Cultural and traditional practices and the implementation of the right of the child to be heard under Article 12 of the UNCRC

KK Oyeyemi

orcid.org/0000-0002-1297-0018

Thesis submitted for the degree *Doctor of Laws in Perspectives on Law* at the North-West University

Promoter: Dr JL Matthee

Graduation: July 2022

Student nr.: 28102185

DEDICATION

To the memory of Late Mrs Folashade Ademola, nee Oyeyemi – my darling elder sister and Late Prince (Barr.) Ibrahim Aderemi Oyeyemi – my loving father. You have transited to eternal life. May Heaven continue to be an abode of joy for you both.

ACKNOWLEDGEMENTS

Like most others, the journey to writing this thesis began with a seed of thoughts. A seed germinated with zeal, quest, courage and determination to lend a voice to the vulnerable. It is not an easy journey. There are many ups and downs. Now that I can see the lights at the end of the tunnel that I have been struggling to reach, I would like to thank those who were with me on this journey. I will be eternally grateful to them.

First and foremost, my supervisor Dr Jacques Matthee. This thesis will have Gone with the Wind if it has not been for him. I would like to thank Dr Matthee immensely for his encouragement, support, comments, input, patience, and guidance and Prof Avitus Agbor for his insightful words and contribution to this thesis. I must also thank Prof Robinson for his encouragement, wise advice, and hospitality while I was in Potchefstroom, as well as for reminding me early on in my doctoral journey of the need for a structure to follow when writing the thesis. I have learned so much from you all, and I can only hope to be half as excellent an academic, mentor, and colleague one day.

I had also like to thank members of the Faculty of Law at North-West University, Potchefstroom campus. I would like to express my gratitude to the late Prof Stephen De La Harpe (past Dean of the Faculty) who was the director of postgraduate programme when I was accepted for my studies. When I initially arrived on campus, he welcomed me with open arms and provided me with invaluable assistance in a variety of ways. May his soul continue to rest in peace. I would also like to express my gratitude to the Faculty of Law (North-West University) and the NWU-Postgraduate Bursary scheme for their financial assistance.

Last but most certainly not least, I had like to thank my family and friends for their constant words of encouragement during my thesis writing process: to my parents, Barr. I.A Oyeyemi (of blessed memory) and Alhaja MM Oyeyemi for their support and encouragement; to my siblings, Mrs Ademola (of blessed memory), Mrs Iyabo Adebesin, Prof AL Oyeyemi, Mr Tunde W Oyeyemi and Mr Tayo

Oyeyemi for being such wonderful brothers and sisters; to my uncles, cousins, nieces and nephew, in the persons of Prof A Oyeyemi, Dr B Oyeyemi, Mr Ahmed Oyeyemi, Dr WA Oyeyemi, Dr BF Oyeyemi, Mr NO Oyeyemi (Jaiye), Master K Ademola, Master U Ademola, Master A Adebesin, Aliyah Adebesin, Prince Atoloye Oyeyemi, Prince Kajogbola Oyeyemi, Princess Farredah Oyeyemi, Princess Hamidah Oyeyemi and Princess Zahra Oyeyemi for all your support one way or the other during the course of my writing.

Finally, I want to express my heartfelt gratitude to my wonderful wife, Asmau, for her unwavering support, loyalty and understanding throughout my studies; and my sons Prince Jamal Gbonjubola Oyeyemi and Prince Habeeb Adeboye Oyeyemi, for their patience with their daddy, who is permanently "doing his work" or travelling. As a result, you have taught me never to give up when the going gets difficult. I will end with the words of Brad Henry: "Families are the compass that guides us. They are the inspiration to reach great heights, and our comfort when we occasionally falter."

ABSTRACT

The 1989 United Nations Convention on the Rights of the Child (hereafter UNCRC) is one of the international instruments that broadened children's rights and placed it at the top of government agenda. A fundamental objective of the UNCRC is to establish the status of children as rights-bearers, and for their rights to be considered as important as those of adults with regards to respect and defence of such rights.

Aside the other relevant articles in the UNCRC, which are linked to the participation of children, Article 12(1) clearly elaborates on the participatory right of the child. In the context of the provisions of Article 12(1) of the UNCRC, the reference to "in all matters" indicates that the participatory rights in Article 12(1) of the UNCRC are not limited to matters specifically addressed in the UNCRC. It covers both the private and public spheres of society, and foists on the state duties in relation to matters left for actors in the private sphere, such as the family, to decide. Therefore, the right to participate in terms of Article 12(1) refers to every child's right to be heard and to participate in all matters that affect their lives, including decision-making within the family. This presupposes that children are autonomous individuals capable of making and participating in decision-making within the family.

Despite the importance attached to the provisions of Article 12(1), it has been the subject of much debate and controversy. Among the major concerns on the part of some State Parties and critics are that the provisions of autonomy rights in Article 12(1) of the UNCRC present the child as having a separate identity from others. These concerns seem to have been exacerbated by the lack of provisions regarding the duties and responsibilities of the child within the family and towards others under the UNCRC. Thus, critics claim that the UNCRC does not adequately account for the reciprocal and interdependent relationships between the child, her/his parents, and other members of his/her family. Again, they question the desirability and applicability of the UNCRC construction of a child's autonomy within those socio-cultural contexts where the autonomy of the individual is not

emphasised as much as his/her interdependence and duties within the family and the community. In other words, the characterisation of children as autonomous logically raises the question of legitimacy, desirability and applicability within different socio-cultural contexts where the autonomy of the individual is not privileged as much as interdependence and the fulfilment of duties within the family. Consequently, critics argue that the practical implementation and effectiveness of the relevant provisions of the UNCRC cannot be enforced in some state jurisdictions.

In understanding the influence of culture, values and practices in children's rights discourse, the thesis considers the implementation approach of Article 12(1) of the UNCRC in the domestic children's rights legislations of specific State Parties such as Nigeria, South Africa and Australia. In these cultural values of rights and duties of the child within the family is an intricate measure of implementation in their specific domestic children's rights legislation.

More so, while the South African and Australian national children's laws on the one hand embed the cultural value of rights and duties and responsibilities of children within the family, they, on the other hand, embeds the UNCRC autonomous children's rights approach of children's participation rights in decision-making within the family.

In Nigeria, the UNCRC's implementation approach in the country's national children rights law is completely based on acceptable local norms and customs in terms of the rights and duties of the child within the family. In other words, there appears to be resistance to, and neglect of the specific provisions of Article 12(1) of the UNCRC concerning children's rights, owing to socio-cultural factors.

In light of the foregoing, the question is not so much about the relevance of cultural values as it is about the dangers of emphasising cultural values over participation rights enshrined in Article 12(1). In the context of rights and relationship, the application of rights and duties within the family demonstrates the complexity and the challenge it offers. In other words, when it comes to children's participation in decision-making, the cultural value of "duties and rights"

can engender complex "conflict" situations within the family. For instance, a family has to deal with situations where indigenous practices and culture play a role in child-rearing and upbringing. As a result, the duty to respect parents might readily be used to limit children's rights to participate in decision-making, particularly in matters affecting them. Some of these cultural practices that may be used within the family are those tied to a "legitimate" cultural practice that is allowed and regulated by the law, and others that are not so legitimate and "harmful" to the child. Male circumcision, which is common in South Africa, is an example of such legitimate cultural practice. Also, the custom of *ukuthwala* in South Africa is another example of a practice that could be considered as legitimate, although it is not so legal due to the negative aspects associated with the practice. In Nigeria, South Africa and Australia, Female Genital Mutilation/Cutting (FGM/C) is a specific example of "harmful" practices, which may hide under the canopy of the cultural value of "duty and rights" within the family. The above-mentioned cultural practices are not only regarded as harmful, but they also violate the UNCRC's Article 12(1) provision on children's participation rights in decision-making within the family.

In light of the above-mentioned culturally diverse Sate Parties' implementation approaches, the thesis primarily examines the extent to and manner in which existing national children's rights law in Nigeria, South Africa and Australia facilitates the inclusion of Article 12(1) of the UNCRC participation rights of children in decision-making within the family in the country's pursuit of children's rights and development. Consequently, the thesis commences with a discussion of key theoretical concepts such as culture and indigenous cultural values, as well as the main features and perspectives of children's right to participation under Article 12(1) of the UNCRC. The meaning, relationship and application of the concepts of culture and cultural values, as well as Article 12(1) are investigated in order to lay the normative groundwork for the rest of the thesis. That is followed by an examination of the specific children's rights law that domesticated Article 12(1) of the UNCRC in the legal system of Nigeria, South Africa and Australia. Furthermore, an analysis of the specific cultural practices that are considered "harmful" and

which may be used under the canopy of family child-rearing and upbringing in terms of the value of "duty and rights", is made in line with the focus of this study. These specific cultural practices are queried and tested against the Article 12(1) provisions on children's participation rights in decision-making within the family. An approach in favour of Article 12(1) children's participation rights is canvassed.

Finally, the thesis concludes that the progressive application and interpretation of the global and domestic idea of children's participation rights within the family and the society can be aided by Article 12(1) of the UNCRC as well as cultural values of rights and duties within the family. As a result, the participation rights requirements in Article 12(1) should be incorporated into Nigeria's Children's Right Act.

The research for this study was concluded in November 2021.

KEYWORDS

Cultural Values – Cultural practices – Children – Rights – Constitution – Participation – Family – Autonomous – Multi-ethnic – Culturally diverse – Harmful – Indigenous – Decision-making – Implementation – Article 12 of the UNCRC

LIST OF ABBREVIATIONS

Afr Hum Rts LJ	*African Human Rights Law Journal*
AIHW	*Australian Institute of Health and Welfare*
Ann Surv SA Law	*Annual Survey of SA Law*
Ariz J Int'l & Comp L	*Arizona Journal of International and Comparative Law*
Berkeley J Int'l L	*Berkeley Journal of International Law*
BMC Pregnancy Childbirth	*BioMedCentral Pregnancy Childbirth*
BYU L. Rev	*Brigham Young University Law Review*
Cal L Rev	*California Law Review*
Can JL & Soc	*Canadian Journal of Law and Society*
Child Abuse Negl	*Child Abuse and Neglect, The International Journal*
Child & Fam. L. Q.	*Child and Family Law Quarterly*
CILSA	*Comparative and International Law Journal of Southern Africa*
Constitution	Constitution of the Republic of South Africa, 1996. The 1999 Constitution of the federal Republic of Nigeria (As amended). Commonwealth Constitution of Australia Act, 1900
Crim Just J	*Criminal Justice Journal*
DFAT	Department of Foreign Affairs and Trade

Elec J Comp L	*Electronic Journal of Comparative Law*
Ethno Med	*Ethno Medicine*
Eur J Crime Crim L & Crim Just	*European Journal of Crime, Criminal Law and Criminal Justice*
Eur J Contracept Reprod Health Care	*European Journal of Contraception and Reproductive Health Care*
Georgia J of Int & Comp L	*Georgia Journal of International and Comparative Law*
Harv Int'l Law Journal	*Harvard International Law Journal*
Harv L Rev	*Harvard Law Review*
Harv Women's LJ	*Harvard's Women's Law Journal*
Hastings Int'l & Comp L Rev	*Hasting International and Comparative Law Review*
Human Rts Br	*Human Rights Brief*
Interim Constitution	*Constitution of the Republic of South Africa 200 of 1993*
Int'l J Child Rts	*International Journal of Children's Rights*
Int J Sociol Anthropol	*International Journal of Sociology and Anthropology*
Intl J of Law, Policy & the Family	*International Journal of Law, Policy & the Family*
J Fam L & Prac	*Journal of Family Law and Practice*
J Mod Afr Stud	*Journal of Modern African Studies*

JJS	*Journal for Juridical Science*
JLP	*Journal of Legal Pluralism and Unofficial Law*
J Obstet Gynaecol	*Journal of Obstetric Gynaecology*
MJA	*Medical Journal of Australia*
McGill LJ	*McGill Law Journal*
NBS	National Bureau Statistic
NPC	National Population Commission
PELJ	*Potchefstroom Electronic Law Journal*
SACJ	*South African Journal of Criminal Justice*
SAJHR	*South African Journal on Human Rights*
SALJ	*South African Law Journal*
SAJHE	*South African Journal of Higher Education*
SAPL	*South African Journal of Public Law*
S Cal Interdisc LJ	*Southern California Interdisciplinary Law Journal*
Soc Indic Res	*Social Indicators Research*
Stell LR	*Stellenbosch Law Review*
Swiss Med Wkly	*Swiss Medical Weekly*
Tul L Rev	*Tulane Law Review*
U Botswana LJ	*University of Botswana Law Journal*
UN	United Nations

UNCRC	United Nations Convention on the Right of Child
UNDP	United Nations Development Programme
UNSWLJ	*University of New South Wales Law Journal*
Unif L Rev	*Uniform Law Review*
WSA	*Witchcraft Suppression Act 3 of 1957*
Yale J L & Feminism	*Yale Journal of Law & Feminism*

TABLE OF CONTENTS

CHAPTER 1

INTRODUCTION

1.1 Introduction....1
1.1.1 Background and problem statement....1
1.2 Problem statement....9
1.2.1 The notion of culture and cultural values....10
1.2.2 Indigenous cultural values....14
1.2.2.1 Respect....15
1.2.2.2 Responsibility and obligation....16
1.2.2.3 Reciprocity....16
1.2.3 Cultural practices....18
1.2.3.1 Harmful cultural practices....18
1.2.3.2 Custom of ukuthwala....19
1.2.3.3 Male circumcision....21
1.2.3.4 Female genital mutilation/cutting....22
1.3 Legal comparison and the implication of implementation of Article 12(1) of the UNCRC in Nigerian, South African and Australian law....25
1.3.1 Constitutionalism – Perspectives in Nigeria, South Africa and Australia....25
1.3.2 Children's laws in Nigeria, South Africa and Australia....27
1.3.3 The implication of the implementation approach in Nigeria, South Africa and Australia....28
1.4 Area of focus....30
1.4.1 Central research question....31
1.4.2 Aims/objectives of the study....32
1.4.3 Hypothesis and Assumptions....32
1.4.3.1 Hypothesis....32
1.4.3.2 Assumptions....33
1.5 Research methodology....33

1.6 Chapter outline 34
1.6.1 Chapter 2: Understanding culture, and cultural values within the context of indigenous children's participation in the family 34
1.6.2 Chapter 3: Article 12(1) of the UNCRC, and the ACRWC provisions within the context of children's right to participation in the family 35
1.6.3 Chapter 4: Implementation of Article 12(1) of the UNCRC in the laws of Nigeria, South Africa and Australia. 35
1.6.3 Chapter 5: Cultural practices and Article 12(1) of the UNCRC children's participation rights: Prioritising children's rights 36
1.6.4 Chapter 6: Conclusion and recommendations 36

CHAPTER 2

UNDERSTANDING CULTURE, FAMILY AND CULTURAL VALUES WITHIN THE CONTEXT OF INDIGENOUS CHILDREN'S PARTICIPATION IN THE FAMILY

