-rightly challenged in Africa. Briefly, parental knowledge of a child and a child's situation is a key factor that also supports parental dominance in healthcare decisions and has been advanced by some scholars as a strong proponent for suggesting that parents are appropriate contributors in the decision-making process of their child's healthcare.⁵⁵

4. Children's right to participate in their health-related family decisions

As already highlighted throughout this thesis, international children's law is clear on the importance of children's involvement in the decision-making processes in all matters – in this case, in all health-related matters – that concern them. A child's healthcare decision is perhaps one of the most important decision-making processes that a family could hold; it is their child's healthcare decision, it has very limited room for mistakes and it must be right and executed with due diligence. Healthcare generally is a very central issue to a child's proper development and equally central to a child's right to life, survival and development.⁵⁶ As has been highlighted in this chapter, involving children in a health-related decision-making process is indeed complex, because generally parents and/or medical practitioners are dominating the process within the scope of their rights.

As will be noticed in this thesis, within Africa, the problem is not the legal recognition of a child's right to be involved in such decision-making processes because, as seen in chapter three of this thesis, there is widespread legislative and administrative acceptance that children do have such rights. Notwithstanding, the level of protection, limitation and caution that states have displayed in the legislative

⁵⁵ M Paul 'Decision-making about children's mental health care: ethical challenges' (2004) 10 *Advances in Psychiatric Treatment* 301–311.

⁵⁶ R Bensted *et al.* 'Comparison of health care priorities in childhood and early/late adolescence: Analysis of cross-sectional data from eight countries in the council of Europe Child-Friendly Health care survey 2011', (2014) 41(1) *Child: Care, Health and Development* 160–165.

conceptualisation of age and maturity and children's capacity to participate in health-related decision-making processes (discussed below) is telling and to some extent highlights the sensitive nature of this matter. Studies across the globe show that children are constantly marginalised in this process,⁵⁷ in some cases on the basis that they are either young or that health-related issues are too complicated for children to understand and that it could be time consuming to explain difficult health processes.⁵⁸

These factors represent factual challenges a child could face in enjoying his or her right to participate in health-related decision-making processes or parents could face in respecting their duty to involve a child in his or her healthcare decision-making process. In reality, healthcare family decision-making processes are complex (because, in most cases they involve a third party (health professional or other state agency) for the final decision to be arrived at) and sensitive (in the sense that one wrong move could lead to a permanent damage or death of a child). However, despite its recognition and acceptance in legal texts within African states, children are still not given the chance to participate; some examples have been identified below as missed chances.

4.1. Missed chances

In practice, the limited or lack of respect of children's right to participate in their medical and healthcare decision-making process has resulted in missed chances. In this sub-section, this thesis intends to highlight and analyse some instances with the help of case law which failed to respect children's right to participate in their healthcare decision-making processes. The complex and sensitive nature of children's right to participate in their healthcare decisions is further confirmed by the fact that it is very likely that the opinion of a third party (medical doctor) could suppress both parental and a child's opinion. Especially in cases where such parental and/or child's opinion is unreasonable and not in the best interests of the child. For

⁵⁷ See for example, research conducted in Ireland, I Coyne et al Giving children a voice; Investigation of children's experiences of participation in consultation and decision-making in Irish hospital (2006) available at http://www.dcy.gov.ie/documents/research/Giving_Children_a_Voice.pdf [accessed: 2 May 2016].

⁵⁸ A Parkes *Children and international human rights law: The right of the child to be heard* (2013) 79–81. See also, Twinomugisha (n 54 above).

instance, the Nigerian case of *Esanubor*⁵⁹ presents a perfect example where the state, through the court, overturned parental opinion which rejected blood transfusion on religious grounds, permitted the transfusion on grounds that it was reasonable, in the best interests of the child and will save the life of the dying child.⁶⁰ From a global perspective, the decision in this case is not the first of its kind,⁶¹ but in the context of Nigeria it is the first and it is progressive.⁶² However, it failed to involve the child concerned in the decision leading to his treatment and rather permits doctors to proceed without the child's or parental consent, especially in cases where they are against such treatment and if the treatment is in the best interests of the child. Briefly, the decision bestows considerable powers on doctors, as they hold the final call especially if it is reasonable and not influenced by non-medical reasons, which are generally understood to impose on doctors an intrinsic duty to act in the best interest of their patients.

Although, from the facts of the case, the decision to carry out a blood transfusion was granted by a State organ (the court), the premise of children's right to participate in

⁵⁹ *Esanubor* (n 49 above). See also a similar situation in the English case of *Re R (A Minor)* (1993) 2 FLR 757; (1993) FCR 544. (Blood Transfusion), where the parents of a ten-month girl who was suffering from B-cell lymphoblastic leukaemia rejected a medically prescribed blood transfusion on religious grounds. However, guided by the welfare and best interests of the child, the court overrode the parents' wishes and directed that the child should receive a blood transfusion as medical advice dictated.

⁶⁰ Arriving at this decision, the court relied heavily on a decision of the Nigerian Supreme Court in *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo* (2002) AHRLR 159 (NgSC 2001) in which the court held that:

The right of freedom of thought, conscience or religion implies a right not to be prevented, without lawful justification, from choosing the course of one's life, fashioned on what one believes in, and a right not to be coerced into acting contrary to one's religious belief. The limits of these freedoms in all cases are where they impinge on the right of others or where they put the welfare of society or public health in jeopardy. The sum total of the right to privacy and of the freedom of thought, conscience or religion which an individual has, put in a nutshell, is that an individual should be left alone to choose a course of life, unless a clear and compelling overriding state interest justifies the contrary if a decision to override the decision of a patient not to submit to blood transfusion or medical treatment on medical grounds, is to be taken on grounds of public interest or recognised interest of others, such as dependent minor children, it is to be taken by the courts. [para 245]

⁶¹ In the same line of parental refusal to blood transfusion to their child based on religious grounds, examples date as far back as the 20th century – see for example, *Re R (A Minor)* [1993] 2 FLR 757 149, *Re S (a Minor)* [1994] 2 FLR 1065.

⁶² Especially when juxtaposed to yet another Nigerian case, *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo* (n 60 above) where the patient, based on religious grounds, refused a blood transfusion. The medical doctor respected that refusal and the patient died. In *Esanubor*, the medical doctor discarded (with the help of the court) the religious barrier to blood transfusions and saved the life of the patient.

health-related decision-making processes was not met, as the child's direct opinion was not obtained before it was overturned on persuasive grounds after due consideration. Significantly, from a rights perspective, the standard set and required by international law and supported by the general intention and interpretation of mainstream children's rights treaties holds that such decision-making processes, irrespective of whether they involve health professionals, or are sensitive and complicated or not, should not be void of a child's active participation which empowers him or her to ask questions.⁶³

Notwithstanding, in this particular case, it could be presumed, rightly so, that the child's opinion, if obtained, would not have differed from his mother's. This is because, legally, children do not have a right to decide on their religion; rather, parents have the responsibility to direct a child's faith, which generally means children follow their parents. In fact, this can be confirmed by taking into consideration the firm rootedness of his mother's resolve – she had no doubts in her decision to reject such blood transfusion due to her commitment to her religious beliefs, coupled with the fact the child in question automatically practiced the same faith. It could possibly be reasoned that his opinion would have been the same as his mother's and influenced by the same faith-based factors which could have masked any family decision-making process. Generally, the lack of a child's right to decide on his or her religious belief or religion, or to accept or reject the religion practiced by his or her parents, makes children's participation in such family decision-making processes difficult.

In fact, at the family level, although not expressly indicated in this case, it could be argued that the decision-making process in *Esanubor* was already corrupted by prejudiced faith-based factors, such as “no blood transfusion”, which would have impacted negatively on the independent thoughts of the child and the credibility of the process. Equally, the fact that the child later applied to the High Court (through his mother) to seek a judicial review of the Magistrate Court's order which overturned his mother's opinion further supports the fact that any family decision-making process that may or may not have taken place was bound not to give due consideration to the views of the child, especially if it was against his mother's view and thus not in the child's best interests.⁶⁴

Indeed, since the decision-making platform shifted to the State, taking into consideration the scope of children's right to participation, it would have been plausible for the court to ascertain that this foundational (family) process took place not only to

⁶³ Committee on the CRC, GC No 12 para 100.

⁶⁴ See also, E Nwauche 'You may not refuse a blood transfusion if you are a Nigerian child: A comment on *Esanubor v Faweya*' (2010) 10 *African Human Rights Law Journal* 309–313.

promote parental rights and duties but also to encourage the recognition and protection of children's right to participation by granting them the opening to be listened to in the family and for their views to be given due consideration. Worse, it is not overtly clear whether during the court process the child was given the opportunity to express his views or consent to the medical process proposed by the healthcare professional as well.⁶⁵ Any attempt to hear the child's view would have given the court the opportunity to meaningfully engage with the child and ascertain whether the child understood the implication of refusing a blood transfusion and the court's decision to turn down such views.⁶⁶ If that had been done, it would have possibly saved the time and resources wasted in requesting a judicial review which was all unsuccessful. Again, although this decision is plausible, it still remains a missed chance because, before the court was approached to intervene, the medical doctor and the mother had some time to seek the child's opinion and involve the child in the decision-making process before the child's health concern became acute.

Elsewhere, the next cases evaluated in this sub-section represent classic situations where children were not in an acute health situation, but they were simply not recognised as initial victims in a health decision process which involved several other persons. Indeed, although not expressly indicated, one cannot reasonably refute the fact that children were among the patients in *Purohit and Another v The Gambia (Purohit)*.⁶⁷ The main subject of the case involved the illegal detention of mentally unwell patients in Gambia, who were also treated or provided healthcare without their consent. The category of patients involved in the case is not sufficiently disclosed. However, the best information can be found in paragraph 53 of the African Commission's decision, which

⁶⁵ Based on the best interests of the child and the critical nature in which the child was, the State had a duty under international law to intervene. See for example, art. 19 of the CRC.

⁶⁶ The limitation of the Court process is also contrary to an essential practice required by art. 12 of the CRC and 4(2) of the ACRWC. Beyond such limitation is the appreciated attempt taken by the Court to save the life of the child based on art. 33(1) of the (1999) Nigerian Constitution which states that "Every person has a right to life, and no one shall be deprived intentionally of his life...".

⁶⁷ *Purohit and Another v The Gambia (2003) AHRLR 96 (ACHPR 2003)*, "This case was brought in regard to the legal and material conditions of detention in a Gambian mental health institution – 'The Complainants are mental health advocates, submitting the communication on behalf of patients detained at Campama, a Psychiatric Unit of the Royal Victoria Hospital, and existing and 'future' mental health patients detained under the Mental Health Acts of the Republic of The Gambia' - In its decision, the Commission found that requiring indigent people like the patients in this case, without legal assistance, to exhaust local remedies in The Gambia before they may approach the Commission is not realistic and should not be required. On the merits the Commission explores the prohibition of discrimination on the basis of disability and the meaning of the right to health, as provided for under the African Charter". The court found the Government of the Gambia in violation of a string of rights (see generally the last paragraph – Decision).

suggests that the "... category of persons that would be detained as voluntary or involuntary patients under the LDA⁶⁸ are likely to be people picked up from the streets or people from poor backgrounds".⁶⁹ This broad categorisation cannot be lacking of children. As a result, based on the interpretation of children's right to participation, read together with Principle 1(2) of the UN Principles for the Protection of Persons with Mental Illness and the Improvement of Mental Care,⁷⁰ their consent is imperative and necessary in the healthcare they are provided - based on the fact they are human beings irrespective of their mental state and age.

The decision in *Purohit* deserves a special mention, because the decision analysed in this thesis was not obtained at the State level but by the African Commission, which is a higher decision-making platform within the legal strata in Africa and in the context of this thesis. However, prior to an appeal to the African Commission, the decision at the State level to detain children classified by the LDA as "lunatics and idiots" indicates no trace of parental or children's consent or involvement in the decision to detain them or to the healthcare they received.⁷¹ In fact, the State admitted to the fact that the detainees were not granted the right to express their views⁷² which culminated in a chain of rights violations (including children's right to participation) by the State.⁷³ The families of the children were given neither the space nor the time to engage in any family decision-making process with the children involved, as the decision was made at the State level and executed without providing or seeking alternative opinions. Collectively, the lack of parental consent remains a valid violation of parental rights and duties by the State which, in turn, could also be regarded as a breach of the State's duty to provide appropriate assistance to parents, amongst others.⁷⁴

Another scenario of a missed chance to accord children the chance to participate in healthcare matters is the landmark South African case of *Treatment Action Campaign*

⁶⁸ The Lunatics Detention Act.

⁶⁹ The African Commission went further to state that "In cases such as this, the African Commission believes that the general provisions in law that would permit anybody injured by another person's act can only be available to the wealthy and those that can afford the services of private counsel". See *Purohit's* para 53.

⁷⁰ Principle 1(2) requires that "All persons with mental illness, or who are being treated as such persons, shall be treated with humanity and respect for the inherent dignity of the human person".

⁷¹ This was of course strongly backed by the Provision of the LDA which prohibited mentally ill persons from exercising *inter alia* their right to participate.

⁷² See, paras 74-75 of *Purohit*.

⁷³ See generally, the last paragraph of *Purohit*.

⁷⁴ See for example, arts. 18(2) of the CRC and 20 of the ACRWC.

