

Implementation of the right of the child to be heard under article 12(1) of the Convention on the Rights of the Child in Nigeria: Lessons from South Africa

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Summary: *Article 12(1) of the United Nations Convention on the Rights of the Child provides for the child's participatory rights. The reference to 'in all matters' indicates that article 12(1) rights is more comprehensive, in that it covers both the private and public spheres of society and creates duties on the state concerning matters left for actors in the private area such as the family. The regional African Charter on the Rights and Welfare of the Child emphasises the preservation of tradition and culture, promoting African morals and values in children's lives, and imparting duties towards family, community and society. CRC and the African Children's Charter are the bedrock of children's rights implementation in Africa. This article examines the implementation of article 12(1) of CRC in domestic children's rights laws in Nigeria and South Africa. While the South African children's law explicitly contains a replica provision of article 12 of CRC reflecting the principles and provisions of the Convention, the Nigerian children's law omits this provision but contains article 12 of CRC in principle scattered in the implementing statute within the meaning of the best interests of the child, the right to*

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freedom of expression under the Constitution. It concluded that having a replica of article 12 CRC provisions in the Nigerian Children's Act will serve as a tool for a rights-based approach advocacy, harmonise its legislation so that it is in line with CRC and makes for greater legislative clarity in terms of children's participation rights within the family as is shown by the South African example discussed in the article.

Key words: *children's rights; participation; decision making; implementation*

1 Introduction

The 1989 United Nations Convention on the Rights of the Child (CRC) is one of the international instruments that broadened children's rights and placed it on the governmental agenda.¹ CRC was widely ratified by countries and created a universal standard for the rights of the child globally.² The fundamental objective of CRC is to establish the status of children as rights bearers and for their rights to be considered equally important to those of adults when it comes to respect and fulfilment.³

The Guiding Principles of CRC include non-discrimination (article 2); the best interests of the child (article 3); the right to life (article 6); the right to survival and development (article 6); and the right to participation (article 12). Together, these provisions form the backdrop against which all actions of state parties to CRC are to be measured.⁴ Although all the preceding provisions are relevant to the participatory rights of the child, the discussions in this contribution are limited to the right to participate in article 12(1) of CRC.

Aside from this, CRC's recognition of normative diversity is also discernible throughout its provisions. For instance, CRC emphasises

1 G van Bueren *The international law on the rights of the child* (1995) 310; J Todres 'The emerging limitations on the rights of the child' (1998-1999) 30 *Columbia Human Rights Law Review* 161-162.

2 The United States of America and newly-created state of South Sudan are yet to ratify the Convention. Somalia ratified CRC on 20 January 2015, http://www.africanchildinfo.net/index.php?option=com_k2&view=item&id=6915#.VMfuXdlvnYo (accessed 15 March 2019).

3 United Nations Convention on the Rights of the Child adopted and opened for signature, ratification and accession by GA Resolution 44/25, 1577 UNTS 3 (20 November 1989). The Convention entered into force on 2 September 1990.

4 A Parkes *Children and international human rights law: The rights of the child to be heard* (2013) 260-261. See also UN Committee on the Rights of the Child Rules of Procedure CRC/C/Rev 4 Rule 77 (18 March 2015). See also S Varanda 'The principle of evolving capacities under the UN Convention on the Rights of the Child' (2019) 27 *International Journal of Children's Rights* 308.

the importance of cultural values for the protection and harmonious development of a child.⁵ Article 30(1) provides that the children of indigenous populations should not be denied the right to enjoy their own culture, religion and language. Furthermore, in terms of article 30(2), state parties must respect and promote children's rights to fully participate in cultural activities. An individual's right to participate in cultural practices is a way to express common sense of identity, values and tradition.⁶ CRC, therefore, acknowledges the interrelation of cultural values, and the realisation of children's rights under article 12(1) of CRC within the domestic legal system of the various state parties.⁷

The regional children's legislation in Africa – the African Charter on the Rights and Welfare of the Child (African Children's Charter) was developed in response to the need for a document that expressly considered the qualities of African cultural heritage, historical context and African civilisation values, and that 'should inspire and characterise their reflection on the concept of the rights and welfare of the child'.⁸ The need for the African Children's Charter was predicated on the perceived failure of CRC to take into cognisance the essential values and the economic realities of the African region.⁹ The African Children's Charter as a children's rights instrument majorly influenced the application of children's rights in the implementing laws of African countries.

5 In furtherance of the above acknowledgment of a diversity of cultures by CRC, art 8(1) obliges state parties to respect the right of the child to preserve their identity. Similarly, art 29(1)(c) provides that education shall be directed towards the development of respect for cultural identity and values.

6 T Boezaart 'Building bridges: African customary family law and children's rights' (2013) 6 *International Journal of Private Law* 396.

7 Suffice to also say that the interplay and realisation above are key aspects to children's rights and legal pluralism in human rights discourse. In fact, there are various legal contributions on how the implementation of children's rights under CRC and local norms interrelate. See C Giselle & D Ellen 'A review of literature on children's rights and legal pluralism' (2015) 47 *Journal of Legal Pluralism and Unofficial Law* 226-245; Boezaart (n 6) 395; S Harris-Short 'International human rights law: Imperialist, inept and ineffective? Cultural relativism and the UN Convention on the Rights of the Child' (2003) 25 *Human Rights Quarterly* 130-181; T Kaime 'The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections' (2005) 5 *African Human Rights Law Journal* 221-238; R Songca 'Evaluation of children's rights in South African law: The dawn of an emerging approach to children's rights' (2011) 44 *Comparative and International Law Journal of Southern Africa* 340-359.

8 See the Preamble to the African Children's Charter. See also Boezaart (n 6) 397.

9 D Olowu 'Protecting children's rights in Africa: A critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights* 127; F Viljoen 'Why South Africa should ratify the African Charter on the Rights and Welfare of the Child' (1999) 116 *South African Law Journal* 661; F Viljoen 'State reporting under the African Charter on Human and Peoples' Rights: A boost from the south' (2000) 44 *Journal of African Law* 110. The author alluded to the fact that 'the reasons why a regional charter was adopted were the side-lining of Africans from the UN drafting process and the exclusion of "African-specific" issues from the CRC'.

Nigeria and South Africa are multicultural state parties to CRC,¹⁰ which domesticated the provisions of article 12(1) CRC in distinctive ways.¹¹ The diversity and the complexity of the task of implementing legislation in a multicultural context is a crucial reason for choosing these countries as a point of discussion.¹² Besides these two multicultural states operating a constitutional democracy, they also share a common law tradition as well as a federal characteristic.¹³ Therefore, it is imperative to study how their article 12(1) CRC implementation obligation is exercised and described.

The approach adopted to investigate the issue of article 12(1) implementation in these countries focuses on one level of implementation, which is the specific children's rights legislation of the respective jurisdiction, namely, the Nigerian Child's Rights Act¹⁴ and the South African Children's Act respectively.¹⁵ These pieces of legislation are critical to the overall implementation of the CRC provisions in these countries. The extent to which the domestic children's laws reflect the principles as well as the spirit and intent of article 12(1) of CRC in terms of children's rights to participation within the family are discussed.

However, before proceeding to discuss the implementation of article 12(1) in the domestic laws of the aforementioned state parties, one must first consider the main features and perspectives of children's rights to participation under article 12(1) of CRC.

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- 10 Nigeria as a member of the UN ratified CRC on 19 April 1991. South Africa ratified CRC on 16 June 1995. See Office of the High Commissioner of Human Rights Status of Ratification of the Convention on the Rights of the Child, <https://www.ohchr.org/en/instruments-mechanisms/instruments/convention-rights-child> (accessed 15 March 2020).
 - 11 See discussion in the subsequent parts for the adopted implementation approach of art 12 of CRC in Nigeria and South Africa respectively.
 - 12 The people of Nigeria are extremely diverse, with over 250 ethnic groups speaking over 500 indigenous languages. See E Durojaiye and others 'Harmful cultural practices and gender equality in Nigeria' (2014) 12 *Gender and Behaviour* 6169-6181; PAO Oluyede 'Constitutional law in Nigeria' (1992) 21; AA Oba 'Religious and customary laws in Nigeria' (2011) 25 *Emory Law Review* 881-895; Central Intelligence Agency 'Country profile: Nigeria' 2018, <https://www.cia.gov/library/publications/the-world-factbook/geos/ni.html> (accessed 20 April 2019). South Africa is a union of nine provinces, reflecting not only a geographical but also a rich cultural diversity. M Alexander 'The nine provinces of South Africa', <https://southafrica-info.com/land/nine-province-south-africa/> (accessed 18 November 2024).
 - 13 On the Nigerian federal system of government, see secs 4(1), 5(1)(a) & 5(2)(a) of the 1999 Constitution of Nigeria. See also Durojaiye and others (n 12) 6169-6181. On the South African system of government, see L Mhlongo 'A critical analysis of South Africa's system of government: From disjunctive system to synergistic system of government' (2020) 41 *Obiter* 257-274.
 - 14 Nigerian Children's Rights Act 2003 Cap C50, Laws of the Federation of Nigeria 2004.
 - 15 South African Children's Act 38 of 2005.