2.1 Introduction 37
2.2 Culture in context 38
2.2.1 Concept of culture 38
2.2.2 Concept of family 46
2.2.2.1 Functions of the family 48
2.2.3 Addressing the questions of dominant and minority cultures within the society and legal systems 55
2.3 The legal status of culture or custom 58
2.3.1.1 Nigeria 59
2.3.1.2 South Africa 61
2.4 The recognition of culture and family under UNCRC 70
2.5 Indigenous cultural values and children's participation within the context of the family 72
2.5.1 What is legitimacy? 73

2.5.2 Indigenous children's participation in the family within the context of the African societies 73
2.5.3 Respect 75
2.5.4 Responsibility and obligation 76
2.5.5 Reciprocity 77
2.6 Conclusion 83

CHAPTER 3

ARTICLE 12(1) OF THE UNCRC AND THE ACRWC WITHIN THE CONTEXT OF CHILDREN'S RIGHT TO PARTICIPATION IN THE FAMILY

3.1 Introduction 86
3.2 The development of international children's right instrument 87
3.2.1 The 1959 Declaration on the Rights of the Child 89
3.3 The scope, nature and applicability of the UNCRC 90
3.3.1 Main perspective and principles of the UNCRC 91
3.3.2 Implementation of the UNCRC 94
3.3.3 Measure of implementation – Article 4 96
3.4 Article 12(1) of the UNCRC: The right to participation 98
3.4.1 The child who is capable of forming his or her own views 99
3.4.2 The right to express those views freely 100
3.4.3 In all matters affecting the child 101
3.4.4 The views of the child being given due weight in accordance with the age and maturity of the child 104
3.5 Arguments in favour and against Article 12 UNCRC children's participation rights within the context of the family 108
3.6 ACRWC – African Charter on the Rights and Welfare of the Child 115
3.6.1 Preservation of African cultural value 116
3.6.2 Article 31 on the duties of the child: A forward leap for UNCRC? 116
3.7 The relationship between UNCRC and ACRWC within the context of the children's right to participation within the family 119

3.8 Conclusion 121

CHAPTER 4

IMPLEMENTATION OF ARTICLE 12(1) OF THE UNCRC IN THE LAWS OF NIGERIA, SOUTH AFRICA AND AUSTRALIA

4.1 Introduction 124
4.2 Overview of the Nations of Nigeria, South Africa and Australia 126
4.2.1 Basic facts 126
4.2.1.1 Nigeria 126
4.2.1.2 South Africa 129
4.2.1.3 Australia 132
4.3 The right of children to be heard in Nigeria, South Africa and Australia 134
4.3.1 Nigeria 134
4.3.1.1 The constitution and children 134
4.4 The Nigerian Children's Rights Act 139
4.4.1 Scope and status of the Act 139
4.4.1.1 Recognition of cultural values in the Act 142
4.4.1.2 Parental responsibilities and rights 143
4.4.1.3 Duties and responsibilities of the child 147
4.4.1.4 Omission of the child's right provision of Article 12(1) of the UNCRC in the Act…. 149
4.4.1.5 Implications of the Nigeria's implementation approach of Article 12(1) . 150
4.5 South Africa 153
4.5.1 The constitution in general 153
4.5.2 The constitution and the children 154
4.5.3 S 28(2): Child's best interests of paramount importance in every matter concerning the child 157
4.6 Children's Act 162
4.6.1 Overview of the Children's Act 162
4.6.1.1 The best interests' principle under section 7 of the Children's Act 163

4.6.1.2 Section 10 of the South Africa Children's Act: A replica of Article 12(1) of the UNCRC 167
4.6.1.3 The right to participate in an appropriate way 168
4.6.1.4 Child that is of such an age, maturity and stage of development 170
4.6.1.5 The circumstances in which children should be heard 171
4.6.2 The extent to which children's decisional autonomy right are protected in certain medical decisions under the Children's Act 173
4.6.3 Cultural value and the Children's Act..... 176
4.6.3.1 Parental responsibilities and rights..... 176
4.6.3.2 Extent of the application and interpretations of the integration approach in the Children's Act in relation to the best interests of the child..... 181
4.7 Australia..... 183
4.7.1 The Constitution and the children..... 183
4.8 The Australian children's law..... 185
4.8.1 Scope, status, cultural values and the Article 12(1) inclusion in the children's law and its implications..... 185
4.9 Conclusion..... 190

CHAPTER 5

CULTURAL PRACTICES AND ARTICLE 12(1) OF THE UNCRC CHILDREN'S PARTICIPATION RIGHTS: PRIORITISING CHILDREN'S RIGHTS

5.1 Introduction..... 195
5.2 "Legitimate" cultural practices..... 197
5.3 Harmful cultural practices..... 199
5.4 *Ukuthwala*..... 202
5.4.1 *Ukuthwala* in theory and practice..... 203
5.4.2 *Ukuthwala* and Article 12(1) of the UNCRC rights to participation..... 207
5.5 Male circumcision..... 209
5.5.1 Male circumcision in theory and practice..... 210
5.5.1.1 Traditional male circumcision..... 210

5.5.1.2 Medical circumcision 212
5.5.2 Male circumcision and the UNCRC children's participation rights 213
5.5.3 Male circumcision and children's rights laws in South Africa 214
5.6 Female Genital Mutilation/Cutting (FGM/C): An overview 217
5.6.1 Female Genital Mutilation/Cutting in Nigeria: Theory and practices 220
5.6.2 Female Genital Mutilation/Cutting in South Africa: Theory and practices. 224
5.6.3 Female Genital Mutilation/Cutting in Australia: Theory and practices 227
5.6.4 Female Genital Mutilation/Cutting and the UNCRC children's participation rights 230
5.6.5 FGM/C and children's consent to the practices: Addressing its legality 232
5.6.6 Legal prohibition of Female Genital Mutilation/Cutting: Further justification 234
5.6.6.1 International instruments 235
5.6.6.2 Regional instruments 237
5.7 Cultural values and practices and Article 12(1) children's participation rights: Canvassing an approach in favour of Article 12 (1) children's participation rights 241
5.8 Conclusion 246

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

6.1 Background 249
6.2 Revisiting the Research Question and Objectives 250
6.3 Structure and Purpose of the Analysis 251
6.4 Central Findings 252
6.4.1 Conceptualising culture as the values, attitudes, beliefs, orientations and underlying assumptions prevalent among people in the society 253
6.4.2 Indigenous cultural values and children's participation within the context of the family 254
6.4.3 Cultural practices: Identifying the issues 255

6.4.3.1 Harmful cultural practices 255
6.4.3.2 *Ukuthwala* and UNCRC children's participation rights 256
6.4.3.3 Male circumcision and the UNCRC children's participation rights 257
6.4.3.4 FGM/C and the UNCRC children's participation rights 257
6.4.3.5 FGM/C and children's consent to the practices: Addressing its legality .. 258
6.4.4 Article 12(1) of the UNCRC and the ACRWC within the context of children's right to participation in the family: Identifying the issues 259
6.4.4.1 Article 12(1) UNCRC entails that children are autonomous individuals who are capable of making and participating in decision-making within the family 259
6.4.4.2 The views of child participation based on individual or autonomous rights of Article 12(1) as a matter of concern 260
6.4.5 Legal comparison and implication of implementation of Article 12(1) of the UNCRC in the laws of Nigeria, South Africa and Australia 261
6.4.5.1 Constitutionalism: Nigerian, South African and Australian Perspectives . 262
6.4.5.2 Children's Laws 263
6.4.5.3 Implication of the implementation approach 264
6.5 Recommendations 265
6.5.1 Suggested approach and response towards curtailing the harmful cultural practice, specifically FGM/C 266
6.5.2 Suggested approach to the implementation of Article 12(1) of the UNCRC in Nigeria 272
6.5.3 Suggested inclusion of the recommended Optional Protocol to the Convention on the Rights of Child on Article 12(1) 278

CHAPTER 1

INTRODUCTION

1.1 Introduction

1.1.1 Background and problem statement

The 1989 United Nations Convention on the Rights of the Child (hereafter UNCRC) is one of the international instruments central to the overall protection of children's rights.[1] It was widely ratified by countries and created a universal standard for the rights of the child globally.[2]

The provisions of autonomy rights as enshrined in Articles 12-17 of the UNCRC are widely regarded as central to the children's rights agenda set by the drafters of this instrument.[3] Therefore, these rights are said to be the most important of the rights established by the instrument because they recognise children as independent subjects of the law.[4] The goal of the UNCRC is to ensure that the world's 2.2 billion children have the same opportunities as adults to exercise their Universal Declaration of Human Rights.[5] In its preamble, the UNCRC notably mentions the Universal Declaration, which stipulates that everyone, regardless of race, religion, or nationality, is entitled to all of the rights and freedoms set forth therein. To put it another way, certain people should not be treated differently than others. In the UNCRC, the right to participation is most clearly stated in Article 12. As indicated in this thesis, Article 12 is the distinct provision that takes

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1 See Van Bueren *The International Law on the Rights of the Child* 15-17 and Todres 1998 *Colum Hum Rts L Rev.*161-162. It is notable that, among the earlier case law that enhanced the international development of children's rights is the *Gillick* case [1986] 1 AC 112 decided by the England court which borders on the extent of a parent's right and duties with respect to the medical treatment of a child**.**

2 Only the United States of America and South Sudan are yet to ratify the Convention. Somalia is the last country to ratify the CRC on 20 January 2015. Available on: http://www.africanchildinfo.net/index.php?option=com_k2&view=item&id=6915#.VMfuXdIvYo accessed 25 January 2017.

3 See Hillary and Roche, "Feminism and Children's Rights: The Politics of Voice" 52; Rwezaura *Intl J. of Law, Policy & the Family*, 253-273.

4 Mower The Convention on the Rights of the Child: International Law Support for Children 4.

5 See the preamble to the UNCRC.

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.

Paragraph 2 of Article 12 builds on the above when it states that the child shall, in particular, be afforded the right to be heard in any judicial or administrative proceedings that affects the child. However, it should be kept in mind that in this study, and as shown throughout in the chapters of this thesis, the focus is on participation under paragraph 1 (Article 12(1)), which specifically concerns the right of children to express their views and having these views afforded due weight within the context of the family. The reference to "in all matters affecting the child" in the wording of Article 12(1) presupposes that the right to participation is not limited to matters explicitly mentioned in the UNCRC.[6]

In other words, the scope of Article 12(1) right is wider.[7] It applies to both the private and public spheres of society, and it imposes obligations on the state in areas where private players such as the family, have to decide.[8] Therefore, State Parties to the UNCRC have an obligation to protect the right of children to participate in decision-making within the family through domestic children's legislation.

Despite the importance accorded the provisions of Article 12(1), it has been the subject of much debate and controversy. For example, the opposition to these provisions by various interest groups led to fierce debates during the drafting process, and as evidenced by the many reservations and interpretative declarations made by countries at the ratification of the UNCRC, these provisions remain contentious.[9] According to Hodgkin and Newell,[10] many of these

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6 Stern *The Child's Right to Participation – Reality or Rhetoric?* 161

7 Stern The *Child's Right to Participation – Reality or Rhetoric*? 161.

8 Such and Walker 2005 *Journal of Social policy* 39-57; Freeman 2007 *International Journal of Children's Rights* 5-23 and Stern *The Child's Right to Participation – Reality or Rhetoric?* 161.

9 On the issue of reservations, see Deirdre "Assessing the First Decade of the Convention on the Rights of the Child" 3. For an analysis of these reservations, see Leblanc, *Int'l J Child. Rts* 357; Bissset-Johnson *Int'l J Child Rts* 399 and Schabas *Human Rights Quarterly* 472-491.

reservations and interpretative declarations refer to national legislations, traditions, or religions. For instance, a declaration by Poland states that:

> such rights shall be exercised with respect for parental authority, in accordance with the Polish customs and tradition regarding the place of the child within and outside the family.[11]

Among the main concerns expressed by some State Parties and critics stress that the provisions of UNCRC's Article 12(1) on children's autonomy participation rights present the child as having a separate identity from others.[12] This status entitles the child to considerations and protection under international law as an individual in his/her own right. The inclusion of these rights has evoked fears that projects the right of the child as topmost on the promotion agenda at the expense of parents and the family as an institution, and may therefore be detrimental to parent/child relationship.[13] These concerns seem to have been exacerbated by the lack of provision regarding the duties and responsibilities of the child within the family and towards others under the UNCRC.[14] Thus, some critics claim that the UNCRC does not adequately account for the reciprocal and interdependent relationships between the child, her/his parents, and other members of his/her family.[15]

Questions have also been asked as to the desirability and applicability of the UNCRC construction of the autonomous child within those socio-cultural contexts

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10 Hodgkin and Newell, Implementation Handbook for the Convention on the Rights of the Child 90.

11 See CRC/C/2/Rev 8 at 27 and 35. See also Implementation Handbook for the Convention on the Rights of the Child 90.

12 Wihstutz 2011 *Childhood* 447–459; Tisdall and Punch 2012 *Children's Geographies* 249–264; Stoecklin 2012 *Childhood* 443–457; Mason and Bolzan 2010 "Questioning Understandings of Children's Participation" 128; and Isabelle *et al* 2008 21 *Social Justice Research* 432-456. See also see paras 3.4, 3.4.1 to 3.4.4 in Chapter 3 of the thesis for a detail discussion on the Article 12 provision of the UNCRC – the rights to participation.

13 Deirdre "Assessing the First Decade of the Convention on the Rights of the Child" 5.

14 Hodgson, Individual Duty Within a Human Rights Discourse 150-151; Purdy 1994 2 *International Journal of Children's Rights* 224-241; Mosikatsana 1993 *Michigan Journal of Race and Law* 341.

15 Otlowski and Tsamenyi *Australian Journal of Family Law* 144; Todres *Columbia Human Rights Law Review* 190; Cantwell 2007 "Children's rights in relation to the family" 398.*Columbia Human Rights Law Review* 190; Cantwell 2007 "Children's rights in relation to the family" 398. See also Chapter 3 on the debate for and against autonomy rights of the child.

where the autonomy of the individual is not emphasised as much as his/her interdependence and duties within the family and the community.[16] This is especially the case with Africa and Asia, as well as among ethnic migrants and indigenous groups in Western societies.[17] As a consequence of the foregoing, the practical implementation and effectiveness of the relevant provisions of the UNCRC cannot but be in doubt within some state jurisdictions. In fact, in this thesis, an examination of the implementation approach of some State Parties to the UNCRC reveals that corresponding rights and duties of the child within the family is an intricate measure of implementation in their domestic children's rights legislation.[18] More so, specific State Parties' implementation approach of Article 12(1) of the UNCRC seems to be solely linked to acceptable local norms and customs in terms of the rights and duties of the child within the family.[19] In other words, there is apparent resistance to and deliberate omission of the provisions of Article 12(1) of the UNCRC children's autonomy rights, which can be linked to socio-cultural differences among State Parties. For example, the Committee on the Rights of the Child, mandated to oversee the implementation of the UNCRC has regularly expressed concern that State Parties are not giving adequate attention to the promotion of the autonomy rights of the child.[20] Traditional practices and

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16 Toope "The Convention on the Rights of the Child: Implications for Canada" 44; Isabelle *et al* *Social Justice Research* 432-456; Twum-Danso 2009: *The International Journal of Children's Rights* 415-432; Wihstutz 2011 *Childhood* 447-459; Tisdall and Punch 2012 *Children's Geographies* 249-264; Stoecklin 2012 *Childhood* 443-457; Mason and Bolzan 2010 "Questioning Understandings of Children's Participation" 128; and Isabelle *et al* 2008 21 *Social Justice Research* 432-456, in which the authors in this study raised a legitimate question as to the applicability and desirability of the UNCRC construction of an autonomous child within those socio-cultural context wherein the autonomy of individual is not emphasised as much as his interdependence with and duties within the community.