(TAC)⁷⁵ which dealt with access to treatment to avoid mother-to-child-transmission (MTCT) of HIV/AIDS but conspicuously ignored the recognition of pregnant children. Although the central issue from a children's rights perspective in this case was to prevent MTCT of HIV/AIDS, the non-recognition of pregnant children in the case remains an interesting omission - especially in a country with a high level of teenage pregnancy.⁷⁶ Their recognition, this thesis argues, would have given them the opportunity to participate directly in the case, understand the importance of the decision of the Constitutional Court (which *inter alia* ordered the State to make niverapine available in both private and public health centers to prevent MTCT of HIV/AIDS), and gain more insights into how to prevent MTCT. However, unlike the decision in *Purohit*, children were not completely ignored in this case as the Court held, *inter alia*, that the State has an obligation to ensure the protection of children's rights guaranteed under section 28 of the South African Constitution, which also includes their right to participate in decision-making processes in matters that concern them, especially when the implementation of their right to parental or family care is lacking.⁷⁷

Indeed, these cases are very different both in context and jurisdiction. However, their similarity, which is why they are highlighted in this sub-section, is based on the fact that in both cases children (possible victims) were not mentioned. Notwithstanding, the credibility of the decisions should not be underestimated, because both *Purohit* and *TAC* are groundbreaking cases in international law jurisprudence. However, the fact that neither the heads of arguments nor the decisions went further to recognise children as possible victims of the issues highlighted leaves a gap in child law jurisprudence to explore the possibility of children's right to participate in healthcare-related decisions that concern them. This represents a gap in reasoning which in the opinion of this thesis is a substantive gap, because it affects not only the general protection of children's rights but also the specific aspects of its key principles, the respect of the views of a child. This thesis is not insinuating that the decisions in these cases are incorrect in reasoning, but that the recognition of children would have granted children the prospect of future consultation especially in family decision-making processes, if such issues re-occur.

⁷⁵ *Minister of Health and Others v Treatment Action Campaign and Others (No 1)* (CCT9/02) [2002] ZACC 16; 2002 (5) SA 703; 2002 (10) BCLR 1075 (5 July 2002). It should be noted that, to a great extent, the case was central in protecting unborn children from contracting HIV/AIDS through Mother-To-Child-Transmission.

⁷⁶ See generally the Report of the Department of Education Teenage pregnancy in South Africa - With a specific focus on school - going learners available at <http://www.education.gov.za/LinkClick.aspx?fileticket=PuNNo1FbrSA%3D&tabid=454&mid=424> [accessed 13 February 2016].

⁷⁷ See also, A Skelton 'South Africa' (2015) in T Liefwaard & JE Doek (ed) *Litigating the rights of the child - The UN Convention on the Rights of the Child in domestic and international jurisprudence* 24.

Also, regrettably, in both cases, children were not recognised as victims and consequently the decision-making process at the family level was invisible.

Parental rights and duties are the strongest at family level and the importance of affording the family not only the space to have family decision-making processes but also parents and children to exercise their right to have an opinion is well captured in the Australian case of *Secretary, Department of Health and Community Services v J.W.B and S.M.B*, where McHugh J held that the importance of such a process (family decision-making process) is strongly based on the "... respect for the family as [a] decision making unit ... and ... possess a moral duty to protect the child and who are, therefore, likely to have the child's best interest in mind".⁷⁸

4.1.1. Impact

As has been developed throughout this thesis, generally and specifically related to children's right to health, it is not really important who makes the decision or who contributes to the decision. What is important is the fact that the decision must be in the best interests of the child. However, what international children's law adds to this process is the fact that it is equally crucial that the child concerned should not be kept completely in the dark concerning the process, because he or she has a right to know and to participate in such decisions, especially in family decision-making processes. Indeed, it is no secret that family decision-making processes are run by parents, not only because they have the responsibility and right to care for their children under international children's law, but also because, naturally, parents have an instinctive attitude to have control over their children.

However, based on the decisions in *Gillick* and *Esanubor*, such dominance has limits and parental rights as provided under international children's law is recognised only as long as it is needed to protect the child and does not empower parents to make decisions on every aspect of a child's medical or health care. Several other limits exist within a child's healthcare decision-making process where parental opinion naturally comes second, if needed. For example, in the case of a pregnancy-related decision, studies have shown that the prime decision maker is the pregnant person – including children.⁷⁹ In fact, in *Christian Lawyers Association*, Mojapelo J, emphasised that "the cornerstone of the regulation of the termination of pregnancy of a girl under the Act [CTPA] is the requirement of her informed consent ... no female person, regardless of

⁷⁸ *Secretary, Department of Health and Community Services v J.W.B and S.M.B* (1992) 175 C.L.R 218 316.

⁷⁹ See for example, art. 5(3)(4) CTPA which insists on the fact that termination cannot be denied because the child did not consult anyone including parents.

her age, may have her pregnancy terminated unless she is capable of giving her informed consent to the termination and in fact does so”.⁸⁰

The decision arrived at in *Christian Lawyers Association* touches squarely on the basic foundation required by international law in affording children the right to be involved in such decisions in a family decision-making process. Indeed, the aspect of informed consent is very central, especially in health-related matters and the case of children is no exception.⁸¹ There is little doubt that through legal instruments, and through this case, children are perceived as competent beings able to make such pregnancy-related decisions on their own without parental opinion and the medical doctor in charge should adhere. The decision arrived at in this case also demonstrates that both parent(s), and doctor have no legal right to act against a child’s decision and a child is equally entitled to medical confidentiality unless she chooses to inform, for instance, her parent(s) before or after terminating her pregnancy.

However, it should be noted that in exceptional cases, a doctor’s clinical judgement is critical as well, especially in medically determining whether a child’s view to a particular medical process is in his or her best interests. In doing so, children’s right to participation, read together with their evolving capacity as protected under international law, warrants the doctor not to only act on the child’s wishes but to give it a fair assessment based on the child’s maturity. For example, a child who decides to have her pregnancy terminated during the third trimester will no doubt face resistance from a doctor, based on medical and legal reasons, and such resistance from a doctor can only be overturned of persuasive reasons, such as that the pregnancy is life threatening. Runeson *et al.*, warn that although there could be challenges in judging the competence of children to understand certain medical procedures, their right to be involved in the decision-making processes should be granted first.⁸² This is a position which this thesis concurs with and adds that due consideration should be given to their opinion based on context in order to attribute due weight in accordance with the maturity of the child.

⁸⁰ *Christian Lawyers Association v Minister of Health* 2004 (10) BCLR 1086 (T) para 19. The Court also referred to the content of sec. 12(2)(a) and (b) of the Constitution of South Africa which guarantees the right of every woman (girl child inclusive) to determine the fate of her pregnancy. The same Constitutional provision grants “everyone” the right to bodily integrity including the right “to make decisions concerning reproduction” and “to security in and control over their body” (paras 51-52).

⁸¹ For a comprehensive insight on how this has been tested through case law and further analysis on same in South Africa, see, A Moyo *Balancing child participation rights, parental responsibility and State intervention in medical and reproductive decision-making under South African law* [2014] available at https://open.uct.ac.za/bitstream/item/13298/thesis_law_2014_moyo_a.pdf?sequence=1 [accessed 8 February 2014].

⁸² I Runeson *et al.* ‘Children’s participation in the decision-making process during hospitalization: an observational study’ 9(6) (2002) *Nursing Ethics* 584.

The Committee on the CRC concurs with, and insists on, the involvement of children in health-related decision-making processes, as it adds that “children should be included in decision-making processes, in a manner consistent with their evolving capacities”.⁸³ The credibility and impact of such process is, of course, dependent on the sufficiency of the information provided, on the proposed treatment including the effects and outcomes to which a child has been granted access.⁸⁴ In fact, based on the examples (practiced in Africa) and cases highlighted in this thesis, the declaration of the Committee on the CRC is a classic case of ‘talk is cheap’. The reason for this is that striking a balance between parental authority in deciding on their child’s health-related matters, and parental obligation to appreciate a child’s evolving capacity in such decision-making processes, and to allow the child do so without external pressure of any sort can be challenging especially because children’s preferences vary and in the case of a particular child, mood swings are very possible.⁸⁵ This is also true in the context of a medical decision made by parents, influenced by religious or cultural beliefs. Usually, in reality, children have no right to choose a religious or cultural practice contrary or different from their parents under international children’s rights law, and related African regional and national laws examined in this thesis. In fact, ascertaining how much weight a child’s views should be given in a healthcare-related decision-making process is a debatable issue. This is possible especially in Africa as, on the one hand, contemporary African child liberationists argue that children possess the same rights as adults⁸⁶ and, on the other hand, typical African cultural practices and beliefs analysed

⁸³ Committee on the CRC, GC No 12 para 100. See also Committee on the CESCR, GC No 14 which states that “States parties should provide a safe and supportive environment for adolescents, that ensures the opportunity to participate in decisions affecting their health, to build life skills, to acquire appropriate information, to receive counselling and to negotiate the health-behaviour choices they make ...”. See also, R Hodgkin & P Newell *Implementation hand book for the Convention on the Rights of the Child 168 available at http://www.unicef.org/publications/files/Implementation_Handbook_for_the_Convention_on_the_Rights_of_the_Child_Part_1_of_3.pdf* [accessed 31 January 2016. Coyne & Harder share the same view as they hold that acting in a child’s best interest in health-related matters should mean encouraging his or her view to be heard together with the views of parents and health professionals (I Coyne & M Maria ‘Children’s participation in decision-making: balancing protection with shared decision-making using a situation perspective’ (2011) 15(4) *Journal of Child Health care* 313).

⁸⁴ Committee on the CRC, GC No 12 (as above).

⁸⁵ See for example a study conducted in Australia in P Parkinson & J Cashmore *The voice of a child in family law disputes* (2012).

⁸⁶ See for example, B Mezmur & J Sloth-Nielsen ‘Listen to us: Arguing the case for child participation in NEPAD’ 2009 (17) *African Journal of International and Comparative Law* 1-28; B Mezmur & J Sloth-Nielsen ‘Surveying the research landscape to promote children’s legal rights in an African context’ (2007) 2 *African Human Rights Law Journal* 330-353 and Frank & L Ehlers ‘Child participation in African context’ in J Sloth-Nielsen (ed) *Children’s rights in Africa: A legal Perspective* (2008) 111-128.

earlier in this thesis hold that children's competence and views are not equal to those of their parents and doctors, because childhood is a transitory process.

Besides, a central question for the purpose of this chapter is: whose life is it anyway? Of course, it is that of the child concerned, which makes his or her participation in the decision-making process critical, and his or her best interest and not that of anyone else paramount. Accordingly, parents and doctors should not exclude children from a decision-making process without persuasive reason(s). The reason(s) that support such inclusion have been succinctly summarised by McCabe who asserts that there are at least five distinct objectives which motivate for children to be consulted: firstly, the ethical principle of patient self-determination or autonomy; secondly, children's involvement will improve open communication among physicians, parents, and children; thirdly, children's involvement in goal setting and treatment planning may directly facilitate their cooperation with treatment; fourthly, children's involvement may also promote a sense of control which, in turn, may relate to positive adjustment or acceptance; and finally, involving children in medical decision-making demonstrates respect for children's capacities, and may provide opportunities for further development.⁸⁷ While little is known about the impact children have made in participating in a decision-making process of their own health-related issue in Africa, there is growing evidence further afield that their participation will have a positive result⁸⁸ and increase trust, acceptability, confidence and understanding of their illness,⁸⁹ which could also lead to a speedy recovery.

⁸⁷ MA McCabe 'Involving children and adolescents in medical decision making: Developmental and clinical considerations' (1996) 21(4) *Journal of Paediatric Psychology* 506.

⁸⁸ See for example, DB Angst & JA Deatrick 'Involvement in health care decisions: Parents and children with chronic illness' (1996) 2(2) *Journal of Family Nursing* 174-194; BA Beresford & P Sloper 'Chronically ill adolescents' experiences of communicating with doctors: A qualitative study' (2003) 33(3) *Journal of Adolescent Health* 172-179.

⁸⁹ In the case of a lengthy or chronic illness, for example, involving a child in the treatment process will also enable the child to manage the illness better by avoiding the *don't dos*. See also, H Shier 'Pathways to participation: Openings, opportunities and obligations. A new model for enhancing children's participation in decision-making,' (2001) 15(2) *Children & Society* 114, in which he adds that the impact could also include "[i]mproving the quality of service provision, increasing children's sense of ownership and belonging, increasing self-esteem, increasing empathy and responsibility, laying the groundwork for citizenship and democratic participation, and thus helping to safeguard and strengthen democracy".

5. Challenges in implementing children's right to participate in health-related decision-making processes

From a legislative and policy perspective, most African states have made tangible strides in protecting children's right to participate in health-related decision-making processes in the public and private space (family). In fact, a host of these instruments have been identified and highlighted in chapter two and in other instances throughout this thesis. However, practical challenges still exist in Africa, especially within the family that have marred the process and made children's enjoyment of this right daunting in several quarters. Indeed, with the constantly improving medical technology and technical methods of treatment provided or reserved for children for specific health-related issues, it remains a challenge both to parents and medical professionals, whether a critically unwell child should be subjected to prolonged, complex and sometimes distressing explanations in order to observe the child's right to participation. These are central aspects which have no doubt frustrated family decision-making processes, especially related to health decisions and to some extent highlighted the vagueness of children's right to participate in health-related treatment decisions.

Outside the family environment, several factors also act as deterrents to such progress and, as indicated in the introductory paragraph of this chapter and sporadically in other sub-sections, such progress or effort at the state level is not without blemish. Lack of resources is and is not a challenge indeed, in cases where it is, it has been reported to be due to lack of prioritisation from state parties to invest in children's health⁹⁰ and in cases where it is not, embezzlement has stifled the limited resources injected into the health sector.⁹¹ Nnamuchi, writing in 2008 and in 2012 on the justiciability of the right to healthcare in Nigeria, holds that kleptomania by officials is also one of the major challenges that continue to frustrate the effective protection and enjoyment of the right to healthcare in Nigeria and Africa alike.⁹² Equally, the shortage of qualified medical

⁹⁰ See for example, the ACPF's report *The African report on the child's wellbeing* (2013) 53. It should also be noted that the limited financial injection is not necessarily related to the lack of financial resources but in most cases based of limited prioritisation within states.