2 Article 12 of CRC – rights to participate in decision making

Article 12 of CRC is the distinct provision that takes cognisance of the participatory rights of the child. Paragraph 1 of Article 12 obliges state parties to ‘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’.

Article 12(2) builds on the above by stating that the child shall be afforded the right to be heard in judicial or administrative proceedings that affect the child. However, the focus of this contribution is on participation under sub-section (1), more specifically concerning children expressing their views and having these views be afforded due weight in the context of the family.

What is noticeable from the components of the article 12(1) provision above is that the rights of children to express views does not refer to any age limit.¹⁶ When commenting on article 12(1) of CRC, Stern¹⁷ pointed out that ‘[c]hildren from a very early age can form views and wishes, even though they might be communicated in ways other than through speech – for example, in play, art or other forms of oral expression’.¹⁸ Similarly, Lansdown¹⁹ points out areas where young children can demonstrate equal or greater competence on issues, for instance, in terms of their ‘capacity to acquire IT skills, remember where things are, use their imaginations, mediate between arguing parents, show a willingness to forgive, learn new languages, or express creativity, love and compassion’.²⁰

From the preceding, the provision of article 12(1) on participation extends to children who can understand and contribute thoughtful opinions on a range of issues affecting them and to children from the very youngest of ages who can form views, even where they are not able to communicate verbally. In other words, there should be no lower age limit on the right to participate, and it should not be limited to the expression of views in ‘adult’ language.²¹ The

16 See art 12(1) CRC.

17 R Stern ‘The child’s right to participation – Reality or rhetoric?’ PhD thesis, Uppsala University, 2006 160 (on file with author).

18 As above.

19 G Lansdown *Participation and young children* (2004) 4-5.

20 As above.

21 Stern (n 17) 160; G Lansdown ‘The realisation of children’s participation rights: Critical reflections’ in P Percy-Smith & N Thomas (eds) *A handbook of children and young people’s participation* (2010) 12; Lansdown (n 19) 4-5.

implementation of article 12, therefore, requires recognition of and respect for non-verbal forms of communication such as ‘play, body language, facial expression, or drawing and painting, through which very young children make choices, express preferences and demonstrate an understanding of their environment’.²²

Furthermore, what is noticeable from the components of article 12(1) is that children who wish to participate have the right to freely convey their views and opinions without any limitations. Therefore, children should not be ‘subject to influence, constraint or pressure from parents, authorities or any other actors that might prevent the expression of the child’s views’.²³ Included in this right is the right to be provided with the access to appropriate information for an informed decision, because a decision cannot be considered free if it is not an informed decision;²⁴ so also, the right not to express a view or position, as freedom of expression also entails the right to choose to remain silent.²⁵ Therefore, to contribute their views freely, children need access to appropriate information and to safe ‘spaces’ where they are afforded the time, encouragement and support to enable them to develop and articulate their views.²⁶

Furthermore, the reference to ‘in all matters’ indicates that the participatory rights in article 12(1) are not limited to matters that are explicitly dealt with in CRC.²⁷ In other words, ‘in all matters’ entails that participation right extends to all actions and decisions that affect children’s lives and it applies both to issues that affect individual children, and children as a group.²⁸ Tisdall and others,²⁹ for example, when explaining children’s participation stated the following: ‘Their very behaviour – going to or absenting themselves from school, their activities in public space, their everyday actions within their families, with peers, with others in their communities – are all forms of participation.’³⁰

22 Lansdown (n 21) 12; Lansdown (n 19) 4-5.

23 Stern (n 17) 161.

24 Lansdown (n 21) 12.

25 M Santos-Pais & S Bissell ‘Overview and implementation of the UN Convention on the Rights of the Child’ (2006) 367 *The Lancet* 426.

26 Lansdown (n 21) 12.

27 See subsequent discussion in this article that describes participation.

28 It applies to individual children, such as parental contact following divorce, and children as a group, such as the quality of child care or play facilities. See Lansdown (n 21) 12; Stern (n 17) 162; MF Lücker-Babel ‘The right of the child to express views and 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* 396.

29 KM Tisdall and others ‘Reflecting upon children and young people’s participation in the UK’ (2009) 16 *International Journal of Children’s Rights* 419-429.

30 Tisdall and others (n 29) 419.

Similarly, Hart³¹ describes participation as '[t]he fact of being involved in the decision-making that concerns oneself and that concerns the life of the community in which one lives', while, Moosa-Mitha³² describes participation as '[t]he expression of one's agency in the multiple relationships within which citizens are present in society'.³³ From the foregoing, it therefore seems that the scope of the article 12(1) participation rights is more comprehensive, in that it covers both the private and public spheres of society and creates duties on the state concerning matters left for actors in the private area such as the family.

In terms of 'in all matters' within the family, decisions that affect a child taken in the family setting may be considered trivial or casual, and formal or significant decisions.³⁴ Trivial or everyday decision making may revolve around, but is not limited to, participating in social aspects of family decisions such as the family's daily food consumption, choice of clothing and extra-curricular activities.³⁵ According to Sutherland,³⁶ 'what the child wears to school may seem relatively trivial to an adult, but it may matter for the child's sense of self and may be important for the child's interaction with his or her peers'. In terms of formal or significant participation, this may involve the legal aspects of family decisions regarding health matters,³⁷ the choice of school and other significant matters that may affect the child, such as cultural practices or religious belief(s) or faith.³⁸

Another essential component of article 12(1) is that children have the right to express their views and, more importantly, to have those views taken seriously.³⁹ Therefore, state parties must provide children

31 R Hart *Children's participation: From tokenism to citizenship* (1992).

32 M Moosa-Mitha 'A difference-centred alternative to theorisation of children's citizenship rights' (2005) 9 *Citizenship Studies* 369-388.

33 Moosa-Mitha (n 32) 375.

34 E Sutherland 'Listening to the child's voice in the family setting: From aspiration to reality' (2014) 26 *Children and Family Law Quarterly* 156. It is not within the focus of this contribution to discuss one after the other all forms of child participation in the family as they are endless. However, references to participation within the family herein are used interchangeably and in the context of both trivial and major participation.

35 J Mason & N Bolzan 'Questioning understandings of children's participation: Applying a cross-cultural lens' in B Percy-Smith & N Thomas (eds) *A handbook of children and young people's participation* (2010) 129. Australia and China were mentioned in their study as places where decision making within the family revolves around interactions on clothes, family food consumption and extra-curricular activities.

36 Sutherland (n 34) 156.

37 Specifically, in the discussion later, the extent of decisional autonomy by the child in health matters under South African legislations is elaborated upon.

38 Article 14(3) of CRC provides for the freedom of a child to manifest their religion or beliefs which may be subject only to such limitations as are prescribed by law and are necessary to protect public safety, order, health or morals, or the fundamental rights and freedom of others.

39 Lansdown (n 21) 12.

capable of self-expression, the platform to air their views through verbal and non-verbal means,⁴⁰ with the possibility that these views influence any decisions taken.

Requiring that attention is given to both 'age and maturity' when considering the views of the child shows that article 12(1) makes it clear that age on its own should not be used to limit the significance accorded to children's views.⁴¹ Lansdown⁴² argues that age alone is not a sufficient criterion and reliable indicator of an individual's capability and capacity to seek and analyse information and to understand the consequences of decisions made. The child's individual experiences and abilities, available support from adults present in the child's life, the peculiarity and social context of the child all form the components to be considered in a specific assessment.⁴³ Therefore, to be considered alongside age and maturity is the rights and duties of parents as expressed in article 5, to provide the child with appropriate direction and guidance.⁴⁴

Furthermore, giving due consideration to children's views does not necessarily mean that the child's preference should be accorded systematic pre-eminence. However, such views should be considered in light of the nature of the problem and the child's developing maturity.⁴⁵ According to Lansdown,⁴⁶ 'consideration has to be given to their level of understanding of the issues involved while also protecting their best interests'. In other words, the extent to which the child's views should be respected needs to 'reflect the risks associated with the decision involved'.⁴⁷ For instance, a child of two years old cannot be left to decide to run into a busy road. However, with knowledge about the weather and the day's activities in hand, the child can take part in deciding what clothes to wear. A decision about whether or not to wear a coat to school, for example, will be based on a comparison of the harm that could be caused by compelling a child to wear a garment the child perceives as restrictive versus the risk of the child catching a cold.⁴⁸

40 CRC Committee General Comment 12 'The right of the child to be heard' CRC/C/GC/12 (2009) para 21.

41 Lansdown (n 21) 12.

42 Lansdown (n 19) 3-5.

43 Lansdown (n 21) 3.

44 Stern (n 15) 164. She is of the view that these factors can somewhat limit the extent to which children's voices are appreciated.