17 For the Asian perspective, see Vasanthi "*Economic and Political Weekly.* Raman 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 Mosikatsana *Michigan Journal of Race and Law* 370. Mosikatsana argues that children's rights without duties or obligations undermine family autonomy.

18 Nigeria, South Africa and Australia are specific example of such State Parties. See generally the discussion on the implementation of Article 12 of the UNCRC in these countries in Chapter 4 of this thesis.

19 See, for example the later discussion on the implementation approach of Article 12(1) of the UNCRC by Nigeria in paras 4.4 to 4.4.1.4 of Chapter 4 of this thesis.

20 General Comments by the Committee, CRC-C-GC-12 (2009) 6. See also the CRC Committee comments to Mexico, Iceland, Burkina Faso, and Senegal. See Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* 90.

culture have been noted by the Committee as obstacles to the implementation of these rights.[21] Notably, many of the States where the Committee identified these cultural obstacles situate mostly in the regions of Africa and Asia.[22]

These states share a world view that situates the child within the family and community, with emphasis on communality, as well as rights and duties as necessary corollaries to individual rights. Within the African communal system, these duties and rights are generally regarded as the fundamental precepts underpinning African cultural values of "rights" and "duties", namely respect, responsibility and reciprocity within the family.[23] These cultural values are explored in detail later in this thesis.[24]

Within the African region, these cultural values of rights and duties have found a place in the regional human rights arrangement that deals with the rights of the child: the African Charter on the Rights and Welfare of the Child (hereafter ACRWC).[25] This regional children's rights instrument encourages the preservation of tradition and culture. In its Preamble, the ACRWC urges State Parties to take "into consideration the virtues of their cultural heritage, historical background and the values of African civilisation". It also makes reference to the negative impact of culture, among others, on the lives of children in Africa.[26] Article 1(3) of the ACRWC further states that "any custom, tradition, cultural or religious practice"

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21 Hodgkin and Newell Implementation Handbook for the Convention on the Rights of the Child 163.

22 Harris-Short *Human Rights Quarterly 130-181.* Harris-Short notes that this creates an implication that problematic culture is only found in Africa and Asia. However, other states not within these groups also have indicated to the Committee that they are facing similar challenges of implementation in practice. See also Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* 163.

23 Twum-Danso 2009 *The International Journal of Children's Rights* 421; Devereux 1995 *U.N.S.W.L.J.* 464 where the author surveyed African authors' views on meaning of duty. See also Cobbah Aug 1987 *Human Rights Quarterly* 309-331 and Sudarkasa 1980 *Black Scholar* 44. For a detailed discussion of respect, reciprocal support obligations and restraint, see Rwezaura Journal of Social Development in Africa 5; Apt *International Social Security Review* 39-44; and Apt and Grieco *International Social Security Review* 111-22.

24 See Chapter 2 for discussion on the cultural values of duty, rights and reciprocity.

25 OAU Doc CAB/LEG/24.9/49 (1990) entered into force on 29 November 1999. The regional organisation OAU was the first to adopt a binding treaty specifically focusing on the rights of the child. South Africa ratified the Charter on 7 January 2000. Nigeria ratified the Charter on the 23 July 2001. Hereafter referred to as ACRWC.

26 Boezaart 2013 *International Journal of Private Law* 2.

that is incompatible with the Charter's rights, duties and obligations must be discouraged to the extent that it is incompatibility with the Charter's provisions.[27] The ACRWC elaborates on the duties of the child in Article 31 which enumerates the duties of the child not only to the family, but also to the community, the nation and the region.[28] In fact, Article 31(d) requires children to uphold African cultural values, while Article 21 is dedicated to the elimination of harmful social and cultural practices. Thus, the ACRWC recognises the rights, duties and responsibilities of the child towards the family, society and region as akin to positive traditions identified as valuable assets to the upbringing of African children.[29] The recognition of the child's duties and responsibilities towards the family is based on African cultural and communal practices.[30] These practices dictate the role and nature of the relationship between children and their parents.[31] Hence, 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 implementation approaches of specific African State Parties are explored in detail in this thesis.

In light of the foregoing, the question at this point is no longer about the importance of the above cultural values of rights and duties, but rather the application of rights and duties within the family. Within the African context, cultural values of rights and duties demonstrate a complexity and poses challenges in the context of rights and relationships.[32] Put differently, the cultural

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27 Other provisions such as Article 11(2)(c) enjoins state parties to focus children's education of children on preserving and promoting African morals, traditional values and cultures and encouraging children's involvement in cultural events.

28 Article 21 of the ACRWC.

29 Ekundayo 2014 *The International Journal of Humanities & Social Studies* 187; Sloth-Nielsen and Mezmur *Journal of African Law* 159-163.

30 Sloth-Nielsen and Mezmur *Journal of African Law* 159-164.

31 Sloth-Nielsen and Mezmur *Journal of African Law* 159-189. See also the discussion in paras 2.5.3 to 2.5.5 of Chapter 2 on how the norms of respect, responsibility (obligation) and reciprocity as traditional and cultural practices within African societies influenced the child's participatory rights within the family.

32 Twum-Danso 2009 *The International Journal of Children's Rights* 421; Devereux 1995 *U.N.S.W.L.J.* 464; Cobbah Aug 1987 *Human Rights Quarterly* 309-331 and; Sudarkasa 1980 *Black Scholar* 44. For a detailed discussion of respect, reciprocal support obligations and restraint see, Apt *International Social Security Review* 39 44; and Apt and Grieco *International*

value of duties and rights can engender complex situations within the family with regard to children's participation in decision-making. For instance, a family had to deal with a situation where indigenous practices and culture play a role in child-rearing and upbringing. In doing so, the obligation to respect parents might readily be used to limit children's rights to participate in decision-making and matters that directly affect them.[33] Van Bueren[34] refers to the responsibility and duties to respect parents and elders at all times as "too unquestioning and general".[35] Similarly, Chirwa[36] notes that the obligation to demand respect at all time may undermined by the child's right to participate in decision-making in matters affecting the child in particular. In other words, participation rights of the child within the family may be undermine through various cultural practices which can and may be used under the pretext of family child-rearing and upbringing in terms of the value of duty and rights. Some of these cultural practices that may be used within the family are those tied to a "legitimate" cultural practice – those allowed and regulated by law, and cultural practices that are not so legitimate – that are "harmful" to the child. Male circumcision, which is common in South Africa, is an example of such legitimate cultural practice. Also, the custom of *ukuthwala* in South Africa is another example of practices that could be considered as a legitimate, although some aspect of the practices are illegal due to associated conduct of abduction, kidnapping and rape. While such practices as Female Genital Mutilation/Cutting (hereafter FGM/C) among others is a specific example of "harmful" practices, which may hide under the canopy of the cultural value of duty and rights within the family. These cultural practices are explored in detail later in this thesis.[37]

Nigeria and South Africa are specific examples of African State Parties where the implementation of Article 12(1) children's participation rights in their domestic

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Social Security Review 111-122. See also Chapter 2 for further discussion on duty, rights and reciprocity.

33 Ncube "Recognition and monitoring children's rights in Africa. Challenges and Prospects" 612; Chirwa "The Merits and Demerits of the ACRWC" 157-177.

34 Van Bueren The International Law on the Rights of the Child 76.

35 Van Bueren The International Law on the Rights of the Child 76.

36 Chirwa "The Merits and Demerits of the ACRWC" 157-177.

37 See Chapter 5 for a detailed discussion on these issues.

children's legislation reflects these cultural values of rights and duties within the family.[38]

In addition to the above two African countries, Australia is an example of another continent where indigenous cultural values seem to play an essential role with regard to children's rights within the family.[39] In fact, within the context of Australia, Dockery[40] notes that the Australian Aborigines with a long traditional history years before colonial settlement, maintain and retain a web of customs and practices, which had evolved over time, and woven into a "sophisticated relationship of sustainability with the Australian environment." He argues that Australian indigenous cultures have a common feature that emphasises "kinship and relationships within families and other members of indigenous communities." Citing studies conducted on Australian indigenous culture to support his argument, Dockery argues that kinship and relationships within families have "special meanings and recognition of them as an important part of indigenous culture seems pervasive across indigenous groups".[41] This kinship characteristic contrasts with other cultures that emphasise on the nuclear family.[42] This issue is explored in detail later in this thesis.[43]

In light of the foregoing, the implementation approaches of Nigeria, South Africa and Australia of Article 12(1) in their domestic children's rights legislation will be discussed in the thesis. This legal discussion is considered necessary because two of the countries in focus seem to have adopted a unique implementation approach, which presents different interpretations and implications for children's

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38 See paras 4.4.1.1, 4.4.1.2, 4.4.1.3, 4.6.3 and 4.6.3.1 of Chapter 4.

39 See par 4.8.1 of Chapter 4.

40 Dockery 2010 *Soc Indic Res* 315.

41 Dockery 2010 *Soc Indic Res* 321. Studies cited include Christie "Aboriginal perspectives on experience and learning"; Greer and Patel 2000 *Accounting, Auditing and Accountability Journal* 307-329; Long *et al* 2007 "An audit and review of Australian Indigenous housing research" AHURI Final Report No. 102, Australian Housing and Urban Research Institute, July; Thompson *et al* 2000 *Health Education and Behavior* 725-743. The term "Indigenous" is used worldwide in reference to internationally recognised indigenous rights, such as those recognised in the *United Nation Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UN GAOR, 61" sess, 107thplen mtg, Supp No 49, UN Doc A/RES/61/295.

42 Dockery 2010 *Soc Indic Res* 321. The term non-indigenous is used to mean other tribes that do not fall within the Aboriginal and Torres Strait Islander.

43 See later discussion on this issue in paras 2.5.2, 2.5.5 of Chapter 2.

rights. Interestingly, these two countries – Nigeria and South Africa – are emerging democratic states that practise constitutional democracy involving multi-ethnic groups and religious beliefs. The two regional African countries also have a hybrid legal system. For instance, in Nigeria, although common law has been adopted and operates as a dominant legal system, the country derives its sources of law from legislation, customary law and the *Shari'ah*. A discussion on *Shari'ah* law or the court system in Nigeria falls outside the scope of this study. South Africa's legal system is based on Common law, Roman-Dutch law and to an extent African customary (indigenous) law. Aside from this, Australia is a multi-ethnic state that operates a constitutional democracy. The country also shares with Nigeria and South Africa a common-law tradition. More so, these three multi-ethnic countries were all former colonies of Britain. Therefore, these democratic, legal and political positions occupied by these countries in their domains lend themselves to a comparisons of the distinct legal structures of the mentioned states. It also allows for opportunities highlighting vital jurisdictional lessons on how State Parties within the confines of their multi-ethnic groupings handle the implementation of the children's rights to participation within the specific context of the family under Article 12(1) of the UNCRC in their legal systems.

1.2 Problem statement

The notion of autonomous children participation and the recognition of cultural and traditional values and practices towards the family are well-contested in the literature.[44] The above-mentioned two concepts form the basis of interrogation in this thesis. The thesis seeks to explore the influence of cultural values and practices in the implementation of Article 12(1) of the UNCRC in the domestic children's rights legislations of specific State Parties, *i.e.*, Nigeria, South Africa and Australia. The focus is to seek an understanding of the implementation

44 Kagitcibasi 2005 *Journal of Cross-Cultural Psychology* 403; Eekelaar 1986 *Oxford Journal of Legal Studies* 161-182; Lansdown, *The Evolving Capacities of the Child* 4. See also Couzens, "Autonomy Rights versus Parental Autonomy" 420; Dwivedi "Race and Children Perspective" cited in Morrow 1991 *International Journal of Children Rights* 149; Sheppard 1992 *Annals Health Law* 197; Minow "Rights for the Next Generations: A Feminist Approach to Children's Rights" 18; Freeman "Taking Children's Rights More Seriously" 184 and Federle 1994 *Int'l J Child Rts* 343-368.

approaches of Article 12(1) UNCRC within the context of these three countries' specific legislations, and how the respective cultural values and practices fit in. This context hinges on the fact that these countries are multi-ethnic with rich, varied and diverse cultures. Yet, one of these countries – Nigeria adopted a unique implementation approach of Article 12(1) UNCRC in her domestic children's rights legislation, which seems to gives room to different interpretations, as well as implications for children's rights. For the purposes of this chapter, it is imperative to give some brief theoretical insights to several notions as well as the issues that will be discussed in detail later in this thesis.

1.2.1 The notion of culture and cultural values

As indicated in this thesis, although the notion of culture defies a unified meaning,[45] many a definition has been rendered by scholars of across disciplines to emphasise those aspects of culture that are deemed most important by them.[46] For instance, most sociologists and anthropologists viewed culture as "a total way of life".[47] This view identified the concept of culture as the sum of a social group's "material and spiritual activities and products", which separate it from other groups.[48] According to Stavenhagen, "culture is also seen as a coherent self-contained system of values and symbols", which includes various practices reproduced over time by a particular cultural group, and which "provides individuals with requisite signposts and meanings for behaviour and social relationships in everyday life."[49] In other words, to sociologists and anthropologists, "culture" or cultural norms cannot be static, but eclectic, dynamic

45 Du Plessis and Rautenbach *PELJ* 30-31; Tomlinson "Cultural imperialism – A critical introduction"5. The author stated that "what we need to understand is not what culture is, but how people use the term in contemporary discourses." See also Ibawoh *Human Rights Quarterly* 840.

46 For example, psychologists, sociologists and anthropologists. See Fisher *S Cal Interdisc LJ* 668; Sewell Jr *"The concept of culture"* 78.

47 Linton *The Cultural Background of personality* 19, where the author defined culture as "[T]he way of life of any society". Also see Eagleton *The Idea of Culture* 34; Stavenhagen "Cultural Rights: A Social Science Perspective" 88.