⁹¹ See for example, WHO Regional Committee for Africa - The African public health emergency fund: Stocktaking – 2015. See also, WHO, Report of the regional committees to the Executive Board (2016) para 9 *WHO doc EB138/4 available at* http://apps.who.int/gb/ebwha/pdf_files/EB138/B138_4-en.pdf [accessed 23 March 2016].

⁹² O Nnamuchi 'Kleptocracy and its many faces: The challenges of justiciability of the right to health care in Nigeria' (2008) 52(1) *Journal of African Law* 1–42. See also, O Nnamuchi & S Ortuanya 'The human right to health in Africa and its challenges: A critical analysis of Millennium Development Goal 8' (2012) 12(1) *African Human Rights Law Journal* 178–198.

practioners is also amongst the list of acute problems.⁹³ Practically, this shortage is caused by a number of reasons, such as the limited number of trained paediatricians and the “brain drain”.⁹⁴ Available resources would lead to the training of qualified medical staff with the competence and the ability to both involve children in decision-making processes on their health matters and assess their evolving capacity and give due weight to their opinion.

The selected challenges mentioned in the paragraph above are fundamental and have been researched and discussed in great detail by other scholars and they are also common across the Continent.⁹⁵ However, what is really critical in the context of this thesis is the aspect of age.⁹⁶ Indeed, it became increasingly critical after the adoption of both the CRC and the ACRWC. The protection of children’s right to participate in all aspects that concern them remains one of the pillars of ensuring the comprehensive understanding and implementation of children’s rights. Dilemmas on whether a child should be allowed to participate in health-related decision-making processes and if they should, whether age should be the barometer on which their competence for admission is measured, remains very central in the general debate, analysis and implementation of this particular right. In fact, in most cases, the age issue analysed further below is not necessarily African specific because studies conducted in other countries, such as Ireland⁹⁷ and Australia,⁹⁸ depict trends of similar age factors and challenges related to children’s competence compounded by poor communication skills among medical professionals and parental lack of patience.

⁹³ See for example, AS Muula ‘Shortage of health workers in the Malawian public health services system: how do parliamentarians perceive the problem?’ (2006) 13(1-2) *Journal of Health Sciences* 124–130 and C Uneke *et al* ‘The Nigeria health sector and human resource challenges’ (2007) 8(1) *The Internet Journal of Health* 1-5. Available at <http://print.ispub.com/api/0/ispub-article/6444> [accessed 6 June 2016].

⁹⁴ See for example, G Odongo ‘Caught between progress, stagnation and a reversal of some gains: Reflections on Kenya’s record in implementing children’s rights norms’ (2012) 12(1) *African Human Rights Law Journal* 135-136. See also, Committee on the CRC, *Consideration of Reports Submitted by States Parties under Article 44 of the Convention: Zimbabwe UN doc CRC/C/ZWE/2* para 280. See also, I Schierenbeck *et al*. ‘Barriers to accessing and receiving mental health care in Eastern Cape, South Africa’ (2013) 15(2) *Health and Human Rights* 110-123.

⁹⁵ For example, see, O Nnamuchi & SU Ortuanya (n 92 above); Odongo (n 94 above); AF Cooper *et al*. *Africa’s health challenges: Sovereignty, mobility of people and healthcare* (2013); and E Durojaye *Litigating the right to health in Africa challenges and prospects* (2015).

⁹⁶ The aspect of age could be worst if it is discriminatory in *Christian Lawyers Association* the Court held that age-based discrimination offends the right to equality and that the party perpetrating it bears the burden to prove that the discrimination is fair.

⁹⁷ See for example, Coyne *et al*. (n 57 above).

⁹⁸ See for example, Parkinson & Cashmore (n 85 above).

5.1. No age limit encouraged?

Although the concept of children has now generally been accepted as any person below the age of 18, as prescribed under international children's rights law and more strongly within the African system, it is worth noting that the aspect of age remains one of the wobbliest aspects under children's rights discourse. Indeed, even within the context of this generally accepted age limit, maturity could be attained earlier.⁹⁹ In criminal matters, different age check points exist for which a child could be criminally liable.¹⁰⁰ In the context of children's right to participation in health-related matters, it could be argued that 'age limit' is two-faced, as on the one hand, age limitation is discouraged¹⁰¹ and, on the other hand, it is welcomed.¹⁰² On the one hand, age could be a barrier for a child to participate in health-related matters and, on the other hand, the reason why he or she should participate. Notwithstanding, in terms of the phraseology of both article 12 of the CRC and 4(2) of the ACRWC, both instruments tend to extend an open invitation to states to determine boundaries and modalities on which children's views are given due consideration in accordance with their age and maturity and to determine whether a child has the capacity to make decisions about his or her health or participate in such decision-making processes. The veracity of this argument is of course limited in context, but in areas related to children's rights to health and medical treatment, which broadly entail protection and autonomy, international law (including the African human rights system) is silent on whether there should be an age limit at which a child should participate in health-related decision-making processes.

Indeed, it could be argued that children's right to participation, as protected under international children's rights law, does not substantively provide sufficient guidance on how and when to apply the rationale of children's involvement in medical and health-related decisions. Instead, the Committee on the CRC delegates much power to the states in their promulgation of national laws and policy structures to define such age boundaries based on local practice the Committee actually encourages state parties to give consideration to the introduction of such legislation.¹⁰³ However, through article 5

⁹⁹ Art. 1 of the CRC in some countries maturity is attained with marriage, military service or economic independence.

¹⁰⁰ See for example, art. 40 CRC, T Liefwaard 'Juvenile justice from an international children's rights perspective' (2015) in W Vandenhole *et al.* (ed) *Routledge International Handbook of Children's Rights Studies* 234-256.

¹⁰¹ See, GC No 12, para 21.

¹⁰² GC No 12 para 102.

¹⁰³ GC No 12 (as above).

of the CRC, for example, the Committee endorses a flexible approach which recognises children's evolving capacities and rejects arbitrary age restrictions.¹⁰⁴

Significantly, in this context, the Committee is simply applying some caution on the application of such age restrictions, as a child's evolving capacities must always be considered irrespective of the age limit identified in such national laws. Thus, where a younger child (based on age of consent set by such national laws or policy) demonstrates the capacity to express an informed view on his or her health-related treatment, due weight should be given to such views regardless of the child's age. Indeed, understanding the protection and recognition of children's evolving capacities simply indicates that although it is up to states to identify such age limits, such powers have also been limited with a transparent cord which, at first, seems to grant states the free hand to determine such age limits while they (states) are also prevented to make such age limits on absolute grounds to determine competence without evaluating a child's evolving capacities. In fact, neither the CRC and the ACRWC nor the Committee on the CRC's GC No 12 in its interpretation of children's right to participation indicates what an acceptable minimum age for children to participate in health-related decisions is.

Indeed, the gap created by such lacuna is not surprising and could be regarded as resulting from the fact that health and medical-related decision-making processes are sensitive, emotional and in some instances coupled with a wide variety of consensual ages across the Continent and the complex nature in which families could react to such limitation. However, Child Rights International Network (CRIN) reasons that a minimum age should nevertheless be set above which everyone has the right to participate in health and medical decision-making processes regardless of capacity.¹⁰⁵ According to CRIN, such an introduction will go a long way to ensure that, in practice, children's right to participate in health-related decision-making processes is not suspended until they reach adulthood simply because they do not have the capacity.

5.1.1. Age limit

From a general human rights perspective, children do not only have the right to participate in all health-related decision-making processes that concern them because they are human beings but also because they are bearers of judicial competencies, subjective rights and legal obligations not limited by age.¹⁰⁶ In fact, healthcare issues are

¹⁰⁴ This is traceable throughout the Committee on the CRC GC No 12.

¹⁰⁵ CRIN, *Age is Arbitrary: Setting minimum ages*, 21 available at <https://www.crin.org/en/library/publications/age-arbitrary-discussion-paper-setting-minimum-ages> [accessed 8 April 2016].

¹⁰⁶ See for example, art. 31 of the ACRWC.

very central in every aspect of human competence, which makes it not surprising that the international community avoids setting any umbrella specific age limit as a criterion for when children should participate in health and medical decision-making processes.¹⁰⁷ Although such lacuna has not helped in discouraging the introduction of age limits as state parties have heeded to the Committee on the CRC's 'call' to institute such age limits as they deem fit within practical context, age limits have indeed been introduced in several African countries as to when a child could be involved in health-related decision-making processes.

The South African Children's Act for example, confers on children over the age of 12 the right to participate in decision-making processes concerning their medical treatment and surgical operations.¹⁰⁸ However, a child younger than 12 can participate in health-related medical decision-making processes if the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment required.¹⁰⁹ Further, as probably expected, the legislation introduces parents and/or medical practitioners as alternatives in the case where a child is under or above 12 and incompetent.¹¹⁰

Parental responsibility, in this context, is worth noting, as it is only fully activated when a child does not display sufficient understanding of the health-related matter that concerns him or her. Also, the introduction of an age limit in the South African legislation is interesting, as the evolving capacities of the child still takes precedence over any age limit that may or may not have been protected by law. Yet, another South African provision related to children's capacity to participate in health-related matters discussed earlier in chapter four of this thesis is found in section 5(1) read with section 1 of the CTPA, which grants every child (irrespective of age) the right to consent to an abortion required he or she has the capacity to do so. Under this legislation every child is competent and has the capacity to make such decisions without parental involvement.

Elsewhere, the Constitution of Malawi simply holds that every child has the right to know¹¹¹ - thus, indicating that every child should be involved and informed of any decision-making process on any matter affecting him/her. Interestingly, the Constitution does not stipulate any age limit as a determinant of competence for a child

¹⁰⁷ It should be noted that the lack of any specific age limit at the international level is not only in the case of children's rights to participation, but seems to be a common in most children's rights aspects, for example juvenile justice.

¹⁰⁸ See generally, ch 129(2)(a) of the Children's Act.

¹⁰⁹ Children's Act ch 129(2)(b).

¹¹⁰ Children's Act 129(4)(a)(b).

¹¹¹ See generally, the Constitution of the Republic of Malawi (1994) sec 23(3).

to participate in health-related decision-making processes, although in practice children aged 12 are allowed to participate in health-related decisions.¹¹² The age limit of 12 is also recognised in Mauritania, but not as an absolute determinant to competence. The limitation in Mauritania is influenced by the Malekite Muslim Law, which regards children under the age of 12 as absolutely incapable, whereas children between the ages of 12 and 18 are only granted limited capacity.¹¹³ The case of Mauritania is contrastable with South Africa in the fact that while in South Africa children below 12 have limited capacity justified by their evolving capacities, in Mauritania the evolving capacities of a child below 12 does not repudiate the age barrier. The difference between the two countries is even clearer with the recognition in the rights of children above 12 to participate in health-related decisions; in South Africa, a child above 12 has full capacity to participate unless proven otherwise, whereas in Mauritania at the same age, a child has limited capacity to participate.

In fact, one would expect that on the basis that Mauritania is dominantly a Muslim state, other dominantly Muslim states would have similar trends of child recognition. However, in Tunisia, another dominantly Muslim state, the age at which a child's opinion is heard in matters concerning the child is set at 13 in the Code for the Protection of the Child.¹¹⁴ These conflicting ideologies illustrate the intricacies involved in age and maturity and children's ability to participate in all matters that concern them. In fact, the consideration and recognition of a child's ability to participate in health-related matters is no better in Namibia, where the age limit to participate in health-

¹¹² Committee on the CRC, *Consideration of reports submitted by States Parties under Article 44 of the Convention: Malawi UN doc CRC/C/8/Add.43* para 55. It should also be noted that Under a later Report to the Committee on CRC, *UN doc CRC/C/MWI/2* the State is silent on this aspect, which could mean that it has not been codified yet.

¹¹³ Committee on the CRC, *Consideration of reports submitted by States Parties under Article 44 of the Convention: Mauritania UN doc CRC/C/8/Add.42* para 19. This provision is supplemented by art. 164 of the Personal Status Code which provides that "A person who reaches the age of discernment before reaching the age of majority does not enjoy full legal capacity".

¹¹⁴ See generally, art. 42, which states that "Le délégué à la protection de l'enfance peut poursuivre l'application de la mesure urgente après le délai de vingt quatre heures et jusqu'au jour suivant s'il correspond à un dimanche ou à un jour de fête officielle et si l'interruption de la mesure est de nature à cause un préjudice considérable à l'enfant."

related matters is set at 16, in Ethiopia where it is set at 18,¹¹⁵ and worst in Swaziland where children are not considered competent at all and the age of consent is 21.¹¹⁶

Notwithstanding, the trend displayed above to some extent displays some level of consistency within the selected legal instruments that protect children in Africa and depicts the fact that age is very central in ascertaining a child's ability to reasonably participate in a health-related matter. However, the question remains whether age is or should be a key determinant of a child's competence to participate in health-related decisions. As indicated earlier, international children's law is not clear on this point. However, in practice the reality is that a child can effectively participate in health-related decision-making processes only to the extent to which his or her parents or legal guardians are willing to involve him or her irrespective of age and/or maturity.