45 A Moyo 'Reconceptualising the "paramountcy principle": Beyond the individualistic construction of the best interests of the child' (2012) 12 *African Human Rights Law Journal* 176.

46 Lansdown (n 19) 5.

47 As above.

48 Lansdown (n 19) 5-6.

Apart from the principal components of article 12(1) of CRC on a child's participation referred to above, article 12(1) together with the other intertwining provisions has been broadly and variously conceptualised as 'participatory rights', empowerment rights or 'autonomous participation rights'.⁴⁹ For example, the General Comment of the Committee on the Rights of Child (CRC Committee) indicates that participation is '[w]idely used to describe ongoing processes'. This process includes information sharing, mutual respect in terms of dialogue between children and adults, 'in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes'.⁵⁰

Another example of a broader view of participation is that of Parkinson and Cashmore.⁵¹ They described children's participation broadly as a process that involves having a 'voice', for instance, control of the process, and having a 'choice', for example, control over the decision. The preceding entails children being informed about a decision that will be or has already been taken, being consulted for purposes of expressing a view, having an opportunity to influence the outcomes, and making independent decisions if the child in question has the intellectual and emotional competence to do so.⁵²

In light of the preceding, participation can be summarised to include specific characteristics such as inclusion, transparency, communication, equality and empowerment.⁵³ Children's participation, thus, can generally and usefully be described as a joint task which is difference-centred, acted out in private and public spaces individually and collectively.⁵⁴ It necessarily entails a relational space, where children play, grow, learn and work.⁵⁵ Thus, participation encompasses a broad understanding of recognising children's everyday experiences, including being an autonomous individual⁵⁶

49 It is important to note that commentators on CRC use varied terminologies to describe these provisions, eg, 'participatory rights' and 'empowerment rights', and some have referred to these as 'autonomous participation rights'. See Lüker-Babel (n 28) 392. Therefore, in this article these terminologies are used interchangeably.

50 UN Doc General Comment CRC/C/CGC/2009/12 para 2.

51 P Parkinson & J Cashmore *The voice of a child in family law disputes* (2008) 20-21.

52 Moyo (n 45) 173.

53 See the analysis above on degrees of participation and participation generally. See also Stern (n 17) 153.

54 H Deirdre and others 'Children's participation: Moving from the performative to the social' (2016) 15 *Children's Geographies* 3.

55 Deirdre (n 54) 3-4.

56 G Mower *The Convention on the Rights of the Child: International law support for children* (1997) 4.

capable of making and participating in decision making within the family.⁵⁷

As is mentioned earlier in the introductory part, it is also clear that CRC recognised or acknowledged culture, tradition and the family as central in the socialisation of children from childhood to adulthood.⁵⁸ It follows logically that the implementation of CRC within the multicultural state parties will bear a specific socio-cultural context.⁵⁹ In fact, and as mentioned earlier, the regional children's legislation in Africa – the African Children's Charter – was developed to expressly consider the qualities of African cultural heritage, historical context and African civilisation values, and that 'should inspire and characterise their reflection on the concept of the rights and welfare of the child'.⁶⁰ The place of the African Children's Charter on the right to participation and how participation is drawn per the peculiarity of the African society will be discussed later in the article.

However, in the determination of which values must take precedence between article 12(1)'s children's autonomous participation right and the cultural values within the context of the family, recourse must be had to the interpretation principle of CRC in terms of its holistic approach,⁶¹ what article 12(1) provisions entail, and the fact that article 24(3) obliges state parties to take all effective and appropriate measures to abolish traditional practices that are prejudicial to the health of children.⁶² Furthermore, the CRC Committee had consistently stated in their response to state parties' reports on the implementation of CRC to prioritise article 12 rights of the child over cultural considerations. It is submitted that under CRC, article 12(1) rights supersede cultural consideration or practices.⁶³

57 E Such & R Walker 'Young citizens or policy objects? Children in the "rights and responsibilities" debate' (2004) *Journal of Social Policy* 39-57; M Freeman 'Why it remains important to take children's rights seriously' (2007) 15 *International Journal of Children's Rights* 5-23.

58 See the introductory part of this article.

59 According to Mutua, the implementation of CRC in the African context, eg, must bear what he terms the 'the African cultural fingerprint'. See M Mutua 'The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties' (1995) 35 *Virginia Journal of International Law* 351.

60 See the Preamble to the African Children's Charter. See also Boezaart (n 6) 397.

61 Parkes (n 4) 260-261. According to the author, CRC enjoys a holistic nature of interpretation and implementation approach. It goes, therefore, that even though most of the CRC articles include elements that amount to either civil or political rights, there is no distinction in terms of the human rights as contained in CRC.

62 Although these provisions did not specifically mention children's rights to participation, denying children rights to participate in matters affecting them can be regarded as traditional practices harmful to them. See Kaime (n 7) 227.

63 See General Comment 5 CRC/C/GC/2003/5 para 20 where the Committee recommended that the provisions of CRC should prevail where there is a conflict with domestic legislation or common practice. See also Kaime (n 7) 227.

The above position rationally ought to have settled likely conflict or dispute at the domestic level for all state parties. However, this seems not to be the case in certain state jurisdictions in terms of their implementation in children's domestic legislation. However, before proceeding to examine the Nigerian and South African implementation approach to article 12 of CRC in their domestic children's legislations, it is considered necessary to further reflect on the place of the African Children's Charter on rights to participation within the family and how participation is drawn per peculiarity of the African society, highlighting specific factors that may impede or limit the application of article 12 of CRC in African countries.

3 African Children's Charter and children's participation rights

As stated earlier, a critical value that the African Children's Charter puts on the front burner is the preservation of tradition and culture. In its Preamble the Children's Charter urges state parties to consider the virtues of cultural heritage, 'historical background and the values of African civilisation'.⁶⁴ The Children's Charter also alludes to the negative impact of, among other things, culture on the situation of children in Africa.⁶⁵ Article 1(3) of the African Children's Charter states that 'any custom, tradition, cultural or religious practice' that is incompatible with the Charter's rights, duties and obligations must be discouraged to the extent that it is incompatible'.⁶⁶ Other provisions, such as article 11(2)(c), enjoins state parties to focus children's education on preserving and promoting African morals, traditional values and cultures, as well as respecting and encouraging children to participate in cultural activities. Thus, the preservation of African cultural value is a 'linchpin' of the African Children's Charter.⁶⁷

Article 31 on the duties of the child is a significant African cultural value addition to the African Children's Charter not contained in CRC. It imparts duties and responsibilities on children, emphasising their responsibility towards their family, community and society.⁶⁸ This is based on the traditional African view that individuals have rights and duties within the family and society, and they must contribute to their greater good.⁶⁹ In other words, in the context of

64 See the preamble to the African Children's Charter.

65 Boezaart (n 6) 397.

66 As above.

67 A Lloyd 'The African regional system for the protection of children's rights' in J Sloth-Nielsen (ed) *Children's rights in Africa: A legal perspective* (2008) 33.

68 See art 31 of the African Children's Charter.

69 Z Motala 'Human rights in Africa: A cultural, ideological, and legal examination' (1988-1989) 12 *Hastings International and Comparative Law Review* 403.