48 Stavenhagen "Cultural Rights: A Social Science Perspective" 88.

49 Stavenhagen "Cultural Rights: A Social Science Perspective" 88.

and subject to significant alterations over time.[50] Several other anthropologist and sociologist scholars affirm the foregoing meaning of culture.[51]

As debates on the meanings and features of culture by sociologists and anthropologists continue, legal scholars such as Matthee also attempted a definition of the term: "culture" within a legal context.[52] The author posited that present-day definitions of a culture distinguish clearly between "a person's actual behaviour and the mental processes behind that person's behaviour".[53] In other words, the modern-day meaning of culture reflects "the values and beliefs that people use to interpret experience and generate behaviour," instead of seeing culture as "observable behaviour".[54]

Among other legal scholars who have attempted to define culture are Bennett,[55] Du Plessis and Rautenbach,[56] Van Broeck[57] and Amoah and Bennett.[58] To Bennett, culture is a result of "human agency or a system of symbols" that provides individuals with a way of providing meaning to their lives.[59] Du Plessis and Rautenbach note that "culture should be understood as an abstract", yet essential components of human life dealing "with a subliminal pattern of thinking".[60] This way of thinking is described as the 'organisation of values, norms, and symbols", that guide actors decisions, and restricts the kinds of "interaction that may occur

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50 Put differently, culture or cultural norms of a community or groups are susceptible to and respond to influences by social, economic and political forces both nationally and internationally. See An-Na'im "Toward a cross-cultural approach to defining international standards of human rights" 27.

51 Herskovitz "Cultural dynamics" 49-50; Triandis "Cultural syndromes and subjective well-being" 13-36; Eagleton: *The idea of Culture* 36; Lederach *Preparing for peace: Conflict transformation across culture* 9; Robertson *Globalisation – Social theory and global culture* 40; Matarasso "Culture, economics & development".

52 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 73. See generally par 3.3.2 of Matthee's thesis on "Pinning down the term culture".

53 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 74.

54 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 74-75.

55 Bennett *U Botswana LJ* 3-26.

56 Du plessis and Rautenbach *PELJ* 27-71.

57 Van Broeck *Eur J Crime Crim L & Crim Just* 1-32.

58 Amoah and Bennett *Afr Hum Rts LJ* 357- 375.

59 Bennett *U Botswana LJ* 14-15. See also Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 75.

60 Du Plessis and Rautenbach *PELJ* 31. See also Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law*? 75.

between individuals."[61] Accordingly, Amoah and Bennett describe culture "as a people's store of knowledge, beliefs, arts, morals, laws and customs" and the entire attributes acquired as a member of the society.[62]

Furthermore, pieces of legislation and policy documents originating from Nigeria and South Africa also provide definitions of culture.[63] For instance, the Nigerian National cultural policy document describes culture as "the totality of the way of life evolved by a people in their attempt to meet the challenges in their environment."[64] In South Africa, culture is defined as "the dynamic totality of distinctive spiritual, material, intellectual and emotional features which characterise a society or social group" in the White Paper on Arts, Culture and Heritage.[65] Culture is also defined in broad terms in South Africa's Culture Promotion Act,[66] which encompasses a variety of characteristics. "The visual arts, music, the literary arts, knowledge acquisition on the applied, natural and human sciences, as well as the utilisation of leisure,"[67] are some of these characteristics.

Furthermore, UNESCO in its preamble to the 2001 Universal Declaration of Cultural Diversity introduced an elaborate definition of culture "as the set of distinctive, spiritual, material, intellectual and emotional features of society or a

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61 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 75.

62 Amoah and Bennett *Afr Hum Rts LJ* 368. See also Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 76.

63 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 76

64 The National Cultural Policy was launched by the Nigerian Government in September 1988. See Federal Republic of Nigeria. *Cultural Policy for Nigeria*. See also Culture and Heritage, the Federal Ministry of Information and Culture, Federal Republic of Nigeria http://fmic.gov.ng/culture/culture.

65 Of 4 June 1996. The White Paper can be accessed at www.dac.gov.za. See also Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 77.

66 S 3(5) of the Culture Promotion Act 35 of 1983. See also Matthee One Person's Culture is another Person's Crime: A Cultural Defence in South African law? 77.

67 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 77. The author pointed out that the provision of s1 of the National Heritage Resources Act 25 of 1999, which states that once something is label as being "culturally significant", that significance refers to an object's "aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance", is a very broad interpretation of culture.

social group", which includes "art and literature, lifestyles, ways of living together, value systems, traditions and beliefs."[68]

The above definition of culture by UNESCO serves as a point of departure for the exploration of the notion of culture in this thesis. This is because it explicitly refers to value systems, lifestyles, traditions and not the least, beliefs – among which include religious beliefs. These provide a far more broader interpretation of what can be included in the concept of culture.[69] It is practically challenging to separate the concept of culture from religion.[70] This difficulty arises because of the role and influence that cultural and traditional practices continue to exert on religion in many societies.[71] In other words, culture and religion are intertwined to such an extent that it is difficult to distinguish between cultural belief and religion in the socio-cultural fabric of some societies.[72] This intertwining of culture and religion is one of the factors that makes the concept of culture more complicated, and its precise content difficult to determine, resulting to ambiguity about what is meant

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68 Universal Declaration of Cultural Diversity (UNESCO Doc. 31C/Res 25, Annex 1 (2001)) adopted unanimously by the organisation's General Conference at its 31st session, 2 November 2001.

69 At least more than the realm of what is explicitly stated in the ICESCR. Taking its cue from article 15 of the ICESCR on cultural rights, the Committee on Economic, Social and Cultural Rights stated that the term culture should be interpreted broadly. In addition, when commenting on the question of culture and minority rights in ICESCR article 27, the Human Rights Committee appears to favour a broad definition of the phrase, remarking that "culture manifests itself in many forms". This serves to emphasise the diversity of the concept. The Human Rights Committee had previously confirmed that a broad and flexible interpretation of the term "culture" is within the scope of the article 27. See UN Fact Sheet No.16 (Rev.1) The Committee on Economic, Social and Cultural Rights.

70 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law*? 75-76. Matthee, while explaining the definition of culture by Amoah and Bennett, point out that culture as "a close and symbiotic relationship with religion" which in reality are considered as difficult to separate. The author further points out that the similarities and distinctions between the categories of "culture" and "religion" are irrelevant, according to Rautenbach, because' "African traditions do not make any distinction between the concepts they are one and the same".

71 Rwezaura *et al* 1995 *JLP* 43-44.

72 Amoah and Bennett *Afr Hum Rts LJ* 368; Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law*? 76. Examples of such society are South Africa and Nigeria, where the religion of Islam and Christianity affect practically every aspect of the society. In both religions the influence of indigenous cultural and traditional practices cannot be denied in the methods and approaches towards worshipping in the two faiths. See also Rwezaura *et al* 1995 *JLP* 43-44. However, this use a noun between culture and religion cuts across the board and cannot be said to be limited only to the countries aforementioned. See Stern *The Child's Right to Participation–Reality or Rhetoric?* 181-182.

with the definition.[73] A discussion on religion, however, falls outside the scope of this study.

For the purpose of this study, which questions how culture affects and relates to legal development, culture is preferably defined in more expansive, abstract and purely subjective terms as the values, attitudes, beliefs, orientations, and underlying assumptions prevalent among a people residing in a given society.[74]

1.2.2 Indigenous cultural values

It is trite that indigenous cultural norms, rules or values that are legitimate within a particular cultural milieu will be respected and observed by members of that culture.[75] This is presumably because of its benefits to the members of that particular culture.[76] According to Viljoen, the observance of indigenous cultural values in terms of children's participation within African societies is informed by "African cultural heritage".[77] As part of cultural heritage, children within African societies are regarded as a valuable part of society.[78] This intrinsic value and worth of the children are emphasised and captured by many African expressions and attitudes towards children.[79] More so, African culture recognises traditional responsibility for meeting the survival needs of children, as well as ensuring children's social well-being within the society.[80] Therefore, the survival and

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73 Stern *The Child's Right to Participation – Reality or Rhetoric*? 182; Amoah and Bennett *Afr Hum Rts LJ* 368

74 This preferred definition is in line with the UNESCO'S definition of culture in its preamble to the 2001 *Universal Declaration of Cultural Diversity* as earlier mentioned and it also resonates with the various perspectives on culture considered in this thesis. See Universal Declaration of Cultural Diversity (UNESCO Doc. 31C/Res 25, Annex 1 (2001)) adopted unanimously by the organisation's General Conference at its 31st session, 2 November 2001. See also the discussion on culture later in par 2.2.1 of Chapter 2.

75 An- Na'im "Problems of universal cultural legitimacy for human rights" 331,336.

76 Kiame 2005 *African Journal of Human Rights* 222-223.

77 Viljoen "The African Charter on the Rights and Welfare of the Child" 214-218. The term "African cultural heritage" was used in the preamble to the ACRWC. The ACRWC urges states parties in the Preamble to take "into consideration the virtues of their cultural heritage, historical background and the values of African civilization…on the concept of the rights and welfare of the child." See the subsequent discussion on the fundamental precepts underpinning the African cultural values.

78 Armstrong *et al International Journal of Children's Rights* 333-368.

79 Kiame 2005 *African Journal of Human Rights* 222

80 Polis *Human Rights Quarterly* 342. See also the Preamble to the ACRWC.

development of children are considered as "legitimate goals of traditional society".[81]

In ensuring the above stated legitimate goals, traditional African societies adopted a communal "family" system.[82] This communal system not only recognises the devolution of authority in the family but also distributes rights, duties and responsibility accordingly on every member of the family.[83] As adopted in this thesis, these duties and rights within the African communal system are generally regarded as the fundamental precepts underpinning African cultural value namely respect, responsibility and reciprocity.[84] These fundamental precepts of African cultural norms concerning participatory rights of a child within the family as theoretically contextualised in this thesis are briefly highlighted as follows.[85]

1.2.2.1 Respect

Respect as a value in most African societies is seen as the fundamental guiding principle of behaviour within the family.[86] It governs relationships among all members of the family.[87] Respect is accorded depending on age, ability, and gender.[88] For instance, from an early age, children are taught appropriate behaviour including acceptable language, gestures and mannerisms to be accorded older people.[89] According to Twum-Danso in her research on the impact of the communal values on children right's in the West African country of Ghana, these values are so important that often children see them as rights to which they

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81 Kiame 2005 *African Journal of Human Rights* 225; Ludsin *Berkeley J Int'l L* 70

82 Ludsin *Berkeley J Int'l L* 70; Keevy *JJS* 36-38. Ludsin points out that the notion of family lies at the heart of African customary law.

83 See Keevy *JJS* 37-38 for an overview of the hierarchy within African communities. See also Van Broeck *Eur J Crime Crim L & Crim Just* 10-11; Bennett *U Botswana LJ* 17.

84 Twum-Danso 2009 *The International Journal of Children's Rights* 421; Devereux 1995 *U.N.S.W.L.J.* 464 where the author surveyed African authors' views on meaning of duty. See also Cobbah Aug 1987 *Human Rights Quarterly* 309-331 and Sudarkasa 1980 *Black Scholar* 44.

85 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.

86 Cobbah 1987 *Human Rights Quarterly* 321; Sudarkasa 1980 *Black Scholar* 44.

87 Motala 1988-1989 *Hastings Int'l & Comp L Rev* 381.

88 Motala 1988-1989 *Hastings Int'l & Comp L Rev* 382.

89 Nwoye 1993 African Languages and Cultures 37-48.

are entitled to. In other words, "children have a right to be obedient", and "children have the right to respect their parents".[90] Himonga, in her comments on the impact of cultural values, such as respect, on children's participation rights in Zambia buttressed Twum-Danso's findings on children and the value of respect.[91] In fact, Himonga's interviews with children in Zambia, reveals the importance attached to the concepts of duty and respect, and highlights children's perception of their rights as a correlation to their obligations.[92]

1.2.2.2 Responsibility and obligation

Responsibility refers to the duty to support and provide care for a needy and deserving parent and other members of the family. This is a well-known and established norm in African societies.[93] In other words, it is an accepted practice and a duty foisted on each member of a family or tribe to protect and promote the well-being of others within the family and the extended family. This responsibility and obligation to others are aptly captured in the typical African phrase to be "one's brother's keeper",[94] and in the Nguni proverb of *umuntungumuntungabantu* ("a person is a person through persons").[95] Hence, from infancy, the African child is raised with this notion of duty and the consciousness that he has responsibilities towards others.

1.2.2.3 Reciprocity

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90 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.

91 Himonga "The Right of the Child to participate in Decision Making: A perspective from Zambia" 113.

92 Himonga "The Right of the Child to participate in Decision Making: A perspective from Zambia" 114.

93 Himonga "African Customary Law and Children's Rights: Intersections and Domains in a New Era" 74. This duty arises prima facie by virtue of membership of the family or community. However, there is also a presumption that the beneficiaries of such a duty deserves of it based on the expectation that they too owe or have discharged the same duties to others (see the following section on reciprocity).

94 Motala 1988-1989 *Hastings Int'l & Comp L Rev* 373. See also earlier reference to *Ubuntu* in this chapter.

95 Keevy *JJS* 65, 71-72, 74 points out that this proverb could also be translated as "I am because we are", "I am because we are and because we are, therefore, I am" and "injury to one is injury to all". See also Mollema and Naidoo *JJS* 51; Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law*? 57-58.

The duty of reciprocity is closely related to that of responsibility and obligation described above.[96] When the child becomes a parent, the child becomes entitled to the support of his children. In this manner, the mutually reinforcing cycle of support and entitlement, obligations and rights is sustained, and everyone benefits from the exercise of their duties to others.[97] The essence of reciprocity is to ensure the continuity of a system of intergenerational bonds and interdependence in the community.[98] Hence, the context and socialisation of a child in this regard relate closely to the duties and functions of the child in the community and his later life as an adult in the same community.[99]

In light of the above discussion on the African communal conception, the interests of the child and those of the community are mutually beneficial. Thus, the preservation of communal or group identity is thought to be in the interests of the child and the interests of the family.[100] More so, in this communal conception, relationships are built in tandem with the extended family model paradigm.[101] Parenthood in this setting is mainly social, and all child-related decision are to be made after consultation with all members of the kinship group, not just the child's biological parents.[102] Although broadly speaking, collective good takes precedence over an individual child's claims, the welfare of the community is inextricably tied to the interest of the individual child. Accordingly, the child is treated not as an individual but as a member of the family,[103] who "serves the family and the family serves her".[104] Therefore, the individual interests of the child as well as those of the family are, therefore inextricably linked.

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96 See Facing Mount Kenya: The tribal Life of the Gikuyu quoted in Steiner *et al International Human Rights in*, *context; Law, Politics Morals* 499.

97 Rwezaura *et al* 1995 *JLP* 32-38.

98 Ncube, "The African Cultural Fingerprint? The Changing Concept of Childhood" 21.

99 Armstrong *et al* 1995 *Int'l J Child Rts*. 336; Mollema and Naidoo *JJS* 51; Bennett *PELJ* 48, 52; Keevy *JJS* 72; Cornell and Van Marle *Afr Hum Rts LJ* 206.