Generally, parental ability to know when to involve a child in a decision-making process is a kind of authority which, in the context of this thesis, affects the basic tenets of children's rights to participate in health-related decision-making processes. Indeed, its presence in practice should spur states to adopt legislative and policy measures that would set the record clear and encourage parents to involve their children in such key decision-making practices irrespective of their personal judgement of the child's ability based on his or her age. Unfortunately, some African states are silent on this issue. Such silence could either be a result of keeping in line with the general view of the CRC and the ACRWC or the complex nature of instituting age limits, which could affect a state's societal beliefs and practices especially within the family. In Uganda, for example, there is no age limit for children to access information on matters that concern them or to participate in health-related issues. The Constitution, just like in Malawi, simply holds that every child has the right to know¹¹⁷ and the Children's Act expands on this, as it declares that a child of sufficient age and understanding shall be consulted on issues relating to the child's welfare.¹¹⁸

It probably goes without saying that in the absence of any age limit, a child's evolving capacities should be taken into consideration and due weight should be given to the views of a child. However, who appreciates a child's evolving capacities, especially

¹¹⁵ See generally, the Family Code art 257(1), which provides that "[t]he guardian shall watch over the health of the minor", and art. 257(2), which provides that "[i]n case of sickness of the minor, the guardian shall take the necessary measures for his recovery". Available at <http://www.refworld.org/pdfid/4c0ccc052.pdf> [accessed 18 April 2016]. See also, Committee on the CRC, *Consideration of reports submitted by States Parties under Article 44 of the Convention: Ethiopia UN doc CRC/C/129/Add.8* para 60.

¹¹⁶ Committee on the CRC, *Consideration of reports submitted by States Parties under Article 44 of the Convention: Swaziland UN doc CRC/C/SWZ/1* para 77.

¹¹⁷ See, arts. 34 and 41 of the Constitution of Uganda.

¹¹⁸ Art. 20(4) Children's Act.

in the family? Parents, of course. As a result, to achieve this, parents should at all times keep an eye on the activities and evolution of their children and the way they react to situations or issues in order to better evaluate their evolving capacities. This is because every child is different. Indeed, Herbots and Put add that “[i]nternal and external characteristics make every child unique [resultantly] special attention should be given to vulnerable groups of children, such as children with disabilities, children with a mental and/or physical illness, the girl child, etc.”¹¹⁹ Besides, it could reasonably be argued that age limits should not be completely discarded as, at the minimum, it places children’s capacity on level grounds. A child’s ability to espouse reasonable or convincing judgement in a matter that concerns him or her should be the standpoint on which such consideration swings parental perceptions and the added value to the justification of the medical decision made, irrespective of the child’s age.

The aspect of “age” is more crucial in the apt implementation of children’s rights to participate in health and medical decision-making processes than it is in any other decision-making process. This is possibly because health-related decisions are very personal and any wrong decision could lead to some form of bodily harm or, at worst, death. To get this right, the Committee on the CRC has reaffirmed the importance of a comprehensive understanding of the context of children’s right to participate in health-related decisions by stating that before parents give their consent, children of sufficient maturity should be given a chance to express their views freely and their views should be given due weight.¹²⁰

6. Exceptions

It should be noted that the exceptions highlighted here are not necessarily exhaustive. However, other scholars too have highlighted some exceptions which could also apply in the context of family health-related decision-making processes.¹²¹ Sporadically, this thesis has also mentioned other exceptions in which it would not be in best interests of the child to wait for his or her opinion on any matter that concerns him or her. That said, it is worth highlighting that the barriers or challenges discussed above live

¹¹⁹ K Herbots & J Put ‘The participation disc: A concept analyses of (a) child (’s right to) participation’ (2015) 23 *International Journal of Children’s Rights* 167. See also, L Cattrijsse & I Delens-Ravier ‘Reflections on the concept of participation’ (2006) in F Ang *et al.* (eds) *Participation Rights of Children* 27 – 38.

¹²⁰ Committee on the CRC, GC No 4 *Adolescent health and development in the context of the Convention on the Rights of the Child* UN doc CRC/GC/2003/4 para 32.

¹²¹ See for example, J Fortin *Children’s rights and the developing law* (2009) 146.

alongside a far more promising children's right to be involved in all family decision-making processes on health-related matters that concern them. Generally, the practice in the last decade has demonstrated that great progress is possible in involving children in such decision-making processes.

However, regrettably, in the context of this thesis such progress has so far been registered out of Africa.¹²² The slow progress on the continent is not a matter of lack of legislation, but a result of insurmountable cultural, religious and childhood conceptual issues discussed throughout this thesis which are hindering the furtherance and implementation of this right. One can hardly disagree with this thesis that there are real instances where such rights accorded to children have no chance of being realised, not because they are children, but because of the critical health condition in which they might find themselves. Indeed, common sense and key undertones of children's right to participate in healthcare-related decisions dictate that where the child has no wishes because he or she is either too young or too unwell to participate, doctors and parents should decide on what is best for the child. Such instances constitute the exceptions not influenced by societal barriers only.

For this reason, it might not be completely tragic that the child's opinion in *Esanubor*, for example, was not heard because although required and well established, neither international law nor the African children's rights system where children have been granted specific duties¹²³ credits children with an obligation to participate in such processes. Plus, in *Esanubor*, it was a case of life or death.¹²⁴ As a result, the requirement under international children's law that in all matters concerning a child, his or her views

¹²² See for example, P Parkinson & J Cashmore (n 85 above); I Coyne *et al.* *Giving Children a voice; Investigation of children's experiences of participation in consultation and decision-making in Irish hospital* (2006) and D Horgan *et al.* *Children and young people's experiences of participation in decision-making at home, in schools and in their communities* (2015) available at <http://www.dcy.gov.ie/documents/playandrec/20150617ExperienceParticipation.pdf> [accessed 10 May 2016].

¹²³ See generally, art. 31 of the ACRWC. See also, J Sloth-Nielsen & BD Mezmur 'A dutiful child: The implications of Article 31 of the African Children's Charter' (2008) 52(2) *Journal of African Law* 159–189.

¹²⁴ The severity of deciding between life and death was not discussed at length in the *Esanubor* case even though it was a decision based on whether to let the child concern die or live. But, the issue of life and death was analysed in the South African case of *Department of Health v Sepeng*, [an unreported judgment delivered by Seriti J in the Transvaal Provincial Division of the High Court of South Africa on 4 November 2005], in which the court held that "... the parents' right to religion is not unfettered, that the right to life is an inviolable right and to the extent that the parents' right potentially violates the child's right to life, it is in the best interest of the child that the child's right to life is protected. The content of the child's right to life includes the right to receive medical treatment, especially where such treatment would preserve the child's life". See also, *Life Healthcare Group (Pty) Ltd and Another v JMS (as parent and guardian of the infant child MT) and Another* (34758/2014) [2014] ZAGPJHC 299 (20 October 2014). All these cases are related to blood transfusions denied by parents on religious grounds and later granted by the courts.

should be sought first and those views should be given due consideration, is questionable and this case justifies this position as it is different and points to a reverse direction which holds that the gravity of the situation and the emergency of the treatment required have to be given due weight, as well. In cases where, based on the doctor's analysis, treatment must be administered quickly and it is a matter of life or death if the child cannot be reached and parental opinion is adverse to medical opinion and not in the best interests of the child, court interdicts must be immediate and based on the child's best interests which in most cases would be to save the child's life first.¹²⁵

In fact, both as a principle and as a right accorded to children, involving children in health-related family decision-making processes has real exceptions which have been discussed broadly through the writings of other scholars.¹²⁶ This is further strengthened by the fact that although children's right to participation requires a careful balance of a child's evolving capacities, a child's age is crucial and the parental obligation to care and protect a child is a rational argument in children's rights jurisprudence, which also points to the fact that involving a child in a health-related decision-making process contains elements which are beyond a child's reasoning and legal scripts. Also, crucial theoretical underpinnings of positive law suggest that for legal principles to be effective in the society which they intend to govern they should be practical. In fact, the meeting point between what has been legally protected and what would be commonly practiced, is a critical interface which needs not be perfect but has to be realistic.

A child's right to participate in all family health-related decision-making processes that concern him or her is partly unfeasible because in instances such as critical health cases where a child is unable to give consent, in cases of emergencies especially where there is need for immediate reaction to stabilise the child and in cases of new born babies, common sense dictates that the best interests of the child prevails and that is generally without his or her opinion.¹²⁷ It is equally crucial to recognise that these exceptional

¹²⁵ The court in *Esanubor* strengthened the powers of the medical doctors to protect the child first and to avoid what happened in an earlier case. See *Okonkwo* (n 58 above), which dealt with the professional negligence of a medical doctor who had respected the wishes of a Jehovah's Witness to refuse a blood transfusion and the patient had died thereafter. The Supreme Court of Nigeria held in this case that the medical doctor was not guilty of professional misconduct because in respecting the wishes of the patient, the doctor was acting in furtherance of patients' rights to freedom of religion and privacy guaranteed by the (then applicable) 1979 Constitution of the Federal Republic of Nigeria.

¹²⁶ See for example, Parkes (n 58 above), G Lansdown *The evolving capacities of the child* (2005), D Horgan *et al.* (n 123 above).

¹²⁷ G Birchley 'Deciding together? Best interest and shared decision-making in paediatric intensive care' (2014) 22 *Health Care Anal* 203–222, in which he adds that "it appears that a focus on the shared nature of a decision does not cohere with the principle that the best interests of the child should remain paramount".

situations are very significant and extend to areas such as drug abuse, alcohol abuse or piercing. Unlike sickness which in most cases is natural, drug abuse, alcohol abuse or piercings are generally choices made by individuals which generally have health effects but not as dramatic as an acute health situation which, as analysed in this sub-section, does not require a child's opinion for treatment. For example, in the case of piercing, probably because it is not a common African practice if not imposed by culture,¹²⁸ it has not been directly protected or regulated by law. However, due to fashion and current 'contemporary' choices, some children would opt for piercing either as a personal choice or as a choice influenced by their admiration of a celebrity. What complicates this choice is that, generally, children do not have a right in Africa to do as they wish with their bodies and if it involves a third party (artist), parental consent is paramount. In a nut shell, these are real instances where exceptions are likely to occur and legal provisions should not turn a blind eye but take them into consideration *vis a vis* the best interests of the child where the child's right to be involved in family health decision-making processes has been or could be ignored or suspended in the child's best interest.¹²⁹

7. Conclusion

Despite all the challenges raised above, one aspect that stands strong in the general protection and implementation of children's right to health in Africa is the role parents and the state play in assisting children to attain this right. Actually, these challenges are factual and to some extent expose the general implementation of children's right to participate in family healthcare decision-making processes as not completely possible. No state has given its children a free passage to such decision-making processes. This makes the unfettered right to participation granted to children a frivolous act of generosity which will only come to fruition after a child attains a particular level of competence.

Until such time, and again only in certain cases, and if parents and/or medical practitioners allow, would a child freely participate in family healthcare decision-making processes on matters that concern them. The position of parents and the state is fortified by the fact that both 'institutions' are expected to have before them the best interest of the child in all actions concerning a child and both have prescribed obligations – in the

¹²⁸ See for example, EM Doh, *Stereotyping Africa: Surprising answers to surprising questions* (2009) 98.

¹²⁹ See for example, In *MS v M*, where Sachs J held: "Thus, in *Fitzpatrick* this Court held that "it is necessary that the standard should be flexible as circumstances will determine which factors secure the best interests of the child" para 18.

CRC and the ACRWC in this regard. As discussed in chapter five of this thesis, the role between parents and the state at times could face some tension and in some instances, they could be complimentary. Tension is likely to occur when both disagree on, for example, the best medical procedure that should be given to a child.¹³⁰ The rationale of this chapter was not to discuss the scope of children's right to health but to analyse their contribution in the decision-making process which leads to them attaining their health rights, especially at the family level. Worth noting, although crucial in this context, especially in Africa where it is commonly practiced, this chapter did not analyse the aspect of home-based medical or health care given to children. One reason for such exemption is the astute empirical methodology this might require, which in return might have led this chapter and possibly this thesis out of its flow.

¹³⁰ This was the case in the *Esanubor* (n 49 above) and *Life Healthcare Group (Pty) Ltd and Another* (n 125 above).

Chapter Seven

NOT UNDERSTOOD AND NOT IMPLEMENTED: REMARKS AND CONCLUSIONS

1. Introduction

There is probably a good and persuasive reason for admiring and appreciating the protection of children's right to participation both in the CRC and the ACRWC and its further domestication in the cluster of domestic laws analysed above in this thesis. Indeed, the recognition and protection of this right moves children from being passive rights bearers or recipients to actual rights bearers with the power to have an opinion on all matters which affect them, even in family decision-making processes. In fact, Krappmann, writing in 2010, asserts that children's right to participation definitely contradicts the presumption that children are incomplete human beings with no capacity to make valuable contributions to decision-making processes on matters which concern them.¹ Surely, one gathers from such assumptions and the arguments raised earlier in this thesis that it is arguably one of the most influential children's rights and, not surprising, it is also one of the guiding principles of children's rights. It precedes both the CRC and the ACRWC. Indeed, what makes this right a fitting guiding principle, as demonstrated in chapter two of this thesis and sporadically in other chapters, is down to its 'presence' in every other right allocated to children.²

As demonstrated earlier, the right to participation as protected for children has an elastic scope; it is not absolute and not specific in terms of location or style of implementation. Simply, it applies to all matters that concern a child everywhere and anytime. This thesis has focused on its implementation and recognition in family decision-making processes on, for example, healthcare matters that affect a child and the role played by or the interrelation of the authority between the state and parents in ensuring that children enjoy this right at the family level.

¹ L Krappmann 'The weight of the child's view (Article 12 of the Convention on the Rights of the Child)' (2010) 18 *International Journal of Children's Rights* 502.