African society, communalism or collective solidarity in relation to child's participation within the family exists. This communal system not only recognises the devolution of authority in the family but also distributes rights, duties and responsibilities accordingly to every member of the family.⁷⁰ However, the addition of duties by the African Children's Charter does not mean that children are subject to whims of their families and society. The Preamble to article 31 introduces duties subject to age and ability, and the child's duties are subject to limitations as contained in the Charter.⁷¹ The first qualifiers require an open-ended assessment of the child's evolving capacity and ability,⁷² similar to CRC's recognition of children's participation rights.⁷³ The second qualifiers subject the child's duties to general clauses and specific protection from abuse, neglect and exploitation.⁷⁴ Finally, when it comes to limits in article 31, the three general principles of the African Children's Charter, namely, 'the best interests of the child, non-discrimination and the right to life, survival and development' must be considered.⁷⁵

Sloth-Nelson and Mezmur⁷⁶ argue that the obligation to respect parents, elders and superiors under the African Children's Charter is similar to positive traditions in African child-rearing practices, 'constituting an asset to the upbringing of African children'.⁷⁷ They argue that respect promotes cohesion and mutual support within the family and the community.⁷⁸ The socialisation goals and participation within the family and society are on raising responsible children who obey and respect their parents and elders.⁷⁹ Therefore, the African Children's Charter aims to celebrate the 'positive aspects of African child-rearing practices in nurturing a respectful society'.⁸⁰

In light of the foregoing, the African Children's Charter seems similar to CRC but also established innovative provisions that are relevant, useful and peculiar to Africa and African children. In terms of similarity, the Children's Charter also adopts the same protection,

70 TW Bennett 'The cultural defence and the practice of *thwala* in South Africa' (2010) 10 *University of Botswana Law Journal* 17.

71 For a further discussion on this matter, see J Sloth-Nielsen and BD Mezmur 'A dutiful child, the implication of article 3 of the African Children's Charter' (2008) 52 *Journal of African Law* 159-189.

72 See the preambular para of art 31 of the African Children's Charter.

73 See earlier discussion on this issue above.

74 Sloth-Nielsen and Mezmur (n 71) 170-173.

75 Sloth-Nielsen and Mezmur (n 71) 173-177.

76 Sloth-Nielsen and Mezmur (n 71) 159-189.

77 Sloth-Nielsen and Mezmur (n 71) 177.

78 Motala (n 69) 381; A Twum-Danso 'Reciprocity, respect and responsibility: The 3Rs underlying parent-child relationships in Ghana and the implications for children's rights' (2009) 17 *International Journal of Children's Rights* 421.

79 Sloth-Nielsen and Mezmur (n 71) 177.

80 As above.

participation and prevention concepts as in its Guiding Principles for defining child rights akin to CRC. Similar to CRC, the African Children's Charter also protects the right to life;⁸¹ the right to equality;⁸² the right to a name and nationality;⁸³ rights to survival and development;⁸⁴ the right to health;⁸⁵ and the best interests of the child,⁸⁶ among others.⁸⁷ The African Children's Charter was developed 'in tandem' with CRC, and not in opposition to it.⁸⁸ Therefore, CRC and the Children's Charter can both be said to provide a framework upon which children's rights are considered and fostered on the African continent, with the latter aligning more to Africa's historical and cultural heritage and taking the value systems of the continent into account. However, the extent to which children may exercise their autonomous participatory rights under CRC and the African Children's Charter differs slightly. For example, article 7 of the Children's Charter grants these rights to children capable of expressing their views, subject to 'such restriction as are prescribed by law'.⁸⁹ Additionally, the African Children's Charter in article 10 imposes a limitation on the privacy rights of children by obliging parents 'to exercise reasonable supervision over the conduct of their children'.⁹⁰ These limitations may affect the exercise or enjoyment of those rights, suggesting that children are less considered autonomous human beings under the African Children's Charter than in CRC.⁹¹

Questions have justifiably been asked as to the desirability and applicability of the CRC construction of the autonomous child in those socio-cultural contexts where the autonomy of the individual is not emphasised as much as their interdependence and duties within the family and the community,⁹² as is especially the case with Africa and Asia, as well as among ethnic migrants and indigenous

81 Art 6 CRC; art 5 African Children's Charter.

82 Art 2 CRC; art 3 African Children's Charter.

83 Art 7 CRC; art 6 African Children's Charter.

84 Art 14 African Children's Charter.

85 Art 16 African Children's Charter.

86 Art 4 African Children's Charter.

87 See J Sloth-Nielsen & BD Mezmur 'Surveying the research landscape to promote children's legal rights in an African context' (2007) 7 *African Human Rights Law Journal* 330-353 for a comprehensive listing of comparative rights.

88 Olowu (n 9) 127.

89 Art 7 African Children's Charter.

90 Art 10 African Children's Charter.

91 E Brems 'Children's rights and universality' in J Willems (ed) *Developmental and autonomy rights of the children, empowering children, caregivers and communities* (2002) 21-45.

92 S Toope 'The Convention on the Rights of the Child: Implications for Canada' in M Freeman (ed) *Children's rights: A comparative perspective* (1996) 44; Twum-Danso (n 78) 415-432; Mason & Bolzan (n 35) 128; ID Cherney, A Greteman & B Travers 'A cross-cultural view of adults' perceptions of children's rights' (2008) 21 *Social Justice Research* 432-456.

groups in Western societies.⁹³ Therefore, it is unexpected that the African Children's Charter's recognition of the child's duties and responsibilities towards the family based on African cultural and communal practices and which dictate the role and nature of the relationship between children and their parents⁹⁴ is a major influence on the application of article 12 of CRC's autonomous child participation in the domestic legislations in Africa. In other words, the implementation of the right of the child to participate in decision making within the family with reference to domestic legislation of state parties in the African region may and cannot escape the confines of cultural values found in the child's socio-cultural environment. The CEC Committee, mandated to oversee the implementation of CRC, has regularly expressed concern that state parties are not giving adequate attention to the promotion of the autonomy rights of the child.⁹⁵ Traditional practices and cultural values in some state parties have been noted by the Committee as obstacles to the implementation of these rights.⁹⁶

The foregoing underscores the need for an approach of implementation of children's participation rights within the family in domestic legislations of African countries, that not only serve the best interests of children but also protect their human dignity within the family and society. A suggestion is, adopting a clear, direct and specific approach of implementation in terms of integrations of autonomous children participation and African cultural values of duties in their implementing children's legislation. The subsequent parts examine the implementation approach of article 12 of CRC in the Nigeria and South Africa-specific implementing children's legislations respectively.

93 It does not fall within the focus of this article to analyse the various jurisprudential debates on this issue as it is considered a subject worthy of a separate article. However, for the Asian perspective, see R Vasanthi 'Politics of childhood: Perspectives from the south' (2000) 35 *Economic and Political Weekly* 4055-4064. Vasanthi argues that the CRC provisions on autonomy are based on the assumption that individuation is the norm for all societies. She subsequently presents a view of the Asian context and how it might differ from the CRC model. For the African perspective, see T Mosikatsana 'Children's rights and family autonomy in the South African context: A comment under the final constitutions' (1993) 3 *Michigan Journal of Race and Law* 347-370. Mosikatsana argues that children's rights without duties or obligations undermine family autonomy.

94 Sloth-Nielsen & Mezmur (n 71) 159-189.

95 General Comment by the Committee, CRC-C-GC-12 (2009) 6. See also the CRC Committee comments to Mexico, Iceland, Burkina Faso and Senegal. See R Hodgkin & P Newell *Implementation handbook for the Convention on the Rights of the Child* (2002) 90.

96 Hodgkin & Newell (n 95) 163.

4 Nigerian Child's Rights Act

4.1 Scope and status of the Act

Nigeria fulfilled its legal and administrative obligation under CRC⁹⁷ by the National Assembly enactment of the Nigerian Child's Rights Act, 2003 (Children's Act or Act).⁹⁸

Despite the above fulfilment, the pledge to promote a uniform children's rights nationally in Nigeria seems not to have been successful.⁹⁹ What seems partly accountable is the pluralist nature of Nigeria with many laws, norms and fora that co-exist to function as its legal system.¹⁰⁰ Under the Nigerian Constitution, each of the component states in Nigeria is empowered to make laws; for example, federal government makes laws on all matters in the exclusive lists and share law making with the state on the concurrent list.¹⁰¹ However, issues around children are not explicitly listed in either the exclusive or the concurrent list in the Nigerian Constitution.¹⁰² This non-listing of children makes it seem as if the nationwide application of the national Children's Rights Act that domesticated CRC is limited to the federal capital territory.