100 Alston 1994 *International Journal of Law Policy and the Family* 1–25; Moyo 2012 *African Human Rights Law Journal* 151.

101 Moyo 2012 *African Human Rights Law Journal* 151.

102 Rwezaura *et al* 1995 *JLP* 40.

103 Ludsin *Berkeley J Int'l L* 70; Keevy *JJS* 70.

104 Moyo 2012 12 *African Human Rights Law Journal* 151; Armstrong A child belongs to everyone: Law, family and the construction of the best interests in Zimbabwe Innocenti

Although in recent times significant changes had occurred within most communities in Africa due to external cultural influences, migration and socio-economic situations,[105] the core values as described above remain valid and prevalent.[106] Furthermore, the cultural value of rights and duties and communal family arrangement, can birth complex conflict situations within the family in terms of children participation in decision-making.[107] These conflicts may occur where a family had to deal with situations where indigenous practices and culture play a role in child-rearing and upbringing. Several of these indigenous cultural practices may be within those regarded as "harmful" to the child.

1.2.3 Cultural practices

1.2.3.1 Harmful cultural practices

As pointed out later in the thesis,[108] the UNCRC did not explicitly mention any practices as harmful. However, Article 24(3) of the UNCRC obliges State Parties to take all effective and appropriate measures to abolish traditional practices that are prejudicial to the health of children.[109] The phrase "prejudicial to the health of the children" entails both legitimate and other cultural or traditional practices. Legitimate cultural practices are those practices "allowed and accepted according to the law" or which the law regulates. Specific examples of such practices include the custom of *ukuthwala* and male circumcision in South Africa. They are considered legitimate cultural practices because the law does not entirely prohibit such practices, but regulate them.[110] Other practices are those cultural or traditional practices that may not be compatible with the UNCRC's four anchoring

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Occasional Papers, Child Rights Series 11 19955; Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* 2009 114.

105 Rwezaura *et al* 1995 *JLP* 25, 74.

106 Rwezaura *et al* 1995 *JLP* 33.

107 Twum-Danso 2009 *The International Journal of Children's Rights* 421; Devereux 1995 *U.N.S.W.L.J.* 464; Cobbah Aug 1987 *Human Rights Quarterly* 309-331 and; Sudarkasa 1980 Black Scholar 44; Apt *International Social Security Review* 39 44; and Apt and Grieco *International Social Security Review* 111-122. See also Chapter 2 for further discussion on duty, rights and reciprocity.

108 See generally, the discussion in Chapter 3.

109 See Kiame 2005 *African Journal of Human Rights* 227.

110 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 163; South African Law Reform Commission Thirty Eighth Annual Report 45.

principles, namely non-discrimination, participation, survival and development, and the best interests of the child.[111] A specific example is FGM/C. A cultural or traditional practice that offends/violates any or all these principles should be considered harmful to a child's rights under the UNCRC. Put differently, cultural practices that are not compatible with the principles of participation rights of the child, *i.e.,* which deny a child's right to express his/her views and to have those views respected, are also regarded as harmful practices.[112]

Considering that the complexity of the cultural values of duty and rights and the challenge they pose in the context of rights and relationships within the family, it goes, thus, that various practices "harmful" to the child may be used under the pretext of parental duty and rights. Specific examples of such harmful practices which may be used within the indigenous family, are the customs of *ukuthwala,* traditional male circumcision and FGM/C.[113] These are potentially harmful cultural practices because they do not foster the development of the child. Therefore, the thesis will focus on the potentially harmful cultural practices, which may underlie the values of rights and duties within the family, the customs of *ukuthwala* and male circumcision, which is prevalent in South Africa, and FGM/C in Nigeria, South Africa and Australia. The rationale is that the above-mentioned practices do not only prejudice the health of children who are the victims, but also violate children's rights to participate in decision-making within the family that concern the child.[114] Although these customs and practices are discussed in detail in the subsequent chapters, a brief overview of each is provided below.

1.2.3.2 Custom of *ukuthwala*

111 The UNCRC did not specifically states what amount to harmful practices. However, practices that are not compatible with the UNCRC four anchoring principles, namely non-discrimination, participation, survival and development and the best interests' principles are regarded as harmful.

112 See Stern 2006 *The child's right to participation – reality or rhetoric?* 186. Stern further point out that there are several reports by the UN Special Rapporteur on Violence Against Women pointing out that the prevalence of cultural practices in families, and elsewhere in society, which constitute violations of women's human rights that have "avoided national and international scrutiny because they are seen as cultural practices that deserve tolerance and respect."

113 These cultural practices are analysed in details later in Chapter 3 of the thesis.

114 Discussion on these harmful cultural practices later in paras 3.3, 3.3.1, 3.3.2, 3.3.3 of Chapter 3 buttressed this assertion.

The custom of *ukuthwala* is an indigenous custom in South Africa that can be used under the value of rights and duties. In terms of this custom, a female is taken or carried off by her prospective husband, his friends or family to the residence of the husband's father or guardian to initiate the negotiation for *ilobolo*.[115] The custom of *ukuthwala* can take on one of three forms. The first form can be said to have occurred when all the parties concerned agreed to it.[116] The second form of *ukuthwala* involves the carrying off without the consent of the woman, but with the approval of both the woman and prospective husband's families.[117] With the last form of *ukuthwala* the carrying off is accompanied by violence and here both the woman as well as her father or guardian's approval is lacking.[118] In most instances, particularly in the latter two forms of *ukuthwala,* it often happens that the woman and potential husband engage in sexual intercourse usually without the woman's consent.[119] It goes to say, that crimes are committed under these above-mentioned forms of *ukuthwala*.

What becomes evident is that the custom of *ukuthwala* serves an important cultural purpose within indigenous communities living in accordance with African customary law.[120] More so, a young girl can be *thwala*'d without her consent or without taking part in the process of decision-making involving her *thwala'*.[121] It is, of course, here that the distorted custom of *ukuthwala* and Article 12(1) of the UNCRC on the rights to participation within the family are diametrically opposed to each other. As indicated before,[122] a cultural practice that violates the rights to participation are considered harmful to the rights of the child under the UNCRC.

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115 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 159; Bennett *U Botswana LJ* 6.

116 See Labuschagne and Schoeman *JJS* 34; Rautenbach and Matthee *JLP* 119; Bennett *U Botswana LJ* 7; Mwambene and Sloth-Nielsen *J Fam L & Prac* 7; Olivier *et al* "Indigenous Law" par 89.

117 See Labuschagne and Schoeman *JJS* 34; Rautenbach and Matthee *JLP* 119; Mwambene and Sloth-Nielsen *J Fam L & Prac* 7; Olivier *et al* "Indigenous Law" par 89.

118 See Labuschagne and Schoeman *JJS* 34; Rautenbach and Matthee *JLP* 119; Mwambene and Sloth-Nielsen *J Fam L & Prac* 7; Olivier *et al* "Indigenous Law" par 89.

119 See Labuschagne and Schoeman *JJS* 34; Rautenbach and Matthee *JLP* 119; Mwambene and Sloth-Nielsen *J Fam L & Prac* 7; Olivier *et al* "Indigenous Law" par 89.

120 See Mwambene and Sloth-Nielsen *J Fam L & Prac* 7.

121 See Mwambene and Sloth-Nielsen *J Fam L & Prac* 7.

122 See generally the discussion on these harmful cultural practices later in paras 3.3, 3.3.1, 3.3.2, 3.3.3 of Chapter 3.

Chapter 5[123] further discusses these practices *vis-à-vis* UNCRC children's participation rights and children's rights law in South Africa.

1.2.3.3 Male circumcision

Male circumcision is the surgical removal of the foreskin, which is the fold of skin that surrounds the head of the penis. It is commonly performed for religious and traditional reasons, usually within the first two weeks following birth, or at the start of puberty as a rite of passage into adulthood.[124] It is also done to treat problems involving the foreskin for medical reasons.

In indigenous communities where male circumcision is practised, traditional circumcision is a rite of passage into manhood. Boys are confined or sent into seclusion for several weeks whilst transitioning to manhood ceremonies are carried out.[125] Traditional male circumcision is performed in groups as a way of maintaining cultural identity and perpetuating traditions.[126] Most circumcise their young at around puberty, although the actual age can range from six to adult years depending on the ethnic group.[127] The procedure also aims at inculcating the values of strength and bravery, and it is expected that during the act of circumcision, the participant should display strength by showing that he is not feeling any pain.[128]

A major concern over the practice of traditional male circumcision is the significant incidence of serious injury and sometimes death.[129] For example, circumcision is traditionally performed in the bush as a rite of passage among the Xhosa in South Africa, sometimes with the use of spearheads and dirty knives, and usually by

123 See the discussion the custom of *ukuthwala* vis-à-vis UNCRC children's participation rights and children's rights law in South Africa in Chapter 5 of this thesis.
124 Traditional male circumcision is discussed further in par 5.5.1.1 of Chapter 5.
125 Van der Zalm 2008 *Emory Int'l Law Review* 906.
126 WHO (2009) Traditional male circumcision among young people: a public health perspective in the context of HIV prevention. World Health Organization, Geneva.
127 Wilcken *et al* 2009 Bulletin of the World Health Organization.
128 Vincent 2007 Male circumcision policy, practices and services in Eastern Cape Province of South Africa.
129 In the Eastern Cape alone, between January 2008 and December 2009, 144 circumcision-related deaths were recorded. *See* Lazarus 2010 *South African Medical Journal* 544.

medically unskilled practitioners.[130] These kinds of traditional operations frequently result in haemorrhage, infection, mangling, and the loss of the sexual organ.[131] There are neither antiseptics, antibiotics nor analgesics used.[132] The practitioners as well as the societies believe that boys who are circumcised without any forms of analgesics are braver and stronger; as a result the use of analgesia is associated with cowardice and weakness on the part of the boy.[133]

What becomes evident is that the practice of traditional male circumcision may substantially harm the male child. For example, many parents or legal guardians may elect to have their male children or young boys in their care circumcised in deference to cultural or religious dictates. Interestingly, older boys who seek to enjoy the social belongingness and acceptance that comes with circumcision, willingly accept to participate in the exercise. This raises a number of children's human rights concerns. As indicated in Chapter 5,[134] the UNCRC, guarantees protection of children against all forms of violence, injury or abuse, and obliges states to do away with traditional practices prejudicial to the health of children. Therefore, as circumcision is a cultural practice which directly affects the well-being of the male child, it presupposes that making or participating in the decision-making process is absolutely paramount, taking into consideration the child's age, maturity and stage of development.[135] Chapter 5 of this thesis further discusses the practice in the light of the UNCRC children's participation rights and children's rights law in South Africa.[136]

1.2.3.4 Female genital mutilation/cutting

130 Anike *et al* 2013 African Primary Health Care and Family Medicine 1–5.
131 Anike *et al* 2013 African Primary Health Care and Family Medicine 1–5.
132 Vincent 2007 Male circumcision policy, practices and services in Eastern Cape Province of South Africa.
133 Vincent 2007 Male circumcision policy, practices and services in Eastern Cape Province of South Africa.
134 See par 5.3, 5.5.2 and 5.5.3 of Chapter 5. See also Article 19 and 24(3) of the UNCRC.
135 See Article 12 (1) of the UNCRC. See also Chapter 4 of this thesis for a detailed discussion on what Article 12 (1) provisions entail and its various components.
136 See par 5.3, 5.5.2 and 5.5.3 of Chapter 5.

A range of terms can be used when discussing female genital mutilation/cutting.[137] In some context, the term "mutilation" is used to avoid downplaying the impacts of the practice, and to emphasise its human rights component. In other situations, the word "cutting" is favoured to underscore the significance of adopting non-judgemental terms, particularly within practising communities. The term "female genital mutilation/cutting" is employed in this thesis to acknowledge both perspectives. Female "circumcision" is not been used because it is a term that is more usually associated with males and may only be connected with less invasive forms of FGM/C.[138]

As discussed later in this thesis,[139] FGM/C is another cultural or traditional practice that may be used under the guise of the value of rights and duties. FGM/C refers to all procedures involving the removal of parts or all of the most sensitive parts of a female's genital organ for non-medical reason.[140] FGM/C is an age-old practice perpetuated in many communities around the world.[141] According to Daniyan *et al*[142] traditional cutters, known as circumcisers in the communities, traditional birth attendants or grandmothers and in rare cases, nurses/midwives, perform FGM/C procedures.[143] There are no health benefits of FGM/C, and there is no medical justification for it. Rather, the practice causes a slew of physical issues and untold psychological issues for female children.[144] For instance, FGM/C has a negative impact on body functioning and can lead to lifelong physical and sexual health

137 See the publication Respectful dialogue: a guide for responsible reporting on female genital cutting (AMWCHR 2014).

138 For more guidance on terminology, see the publication Respectful dialogue: a guide for responsible reporting on female genital cutting (AMWCHR 2014).

139 See para 5.6, 5.6.1, 5.6.2 and 5.6.3 of Chapter 5.

140 WHO 2018 https://www.who.int/reproductivehealth/publications/health-care-girls-women-living-with-FGM/en/.

141 See WHO 2018. http://www.who.int/ mediacentre/factsheets/fs241/en. It is notable and siginificant to recognise that FGM/C has no basis in religion and is practised by ethnic groups of many faiths. See AMWCHR (Australian Muslim Women's Centre for Human Rights) 2014. http://ausmuslimwomenscentre.org.au/wpcontent/uploads/2014/08/Respectful-Dialogue.pdf.

142 See Daniyan *et al* Epidemiology (Sunnyvale)2-3.

143 See Ahanonu and Victor *Health Education Research* 683-689; Population Reference Bureau. 2010. http://www.prb.org/pdf10/fgm-wallchart2010.pdf. See also Federal Ministry of Health Nigeria, World Health Organisation. Elimination of Female Genital Circumcision in Nigeria. 2007, Abuja.

144 See Daniyan *et al* Epidemiology (Sunnyvale) 1.

complications[145] and psychological effects such as anxiety, depression and post-traumatic stress disorder.[146] It follows, therefore, that FGM/C impacts on female children will have immediate, short-term and long-term implications.[147]

As further discussed in this thesis,[148] the reasons for FGM/C practices are complex, and it involves a combination of social and cultural factors that vary across time, ethnicity and region.[149] Commonly cited reasons for FGM/C include the following: to prepare for marriage and adulthood; to preserve culturally accepted values such as initiation rites, and to ensure premarital and marital fidelity.[150] Also, in terms of the biological age for the practice, most communities perform FGM/C before the age of puberty, ranging from infants to children from ages eight to 18 years old.[151] A vast majority of female children undergo FGM/C by the age of 15, and many before the age of nine.[152] For the adolescent female, the practice is seen as part of a cultural initiation rite or preparation for womanhood in the practising communities.[153]

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145 See Bishai *et al* Bull World Health Organ 281-8; Dare *et al J Obstet Gynaecol* 281-3; Abdulcadir *et al Swiss Med Wkly* 1-8.