² P Alderson 'UN Convention of the Rights of the Child: Some common criticism and suggested responses' (2000) 9 *Child Abuse Review* 440.

Based on the issues raised in the previous chapters this chapter, seeks to analyse whether the conceptualisation of children's right to participation in both the CRC and the ACRWC successfully meets its intended motive. According to the provisions of article 12 of the CRC and article 4(2) of the ACRWC, and further scrutiny by Cantwell, the primary motive of children's right to participation is to equate children - at the same level of competence in decision-making processes - to adults to have an opinion on all matters that concern them.³ Also, drawing from some aspects highlighted in previous chapters, this chapter argues that the protection of children's right to participation is, in some respects, encouraging a model of an inclusive decision-making process within the family, which has not been entirely successful throughout the over 25-year existence of both treaties and not comprehensively possible in the foreseeable future in Africa. Indeed, children's rights monitoring committees (Committee on the CRC and the African Committee of Experts), who are ideally placed to clarify the intention of the provisions of the CRC and the ACRWC respectively and specifically in this context, their implementation within the family, have unfortunately not done so sufficiently. The Committee on the CRC's analyses to date, for instance, have been marked by a "striking parental and state party friendly" tone which unfortunately does not convincingly attribute an absolute right to participation to children as claimed in the CRC.⁴ At the African regional level, it is perhaps apt to hold that both the AU and the ACERWC have extended and strengthened the need to ensure that the provisions of the CRC and particularly the ACRWC regulating children's right to participation are respected, as they have set firm targets through long and short term agendas intended to respond to any gaps in implementation that may exist over a period of time.

2. African regional considerations, responses and agendas

The "uncertainties" which surround the comprehensive implementation of children's right to participation, especially within the family environment, highlighted in previous chapters, have not prevented the domestication of such provisions in legal and policy

³ N Cantwell was the Coordinator and general spokesperson for the NGO Ad Hoc Group throughout the drafting of the CRC. See also, N Cantwell 'Words that speak volumes: A short history of the drafting of the CRC' in *18 Candles the Convention on the Rights of the Child reaches majority 21*, available at <http://www.ohchr.org/Documents/Publications/crc18.pdf> [accessed 13 March 2015]. See also, N Cantwell 'The origins, development and significance of the United Nations Convention on the Rights of the Child' in S Detrick (ed.) *The United Nations convention on the rights of the child: a guide to the travaux préparatoires*, (1992) 19–30.

⁴ See generally, Committee on the CRC, GC No 12.

texts at the national level in Africa. Rightly so, at the national level, discussions around children's rights issues have transcended beyond legal and policy recognition to ensuring effective interpretation and implementation of existing laws. Worth noting, though, national challenges have not hampered the spirit of the AU and its organs, for example the ACERWC, in developing agendas that would respond to such challenges overtime.

Recently, the AU has spent considerable time on developing agendas and setting goals, in its currently known *Agenda 2063 for the Africa 'we want'*.⁵ Succinctly, the agenda lists the following "aspirations" for Africa: a prosperous Africa based on inclusive growth and sustainable development; an integrated continent, politically united, based on the ideals of Pan-Africanism and the vision of Africa's Renaissance; an Africa of good governance, democracy, respect for human rights, justice and the rule of law; a peaceful and secure Africa; an Africa with a strong cultural identity, common heritage, values and ethics; an Africa whose development is people-driven, relying on the potential of African people, especially its women and youth, and caring for children and an Africa as a strong, united, resilient and influential global player and partner.⁶

In paragraph 53 of Agenda 2063, the AU acknowledges the fact that "African children shall be empowered through the full implementation of the African Charter on the Rights of the Child". These aspirations inspired the ACERWC to draw a similar, but very child-focused, agenda for children on fostering an Africa fit for children by 2040.⁷ In its agenda, the ACERWC takes stock and prioritises future actions related to shaping an Africa fit for children on the following ten key aspects: The African Children's Charter, as supervised by the African Children's Committee, provides an effective continental framework for advancing children's rights; an effective child-friendly national legislative, policy and institutional framework is in place in all member States; every child's birth and other vital statistics are registered; every child is born alive and survives infancy; every child grows up well-nourished and with access to the basic necessities of life; every child benefits fully from quality education; every child is protected against violence, exploitation, neglect and abuse; children benefit from a child-sensitive criminal justice system; every child is free from the impact of armed conflicts and other disasters or emergency situations and African children's views matter.

⁵ For a comprehensive overview, see, *Framework Document, Agenda 2063, the Africa we want* available at <http://agenda2063.au.int/en/sites/default/files/Framework%20Document%20Book.pdf> [accessed 30 September 2016].

⁶ As above, 29.

⁷ See generally, http://www.acerwc.org/download/africas-agenda-for-children-rights-2040-english_version/?wpdmdl=9752 [accessed 28 September 2016]

Interestingly, and very critical to the much-needed improvement to children's rights protection and fulfilment in Africa, the ACERWC's agenda is further divided into two parts: the understanding and implementation, and monitoring and evaluation of the agenda.

Although these aspirations are necessarily interrelated, what is of specific interest to this thesis, is aspiration No 10 which, based on the context provided by paragraph 47 of Agenda 2063, lays emphasis on the fact that "[i]n pursuit of a people-centred continent, all the citizens of Africa will be actively involved in decision making in all aspects". This sets a target that all African children's views will matter by 2040. Currently, this aspiration is a dream but it will be crucial that state parties to the ACRWC see to it that it becomes a reality by domesticating such targets in their respective national plans for children. This particular target is further simplified by eight goals which accentuate the short (states' responsibility by 2020)⁸ and long terms (children's right to participation is protected by 2040).⁹ Interestingly, all the goals expressly aspire to an inclusive protection of children's right to participation within the public sphere of society, such as a dedicated and permanent forum of a child parliament, with the exception of point 6 under the long-term goals, which aspires that by 2040 "[c]hildren have the right to be consulted and heard in proceedings involving or affecting them". This could be interpreted broadly to also include the protection of children's right to participation, for example, in the private space (within the family environment),

The limitation in this agenda in taking a firm stance on the importance of ensuring children's rights and especially their right to participation in, for example, family decision-making processes is a probable lacuna in the comprehensive protection of this key right, as has been argued throughout this thesis. It should also be noted that, during

⁸ By 2020: States should have adopted national legislation to institutionalise and formalise a process to involve children in parliamentary processes and in the operation of child-specific institutions and should have considered the views of children and young people in the monitoring and accountability of all laws, policies and programmes affecting children.

⁹ By 2040: Child participation, based on the principles of representation, inclusion and accountability, is cultivated at all levels; Children participate meaningfully in law making and policy adoption in matters affecting their interests, and are involved in the oversight of their implementation; Dedicated processes for children's participation are in place, such as a permanent and dedicated forum in the form of a child parliament, or ad hoc forum in the form of a child caucus aimed at bringing forward the voices of children in these processes; At school level, child participation and leadership are cultivated by involving children in school management, for example in advisory student/learner councils; Legal protection is in place affirming children's rights to assemble, organise and access information and to express themselves freely and Children have the right to be consulted and heard in proceedings involving or affecting them.

the 28th session of the ACERWC, the author suggested verbally and in writing to the ACERWC to consider including a specific target on children's rights to participate in all family decision-making processes on all matters concerning them. This suggestion was received, considered and included in the latest version of the agenda now adopted by heads of states. However, the fact that over the years much has been concentrated on strengthening children's right to participation within the public space, as has been argued in this thesis, is probably a justification why the ACERWC found limited justification and/or research supporting its implementation in the private space.¹⁰ This is yet another reason why this thesis is necessary, as it might assist future expansive interpretation and implementation of this right into the private space (family). The argument between the public and private divide on the implementation of children's right to participation, and the importance attached to both spheres is a debate worth debating, especially because the comprehensive upbringing and development of a child demands a strong "partnership" between both divides.¹¹

3. Models designed to facilitate the understanding and implementation of children's right to participation

Children's right to participation is one of the rights protected in both the CRC and the ACRWC that have benefited from proper or insightful designed models of

¹⁰ It should be highlighted here that this agenda was informed by and built upon the inspiration derived from numerous existing legal and policy frameworks which in many ways have also promoted the scope of children's right to participation more within public space than the private space. These include: the African Charter on the Rights and Welfare of the Child; the AU Commission (Department of Political Affairs) Human Rights Strategy for Africa; the African Committee of Experts on the Rights and Welfare of the Child Strategic Plan (2015-2019); the Abuja Declaration and Plan of Action on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases (2001); the Africa Fit for Children Declaration and Plan of Action (2001); the Call for Accelerated Action on the Implementation of the Plan of Action towards an Africa Fit for Children (2008-2012); the Monitoring and Evaluation Framework to Assess Progress towards Africa Fit for Children (Department of Social Affairs); the African Union's Social Policy Framework for Africa (2008); Concluding Observations of the African Children's Rights Committee; General Comments of the African Children's Committee; Millennium Development Goals (MDGs); Sustainable Development Goals (SDGs); the African Child Policy Forum; The Africa Report on Children's Wellbeing (2013); and UNICEF State of the World's Children (2015).

¹¹ See for example, B Milne *Rights of the child. 25 years after the adoption of the UN Convention* (2015) 87–90; P Parkinson & J Cashmore *The voice of a child in family law disputes* (2012) 89, 120–122 and J Sloth-Nielsen 'Seen and heard? New frontiers in child participation in family law proceedings in South Africa' (2009) 2 *Speculum Juris* 1–19.

implementation from several scholars.¹² However, similar to the diction applied by the Committee on the CRC, these models of implementation have been designed to enable children to participate better in decision-making processes in the public sphere and very little attention has been paid to decision-making processes in the private space (family). There are four commonly known of these models. The first one is Hart’s ladder of participation,¹³ which consists of eight rungs divided into two halves: the three lowest rungs are considered as “non-participation” and the upper rungs as “degree of participation”. Briefly, Hart supports a hierarchical model of participation. The second one is Treseder’s circles, which is adapted from Hart’s model with the exclusion of the last three rungs.¹⁴ Just like Hart, Treseder’s model of implementing and understanding children’s right to participation is designed to assist professionals, in guiding children to participate in decisions on matters which affect them as individuals and as a group. The third one is Shier’s pathway to participation¹⁵ which, similar to Treseder’s, identifies five levels of participation. These are: Children are listened to; Children are supported in expressing their views; Children’s views are taken into account; Children are involved in decision-making processes and Children share power and responsibility for decision-making.¹⁶ However, Shier’s approach is different mainly because it is specifically based on the content of article 12 of the CRC, recognises that there could be challenges in involving children, and that adults may have differing stages of commitments. These are: openings, opportunities and obligations.¹⁷ The fourth model is Kirby *et al*’s model of participation, in which they hold that meaningful children’s participation is a process

¹² See for example, R Hart ‘Children’s participation: From tokenism to citizenship’ 1992 (4) *UNICEF Innocenti Essays* 5; G Lansdown *Promoting children’s participation in Democratic decision-making* (2001); J Miller *Never too young: How young people can take responsibility and make decisions* (2003); L Lundy ‘Voice’ is not enough: Conceptualising Article 12 of the United National Convention on the rights of the child’ 2007 (33) 6 *British Educational Research Journal* 933, and K Herbots & J Put ‘The participation disc: A concept analyses of (a) Child (’s Right to) participation’ (2015) 23 *International Journal of Children’s Rights* 167; and an expanded version of Lundy’s Model in *Department of Children and Youth Affairs (2015) National Strategy on Children and Young People’s Participation in Decision-making, 2015–2020* (2015) 22. Available at <http://dcya.gov.ie/documents/playandrec/20150617NatStratParticipationReport.pdf> [accessed 30 July 2016].

¹³ Hart (as above). Hart’s view was adapted from Arnstien’s 1969 model on adult participation.

¹⁴ P Treseder *Empowering children & young people training manual: promoting involvement in decision making* (1997).

¹⁵ H Shier ‘Pathways to participation: Openings, opportunities and obligations: A new model for enhancing children’s participation in decision-making’ (2001) 15(2) *Children & Society* 107–117.

¹⁶ As above 110.

¹⁷ As above.

and ‘not simply the application of isolated cases of participation activities or events’.¹⁸ Their model, just like Shier’s, is based on article 12 of the CRC and is against a hierarchical model of participation. They maintain that children should be listened to in all matters that concern them, because it is only in so doing that their involvement is meaningful.

Interestingly, during the progression of the last century or so, other models have emerged. The most prominent of them are Lundy’s model of participation¹⁹ and Herbots and Put’s participation disc.²⁰ Between these models, Lundy’s model is currently the best known and this could well be because it precedes Herbots and Puts’. Although ‘recent’, traces of Shier’s model can be identified in Lundy’s model,²¹ as it also embraces a non-hierarchical model of participation and is based on the content of article 12 of the CRC. Lundy advocates a rights-based approach that is non-hierarchical. She maintains that it is plausible and should be adopted in order to understand the content and context of children’s right to participation, not only because it is flexible but also because it highlights the importance of the impact and outcomes of participation. Because it is progressive and outlines a set of core principles of participation, the model has been expanded with a carefully drafted checklist adopted in the government of Ireland’s 2015-2020 national strategy on children’s participation in decision-making.

The similarity of Lundy’s model to Shier’s is stronger when juxtaposing Shier’s five levels of participation with Lundy’s voice model checklist. Both advocate a systemic understanding and implementation of children’s participation which is child-centred and purposeful. However, Lundy’s checklist is expansive and spans beyond the participation of children to include young people between 18 and 24 years of age. Indeed, just like the other methods, Lundy’s checklist is also structured to ensure that children are given the space to express their views; that their voice is enabled; that they have an audience to express their views to; and that their views will have an influence in the public sphere.²²

The most recent of the methods that have been suggested to assist in the understanding and implementation of children’s right to participation is Herbots and

¹⁸ P Kirby *et al.* *Building a culture of participation involving children and young people in policy, service planning, delivery and evaluation* (2003). Also available at http://www.gyerekesely.hu/childpoverty/docs/involving_children_report.pdf [accessed 3 July 2016].