Nevertheless, the practice is that each state of the federation may adopt or refuse any provisions about children that were enacted at the national level.¹⁰³ This practice explains why, even where the nationally-enacted Children's Rights Act gives recognition to specific children's rights,¹⁰⁴ by adherence to customary laws and values at the

97 Art 4 CRC.

98 Nigerian Child's Right Act, 2003 Cap C50, LFN 2004.

99 See KK Oyeyemi & LA La-kadri 'Realiing the rights of child under the Nigerian Child's Rights Act, 2003: An exploratory critique' (2017) 2 *Unimaid Journal of Private and Property Law* 22-32; Oba (n 10) 881-895; T Ladan 'The Nigerian Child Rights Act, 2003: An overview of the rationale, structure and contents' (2004) 2 *Nigerian Bar Journal* 219-230; F Olaleye 'Cultural diversity, child discipline and the Child's Rights Convention: The quest for a universal child?' (2005) 4 *University of Ibadan Journal of Private and Business Law* 162.

100 Durojaiye (n 12) 6169-6181.

101 See secs 4 and 2nd Schedule, Parts I and II of the 1999 Constitution of Nigeria (as amended).

102 As above.

103 The reason perhaps lies in the fact that children's rights in Nigeria involve a matter also within the legislative competence of the states. Therefore, the federal act on children's rights must be ratified or separately enacted by each state's Houses of Assembly before it becomes applicable in the states. See Oba (n 10) 893. This explains why, since the enactment of the Nigerian Children's Rights Act 2003, which is over a decade, not all the 36 states in Nigeria have adopted the Children's Rights Act into their state legislation.

104 Secs 3(1)(2), 6, 7, 8, 13, 19 & 20 are among the sections that provide for specific rights of the child which include the rights and duties of the child in matters that concern them.

state level, cultural practices contrary to established children's rights often deprived the child of these rights.¹⁰⁵ Besides, not all states in Nigeria have adopted or enacted a Children's Rights Law.¹⁰⁶

4.1.1 *Best interests of the child under the Act*

Under part 1 of the Nigerian Children's Rights Act, section 1 provides that the best interests of the child shall be the paramount consideration in all actions to be taken by all concerned.¹⁰⁷ Therefore, under the Act, an individual, a public or private body, institutions or service, a court of law, administrative or legislative authority in Nigeria shall adhere in their duties towards ensuring the best interests of the child.

The fact that there is no precise definition of the phrase 'interests of the child' was emphasised in the case of *Odogwu v Odogwu*,¹⁰⁸ where the Supreme Court of Nigeria stated that the phrase is not limited to material provisions but include those things that will assist the psychological, physical and moral development of the child, something that would promote the happiness and security that a child of tender years requires.

The interests of children envisaged under the Children's Rights Act, thus, embody several factors that depend on the peculiar circumstance of each case. In the case of *Williams v Williams*¹⁰⁹ the learned Supreme Court justice summed up that these factors interpreted the phrase 'paramount consideration' to mean 'preeminent and superior consideration'. Prominent among varieties of factors as considered by the Court are the adequacy of arrangement respectively made by the parties,¹¹⁰ their conduct,¹¹¹ the age of the child,¹¹² the sex and social background of the child,¹¹³ and the wishes of the child.¹¹⁴

¹⁰⁵ See Oyeyemi & La-kadri (n 99) 31.

¹⁰⁶ Since the enactment of the Nigerian Childs Rights Act 2003, which is over a decade, not all the 36 states in Nigeria have adopted the Children's Rights Act into their state legislation. See Oyeyemi & La-kadri (n 99) 27-28.

¹⁰⁷ See Part 1, sec 1 of the Children's Rights Act.

¹⁰⁸ (1992) 2 NWLR (Pt 225) 339.

¹⁰⁹ (1987) 2 NWLR (Pt 54) 74.

¹¹⁰ See the cases of *Damulak v Damulak* (2004) 8 NWLR (Pt 874) 151, *Dawodu v Dawodu* (1976) 7-9 CCHCJ 201 and *Onwuzulike v Onwuzulike* (1981) 1-3 CCHCJ 277, 280-81. In *Damulak*, the Court held that an order of custody for the child of the marriage must necessarily postulate that there is on ground adequate arrangements for the sound education as well as those for the physical and mental welfare of the said child.

¹¹¹ In the case of *Afonja v Afonja* (1971) 1 ULR 105 the Court held that 'the welfare of the infant', as necessary, is not the sole consideration. The guilty party's conduct is a matter also to be taken into account. See also *Lafin v Lafin* [1967] NMLR 101; *Oduneye v Oduneye* [1976] 2 85.

¹¹² See *Williams v Williams* (1987) 2 NWLR (Pt 54) 66 at 74.

¹¹³ See *Oyelowo v Oyelowo* (1987) 2 NWLR 239.

¹¹⁴ See *Odogwu v Odogwu* (1992) 2 NWLR (Pt 225) 339.

Besides the foregoing, inferences from other provisions of the Children's Rights Act also point to what determine the standard of best interests of the child. Section 2(1) of the Children's Rights Act provides that necessary protection and care shall be given to the child for their well-being, while taking into account the rights and duties of the child's parents, legal guardians and other bodies that are legally responsible for the child.¹¹⁵ The implication of the above section 2(1), read alongside section 1, is that the best interests of the child, which shall be the paramount consideration, are subject to the control of parents, legal guardians and other bodies that are legally responsible for the child.

From the above, it therefore seems as though the Children's Act limits the application of the best interests of the child to parental control. There are other instances where the rights of the child are subject to parental control.¹¹⁶ For example, on the protection of the privacy and family life of the child, section 8 of the Act provides that 'every child is entitled to his privacy, family life, home, correspondence, telephone conversation and telegraphic communications, except as provided in sub-section (3) of this section'.¹¹⁷ Section 8(3) is to the effect that nothing in the provision of sections 8(1) and (2) 'shall affect the rights of the parents and, where applicable, legal guardians, to exercise reasonable supervision and control over the conduct of their children and wards'.¹¹⁸

Similarly, it is noticeable that section 9(2) on freedom of movement subjected the application of the child's freedom of movement to the 'right of a parent, and where applicable, a legal guardian or other appropriate authority to exercise control over the movement of the child in the interest of the education, safety and welfare of the child'.¹¹⁹

Furthermore, the term 'reasonable supervision and control' as used in section 8(3) of the Act indicates the intention of the drafters of the Act to ensure parental authority over children's exercise of their right in the daily activities of the family life.¹²⁰

115 See part 1, sec 2(1) of the *Nigerian Child's Rights Act*, 2003.

116 Secs 8(1), (2) & (3) and sec 9(1)(2) and sec 20 of the *Nigerian Child's Rights Act*.

117 Sec 8 of the *Nigerian Child's Rights Act*.

118 Sec 8(3) of the *Nigerian Child's Rights Act*.

119 Secs 9(1) & (2) of the *Nigerian Child's Rights Act*.

120 See part 1, sec 1-2(1) and sec 8(1)(2) and (3) of the Act. So more so, that sec 20 of the *Child's Rights Act* categorically placed a duty on every parent, guardian and others to ensure the necessary guidance, discipline, education and training to the child, for the assimilation, appreciation and observance of the their responsibilities set out in the Act.

It is observed from the foregoing provisions that parents and guardians are required to provide the needed guidance and training for the child in the daily activities of the family life, which includes traditional values of nurturing children from infancy. Parents and guardian are expected to consider the best interests of the child in all actions concerning the child. Unfortunately, parents, guardians and many care givers have been found wanting in terms of compliance with the best interests principle. The Concluding Observation of CRC¹²¹ notes that most Nigerian children are subject to domestic violence or corporal punishment in school or in detention facilities, adding that several harmful traditional practices remain common in Nigeria.

4.1.2 Duties and responsibilities of the child

Section 19 of the Act makes explicit provision for the responsibilities of children, which include working towards the cohesion of the family, respecting their parents and elders at all times, and assisting them in their time of need.¹²²

In addition to establishing the duties of the child, the Children's Rights Act obligates the parents and guardians, institutions and authorities in whose care children are placed to so equip the child in order to secure '[h]is assimilation, appreciation and observance of these responsibilities'.¹²³ In other words, parents and guardians should ensure that children in their care understand and observe their responsibilities towards the cohesion of the family. Therefore, the obligation on parents and guardians of the child to secure assimilation and observance of their responsibilities shows the importance of the duties and responsibilities of the child in exercising their rights and the children's relationships within the family.¹²⁴

In light of the foregoing, the approach of the Children's Act in terms of prescribing duties and responsibilities on the child appears to dictate the role and nature of the relationship between the child and their parents and family. Further, it can be stated that section 19 of the Act on responsibilities and duties of the child is premised on the African customary law concept of rights and duties that hinges on connectedness, interdependence and loyalty within the society

121 Concluding Observations on the Rights of Child, Nigeria CRC/C/15/Add. 257 (2005). See also Concluding Observations on the Rights of Child, Nigeria CRC/C/NGA/CO 3-4 (2010).