146 See Daniyan *et al* Epidemiology (Sunnyvale) 3-4. 6

147 Short term implications include pain, bleeding, shock, urination problem, infection, genital tissue swelling and death. While long term implication includes Menstrual problems (for example, difficulty passing blood or painful periods), Increased risk of childbirth complications, scar tissue complications (e.g., keloids and epidermal inclusion cysts), Chronic pain, Urinary tract infections. Reproductive tract infections and Sexual health complications. See WHO 2016 www.who.int/reproductivehealth/topics/fgm/health_consequences_fgm/en.

148 See generally the discussion in Chapter 5 on the theory and practice of Female Genital Mutilation in Nigeria, South Africa and Australia respectively.

149 See AMWCHR (Australian Muslim Women's Centre for Human Rights) 2014. http://ausmuslimwomenscentre.org.au/wpcontent/uploads/2014/08/Respectful-Dialogue.pdf. See also WHO 2018. https://www.who.int/reproductivehealth/publications/health-care-girls-women-living-with-FGM/en/.

150 WHO 2018. https://www.who.int/reproductivehealth/publications/health-care-girls-women-living-with-FGM/en/.

151 See, generally, Hosken The Hosken Report: Genital and Sexual Mutilation of Females.

152 DHS (Demographic and Health Surveys) 2018. http://dhsprogram.com/Publications/Publications-by-Country.cfm.

153 Nkateko The silenced voice of initiated Venda Women*;* Kitui date unknown https//africlaw.com See also Stayt *The Bavenda*. According to Van de Walle and Franklin women are taught about future obligations, commitment to their counterpart (husband), etiquette, controling interactions with her in-laws as well as the proper place of submission and obidence to their husband. See Van de Walle and Franklin *Sexual of Initiation and the Transmission*. *Reproductive Knowledge*.

As indicated later in this thesis,[154] the practice of FGM/C in Nigeria is usually carried out without the victims' consent. The final decision whether or not to circumcise their daughter often lies with the parents.[155] In South Africa, for instance, most adolescent females at puberty who participate in the cultural rites of initiation/ceremonies or preparation for womanhood in the practising communities which involve FGM/C do so based on societal and cultural pressure. Pressure such as fear of been mocked and ostracised.[156] Consequently, most of the victims of FGM/C are coerced by applying threats and intimidations into agreeing to undergo the initiation proceedings. In this regard, the requisite consent to participate cannot be said to have been adequately sought.

In chapter 5 of this thesis,[157] it is indicated that FGM/C infringes on the right to life, the protection of children from all form of violence, injury or abuse and participation rights of children. More so, the UNCRC obliges states to do away with "traditional practices prejudicial to the health of children".[158]

1.3 Legal comparison and the implication of implementation of Article 12(1) of the UNCRC in Nigerian, South African and Australian law

In this thesis, the approach adopted in discussing the implementation of Article 12(1) UNCRC in the domestic laws of Nigeria, South Africa and Australia focuses on two levels of implementation, which are critical to the overall execution of the UNCRC in these countries. These are the constitutions and a specific children's rights legislation that has domesticated the provisions of the UNCRC.[159] The subsequent section briefly discusses the above-mentioned thus:

1.3.1 Constitutionalism – Perspectives in Nigeria, South Africa and Australia

154 See par 5.6.1 of Chapter 5 for a discussion of FGM/C in Nigeria.
155 See EASO, Country Guidance: Nigeria February 2019 63. See also further discussion in par 5.6.1 of Chapter 5.
156 See also Nkateko *The silenced voice of initiated Venda Women* 38. See also further discussion in par 5.6.2 of Chapter 5.
157 See paras 5.6 to 5.6.3 of Chapter 5.
158 See Articles 19 and 24(3) of the UNCRC.
159 See further discussion on this in paras 4.3, 4.5 and 4.7 of Chapter 4.

As discuss later in this thesis,[160] Nigeria, South Africa and Australia are multi-ethnic societies, encompassing a wide variety of cultures, languages and religions.[161] With respect to South Africa, her pluralistic nature is expressed by the constitutional recognition of many distinct languages.[162] Similar to Nigeria and Australia, South Africa operates a constitutional democracy with three tiers of Government – National, Provincial and Local Government – each with its own distinct executive authority.[163] However, unlike Nigeria and Australia, the Constitution of South Africa enshrines specific rights for children.[164] This, however, does not preclude children from access to other human rights provisions as is the case in the Nigerian and Australian Constitutions.[165] Also, the South African Constitution specifically makes paramount the best interests of the child in all matters affecting them. This is not the case in the Constitutions of Nigeria and Australia, which has no specific provisions on the best interests of the child.[166] However, like all the other specific rights enjoyed under the Nigeria and Australian Constitutions, the best interests of the child under the South African Constitution are subject to applications and limitations as any other specific rights endorsed in the Bill of Rights.[167] Their application are subjected so far as it does not trump on others rights. It is notable that the Nigerian Constitution rates low in terms of visibility to specific children's rights. In other words, some of the constitutional

160 See detailed discussion on this in paras 4.2.1.1, 4.2.1.2 and 4.2.1.3 of Chapter 4.

161 See Durojaiye *et al* 2014 *Gender & Behaviour* 6169-6181; Oluyede Constitutional law in Nigeria 21; Crawford the politics of cultural pluralism 276–281; Oba 2011 *Emory Law Review* 881-895; Central Intelligence Agency Country Profile: Nigeria 2018. See Brand South African Information get away to South Africa 2017 http://www.southafrica.info/about/. See Australia in Brief, Australian Government Department of Foreign Affairs and Trade 15. See also further discussion in paras 4.2.1.1, 4.2.1.2 and 4.2.1.3 of Chapter 4

162 See s 6 of the 1996 South African Constitution. S 6 (1) categorically recognised the official languages of the Republic which are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

163 See Brand South African Information get away to South African 2017 http://www.southafrica.info/about/.

164 See s. 28 of the South African Constitution. See also further discussion in paras 4.5.1, 4.5.2 and 4.5.3 of Chapter 4.

165 For example, all the section on the fundamental human rights, by its wording provide that "everyone has the right. It is argued in this thesis, that children as a citizen and part of everyone in the country have an immediately enforceable constitutional guarantee right. See par 4.3.1.1 of Chapter 4 for further discussion on this issue.

166 S. 28 (2) states that "[a] child's best interests are of paramount importance in every matter concerning the child." See par 4.5.3 for further discussion on this issue.

167 See Robinson 2003 *Potchefstroom Electronic Law Journal* 12-14. See par 4.5.3 of Chapter 4 for further discussion on this issue.

provisions for children are mere declarative and not enforceable in a court of law. Chapter 4 further discusses this in detail.[168]

It is notable that the Constitutions of these three countries, despite affording a range of human rights to their children, does not specifically makes provisions for the rights of children to participate in decision-making within the family. Their obligations in terms of children's right to participate in decision-making resides in their governments' ratification of international children's rights instruments.[169] In fulfilling their legal and administrative obligations under the UNCRC, Nigeria, South Africa and Australia, have enacted children's rights laws in their countries.[170]

1.3.2 Children's laws in Nigeria, South Africa and Australia

As discuss later in this thesis,[171] the preambles to the Nigerian Children's Rights Act, 2003 and the South African Children's Act, 2005 specifically reinforce and endorse rights provided for in chapter IV of the Nigerian Constitution (Fundamental Human Rights provisions) and section 28 of the South African Constitution respectively.[172] More so, the Nigerian, South African and Australian children's rights laws embrace a notion of childhood that is based on the idea that for a child to fully assume his/her responsibility in the community, and for a full and harmonious development of his/her personality, that child should ideally grow up in a family environment and in an atmosphere of happiness, love and understanding.[173] To a certain extent, this notion of childhood as embraced by

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168 See generally Chapter 4, particularly par 4.3.1.1 for a discussion on the Nigerian Constitution and the Children.

169 Under S. 4 of the UNCRC, State Parties are obligated to implement the provisions of the UNCRC. See paras 4.3.1.1, 4.6 and 5.7.1 for discussion on the Implementation of the UNCRC in Nigeria, South Africa and Australia respectively.

170 Nigeria as a member of the United Nations ratified the UNCRC on 19th April 1991. South Africa ratified the UNCRC on 16th June, 1995. Australia ratified the UNCRC on 17 December 1990 and it came into force on 16 January 1991 See Office of the High Commissioner of Human Rights, Status of Ratification of the Convention on the Rights of the Child, available at: ohcrh.org. See paras 4.5, 4.6 and 4.7.1 for further discussion on this issue.

171 See paras 4.3.1.1 and 4.6.1 of Chapter 4.

172 See the Preamble to the Nigeria and South Africa Children's Rights Legislation. See also paras 4.3.1.1 and 4.6.1 for further discussion on this issue.

173 See generally the preamble to the Nigerian Child's Rights Act. See the later part of the preamble to the South Africa Children's Act. See also Songca 2011 *Comparative and International Law Journal of Southern Africa* 340-359. See also paras 4.3.1.1, 4.6.1 and 4.7.1 for further discussion.

these countries' children's rights laws, recognises the cultural values of respect, responsibility and reciprocity predicated on rights and duties within the family.[174]

Similarly, the South African and Australian Children's Acts recognises that certain children are capable of acting autonomously and in their own best interests in all situations affecting them, including decision-making within the family.[175] Thus, the South African and Australian Children's Acts recognise that children are individuals, and as such capable of participating in decisions that affect them. Of importance in these respects, is the provision of section 10 of the South African Children's Act and section 68F (3) of the Australian Family Law Act, which unlike the Nigeria Children's Rights Act, incorporated Article 12 (1) of the UNCRC into their domestic legal system. This explicit acknowledgement of a child's ability to participate in decision-making in matters affecting him/her in the South African and Australian children's laws, complies with the UNCRC commitment to protect and fulfil the rights of children through administrative and legal means necessary.[176]

1.3.3 The implication of the implementation approach in Nigeria, South Africa and Australia

As indicated later in this thesis,[177] Nigeria's implementation approach lies solely within the confines of acceptable local norms and culture, which dictates the role and nature of the relationship between the child and his/her parents within the Nigerian context.[178] In contrast, the South African and Australian children's laws

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174 See paras 4.4, to 4.4.5 of Chapter 4 for further discussion on this matter. See also discussion in Chapter 5 on the recognition of cultural values in the Nigerian and South Africa children's rights laws respectively.

175 Section 10 of the South African Children's Act which is a replica of Article 12 UNCRC provision. See also s 68F (3) of the Australian Family Law Act which obliges the court to consider several factors from a 'statutory checklist,' including the wishes of the child, in light of any factors that the court deems relevant, such as the child's age and level of understanding. See Songca 2011 *Comparative and International Law Journal of Southern Africa* 340-359. See also paras 4.6.1.2 to 4.6.1.5 and 4.7.1 for further discussion on this matter.

176 See Article 4 of the UNCRC on the obligation on States Parties to protect and enforce the provisions of the UNCRC.

177 See Paras 4.4 to 4.4.1.5 of Chapter 4 for detailed discussion on the Nigerian implementation of Article 12 of the UNCRC in her domestic Children's right law.

178 Ibhawoh 1999 "*Between Culture and Constitution: The Cultural Legitimacy of Human Rights in Nigeria*." See also S. 19 of the Nigerian Children's Rights Act, 2003, most particularly s. 19(2), (a) and (b) which emphasise the need for children to work towards the cohesion of

did not only reflect the cultural value of connectedness, interdependence and loyalty of children within the family,[179] but also the UNCRC Article 12(1) autonomous child's rights approach of children being capable of making and participating in decision-making within the family.[180] It goes, therefore, to show that Nigeria's adopted implementation approach lies within confines of acceptable local norms and culture, and expresses a resistance and the unwillingness to comply with the intent and the actual implementation of the child's right to participation within the family in light of Article 12(1) of the UNCRC. The inevitable consequence of Nigeria's implementation approach is that there is no basis for actualising Article 12(1) rights, which empowers children to freely express themselves within the family under the Children's Rights Act. In contrast, the integration approach of Western and cultural values adopted in the South Africa Children's Act reflects an approach to children's rights that transforms the interpretation and application of the law relating to children participation rights in South Africa. For example, the provision of section 7 provisions of the Children's Act on the best interests of the child and the constitutional values of tolerance and respect for diversity and pluralism in South Africa and section 68F (3) of the Australian Family Law Act may allow for an approach that takes cultural, traditional and religious circumstances of an individual child into account when considering the individual best interests of the child in terms of the child's rights to participate in decision-making within the family.[181] The South African and

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family and community; and respect for parents, superiors and elders at all times and assist them in case of need. See par 4.3.1.4 of Chapter 4 for further discussion on this matter.

179 See Chapter 1, No 2 (a) and (e) of the Children's Act, where among objects of the Children's Act is stated to be: (a) to promote the preservation and strengthening of families; and (e) to strengthen and develop community structures which can assist in providing care and protection for children. This provision of Chapter 1 recognises the values of connectedness, interdependence, and loyalty within the family, which is a typical African traditional practice. See further discussion on this matter in Chapter 4.

180 See s10 of the South African Children's Act which is a replica of Article 12 of the UNCRC provision. See s 68F (3) of the Australian Family Law Act which obliges the court to consider several factors from a 'statutory checklist,' including the wishes of the child, in light of any factors that the court deems relevant, such as the child's age and level of understanding. See Songca 2011 *Comparative and International Law Journal of Southern Africa* 340-359. See also paras 4.6.3.2 and 4.8.1 for further discussion on this matter.

181 Songca 2011 *Comparative and International Law Journal of Southern Africa* 352. For further discussion on this matter see par 4.6.3.2 and 4.8.1 of Chapter 4.

Australian integration approach subject these cultural, traditional and religious considerations to their Children's Acts and their constitutions.

In light of the foregoing implementation approaches by these countries, the question therefore arises as to how a culturally diverse country such as Nigeria which is yet to implement the Article 12(1) provision can fully comply with the obligations foisted on her by Article 12(1) of the UNCRC. However, it is worth noting that it is near impossible to formulate a perfect or flawless approach in terms of how culturally diverse societies like Nigeria commit to meeting her obligations on the implementation of Article 12(1) of UNCRC. Nonetheless, the author suggests in the concluding part of this thesis a practical approach and accompanying considerations, which may provide some guidance on how Nigeria can comply with her obligations in respect of Article 12(1) of the UNCRC in her Children's Rights Act.

1.4 Area of focus

The focus is on the implementation approach of Article 12(1) of the UNCRC with regard to the influence of cultural values and practices in the domestic children's rights legislation in Nigeria, South Africa and Australia.