¹⁹ Lundy (n 5 above) 933.

²⁰ Herbots & Put (n 5 above).

²¹ Lundy (n 12 above).

²² See generally, *Department of Children and Youth Affairs’ national strategy* (n 5 above) 22, which states that “This checklist aims to help organisations, working with and for children and young people, to comply with Article 12 of the UNCRC ...”.

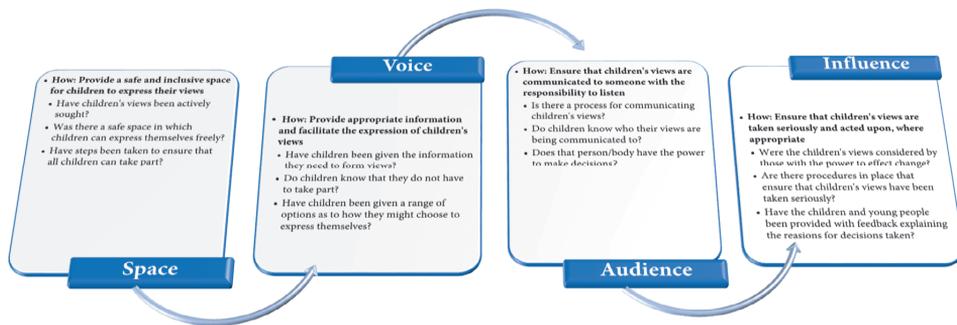


Figure 1: Lundy's Voice Model checklist for participation as included in Ireland's National Strategy on Children and Young People's Participation in Decision-making 2015-2020

Put's participation disc. According to Herbots and Put, to understand and properly implement children's right to participation, it has to be analysed and approached from the following interrelated four main components: The purpose, the context, the relevant stakeholders and the mode of participation.²³ They maintain and concur with Kirby *et al's* model of participation that participation is a process rather than a static, once-off event. In arriving at their suggested model, they dissected the content of article 12 of the CRC, and extended their interpretation, rightfully so, beyond article 12 to include children's rights related to their right to participation – such as their right to freedom of expression (article 13).

However, unlike the other models of participation analysed in this chapter which are specific in terms of the purpose and whom the models are directed to, Herbots and Put's model is purely an in-depth analysis and examination of children's right to participate in all matters that concern them, through the lens of several disciplines and in the context of a cluster of rights rather than a stand-alone right. This is appreciated and very welcome in contemporary children's rights discourse. However, in a nutshell, their disc is a tool intended to ease the interpretation and understanding of children's right to participation and not a tool intended to ease factual implementation.

Regrettably, the models discussed above fall short in the specific context of children's participation in family decision-making processes, which this thesis attempts to highlight, as their structures and context are generally intended to enable children's participation in the public sphere. The lack of a family decision-making dimension leaves these models one-sided, because a comprehensive understanding and resultant implementation of this right requires a satisfactory implementation both in the private and public spheres of society. The lack of this minor but necessary recognition is a sure

²³ Herbots & Put (n 5 above) 167.

missing link in the general interpretation and understanding of this right as it is protected for children. Indeed, the interpretation of children's right to participation afforded by the Committee on the CRC considers family decision-making processes (private sphere) as given fora in which children must exercise and enjoy this right in all matters that concern them.²⁴

4. Children's right to participation is like new wine poured into an old bottle

There is a factual challenge in establishing a comprehensive model (which would include both the private and the public divide) of child participation. This may be even truer in the family environment and is likely based on the fact that the human right to participation, as is generally known, was legally first established in the CCPR.²⁵ Indeed, over the years, article 25 of the CCPR has benefitted from thorough analytical scrutiny, interpretation and models of understanding by the Committee on the CCPR intended to address the needs of adult participation and not specifically that of children.²⁶ Historically, it is an old right, older than both the CRC and the ACRWC.²⁷ It is a right that was first intended for adults and through the CRC and the ACRWC children are the "new" recipients.

Neither provision in the CRC nor the ACRWC are copy-pasted from the CCPR; however, they have been tailor-made for children with "far too much expectations" to participate in *all matters that concern them* and parents and the state as guarantors. Despite this assurance, a culture of selective participation, weak participation or non-participation²⁸ is still widespread in family decision-making processes which is possibly due to the fact that parents do not understand why children should have this right, when it should be granted and how it should be granted, coupled with the fact that parents know that they have a cultural and legal obligation under the African human rights

²⁴ See generally, Committee on the CRC, GC No 12. See also, Herbots and Puts (n 5 above) 159. As they admit that, "The scope of participation can be divided into, on the one hand, the private sphere of a child's life, such as the nuclear family or relations between individuals and, on the other hand, the public sphere of a child's life, such as school, (youth) associations and public services". See also, Kirby *et al.* (n 11 above).

²⁵ See for example art. 25 of the CCPR.

²⁶ See generally, Committee on the CCPR GC No 25 adopted by the human rights committee under art. 40, para 4, of the CCPR.

²⁷ See for example CCPR (n 18 above) adopted in 1966.

²⁸ See for example, H Matthews 'Children and regeneration: Setting an agenda for community participation and integration' (2003) 17(4) *Children and society* 264–276.

system to direct and care for their children.²⁹ To enable a relatively smooth implementation of both parental responsibility and the right of the child to participate in family decision-making processes, some scholars have advocated a child-centred approach to be adopted at the family level to assist parents in understanding³⁰ this right and to enable children involved to have a say in all matters that concern them.³¹ A child-centred approach is in tandem with the famous UN slogan “Nothing about Us, Without Us” adopted by the UN to promote the rights of persons with disabilities, which as per article 7 of the CRPD which protects the right to participation of children with disability, also includes children with disabilities.³²

However, having children involved in contributing to identifying possible solutions to all matters that concern them is only one part of the child-centred approach. The other part is to act on the issues discussed. Generally, children are easily disenchanted, if they do not see their suggestions acted upon without reason(s).³³ This is the reason why Lundy’s insistence on the fourth stage influence is very crucial even in the family and should be understood so that children’s right to participation does not grant children an absolute right to make decisions, especially because such an opinion still has to be processed by an adult/parent “with power to effect change”.³⁴

This is precisely where the crack is glaring between this right as originally ascribed to adults and how it has been adapted for children. Generally, adults (presumed competent) exercise their right to participation with the intent to effect change, or have a say in the decision that will be arrived at; however, a child (presumed incompetent), in exercising his or her right to participation will have to “wait” for an adult to give his or her opinion due weight based on the child’s age and maturity before hoping that his or

²⁹ See generally, *Africa’s agenda for children 2040: Fostering an Africa fit for children*, available at http://www.acerwc.org/download/africas-agenda-for-children-rights-2040-english_version/?wpdmdl=9752 [accessed 22 September 2016].

³⁰ Herbots & Put (n 5 above) 166–168, 170–180.

³¹ See for example, N Thomas ‘Towards a theory of children’s participation’ (2007) 15(2) *International Journal of Children’s Rights* 199–218, U Kilkelly ‘Health and children’s rights’ (2015) in W Vandenhoele *et al* (ed) *Routledge International Handbook of Children’s Rights Studies* 216–233, J Sloth-Nielsen (n 10 above), Shier (n 9 above), Lundy (n 12 above).

³² For details on this UN position, see <http://www.un.org/esa/socdev/enable/iddp2004.htm> [accessed 30 September 2016]. This slogan was first intended to encourage the “... active involvement of persons with disabilities in the planning of strategies and policies that affect their lives. The motto “Nothing About Us Without Us” relies on this principle of participation, and it has been used by Disabled Peoples Organizations throughout the years as part of the global movement to achieve the full participation and equalization of opportunities for, by and with persons with disabilities”.

³³ Parkinson & Cashmore (n 10 above).

³⁴ Lundy (n 12 above) and Ireland’s Department of Children and Youth Affairs national strategy (n 5 above) 23.

her opinion will be taken seriously in the final decision on a matter that concerns him or her. This classification (competency) is not prescribed by law (it is merely psychological and in some cases historically based on the perception of childhood, culturally linked to a child as an object to whom welfare is due, commonly practiced within the family), because at the core of children's right to participation under international law, a child is perceived as able with a certain amount of power. At the family level, the law fails to clearly identify the limits or the extent to which a child's views should influence a family (adult) decision-making process on matters that concern the child.³⁵ It is this limitation that has made the search process for a dissemination pathway, especially in family decision-making processes, crucial.

4.1. Children's right to participation in the family

Although most of the rights-based models analysed above have been focused on the context of the CRC and not inclusive or in consideration of the ACRWC, their tendencies could permeate a spill over into the African context. Historically, as has been demonstrated sporadically in this thesis, children in African societies are seen more as property to their parents who require support and care at all times, rather than persons with an opinion on every matter that concerns them. Granting children the right to participate in all matters that concern them and its further domestication in national laws has not changed much family-based classification of a child's position in family decision-making processes.

Indeed, the situation is further exacerbated by the lack of a clear approach or model of implementation of children's right to participate in family decision-making processes. At the family level, such an approach should not be geared towards a complete eradication of traditional practices that work, but towards complimenting them. At the minimum, to ensure that there is a mentality shift in contemporary parental attitudes, behaviours, customs, skills and ways of parenting, it will require a baseline point of departure, which this thesis holds very strongly should begin with some form of education for parents to know how, when and why it is necessary to involve their children; to know how to grant children the opportunity to ask questions; and to know how and why to appreciate their opinions appropriately.

It is also worth noting that the lack of focus on the private sector – family – in the models analysed above is not deplorable or hopeless at the moment, as might have been

³⁵ According to Stern, the combination of 'children' and 'power' is problematic in a family setting because it would upset the social order especially because children by definition are subordinate to their parent(s). R Stern *The child's right to participation – Reality or rhetoric?* (2006) 129.

painted above, because although it is true that the models analysed are deeply concentrated on facilitating children's participation in the public sphere,³⁶ they could also be adapted to suit the specific context of children's participation in the private sphere – the family. For example, Shier's five levels of participation jointly with his three stages of commitment could be adapted to train/educate parents in how to involve and give due consideration to a child's opinion expressed in a family decision-making process based on their maturity. Also, it could be used by states as a checklist to check whether such steps were followed by parents in case of a default or when the state is asked to intervene. These are, in fact, credible possible ways of either redirecting or reshaping Shier's model to fit a family setting. Unfortunately, however, such redirection might not be effective because Shier's approach holds some rigid elements such as "children share power and responsibility for decision-making" which may not be completely accepted within the family, nor give much room for family dynamics. For example, at the African level, taking into consideration the example given in chapter five of this thesis of a child who makes a choice to have a piercing without the knowledge and permission of his or her parents, it would be challenging for the state to correct irregularities in such decisions, especially because most African states have no specific laws in this regard. In fact, it will be equally difficult to involve the child in a decision he or she has already made – probably based on his or her right to self-determination, or to fairly talk the child out of his or her decision, and equally challenging for parents to take such views into consideration at the expense of their obligation to be primary caregivers to their child.³⁷

In the context of this thesis, although it might have similar traces of a stereotyped process, Lundy's model and checklist (figure 1 above) might also assist parents. However, just like Shier's model, it might face some challenges at the point of influence. Indeed, 'influence', in any decision on a matter that concerns a child is crucial, because it completes the process and ensures the practicality of the right. It probably goes without saying that without having an influence, or having one's view given due weight, any contribution from a child in any matter that concerns him or her has no value. Certainly, it is not completely impossible for a child's opinion to have an influence in a

³⁶ For further reading on what constitutes children's participation in the public space, see for example, A Partridge 'Children and young people's inclusion in public decision-making' (2005) 20(4) *Support for Learning* 181–189. See also, the submission from the CRIN to the Forum on Human Rights, Democracy and the Rule of law, *Widening the democratic space: the role of youth in public decision-making* (2016) available at <http://www.ohchr.org/Documents/Issues/Democracy/Forum2016/CRIN.pdf> [accessed 8 August 2016].

³⁷ See for example, art. 19 of the ACRWC.

family decision-making process and this can be demonstrated by two examples. On one hand, a child's view will have an influence and possibly be the deciding opinion, if such opinion is beneficial to parent(s). A fitting example is the case of custody.³⁸ Indeed, with the exception of countries that practice the Shari'a law (for example in Algeria where the opinion of the child from a dissolved marriage is not required,³⁹ but the decision must be in the best interests of the child),⁴⁰ this is one area of the law and family decision-making processes where children in common and civil law jurisdictions on the Continent best enjoy this right. This is because, although the law also considers other aspects such as the custodial parent's well-being and ability to care for the child, it is the child's opinion and the child's best interest that the courts rely on first before making a decision.⁴¹

However, the influence of a child's opinion would have no bearing; in fact, if received, it could be discarded instantly, if parents think it is not founded on the family values they have indoctrinated.⁴² These are factual and practical fluctuations in a child's influence and one of the reasons why a child's right to participation remains an aspect of new wine in an old bottle – the acceptance and recognition that children have the

³⁸ This is not an African problem, it is a global issue and a perfect example of selective implementation of children's right to participation in family decision-making processes – see for example, N Taylor *et al.* 'Respecting children's participation in family law proceedings' (2007) 15(1) *International Journal of Children's Rights* 61, 72; N Taylor *et al.* 'International models of child participation in family law proceedings following parental separation / divorce' (2012) 20(4) *International Journal of Children's Rights* 645–673. See also, P Parkinson *et al.* 'Parents and children's views on talking to judges in parenting disputes in Australia' (2007) 21(1) *International Journal on Law, Policy and the Family* 84–107, in which they hold that hearing a child's view, for example, through the medium of trained experts is an accepted practice in common-law jurisdictions.