122 See secs 19(1) & (2)(b) of the Nigerian Child's Rights Act.

123 Sec 20 of the Nigerian Child's Rights Act.

124 As above.

and the family.¹²⁵ Therefore, it is safe to conclude that the societal expectation in Nigeria in terms of children's rights to participation in decision making seems that the child within the family can only exercise their rights subject to restraints existing within the family.¹²⁶

As the subsequent discussion shows, the Children's Act noticeably omits the article 12(1) of CRC provision on the right of the child to participate in decision making.

4.1.3 Omission of child's right provision of article 12(1) of CRC in the Act

Conspicuously, the Children's Rights Act omits the right of the child to participate in decision making and to have freedom of expression within the family as contemplated under CRC. In other words, article 12(1) of the CRC provision on a child's right to participation in decision making within the family is not included among those rights listed in the Children's Rights Act as applicable to a child.¹²⁷ What appears to be the closest interpretation of the article 12 CRC provision in the Child's Rights Act is section 3 which refers to the provisions in chapter IV of the Nigerian Constitution, relating to fundamental rights of citizens.¹²⁸ The provisions of chapter IV of the Constitution, among others, includes general provisions on freedom of expression as well as all other civil rights.

In light of the above, it appears that the exercise of children's participation rights in decision making within the family under the Act becomes contingent on the constitutional provisions on freedom of expression for all citizens in the Constitution.¹²⁹ Although this approach seems laudable and logical, it is rather too simplistic, blanket and unyielding. The reason for this is that fundamental

125 For a detailed discussion of respect, reciprocal support obligations and restraint, see BA Rwezaura 'Changing community obligations to the elderly in contemporary Africa' (1989) 4 *Journal of Social Development in Africa* 5; Twum-Danso (n 92) 415; NA Apt 'Ageing and the changing role of the family and the community: An African perspective' (2002) 55 *International Social Security Review* 44; NA Apt & M Grieco 'Urbanisation, caring for elderly people and the changing African family: The challenge of social policy' (1994) 47 *International Social Security Review* 111-122.

126 B Ibhawoh *Between culture and constitution: The cultural legitimacy of human rights in Nigeria* (1999). See sec 19 of the Nigerian Children's Rights Act, 2003, most particularly secs 19(2), (a) and (b) which emphasise the need for children to work towards the cohesion of family and community, and respect for parents, superiors and elders at all times and assist them in case of need.

127 See, generally, the Nigerian Child's Rights Act, more particularly, part II – Rights and responsibilities of a child.

128 Sec 3 of the Nigerian Child's Rights Act. See also Nigeria Third and Fourth Periodic Report of State Parties due 2008, OHCHR, 2009 UN DOC CRC/C/NGA/3-4.

129 Sec 39 of the 1999 Constitution of the Federal Republic of Nigeria.

rights provisions under the Nigerian Constitution that apply to all citizens are not absolute; they are qualified rights in nature. In other words, the exercise of these rights is curtailed to the extent that the Constitution prescribed.¹³⁰ According to Hodgkin and Newell,¹³¹ constitutional provisions are sometimes 'purely aspirational or declaratory and could be limited in scope'. Therefore, it is not enough that the Constitution simply includes civil rights as fundamental rights for everyone, but it is essential and imperative that it indicates how these rights specifically apply to children.¹³² The Nigerian Constitution does not contain a Bill of Rights specifically for children.

In light of the absence of specific Bills of Rights for children in terms of article 12(1) of CRC participation rights, it appears that the legislative provisions of the Nigerian Children's Rights Act did not fully reflect the aspiration and intent of CRC.¹³³ The omission of the important article 12(1) provisions in the Act is an indication that the Nigerian implementation approach of children's participation in decision making within the family is solely within prevailing cultural norms and values, and merely imbibed article 12 of CRC in principle scattered in the implementing statutes within the meaning of the best interests of the child and the rights to freedom of expression under the Constitution. More so, the exercise of some of the rights of children in the Act is explicitly linked to the children's relationship with the family, especially parental control and not the child's evolving capacity.¹³⁴ This adopted approach may constitute an impediment to the enforcement and implementations of children's rights to participation within the family in terms of article 12(1) of CRC.

4.1.4 Justifying the need for specific inclusion of children's rights in the domestic children's legislation in Nigeria

It is valid to argue that the reason why specific rights for the children are not explicitly included in the children's legislations could be that children are included in the general rights as provided regardless of whether or not they are explicitly mentioned.¹³⁵ Therefore, explicitly

¹³⁰ See generally sec 45 of the 1999 Constitution.

¹³¹ Hodgkin & Newell (n 95) 187.

¹³² As above.

¹³³ See earlier analysis of art 12 of CRC.

¹³⁴ See earlier discussion above.

¹³⁵ As indicated earlier in terms of the rights as contained in ch IV of the Nigerian Constitution all the sections on fundamental human rights, by its wording provide that 'everyone has the right'. Children are regarded as part of everyone. See secs 33(1) and 34(1) of the Constitution. Also, there is no replica of art 12 of CRC's children's participation rights in the Nigerian legislation implementing

making specific rights for children could be considered redundant. As indicated in the earlier discussion, the Nigerian Constitution contains the right to freedom of expression which applies to the child, and the statute that implements CRC contains a provision on the best interests of the child. To ascertain the best interests of the child may involve the participation of the child in decision making within the family.¹³⁶ Hence, the inclusion of a replica provision of article 12 of CRC is not necessary. The foregoing resonates with the views that in implementing human rights norms, a flexible approach that takes the particular circumstance of each state into account is the practice and that it may take the form of a comprehensive implementing legislation, principles scattered in different statutes, policy measures or a combination of them all.¹³⁷

While acknowledging the above as a common position in human rights practice, it does not foreclose other remarkable approaches in terms of legislations as essential to advancing specific human rights and well-being.¹³⁸ Legislative protection in terms of provisions that guarantee specific children's rights, therefore, cannot be overemphasised. Making provision for children's rights in a legislation or the Constitution is only a starting point; the extent to which it adopts a genuine child's rights approach is determined by the quality of the legal or constitutional provisions in question.¹³⁹ O'Mahony provides a typology for assessing the approach to protecting children's rights, based on visibility, agency and enforcement spectrums.¹⁴⁰ Visibility indicates the extent of explicitly protecting children's rights; agency determines whether children are autonomous rights holders or need protection; and enforcement specifies the extent of enforcement through various remedies.¹⁴¹

In light of the foregoing, it is clear that the implementing legislations in Nigeria merely imbibed article 12 of CRC children's participation in principle. This approach rates children's participation rights within the family low due to its lack of visibility and agency. Agency is a measure of the extent to which a legislation treats children

CRC. See earlier discussion on the omission of art 12 of CRC in the Nigeria Child's Rights Act, 2003.

136 See generally earlier discussion on the best interests of the child in this article.

137 L Chenwi 'International human rights law in South Africa' in E de Wet, H Hestermeyer & R Wolfrum (eds) *The implementation of international law in Germany and South Africa* (2015) 353-354; SD Kaplan *Human rights in thick and thin societies: Universality without uniformity* (2018) 16-47.

138 Kaplan (n 137) 16-47.

139 C O'Mahony 'Constitutional protection of children's rights: Visibility, agency and enforceability' (2019) 19 *Human Rights Law Review* 401-434.

140 O'Mahony (n 139) 403-432.

141 O'Mahony (n 139) 402-434.

as autonomous rights holders, not objects in need of protection.¹⁴² The provisions relating to children's participation within the family in the implementing statutes do not convey agency,¹⁴³ and are lacking in clarity.¹⁴⁴ For instance, to determine the standard of the best interests of the child, recourse is usually had to inferences from other provisions of the Children's Act that limit the application of the best interests to parental control, and other legislations in matrimonial causes relating to guardianship and custody issues as applicable to everyone, not specifically children.¹⁴⁵ The inevitable consequence is that most legal as well as some constitutional provisions on rights applicable to everyone are merely 'aspirational or declaratory and could be limited in scope'.¹⁴⁶ Therefore, it is essential to indicate the extent these rights specifically apply to children, particularly participation rights of children within the family.

It is submitted that failing to provide specific protection for key children's rights, such as participation rights within the family, in the implementing domestic legislations could be seen as lack of recognition of the particular vulnerability of children in relation to their parents and other stakeholders. The Nigerian implementation legislations, therefore, could be seen and characterised as primarily paternalistic.