As indicated in this thesis, the integration approach of Article 12(1) of the UNCRC children's participation rights and cultural values into the South Africa Children's Act and Australian Family Law Act reflects an implementation approach to children's rights that transforms significantly the interpretation and application of the law relating to children participation rights.[182] This adopted implementation approach is commendable, as it takes into consideration both the rights of the child under the UNCRC and customary values, compared with an approach of implementation that lies solely within acceptable local norms and culture, and which dictates the role and nature of the relationship between the child and

182 See generally the discussion in chapter 4. See specifically discussion in par 4.5.3.2 and 4.8.1 of Chapter 4.

his/her parents.[183] Again, the question is this: how can multi-ethnic societies such as Nigeria who is yet to adequately implement the provisions of Article 12(1) further comply with her obligations to Article 12(1) of the UNCRC?

Of course, in answering the above question, it is necessary to consider the influence of specific cultural values in the implementation of Article 12, and by extension, specific harmful cultural practices within the family. Therefore, in this thesis, the influence of cultural values is limited to the question of how cultural values of rights and duties reflect and affect the implementation of Article 12(1) specifically on domestic children's rights legislation of Nigeria, South Africa and Australia. Furthermore, the discussion on harmful cultural practices is limited to the customs of *ukuthwala*, male circumcision and female genital cutting/mutilation. The reason for limiting this study to the cultural values of rights and duties is because a closer look at these countries' implementation approaches reveals that these cultural values are intricate measures of implementation in these countries with differences in interpretation and implications for children's rights. In light of this, there arises a need to discuss the challenges of implementation and to explore further means of promoting the right of the child to participate in decision-making within the family under Article 12(1) of the UNCRC in Nigeria while taking into account jurisdictional examples in terms of implementation approaches of Article 12(1) in the other two jurisdictions.[184]

Against this background, the central research question and specific aims and methodology, as well as an outline of the study are as follows:

1.4.1 Central research question

What is the influence of cultural values and practices on the implementation of the rights of the child to be heard within the family under Article 12(1) of the Convention on the Rights of the Child in the legal systems of Nigeria, South Africa and Australia?

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183 See the discussion on the omission of Article 1 2(1) of the UNCRC provision and the implication in Nigeria in Chapter 4. See specifically par 4.3.1.4.

184 Generally, see discussions in Chapter 4 of this study. Specifically see paras 4.3.1, 4.5 and 4.7 of Chapter 4.

1.4.2 Aims/objectives of the study

This study aims as follows:

1. To contextualise the meaning of culture and provide an overview of specific indigenous cultural values in terms of children's participation within the context of the family.

2. To distil the scope, nature and applicability of Article 12(1) of the UNCRC.

3. To investigate the influence of specific cultural values on the implementation of Article 12(1) of the UNCRC in the legal systems of culturally diverse State Parties such as Nigeria, South Africa and Australia.

4. To elucidate the specific cultural and traditional practices that may be used under the guise of the values of rights and duties within the family in the context of culturally diverse societies such as Nigeria, South Africa and Australia.

5. To consider the approach to implementing Article 12(1) of the UNCRC in the legal systems of State Parties with cultural diversities such as Nigeria, South Africa and Australia.

6. To make recommendations and suggest an approach for the effective implementation of Article 12(1) of the UNCRC in the legal systems of State Parties with cultural diversities, specifically in Nigeria.

1.4.3 Hypothesis and Assumptions

1.4.3.1 Hypothesis

This thesis adopts the following hypotheses in the analysis of the research question posed:

a) That Article 12(1) of the UNCRC provision gives recognition to the right of the child to participate in decision-making within the family;

b) that culture is an intricate value in the implementation of right of the child in the domestic legal system of State Parties to the UNCRC; and

c) that adopting the integration approach of Article 12(1) of the UNCRC provisions and cultural values in the implementation approach to children's rights will significantly transform the interpretation and application of the children's rights law relating to children participation rights in Nigeria.

1.4.3.2 Assumptions

The following assumptions support the query posed by the research questions:

a) That Nigeria, South Africa and Australia are culturally diverse State Parties with rich cultural heritages;

b) the realisation of children's rights is hinged on a socio-cultural context in the State Parties, therefore, cultural values of rights and duties intersect with children's participation rights;

c) there is a conflict between cultural values and practices, the family and autonomous children's participation rights; and

d) harmful practices may be used under the pretext of proper upbringing in line with the cultural values of rights and duties within the family.

1.5 Research methodology

This research is a study in international law focusing on international human rights, and in particular, the rights of the child to participate in decision-making within the family. Therefore, the children's right to participation as expressed in Article 12(1) of the UNCRC, specific indigenous cultural values and practices, as well as the implementation of children's rights to participate in decision-making within the family are discussed. In this regard, the research is based on an analytical and descriptive exposition of all the sources considered. The literature study is done using secondary sources, which include books and academic articles. The study also relies on primary sources such as international law instruments,

existing relevant and essential laws, institutional practices in Nigeria, South Africa and Australia, the reports of law reform commissions, case laws, resolutions, declarations and general comments. The study utilised literatures on the respective sources considered. Various internet sites and law databases are consulted for relevant data and information. In the last instance, a legal discussion on how Nigeria, South Africa and Australia have dealt with the implementation of Article 12(1) of the UNCRC is conducted. The approach adopted to investigate the issue of Article 12(1) implementation in these countries, focuses on two levels of implementation, which are the constitutions and the specific children's rights legislation of the respective jurisdiction. These pieces of legislation are critical to the overall implementation of the UNCRC provisions in these countries.

1.6 Chapter outline

The chapters in the study are divided as follows:

The purpose of this first chapter is to introduce the problem statement, as well as the aims of the study, central research questions and the research methodology applied in the search for answers to the questions that the research creates.

1.6.1 Chapter 2: Understanding culture, and cultural values within the context of indigenous children's participation in the family

This chapter focuses on defining culture and provides an overview of its legal character – that is, the binding nature of customs and traditions and its interplay with children's rights. Furthermore, the chapter contains a discussion of indigenous children's participation in the family within the context of African societies and Australia. The chapter also identifies the specific fundamental precepts underpinning the cultural value of "duty and rights" within the family, namely respect, responsibility and reciprocity and explains these values in terms of children's participation in family decision-making. The discussion in this chapter intends to set the framework for the discussion in the subsequent chapters on specific States' Parties implementation approach of the UNCRC in their domestic legal system.

1.6.2 Chapter 3: Article 12(1) of the UNCRC, and the ACRWC provisions within the context of children's right to participation in the family

In Chapter 3 the main features and perspectives of children's right to participation in terms of Article 12(1) of the UNCRC are described, as are the discussion of the development within international law leading up to the adoption of the UNCRC. The chapter include a discussion on the scope and applicability of the UNCRC and its measure of implementation and monitoring procedure, as well as a discussion of what children's right to participation entails and how particularly Article 12(1) – the right to participation – is addressed within the context of the family. Furthermore, this chapter discusses some theoretical arguments in favour of and against Article 12(1) autonomous rights of the child. Finally, it contains a discussion on the relationship between UNCRC and ACRWC within the context of the children's right to participation within the family.

1.6.3 Chapter 4: Implementation of Article 12(1) of the UNCRC in the laws of Nigeria, South Africa and Australia.

Chapter 4 continues the discussion by focusing on the recognition of culture and children's participation rights in the laws of Nigeria, South Africa and Australia. The purpose is to show how these specific States' Parties have implemented the provisions of Article 12(1) of the UNCRC, and in such case, how and what cultural and traditional values in multi-cultural societies such as Nigeria, South Africa and Australia reflects in its implementation at the domestic level. As mentioned earlier, the approach adopted for investigating the issue of Article 12(1) implementation in this chapter, focuses on two levels of implementation, which are critical to the overall execution of the UNCRC. First is the issues of Constitutionalism in Nigeria, South Africa and Australia. Second is the specific children's legislation domesticating the UNCRC in these countries. The chapter further discusses the implications of the Nigerian, South African and Australian law implementation approaches of Article 12(1) of the UNCRC on the right of the child to be heard within the family.

1.6.3 Chapter 5: Cultural practices and Article 12(1) of the UNCRC children's participation rights: Prioritising children's rights

The focus of this chapter is to identify specific cultural practices and contextualise "harmful cultural practices". More specifically, the customs of *ukuthwala*, male circumcision in South Africa and in particular female genital mutilations/cutting (FGM/C) in Nigeria, South African and Australia are discussed. The reason why the chapter draws attention to these customs of *ukuthwala*, male circumcision and FGM/C is not disconnected to examples of specific harmful practices that may be used under the pretext of proper cultural upbringing in terms of cultural values of rights and duties discuss in Chapter 2. To further investigate the issue of children's participation rights, cultural values and harmful practices within the family, the chapter, juxtaposes these cultural practices with Article 12(1) of the UNCRC children's participation rights. These cultural practices are found to infringe on the provisions of Article 12(1) UNCRC. The chapter argues for the need to prioritise children's rights on the basis of the fundamental values of equality, human dignity and freedom in the course of evaluating children's participating rights within the context of the family by adopting an integration implementation approach similar to those in South African and Australian children's rights laws.

1.6.4 Chapter 6: Conclusion and recommendations

Chapter 6, finally, presents conclusions drawn from all the discussions. It further suggests what measures can be taken to implement and to make the rights to participation within the context of the family more effective in the UNCRC as a whole, as well as in Nigeria in particular. Specific recommendations are made on what measures can be taken to further stem the tide of harmful cultural practices.

CHAPTER 2

UNDERSTANDING CULTURE, FAMILY AND CULTURAL VALUES WITHIN THE CONTEXT OF INDIGENOUS CHILDREN'S PARTICIPATION IN THE FAMILY

2.1 Introduction

In Chapter 1 it was pointed out as first of the aims/objectives of this study to contextualised the meaning of culture and provide an overview of specific indigenous cultural values in terms of children's participation within the context of the family.[1] Considering the influence of cultural values and practice in the implementation of Article 12(1) UNCRC provision in Nigeria, South Africa and Australia as shown later in Chapter 4,[2] the questions of what is culture, family and which cultural values and practices in terms of children participation within the family, require a greater degree of clarifications.

Aside the above, under the UNCRC the basis and implementation of cultural values is linked to how the UNCRC considers "culture", and how the principles of interpretations underlying children's participation rights and cultural values are evaluated.[3] Chapter 3 focuses on surveying not only the interpretative principles but also the range of Article 12(1) UNCRC provisions, *vis-à-vis* the arguments in favour and against Article 12(1) children's participation rights.[4] The present chapter will therefore focus on surveying the theoretical issues underlying "culture", "family" and the recognition of culture in specific legal systems, as well as the UNCRC.[5] The chapter will also elucidate on specific indigenous cultural values in terms of children's participation in the family within a general context of African societies, and in particular States Parties such as Nigeria, South Africa and Australia.[6]

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1 See par 1.4.2 of Chapter on the aims/objectives of the study.
2 See paras 4.4.1.2 to 4.4.1.5, 4.6.2 to 4.6.3.1 and 4.8.1 of Chapter 4 respectively.
3 See discussion in Chapter 3 on the principles and interpretation of the UNCRC provisions.
4 See this discussion in paras 3.4 to 3.4.4 and 3.5 of Chapter 3.
5 See this discussion in paras 2.2.1, 2.3.1, 2.3.1, 2.3.3, 2.3.4 and 2.4 of this Chapter.
6 See paras 2.5.2 to 2.5.5 of this Chapter.

The need to discuss indigenous cultural values becomes necessary in view of the fact that the ways and manners that children's rights in cultural settings are construed differs from the children's rights model as envisaged by Article 12(1) of the UNCRC children's participation rights.[7] It is therefore considered important to put into perspective rights and duties within the family in cultural context. The essence of such discussion is not only toward identifying the specific fundamental precepts underpinning the cultural value of duty and rights namely respect, responsibility and reciprocity, but also to indicate the nature of the cultural values which find expression in the domestic children's rights legislation of Nigeria, South Africa and Australia as shown later in Chapter 4.[8]

It is when these above-mentioned concepts and the instances in which they can be used have been clearly described, that a discussion can continue on what Article 12(1) of the UNCRC entails, as well as its implementation in specific domestic laws of States Parties such as Nigeria, South Africa and Australia.

2.2 Culture in context

2.2.1 Concept of culture

Culture is not an easy concept to define.[9] Many a definition has been attempted by scholars across disciplines, which sought to emphasise those aspects of culture deemed most important by them.[10] Lawyers are not left out, albeit within a legal context.[11]

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7 See paras 3.4 to 3.4.4 of Chapter 4 on what Article 12(1) of the UNCRC entail.

8 See Chapter 4 discussion on this matter particularly paras 4.4.1.2, 4.4.1.3, 4.6.3.1 and 4.8.1 respectively.

9 See Du Plessis and Rautenbach *PELJ* 30-31; Tomlinson "Cultural imperialism – A critical introduction" 5. The author stated that "what we need to understand is not what culture is, but how people use the term in contemporary discourses." See also Ibawoh *Human Rights Quarterly* 840.

10 For example, psychologists, sociologists and anthropologists among others. See Fisher *S Cal Interdisc LJ* 668; Sewell Jr *"The concept of culture"* 78

11 Matthee One Person's Culture is another Person's Crime: A Cultural Defence in South *African law?* 73; Du Plessis and Rautenbach *PELJ* 3; Rautenbach, Rensburg and Pienaar *PELJ* 4-8.

A common thread linking such definitions, which may be ascribed to sociologists and anthropologists is the notion that culture is "a total way of life".[12] Culture perceived in this light identifies the concept as the sum of a given social group's "material and spiritual activities", which separate such a group from similar groups.[13] Furthermore, culture is said not to be static, but "something rather more fluid in character", and always changing.[14] In other words, "culture" or cultural norms cannot be cast in stone, but are eclectic, dynamic and subject to significant alteration over time.[15] Herskovitz[16] asserted as follows:

> Culture is flexible and holds many possibilities of choice within its framework... [T]o recognises the values held by a given people [at any given time] in no way implies that these values are a constant factor in the lives of succeeding generations of the same group. [17]

Triandis,[18] hinged the act of transmitting culture and cultural norms to succeeding generations as a defining characteristic of culture when he held that:

> [C]ulture is to society what memory is to individuals. It refers to tools and ideas that are shared and transmitted to succeeding generations because they were once practical at some point in time. [19]

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12 Linton *the cultural Background of personality* 19, where the author defined culture as "[T]he way of life of any society". Also see Eagleton *The Idea of Culture* 34; Stavenhagen *"Cultural* Rights: A Social Science Perspective" 88.

13 See Stavenhagen *"Cultural Rights: A Social Science Perspective"* 88. According to Stavenhagen "culture is also seen as a coherent self-contained system of values and symbols" which includes various practices reproduces over time by a particular cultural group and which "provides individuals with the required signposts and meanings for behaviour and social relationships in everyday life."