³⁹ K Filali 'Experience in Algeria with the use of the CRC in legal proceedings' (2015) in T Liefwaard & JE Doek (ed) *Litigating the rights of the child: The UN Convention on the Rights of the Child in domestic and international jurisprudence* 171.

⁴⁰ See, art. 64 of the Algerian Family Code 2005.

⁴¹ Warshak holds that the two fundamental reasons for permitting children's participation in custody matters are 'enlightenment and empowerment'. See RA Warshak 'Payoffs and pitfalls of listening to children' (2003) 52(4) *Family Relations*, 373-384. See also, *Re: Salem Mukiibi and Ashaf Ssemakula (Minors); In Re: An Application by Hoffman Edward and Olivia Nakawungu Hoffman, Brother-in-law and Sister, respectively (Family Cause No 061 of 2005) ((Minors)) [2005] UGHC 30*. Discussed in detail in chapter 4 of this thesis in which the opinion of the children concerned had much influence in the decision to give them away to foster parents - most likely because it correlated with their mother's view.

⁴² See for example, *Gillick v West Norfolk and Wisbech Area Health Authority & Another* (1985) 3 All ER 402; *Esanubor v Faweya* [2009] All FWLR (Pt 478) 380 (CA). For further reading on similar instances, see for example, C Bridge 'Parental beliefs and medical treatment of children' (1994) *Butterworth's Family Law Journal* 131 and M Bekink "'Child Divorce': A Break from parental responsibilities and rights due to the traditional socio-cultural practices and beliefs of the parents' (2012) 15(1) *Potchefstroom Electronic Law Journal* 179.

capacity to participate is not mature enough and would not be, in a great rush especially in the family decision-making process. However, the bottle (children's right to participate) is old and deceptive. According to Sloth-Nielsen, it is something of a fashion item on the children's rights agenda.⁴³ Indeed, it is not the same, as has been interpreted and practiced over the years, as an adult's right to participation. In the case of an adult's right to participation, the aspect of "influence", resultant from an adult's involvement in a matter that concerns him or her, is crucial. In the case of children, the fluctuation on whose opinion directs or influences the stronger part of the decision arrived at in any family decision-making process, has been weakened by the low standard generally ascribed to a child's capacity to make a substantive contribution during such processes.

Generally, none of the models analysed above comprehensively permeate a change of perception at the family level; rather, they are structured to enhance the ability of public officials to give due consideration to a child's opinion on public matters that concern a child or children as a collective. For present purposes, however, some scholars have submitted some seemingly convincing arguments as they attempt contextual inroads into private decision-making related to children's private lives.⁴⁴ In the opinion of this thesis, the most interesting of these are Thomas's climbing wall model and Dahlstrand's model. Thomas's model identifies six aspects as crucial in involving children in making important decisions.⁴⁵ These are: the choice a child has over his or her participation; information about the situation and his or her rights; control over the decision-making process; voice in any discussion; support in speaking up; and degree of autonomy. Dahlstrand's model, based on the Swedish context, assigns three roles to a child in a decision-making process to facilitate children's participation in family decision-making processes:⁴⁶ the child as informant, the child as co-actor, and the child as actor. Röbbäck and Höjer, writing in 2004, allude to the fact that Dahlstrand's model goes a step further, as it allows for a child's opinion in a matter that concerns him or her to be taken into consideration even in instances where the child is absent in person.⁴⁷

⁴³ Sloth-Nielsen (n 22 above). See also, J Sloth-Nielsen 'Realising children's rights to legal representation and to be heard in judicial proceedings: an update' (2008) 24(3) *South African Journal on Human Rights* 495.

⁴⁴ See for example, J Thoburn *et al* *Paternalism of partnership? Family involvement in the child protection process* (1995) and B Franklin 'The ladder of participation in matters concerning children' (1997) in J Boyden & J Enew (eds) *Children in focus: a manual for participatory research with children*.

⁴⁵ N Thomas *Children, family and the state: decision-making and child participation* (2000/2002). For a review of this book, see also, E Munro 'Children, family and the State: Decision-making and child participation. Nigel Thomas' (2015) 29(4) *Journal of Sociology & Social Welfare* 166–169.

⁴⁶ L Dahlstrand *Barns deltagande i familjerättsliga processer* (2004). [Colleague's translation]. See also similar analyses in, K Röbbäck & I Höjer 'Constructing children's views in the enforcement of contact orders' (2009) 17(4) *International Journal of Children's Rights* 665–667.

⁴⁷ Röbbäck & Höjer (as above) 665.

To summarise, credit must be given to all those scholars who have made reasonable attempts to facilitate the understanding and implementation of children's right to participation. They have informed this thesis and enabled the development of a model which could work in Africa, and elsewhere, where families are broad, traditions are held to the highest level and parents have a responsibility to pass them on to the next generation. This thesis argues that a comprehensive acceptance and implementation of children's right to participation in family decision-making processes, especially in Africa, should start with the acknowledgement that children are not equal to adults, and that families are generally construed on certain norms and beliefs that shape the specific identity of a particular family or community. These beliefs in most instances, as have been demonstrated in this thesis, are so entrenched that any attempt without recognising powers and balancing opinions to suit specific targets such as a child's best interests within the family to usher into the family environment any 'foreign practice' would face resistance that would either delay children from enjoying this crucial right and being included in family decision-making processes or prohibit them partially or completely.

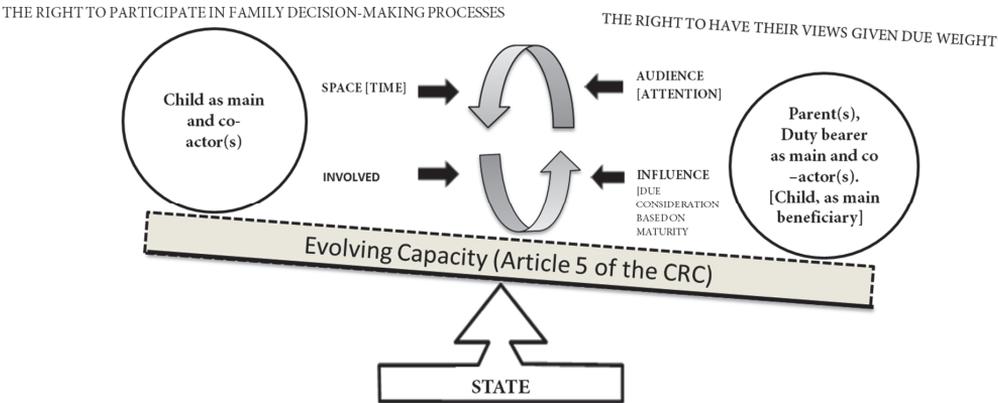
5. The balance model

Based on the analyses derived from the models analysed above, this thesis takes the debate further and suggests the balance model specifically aimed at targeting children's participation in family decision-making processes. This model is based on a user perspective of rights.⁴⁸ Generally, children's participation can adopt any style to involve children in family decision-making processes. However, based on the context of the provisions of both the CRC and the ACRWC, and related national laws, the crucial aspect of children's right to participation is that the result must be in the best interests of the child and no one else. In fact, international law pays little attention to who makes the final decision but requires the child/ren concerned to be involved in the process either directly or through a representative and to be meaningful. A meaningful process will allow children to ask questions and demand their views to have an impact on the final decision.

Several scholars have argued that the opportunity to ask questions will, amongst others, give children the complete picture of why the decision arrived at was made. Also, it will give children and/or parents the opportunity to rethink their opinions if already

⁴⁸ For more on the user perspective of rights, see M Baumärtel *Perspective on the 'user': Unpacking a concept for human rights research* (2014) 8(2) *Human Rights and International Legal Discourse* 142-159.

conclusive or to ameliorate them if still in the course of making a decision.⁴⁹ This is a stance which the balance model analysed below agrees with. However, on the one hand, the model discourages a situation where a child would get into any verbal or physical confrontation with his or her parent(s) because the parent(s) refused to grant the child the opportunity to be listened to and to have their views given due consideration. On the other hand, with the assistance of article 5 of the CRC (evolving capacities), it encourages a fair and balanced perspective. A balanced approach will hold both parties (parent(s) and child/ren) accountable and permeate each party's ability to give any acceptance or objection due consideration to enable a justified decision. This is best demonstrated in the form of a participation balance model (figure 2) to enable a child's participation in family decision-making processes.



(Figure 2) The balance model to involve children in family decision-making processes

5.1. The balance model explained

Protecting and promoting children’s right to participate in family decision-making processes through the balance model recognises the fact that children are not equal to their parents; that the traditional and customary superiority of parents as head of the family should be acknowledged;⁵⁰ that children involved in family decision-making processes alongside their parents are main (make their own decisions) and co-actors (make decisions together with their parents when necessary) depending on the issue discussed; and that parents need to fairly assist their children in making decisions. The

⁴⁹ See for example, N Lynch ‘Restorative justice through a children’s rights lens’ (2010) 18(2) *International Journal of children’s Rights* 171–173; U Kilkelly ‘Health and children’s rights’ in W Vandenhoe *et al.* (eds) *Routledge International Handbook of Children’s Rights Studies* (2015) 226–229.

⁵⁰ It could also extend to child-headed homes where the leading child could be granted the status of ‘parent’.

model, as discussed further below, recognises the fact that the development of a child's capacity to make constructive decisions is shaped to a significant extent by a child's own effort with increasing maturity and assistance from parents; that parents are duty bearers and could make decisions on behalf of their child in the child's best interests - especially in cases where the child cannot express his or her view on a matter concerning him or her; and that parents will be willing to allow a change in the balance at different periods as a child matures or can contribute substantively, irrespective of the child's age.

Crucially, the balance model acknowledges the fact that the state is not allowed to intervene in the family environment without persuasive reason and the intention to protect. The model, as proposed, encourages the state to aim at intervening especially in cases where the child's views have not been taken into consideration, or where the child is being abused and parental opinion is not in the child's best interests. The balance model also portrays (wishes) a state willing to accept a child's view even when the view or decision is different from the state's, but in the child's best interests.

Parties

As indicated in chapters five and six, children's right to participation does not grant them the right to self-autonomy. Although it grants them the right to have a view in the decision-making process of every matter that concerns them, it also suggests that any decision arrived at should be given due weight, according to their age and maturity. In the case of a family decision-making process, usually the primary responsibility to give due weight rests on parents or relatives with the legitimate responsibility to act as parents. The secondary responsibility lies with the state as a third force, if the final decision is not in the child's best interests. The role of the state is recognised under international law and grounded on the fundamental role that the state has to protect its citizens. As a result, the balance model encourages a three-party role system, intertwined at different intervals ranging from involving a child in a family decision-making process to giving his or her views due consideration based on his or her maturity and not age.⁵¹ The model encourages respect for parental rights, safeguarded in international law and further domesticated in national laws in Africa, as demonstrated in chapters two and three of this thesis.

⁵¹ Note: children and parents form the initial stage - during family decision-making processes - the state only comes in if there are difficulties at arriving at a decision or the decision arrived at is not in the child's best interests.

Components

It is worth noting that the ‘tools’ highlighted in the model are interrelated, especially because each aspect feeds the next. As seen in *figure 2*, these are space [time], involved, audience [attention] and influence [due consideration based on maturity] required to facilitate children’s participation in family decision-making processes. The tools have been adopted from Lundy’s Model of participation⁵² with some modifications. The modifications made to Lundy’s model are based on the trend developed through this thesis to involve children in family decision-making processes on all matters that concern them. Further, this thesis argues that at the family level, the aspect of “space” should extend beyond providing a child a safe place to include the crucial aspect of ‘time’.⁵³ Indeed, granting children the space and time to express themselves also gives parents a better opportunity to appreciate a child’s views and for an inclusive due weight to the views expressed. The second aspect which this thesis builds on is “Involved”, the crux of children’s right to participation, which means that they are involved in decision-making processes on matters that concern them. Involving children gives them the opportunity to express themselves as they best can. Lansdown holds that a child’s expression of his or her views could take any form including voice, facial expression and art⁵⁴ – as a result, a child’s involvement in a decision-making process should not be limited to verbal communication. The third aspect is “Audience”. It goes without saying that without an audience, in this case parents, the views of the child will not be given due consideration. As a result, this model insists on the fact that parents must pay undivided attention to a child, when he/she is expressing views in a matter that concerns him/her. Based on the issue at hand, this is the only way that parents will be able to give a child’s views due weight. The last component of the balance model is “Influence”. Just like any decision-making process, the decision arrived at is crucial, especially because, based on the decision, one could ascertain whether views of all the parties involved were considered and given due weight or not. Similarly, the extent of weight given to a child’s opinion in a family decision-making process can be measured based on the impact it had or did not have in the final decision. The weight of a child’s opinion, articles 12 of the CRC and 4(2) of the ACRWC, read jointly with article 5 of the CRC, dictates that it must be based on the child’s

⁵² Lundy (n 12 above).

⁵³ The difference with children participating in a public sphere is that such activities are – most of the time – planned and executed at a particular place, for example, children in parliament sessions.

⁵⁴ G Lansdown *The evolving capacities of the child*, (2005) 20.

maturity first, and not age.⁵⁵ Indeed, as has been raised previously, a child's capacity is often more a function of intellectual reach than physical years.