It is further submitted that enumerating specific rights for children in terms of their participation in decision making within the family in the Nigerian implementing children's legislation will not only serve as a tool for a rights-based approach advocacy, but also as a beacon guiding implementation and for developing policies,¹⁴⁷ and to protect children from abuse within families and society. For instance, article 12(1) of CRC recognises children's vulnerabilities in power hierarchies and children's autonomy rights. The inclusion of this provision in the Nigerian Children's Rights Act, the specific

142 As above.

143 See earlier discussion in terms of the rights as contained in ch IV of the Nigerian Constitution, all the sections on fundamental human rights. See secs 33(1) and 34(1) of the Constitution. Again, there is no replica of art 12 of CRC children's participation rights in the Nigerian legislation implementing CRC. See earlier discussion on the omission of art 12 of CRC in the Nigeria Child's Rights Act, 2003.

144 Eg, the Constitution provides fundamental rights applicable to every citizen, but these are limited and not absolute. See generally sec 45 of the 1999 Constitution. Also, the directive principles of ch II on promoting and protecting children's interests in social, religious, cultural life, and family promotion are also not enforceable in a court of law. See sec 6(6)(c) of the 1999 Constitution.

145 See earlier discussion in parts 3.1 and 3.1.1.

146 Hodgkin & Newell (n 95) 187.

147 The South African Children's Act and the South African Constitution are examples in this regard, since they explicitly bestow on children the right to participation. See sec 10 of the Children's Act and sec 28 of the South African Constitution 1996.

implementing legislations, are likely to be more powerful tools guiding implementation than general provisions on children or principles in scattered statutes. More so, having a replica of the article 12 of CRC provisions will not only harmonise the legislation so that it is in line with CRC, but makes for greater clarity in terms of children's participation rights within the family than drawing inferences from scattered legislations that are limited in scope.

At this juncture, it becomes desirable to discuss the South African implementation approach to article 12(1) of CRC in its domestic Children's Rights Act (Children's Act). The essence is to show how a Southern African country as opposed to Western Africa – Nigeria – goes about its implementation. As shown in the discussion that follows, South Africa adopted a clear and remarkably integrated approach to the implementation of article 12(1) of CRC and local norms and values in its domestic Children's Rights Act.

5 South African Children's Act 2005

5.1 Scope and status of the Children's Act

The Children's Act came into full operation in April 2010. The Preamble to the Children's Act reinforces and endorses rights provided for in section 28 of the South African Constitution.¹⁴⁸ It specifically echoes the provision of section 28(2) of the Constitution to the effect that in all matters concerning the protection, care and well-being of the child, the child's best interests must always be of paramount importance.¹⁴⁹

The Children's Act embraces a notion of childhood, namely, that for a child to fully assume their responsibility in the community, and for a full and harmonious development of their personality, a child should ideally grow up in a family environment, and in an atmosphere of happiness, love and understanding.¹⁵⁰ In other words, there is recognition of family and community values for the growth of a child in the Children's Act.

¹⁴⁸ Sec 28(2) of the Constitution indicates that the principle of the child's best interest is of paramount importance in every matter concerning the child.

¹⁴⁹ See sec 9 of the Children's Act.

¹⁵⁰ See the last part of the Preamble to the Children's Act. To a certain extent, this recognises the African cultural value of connectedness, interdependence, and loyalty within the family.

Section 16 of the Children's Act specifically articulates the responsibilities of children to their families, community and the state.¹⁵¹ Also, the Children's Act recognises that some children are capable of 'acting autonomously and in their own best interests'.¹⁵²

5.1.1 The best interests principle under section 7 of the South Africa Children's Act

Besides the judicial guidelines in terms of the children's best interests principle stipulated by section 28(2) of the Constitution, the Children's Act explicitly provides for a set of guidelines on the standard of the best interests of the child. These guidelines are stipulated in section 7(1) of the Children's Act.¹⁵³

Section 7 of the Act provides 'remarkably a realistic legislative scheme revealing the holistic nature of the concept of the best interests of the child'.¹⁵⁴ Section 7 recognises parental role and influence in the overall development of the child as well as the child being part of a larger family and community.¹⁵⁵ Therefore, whenever a provision of the Children's Act requires the best interests of the child standard to be applied, the nature of the personal relationship between the child and the parents or any person is relevant in those circumstances.¹⁵⁶

Furthermore, according to section 7 of the Children's Act, parents and other decision makers in the public and private may be compelled to protect the child from any physical or psychological harm; specifically, any physical or psychological harm caused by maltreatment, abuse, neglect, exploitation or degradation or exposure of the child to violence or exploitation or other harmful behaviour.¹⁵⁷

In addition to the factors provided by section 7 of the Children's Act, a strong emphasis is placed on the importance of a child being raised in a stable family setting or in an environment that is as close as possible to a caring family environment.¹⁵⁸ Similarly, there is a

151 Sec 16 of the Children's Act.

152 Ch 2 sec 6(3) of the Children's Act. See R Songca 'Evaluation of children's rights in South African law: The dawn of an emerging approach to children's rights' (2011) 44 *Comparative and International Law Journal of Southern Africa* 340-359.

153 See sec 7(1) of the Children's Act for the list of guidelines on the best interests of the child.

154 Moyo (n 45) 142-267.

155 Secs 7(1)(a), (b), (c) & (f) of the Children's Act.

156 Secs 7(1)(a) & (b)(i) & (ii) & (c) of the Children's Act.

157 See sec 7(1)(l) of the Children's Act.

158 See sec 7(1)(k) of the Children's Act.

need for the child to remain in the care of their parent, family and extended family as well as to keep ties to their family, extended family, culture or tradition.¹⁵⁹ Section 7 provisions, therefore, mirror the variety of family models, value systems and practices in South African society.¹⁶⁰ King¹⁶¹ explains that the child's right to grow up in the context of a family and culture is based on the fundamental truth that it can be crucial to the 'basic dignity, survival and development' of everyone in society. In other words, the interests of the child to ideally grow up in a family environment for a full and harmonious development of their personality are linked to the interests of society.¹⁶²

5.1.2 Section 10 of the South Africa Children's Act: A replica of article 12(1) of CRC

Section 10 of the Children's Act provides as follows: 'Every 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.'

The above section 10 provision in the Children's Act – a replica of article 12(1) of CRC – provides that all children that are of such an 'age, maturity and stage of development' are entitled to influence decision making in all matters affecting them.¹⁶³ Therefore, the approach of section 10 of the Children's Act on child participation rights symbolises the separate personhood of the child, and the need to take seriously the views expressed by the child same way as article 12(1) of CRC expresses it.¹⁶⁴

There are several provisions of the Children's Act that fully embrace the autonomous status of children's participatory rights in decision making in matters that affect the child within the family. As

159 Sec 7(1)(f) of the Children's Act.

160 Moyo (n 45) 142-267.

161 S King 'Competing rights and responsibilities in inter-country adoption: Understanding a child's right to grow up in the context of her family and culture' in C Lind and others (eds) *Taking responsibility: Law and the changing family* (2011) 259.

162 See also J Heaton 'An individualised, contextualised and child-centred determination of child's best interest and the implication of such approach in South African context' (2009) 34 *Journal for Juridical Science* 8. However, despite these laudable provisions as regards the best interests standard, sec 7 has been criticised and considered too vague and indeterminate, as it gives the courts a wide discretion to apply different cultural norms. On the other hand, this inherent flexibility to contextualise the best interests standard by the court could be said to be a strength. See Boezaart (n 6) 395-396; Moyo (n 45) 142-267.

163 Sec 10 of the Children's Act.

164 Brems (n 91) 21-45.

the subsequent discussion indicates, the Children's Act creates space for children's autonomy and self-determination in many contexts.

5.1.3 *Decisional autonomy under the Children's Act*

As established earlier, article 12(1) of CRC views a child as being an autonomous individual capable of making and participating in decision making in all matters that concern them. As will be seen shortly, it seems that in line with the intent and spirit of CRC, the Children's Act creates excellent space for children's autonomy and self-determination in many contexts.