*Evolving capacity*⁵⁶

The balance model gives considerable significance to the evolving capacities of children, parent(s) and, by extension, the state as crucial role-player in achieving a meaningful participation and to ensure that a child is not only involved in a family decision-making process but that his or her views are duly considered. Also, the model regards evolving capacity as a tool, not only incumbent for a child to strengthen his or her capacity and ability to reason, but also on parents to continuously strengthen their ability to give due weight to a child's view. This perception is strongly rooted in the fact that parental ability to give due weight to a child's view should continuously evolve as a child's capacity evolves. Also, the model portrays the aspect of evolving capacity as the bridge between two fundamental divides (family as private space and state intervention) that might permeate or prohibit that due consideration is given to a child's views. In fact, the gap between what is legally permissible, such as the state's obligation to protect and promote the rights of its citizens and, what is sometimes customarily and legally prohibited, such as a state intervention into the family, remains an aspect of children's rights jurisprudence that should not be air brushed or limited only to very serious violations.

Legally, what is permissible and what is not permissible, especially in regard to parental obligation to listen to a child's views and to give such views due consideration, or state intervention into the family environment, is pacified by the fact that the codification of article 5 of the CRC, and the specific inclusion of the word 'appropriate' does not give African families (parents) a blanket rule to willy-nilly provide whatever direction or guidance they hold as suitable. This is especially because what parents might hold as suitable in a specific context might not be suitable for the child in that particular context – thus the need for an ice-breaker, the state. The introduction of the state as a watch-dog – only on call in a family decision-making process, is one of the main aspects of the balance model; it encourages an unprejudiced parental view, it discourages pre-decisions based on parental perception especially based on a child's age, and it also

⁵⁵ See also, ID Cherney 'Mothers', fathers', and their children's perceptions and reasoning about nurturance and self-determination' (2010) 18(4) *International Journal of Children's Rights* 88-94. See also, T Mangena & S Ndlovu 'Reflections on how selected Shona and Ndebele proverbs highlights a worldview that promotes a respect and/or a violation of children's rights' (2014) 22(3) *International Journal of Children's Rights* 662-664, in which they hold the view that 'a child is not just a minor but can also be a majority'.

⁵⁶ See, chapter 3 of this thesis for the explanation of the aspect of evolving capacity.

acknowledges the fact that, at some point, a child's views gain more strength as he or she matures. Most importantly, it helps to answer the following questions:

The question of capacity and conceptualisation of children's right under articles 12 of the CRC and 4(2) of the ACRWC

This model argues that the requirement of a child's capability to communicate his or her own views should not be restricted to verbal communication only. This is because communication, especially amongst some disabled children, and tiny babies, could take several forms, including art, body language, facial expression and action.⁵⁷ It is this broad categorisation of how a child can/should express his or her views, ascribed to this right and analysed by several scholars, for instance Lansdown,⁵⁸ which informs this model to approach articles 12 of the CRC and 4(2) of the ACRWC as children's right to participation rather than their right to be heard as the CRC Committee captured in its General Comment No 12.

Also, the model considers the influence of the evolving capacity and portrays the specific provisions as children's right to participation on the ground that the term 'participation', broadly, provides children with better ways of becoming involved in a family decision-making process. In fact, without limiting their access to 'voice' only, evolving capacity gives children of all walks of life, for instance, disabled, vulnerable or affected by discrimination or multiple-discrimination, the opportunity to express their views how they wish to. Indeed, the burden to enable meaningful participation only shifts to parents and/or the state, when required to give due consideration to any views expressed by a child based on his or her maturity.

The question of parental ability to give due consideration/weight to a child's views

Currently, and this is not only the case in Africa, the ability and willingness of parents to meaningfully involve children in family decision-making processes is still questionable. Indeed, this thesis has argued that this is one of the challenges that prevent children from appropriately benefitting from the intention of their right to participation at the family level. Generally, parents can only give what they have or aspects from the training (parental-rearing) they received during their childhood which, at the time, had little to do with having a right to express their views in family-decision making processes in Africa.⁵⁹ However, because it is progressive and not

⁵⁷ Lansdown (n 45 as above).

⁵⁸ Lansdown (as above).

⁵⁹ T Mangena & S Ndlovu (n 46 above) 660–670.

limited only to children, especially because it bears the capacity to recognise and encourage the evolution of parental skills, evolving capacity can improve parenting especially, in providing guidance and direction to a child. Also, it will assist parents, and grant them the opportunity to not only assume competence in children, but to listen to a child first and, based on the views expressed in a particular matter concerning the child, ascertain a child's competence before giving due weight to such views expressed with specific aim at what is in the child's best interest.

The question of the child's best interest

It is an open secret that the aspect of a child's best interests under international law remains a component in children's rights jurisprudence which should guide and direct any decision made with or without a child for a child. Indeed, it also represents one of the strongest justifications under both the international and African children's rights legislative and practical framework why it is necessary and crucial to involve children in a family decision-making process.⁶⁰ This is telling, as some of the most significant and well-documented African cases relating to or involving children have been decided chiefly on what is in the best interests, of the child.⁶¹ However, what really constitutes the best interests of a child has over the years been one of the most complicated key aspects which has, to some extent, made the understanding and implementation of children's rights as a whole, some kind of a double-edged sword. In the case of ensuring that a child enjoys his or her right to participation, the evolving capacity of the parties, as portrayed in the balance model, grants all parties the opportunity to identify what is in a child's best interest at a given moment. Also, it directs and determines the level of influence each party has in a given decision-making process at the family level. Under this model, parents have a correlative duty to ensure that a child's best interest is attained, at all times and the state has an interest in protecting what is best for the child if parents fail to do so.

⁶⁰ BK Twinomugisha *Fundamentals of health law in Uganda* (2015) 208.

⁶¹ See for example, amongst other cases cited in this thesis, *C.K. (a child) (through Ripples International as her guardian and next friend) and others v Commissioner of police / Inspector general of the national police service and others Petition 8 of 2012 [2013] eKLR*, in which it was held amongst others that it was in the best interests of the child for the state to conduct a comprehensive and thorough investigation into complaints of statutory rape.

The question of African ethical, cultural and social family practices

A considerable part of this question has been investigated and answered by an array of reputable empirical research studies conducted by legalists,⁶² sociologists⁶³ and anthropologists⁶⁴ across the African continent. Some of these contributions have informed the arguments and analysis in previous chapters and form the basis on which the balance model is structured. Worth noting in this context is the fact that fundamental African ethical, cultural and social practices are cognizant of the fact that, generally, participation in a decision-making process gives any individual or group the opportunity to have an influence on the decision that would be arrived at.⁶⁵ With the assistance of the evolving capacity, the balance model introduces a child who is waiting for the opportunity to be involved in family decision-making processes on all matters that concern him or her. Also, it introduces a child who knows what he or she wants, a child who also knows that what he or she wants might neither be what he or she needs nor is in his or her best interest. Furthermore, the model introduces a rational child with moments of irrationality, because he or she expects that his or her parents will help to know and help to make decisions that are in his or her best interests. Indeed, as Mangena holds, “dependency is a defining necessary element of childhood, and children have a right to enter into it with trust”.⁶⁶ It also holds that parents, despite their cultural ethos, know that the best interests of the child and not theirs should prevail in any decision on a matter regarding a child.

⁶² T Kaime ‘The Convention on the Rights of the Child and the cultural legitimacy of children’s rights in Africa: Some reflections’ (2005) 5(2) *African Human Rights Law Journal* 221-238; T Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009); T Kaime ‘Vernacularising’ the Convention on the Rights of the Child: Rights and cultures as analytic tools’ (2010) 18(4) *International Journal of Children’s Rights* 637-653; T Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* (2009); AA An-na’im ‘The interdependence of religion, secularism, and human rights: Prospects for Islamic Societies’ (2005) 11(1) *Common Knowledge Winter* 56-80.

⁶³ GK Nukunya *Tradition and change in Ghana: An introduction to sociology* (2003); A Twum-Danso ‘Reciprocity, respect and responsibility: The 3Rs Underlying parent-child relationships in Ghana and the Implications for Children’s Rights’ (2009) 17(3) *International Journal of Children’s Rights* 415-43. See other but similar examples further afield; R Richter & U Zartler ‘Children participating in family decisions’ (2011) 32 *Revista de Cercetare si Interventie Sociala* 7-24.

⁶⁴ See for example, RK Hitchcock ‘Indigenous children’s rights and well-being: Perspectives from Central and Southern Africa’ in DJ Johnson *et al* (eds) *Vulnerable Children: Global Challenges in Education, Health, Well-being, and Child Rights* (2013) 219-223 and 225-232; RK Ame ‘Traditional religion, social structure, and children’s rights in Ghana: The making of a *trokosi* child’ in DJ Johnson *et al.* (eds) *Vulnerable children: Global challenges in education, health, well-being, and child rights* (2013) 240-252.

⁶⁵ Kaime (n 53 above).

⁶⁶ T Mangena ‘Suffer little children: Zimbabwean childhood literacy representations in the context of crisis’ (2011) 19(2) *International Journal of Children’s Rights* 207.

The question of the state's intervention into the family environment

Although African states are parties to the CRC and the ACRWC, these treaties do not give the state an open access into the family environment. However, there is significant agreement [see chapter four and five of this thesis] that there are instances where the state, through its agencies for example, the court – should intervene into the family environment, override parental influence to protect a child.⁶⁷ International law recognises such instances through the extensive interpretation of its accord to states, the responsibility to assist parents in the upbringing of a child.⁶⁸ It is in providing this assistance, and the intrinsic nature of state obligation to protect its citizens that the involvement and influence of the state cannot be completely discarded in assisting children to enjoy their right to participation in family decision-making processes.⁶⁹ Parental evolving capacity should inform parents when to appreciate state interference and the fact that it is intended to protect the child and not to spirit away parental authority.

6. Conclusion

The legal and practical meaning of children's participation and specifically their right to participate in family decision-making processes that has been analysed in this thesis offers an illustration of where the primary cynicism about the reliability and validity of children's opinion has given way to a more dominant parental opinion. Parental trust and reliance on children's opinion is still very weak and only becomes stronger as the child grows older. The reason for this, as has been discussed in this thesis, is based on the fact that decisions on issues that concern children could be complex. As seen above, it could require the logical mixture of medical, legal, social and ethical issues. In the case of children, it is difficult to sever or to isolate any of these, as what is ethical within a given family might not correlate with legal standards or contemporary medical practice. The participation models discussed above have, to a great extent, attempted glossing children's right to participation by explaining what it is and what it entails and what any decision on a matter concerning a child should focus on. However, the models have been

⁶⁷ Contemporary parenting is aware of such possibility especially because several African states have established 'hotlines' which can be used by any member of the family to invite a state agency – police - into the family environment to protect a child. In South Africa; 10111, Angola; 113, Botswana; 999 and Egypt; 122.

⁶⁸ This responsibility is visible throughout the CRC and the ACRWC.

⁶⁹ See chapter 5 for detailed analysis of state interference.

adopted to best suit such participation in the public sphere – the private sector has not extensively been explored.

Reflecting on the practice in the private sphere in an African context with the assistance of selected court cases, this thesis has displayed the fact that although typical African traditional practices, legal and policy frameworks do grant much power to parents to ensure the well-being of children and to ensure their right to participation, such authority is only limited to the extent that its final decision gives due weight to children's views in the child's best interest.

In assisting in the interpretation and implementation of this right, in the private space, this thesis has suggested the balance model, which to a great extent calls for parental education to include aspects of how to involve children in the decision-making processes on matters that concern them. While this thesis is convinced that the balance model proposed above is potentially applicable to various religious, cultural and political contexts across the globe, the author's primary concern as an African is the prospect for this approach and model in Africa. In so doing, this thesis insists on the fact that such education should not be void of a fair consideration of the cultural and traditional norms which do not corroborate with the spirit and the provisions of both the CRC and the ACRWC on which most families are found. Else, a complete discard of standing traditional and customary values that are not repugnant to natural justice equity and good conscience could be an open invitation to resistance from parents.

Reaching this point, building from the introduction provided in chapter one, chapters two, three and four set the stage by analysing legal, policy and institutional frameworks both at the international level and in specific national laws in Africa. Legally, it is the role of the state not only to ratify international instruments, but also to domesticate them, and African states have done impressively well in domesticating children's rights as a whole and specifically their right to participation. It is for this reason that the introduction of the state as a third party – on call – to intervene in a family decision-making process, has been recognised in the balance model as bearing a *watch-dog* status. The model also calls on parents to recognise and accept the role of the state as beneficial to protecting children rather than arbitrary to family values. Indeed, chapters five and six have attempted to justify this relationship through the lens of health and medical treatment and, in the process, indicated the extent to which each authority involved in such decision-making processes has to go, but not beyond what is in the particular child's best interests. In a nutshell, if the African community wants to build a society, through the lens of human rights and particularly the rights of the child to participate in all matters that concern the child, children need to be involved in current

decision-making processes both in the private and the public sphere not only to grant them their rights, but to also equip them to also grant the same opportunity to their children.

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Elvis Mukumu Fokala

Implementing Children's Right to Participation in Family Decision-Making Processes in Africa

This contribution acknowledges and adds to the wealth of literature already written by children's right experts as it pays particular attention to one of the most delicate rights ascribed to children in article 12 of the CRC and article 4(2) of the African Children's Charter protecting children's right to participation. Research on children's right to participation in particular, is still embryonic in Africa and this contribution dares to exploit the unfortunate gap created by such limited research. The author acknowledges that the scarcity of research exploring the applicability of children's right to participation could be based on the diversity of cultural and parenting styles extant in Africa. This contribution also holds that the limited application of children's right to participation in family decision-making processes is also exacerbated by the strong position of parental responsibilities and rights recognised in legal instruments in Africa. The author concludes with the introduction of the balance model to ease children's right to participation in family decisions-making processes.