Decisional autonomy is guaranteed for every child under the Children's Act with the capacity for rational action.¹⁶⁵ For example, under sections 129(2)(a)(b) and 129(3)(a)(b) of the Children's Act, a child may consent to medical treatment or a surgical operation if the child is over the age of 12 years and has sufficient maturity to understand the benefits, risks and other implications of the treatment or surgical procedure.¹⁶⁶ However, section 129(3)(c) provides for due assistance by the parent or guardian of the child to validly consent to a surgical operation.¹⁶⁷ It is interesting to note that section 129(3)(c) only covers consent concerning the surgical procedure and not medical treatments, as there is no 'visible requirement of parental assistance in respect of consent to medical treatment by children who have the capacity to make rational decisions'.¹⁶⁸

Another instance in the Children's Act is the provisions of sections 130(2)(a) and 133(2)(a) of the Children's Act on HIV testing. These provisions enable consent to an HIV test or to the disclosure of HIV status by a child who has reached 12 years of age, or under 12 years with sufficient maturity to understand the benefits, risks and social implications of such a test or disclosure.¹⁶⁹ In other words, a child of 12 years or below but endowed with sufficient maturity will be ascribed by the Act the competence that enables the child to exercise self-determination in respect of these decisions.¹⁷⁰

However, there are other criteria such as informed consent that may be required when deciding issues of a child's sufficient maturity

¹⁶⁵ See the provisions under part 3, protective measures relating to the health of the children, of the Children's Act.

¹⁶⁶ Secs 129(2)(a) & (b), 129(3)(a) & (b) of the Children's Act.

¹⁶⁷ Sec 129(3)(c) of the Children's Act.

¹⁶⁸ Moyo (n 45) 181.

¹⁶⁹ Secs 130(2)(a) & 133(2)(a) of the Children's Act.

¹⁷⁰ Secs 130(2)(a) & 133(2)(a) of the Children's Act.

to enable the child to exercise self-determination.¹⁷¹ In the case of *Castell v De Greeff*¹⁷² the Court emphasised that for consent to be regarded as valid, it must be informed, voluntary and comprehensive. According to Van Bueren,¹⁷³ for a child to be capable of giving informed consent, 'a child should be able to understand the nature of the medical treatment, the risks and seriousness of the procedure, the potential benefits, the alternatives, the possibility of refusing consent, and the medical consequences which such refusal could entail'.

In light of the above, children above the age of 12 years will be accorded a larger measure for personal decisions than children below the age of 12 as a result of sufficient maturity and mental capacity.

Virginity testing is another instance where decisional autonomy will be guaranteed for any child with the capacity for rational action. For example, sections 12(5)(a) and (b) of the Children's Act permit virginity testing of children older than 16 years if the child gives her consent in the prescribed manner and after proper counselling.¹⁷⁴ Section 12(6) allows the results of the virginity test to be disclosed only with the child's consent.¹⁷⁵ Similarly, sections 12(9)(a) and (b) only makes the circumcision of a child over 16 years possible when the male child gives consent to the circumcision in the prescribed manner and after proper counselling.¹⁷⁶ The provision of section 12(10) gives every male child the right, in light of his age, maturity and stage of development, to refuse circumcision.¹⁷⁷ Finally, section 134 of the Children's Act enables a child who is 12 years or older to be provided with contraceptives on request by the child and without the consent of the parent or care giver of the child.¹⁷⁸

The implications of the foregoing provisions of the Children's Act are that it creates a presumption of competence for children that have acquired the requisite capacities and maturity to make autonomous decisions.¹⁷⁹ The foregoing position is in line with the spirit and intent of the article 12(1) provisions of CRC.

171 Sec 7 of the National Health Act 61 of 2003.

172 1994 (4) SA 408 (C) 425.

173 Van Bueren (n 1) 310.

174 Secs 12(5)(a) & (b) of the Children's Act.

175 Sec 12(6) of the Children's Act.

176 Secs 12(9)(a) & (b) of the Children's Act.

177 Sec 12(10) of the Children's Act.

178 Sec 134(1) & (2) of the Children's Act.

179 Moyo (n 45) 182.

5.1.4 Application and interpretations of the integration approach in the South African Children's Act in relation to the best interests of the child

The integration of both article 12(1) of the CRC, as well as accepted cultural norms and values in the South African Children's Act, provides for a unique interpretation of children's rights to participation in decision making within the family in South Africa.

As discussed earlier, the Children's Act introduced a new dimension of relationships regarding parent and child. The Children's Act expressly recognises that parents have both rights and responsibilities towards their children.¹⁸⁰ The rights and responsibilities of the parent over their children under section 18(1) of the Children's Act focus on the right of the child to parental care and not on parental powers as would be assumed under the customary model. In fact, under section 18(1), parental responsibilities and rights that a person can exercise in respect of a child include 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.¹⁸¹ The implication of the above is the clear emphasis on parent-child relationships of care and support and not parental authority or control over a child, which is to promote the best interests of the child.

Furthermore, the best interests of the child are paramount under the Children's Act. However, the consideration of what is best for the child depends on the guiding factors laid down by section 7 of the Children's Act, and the Constitutional Court of South Africa.¹⁸² At the same time, the guiding factor depends on the circumstances of each interest of the child as well as the social realities and interpersonal relations of the child within the family.¹⁸³ Therefore, section 7 provisions on the best interests of the child and the constitutional value of tolerance and respect for diversity may allow for an approach that takes the cultural, traditional and religious circumstances of an individual child into account when considering the best interests of

180 Sec 18 of the Act. In *J v J* 2008 (6) SA 30 (C) the Court held that the terms 'parental authority' and 'parental power' are replaced by the terms 'parental responsibilities and rights' and the term 'custody' by 'care'. In *LB v YD* 2009 (5) SA 463 (T) Murphy J stated that the Children's Act has introduced changes to existing laws to bring them in line with constitutional rights and values. The judge was of the view that the concept 'rights and responsibilities' corresponded broadly with 'parental authority' and its components of care.

181 Secs 18(1)(a), (b) & (c) of the Children's Act.

182 *McCall v McCall* 1994 (3) SA 201 (C) 205 B-G.

183 Sec 7 of the Children's Act. See also Moyo (n 45) 177.

the child in all matters affecting the child¹⁸⁴ – in this instance the child's rights to participate in decision making within the family.

The fulcrum of the foregoing discussion is that the integrated approach of implementation of article 12(1) of CRC portends an implication for a clear and flexible application of children's rights to participation in South Africa. In other words, with the provisions of section 10 and 7 of the Children's Act, children will exercise their participation rights in decision making within the family in an autonomous manner. Also, with the value of tolerance, respect for diversity and pluralism in South Africa, children may also exercise their participation rights in decision making within the family in a culturally-responsive manner, in accordance with the constitutional requirements.¹⁸⁵ This approach of implementation did not only fully reflect the specific principle and provisions of CRC, but it also allows for a greater legislative clarity in terms of children's rights to participation within the family in South Africa.

6 Conclusion

CRC establishes children's participatory rights. Article 12(1) contains children's rights to participate in family decision making. The regional African Children's Charter emphasises preserving tradition and culture, instilling African morals and values in children's lives, and entrusting them with duties and responsibilities to their family, community and society. CRC and the African Children's Charter as children's rights instruments majorly influenced the application of children's rights in the implementing laws of African countries. The approach to implementing article 12(1) of CRC in Nigerian and South African domestic children's laws is an example in this regard. The South African children's law explicitly contains replica provisions of article 12 of CRC reflecting the principles and provisions of the Convention as well as incorporating cultural norms and values based on family rights and duties. The Nigerian children's law omits the article 12 provision and emphasises the duties and responsibilities of the child within the family. However, it contains article 12 of CRC in principle scattered in the implementing statute within the meaning of the best interests of the child and the right to freedom of expression under the Constitution. This approach seems to suggest

¹⁸⁴ Heaton (n 162) 1-18.

¹⁸⁵ See secs 15(3)(b) & 39(3) of the Constitution; sec 211 of the Constitution. See also *Shilubana v Nwamitwa* 2008 (9) BCLR 914 (CC) 926. See also C Rautenbach 'South African common and customary law of intestate succession: A question of harmonisation, integration or abolition' (2008) 119 *Electronic Journal of Comparative Law* 1-15.

that the implementing legislation in Nigeria only imbibed article 12 of CRC children's participation in principle, which rates children's participation rights within the family low due to its lack of visibility and agency. Agency is a measure of the extent to which legislation treats children as autonomous rights holders, not objects in need of protection. Although human rights could be articulated differently in dissimilar parts of the world, a remarkable approach in terms of specific legislative provisions essential to advancing human rights and the well-being of children should be encouraged and practised. Thus, having a replica of article 12 of CRC provisions in the Nigerian Children's Act will not only serve as a tool for rights-based approach advocacy, guiding implementation, and for developing policies, but also harmonise its legislation so that it is in line with the spirit and intent of CRC. More so, it makes for greater legislative clarity in terms of children's participation rights within the family, as is shown by the South African example discussed in this article.