14 Stern *The Child's Right to Participation – Reality or Rhetoric?* 182. Stern analysis of Ann-Belinda Preis often-cited 1996 article on the relationship between human rights and anthropology, observed this trend in contemporary Anthropology. Preis, according to Stern advocates for a more dynamic and radical approach to culture, one that recognises and accommodates cultural diversity. This is because the previous manner of defining the concepts provides no answers to problems about human rights and culture, but rather simply repeats existing definitions under a more sophisticated name.

15 Put differently, culture or cultural norms of a community or groups are susceptible to and respond to influences by social, economic and political forces both nationally and internationally. See An-Na'im "Toward a cross-cultural approach to defining international standards of human rights" 27.

16 Herskovitz "Cultural dynamics" 49.

17 Herskovitz "Cultural dynamics" 49-50.

18 Triandis "Cultural syndromes and subjective well-being" 13–36

19 Triandis "Cultural syndromes and subjective well-being" 13–36; Eagleton *the idea of Culture* 36. See also Lederach *Preparing for peace: Conflict transformation across culture* 9. Who pointed out that: "Culture is the shared knowledge and schemes created by a set of

From the preceding assertions, it goes to show that cultures are shared human values considered necessary for any society to function. According to Robertson,[20] culture (as a human value) is that which "individuals, groups and societies produce and acquire in order to function effectively."[21] Flowing from the above context of the definition of culture in terms of human values of any society, Matarasso[22] clearly states that:

> [C]ulture is the expression of human values. It may be very intense and conscious, as in art objects and performance or religious practice. It may be pervasive and relatively unconscious, in the rituals of food, the use of time or family celebrations. It embraces the extremes of this spectrum and everything between. Culture is everything we don't have to do to survive – but are compelled to do to feel human.[23]

Aside from the preceding meanings and features of culture by sociologists and anthropologists, a legal scholar, Matthee[24] also embarked on an intellectual voyage of "pinning down the term culture" within a legal context. The author posited that present-day definitions of culture distinguish clearly between "a person's actual behaviour and the mental processes behind that person's behaviour".[25] In other words, the modern-day meaning of culture reflects "the values and beliefs that people use to interpret experience and generate behaviour," instead of culture being seen as "observable behaviour".[26] Matthee also consider the definitions of culture by Bennett,[27] Du Plessis and Rautenbach,[28] Van Broeck[29] and Amoah and Bennett.[30]

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people for perceiving, interpreting, expressing, and responding to the social realities around them."

20 Robertson Globalisation – Social theory and global culture 40.
21 Robertson Globalisation – Social theory and global culture 40.
22 Matarasso "Culture, economics & development".
23 Matarasso "Culture, economics & development".
24 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 73. See generally par 3.3.2 of Matthee's thesis on "Pinning down the term culture".
25 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 74.
26 Matthee *One Person's Cult3ure is another Person's Crime: A Cultural Defence in South African law?* 74-75.
27 Bennett *U Botswana LJ* 3-26.
28 Du plesis and Rautenbach *PELJ* 27-71.
29 Van Broeck *Eur J Crime Crim L & Crim Just* 1-32.
30 Amoah and Bennett *Afr Hum Rts LJ* 357- 375.

To Bennett,[31] culture is defined as:

> A product of human agency or a system of symbols, which offers people a means of giving meaning to their lives and orienting themselves towards the social and physical worlds.

Du Plessis and Rautenbach[32] point out that culture should be seen as an abstract, yet essential component of human life dealing with a "subliminal pattern of thinking". According to Matthee, this pattern of thinking describes the "organisation of values, norms, and symbols" which guide actors decisions as well as restrict the forms of interaction between individuals."[33]

Van Broeck's[34] definition of culture is broader and more abstract. She describes culture as follows:

> [A]n intersubjective system of symbols which offers the human being an orientation toward the others, the material world, him- or herself and the non-human. This symbolic system has a cognitive as well as an evaluative function. It is handed over from one generation onto a next generation and subject to constant transformation. Even when it never achieves complete harmony, there is a certain logic and structure that binds the system together.[35]

Furthermore, Amoah and Bennett[36] define culture "as a people's store of knowledge, beliefs, arts, morals, laws and customs" and the entire thing acquired as a member of the society. The above definition by Amoah and Bennett aligns with that of Johnson and Eagleton[37] who describe culture "as the whole complex of knowledge and beliefs and attitudes and practices" including its "social, political and economic arrangement" and "which constitutes the way of life of a specific

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31 Bennett *U Botswana LJ* 14-15. See also Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 75.

32 Du Plessis and Rautenbach *PELJ* 31. See also Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 75.

33 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 75.

34 Van Broeck *Eur J Crime Crim L & Crim Just* 8.

35 Quoted in Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 75-76.

36 Amoah and Bennett *Afr Hum Rts LJ* 368. See also Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 76.

37 Johnson, "Free trade and cultural industries"350; Eagleton *The Idea of Culture* 34.

group".[38] Of course, as already noted above, these values, attitudes and practices as acquired are meant to aid the society to function effectively.[39]

Apart from the preceding definitions of culture by legal scholars, legislation and policy documents also define culture in Nigeria and South Africa.[40] For instance, the document on Nigeria's *National cultural policy* describes culture as follows:

> The totality of the way of life evolved by a people in their attempt to meet the challenges in their environment which gives order and meaning in their social, political, economic, aesthetic and religious norms and modes of organisation, thus distinguishing a people from their neighbour. [41]

In South Africa, for example, *the White Paper on Arts, Culture and Heritage* defines culture as:

> The dynamic totality of distinctive spiritual, material, intellectual and emotional features which characterise a society or social group. It includes the arts and letters, but also modes of life, the fundamental rights of the human being, value systems, traditions, heritage and beliefs developed over time and subject to change.[42]

Furthermore, South Africa's Culture Promotion Act describes culture in rather broad terms to include several features,[43] such as "the visual arts, music, the literary arts, knowledge acquisition on the applied, natural and human sciences, as well as the utilisation of leisure."[44]

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38 Johnson, "Free trade and cultural industries"350; Eagleton *The Idea of Culture* 34.

39 Robertson Globalisation – Social theory and global culture 40.

40 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 76

41 The National Cultural Policy was launched by the Nigerian Government in September 1988. See Federal Republic of Nigeria. *Cultural Policy for Nigeria*. See also Culture and Heritage, the Federal ministry of Information and Culture, Federal Republic of Nigeria http://fmic.gov.ng/culture/culture.

42 Of 4 June 1996. The White Paper can be accessed at www.dac.gov.za. See also Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 77.

43 S 3(5) of the Culture Promotion Act 35 of 1983. See also Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 77.

44 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 77. The author observed that the provision of s.1 of the National Heritage Resources Act 25 of 1999, to the effect that once something has been labelled as being' "culturally significant", then such significance would refer to an object's "aesthetic, architectural, historical, scientific, social, spiritual, linguistic or technological value or significance", is a very loose interpretation of culture.

With reference to other international and regional rights instruments, the African Charter on Human and Peoples' Rights (ACHPR) and the African Charter on the Rights and Welfare of the Child (ACRWC) are examples of regional instruments that makes reference in some way to culture and cultural rights in a broad terms.[45] Articles 17 and 22 of the ACHPR protects cultural rights, stating that every individual has the right to take part freely in their community's cultural life as well as their economic, social and cultural development.[46] In Article 29 on a person's responsibilities, the ACHPR specifically mentions "African cultural values".[47] See further discussions on the ACRWC in Chapter 3 below.[48]

Similarly, the UN Committee on Economic, Social and Cultural Rights commenting on the topic of culture and minority rights in Article 27 of its covenant, indicates that culture should be interpreted in broader terms.[49] More so, the United Nations Economic, Social and Cultural Organisation (UNESCO) introduced an elaborate definition of culture in its preamble to the 2001 *Universal Declaration of Cultural Diversity.* Culture, according to the 2001 Declaration on cultural diversity is the "set of distinctive spiritual, material, intellectual and emotional features of society or a social group", which includes "in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs."[50]

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45 International instruments include and not limited to the Universal Declaration on Human Rights, See Article 22; See Article 15 of the International Covenant on Economic, Social and Cultural Rights; See Article 27 of the International Covenant on Civil and Political Rights; See Article 7 of the *UN Convention on the Elimination of Racial Discrimination*; and See Article 30 of the *UN Convention on the Rights of the Child*. Discussion on the recognition of culture by the UNCRC is done later in this chapter. See par 2.4 below.
In many of the regional and international rights discourse, when considering cultural rights in the framework of human rights protection, which includes individual and groups rights, the term "culture" is frequently used. See Stern *The Child's Right to Participation – Reality or Rhetoric?* 179.

46 See article 17 (2) and 21 of The African Charter on Human and Peoples' Rights and the African Charter on the Rights.

47 Article 29 of the African Charter listed the duties of an individual. Item 7 on the list is "to preserve and strengthen positive African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and in general to contribute to the promotion of the moral well-being of society."

48 See paras 3.6, 3.6.1 and 3.6.2 of Chapter 3.

49 UN Fact Sheet No.16 (Rev.1) The Committee on Economic, Social and Cultural Rights

50 Universal Declaration of Cultural Diversity (UNESCO Doc. 31C/Res 25, Annex 1 (2001)) adopted unanimously by the organisation's General Conference at its 31st session, 2 November 2001.

The above definition of culture by UNESCO specifically mentions value systems, lifestyles, traditions and not the least, beliefs – among which include religious beliefs. These provide for a broader interpretation of what culture constitutes.[51] In terms of religious belief and culture, it is practically challenging to separate the concept of culture from religion.[52] This difficulty arises because of the role and influence that cultural and traditional practices have and continues to exert over religion in many societies.[53] In other words, culture and religion are intertwined in a way that an attempt to distinguish between what is a cultural belief and religion in the socio-cultural fabric of some societies becomes increasingly difficult.[54] This intertwining of culture and religion is one of the factors that makes the concept of culture more complicated, and its precise content difficult to determine, resulting to ambiguity about what is meant when attempting a definition of "culture.[55] However, a discussion on religion falls outside the focus of this study.

For the purpose of this study, which concerns itself with how culture affects and relates with legal development, culture is preferably seen and defined in a more

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51 At least more than the realm of what is explicitly stated in the ICESCR. Taking its cue from article 15 of the ICESCR on cultural rights, the Committee on Economic, Social and Cultural Rights stated that the term culture should be interpreted broadly. In addition, when commenting on the question of culture and minority rights in ICESCR article 27, the Human Rights Committee appears to favour a broad definition of the phrase, remarking that "culture manifests itself in many forms". This serve to emphasise the diversity of the concept. The Human Rights Committee had previously confirmed that a broad and flexible interpretation of the term "culture" is within the scope of the article 27. See UN Fact Sheet No.16 (Rev.1) The Committee on Economic, Social and Cultural Rights.

52 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 75-76. Matthee, while explaining the definition of culture by Amoah and Bennett, point out that culture as "a close and symbiotic relationship with religion" which in reality is considered as difficult to separate. The author further pointed out that the similarities and distinctions between the categories of "culture" and "religion" are irrelevant, according to Rautenbach, because' "African traditions do not make any distinction between the concepts – they are one and the same".

53 Rwezaura *et al* 1995 *JLP* 43-44.

54 Amoah and Bennett *Afr Hum Rts LJ* 368; Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law*? 76. An example of such society is South Africa and Nigeria, where the religion of Islam and Christianity – affect practically every aspect of the society. In both religions the influence of indigenous cultural and traditional practices cannot be denied in the methods and approaches towards worshipping in the two faiths. See also Rwezaura *et al* 1995 *JLP* 43-44. However, this intertwined between culture and religion cut across board and cannot be said to be limited only to the countries aforementioned. See Stern *The Child's Right to Participation–Reality or Rhetoric?* 181-182.

55 Stern *The Child's Right to Participation – Reality or Rhetoric*? 182; Amoah and Bennett *Afr Hum Rts LJ* 368

expansive, abstract and purely subjective terms as the values, attitudes, beliefs, orientations, and underlying assumptions prevalent among people in the society. This definition of culture resonates with UNESCO's definition of culture in its preamble to the 2001 *Universal Declaration of Cultural Diversity*, as earlier mentioned.[56]

The reason for the above-preferred definition of culture is that certain critical elements of a culturally diverse society can be deduced from it such as orientations, lifestyles, ways of living together, value systems, traditions and belief. Each one of these elements will influence family practices in terms of children's rights in most societies.

Against the preceding background, the question arises as to whose "culture" or values are recognised in multicultural societies in terms of the dominant and minority cultures within a society and a particular legal system. Addressing the above question becomes necessary in order to clarify as much as possible cultural conflicts that may occur in a culturally diverse society where individuals may share similar values or no significant similarities in their values.[57] Yet, as indicted later in this thesis,[58] cultural values are intricate measures in terms of the implementation of Article 12(1) of the UNCRC children participation rights within the family in the legal system of State Parties.

Not only will subsequent discussions reflect on the preceding discussions, but it will also shed light on the significance of dominant and minority cultures in the legal system of multi-cultural societies such as Nigeria, South Africa and Australia. But before then, it is absolutely important to first consider and understand the concept of family, and the various functions of a family in relation to children. More importantly, I will conclude by discussing the premise or the basis for the definition of family to be used in the context of this study.

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56 Universal Declaration of Cultural Diversity (UNESCO Doc. 31C/Res 25, Annex 1 (2001)) adopted unanimously by the organisation's General Conference at its 31st session, 2 November 2001.

57 An-Na'im "Toward a Cross-Cultural Approach to Defining International Standards of Human Rights" 19-44.

58 See paras 4.4.1.2 to 4.4.1.5, 4.6.2 to 4.6.3.1 and 4.8.1 of Chapter 4 respectively.

2.2.2 Concept of family

The term "family" has for many decades defied a universal definition[59] despite its frequent usage in academic literature and in statutory provisions. Of course, one of the veritable reasons accountable for the inexplicable lack of a universal definition of family lies in the diversity of family forms, roles and the functions of the family.[60] This diversity hinges on varieties of culture, religion, sociological order (including individual lifestyle preferences) and legal perspectives that exist around the globe.[61] Therefore, defining the term "family", and who to acknowledge as family members, depend on the context in which the term is used and the purpose for which it is utilised.[62] As a result, the family might be defined in different ways depending on the situation, such as for inheritance purposes, and in another way for the purpose of day-to-day decisions. It goes to say that the definition of the family can be looked at in terms of the functions that a family performed in the past, and the functions it performs today, as well as the changes in those functions.[63]

Another major challenge in defining "family" hinges on whether it is defined externally or internally, that is, whether the family is being defined by some external body or agency for its own purposes or whether individuals describe the nature and form of the relationships that they consider to define the family and its membership.[64] In other words, there exists varied definitions of family because of the multi-faceted perspectives regarding what family relationships and family functions entail. This goes to say that discussions on the functions of family will assist in understanding the meaning of family. However, before proceeding with discussions on the functions of the family, some attempts at defining the concept of family by several authors and specific international children's rights instruments are highlighted below.

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59 DH Demo *et al* (eds) Handbook of family diversity 1.
60 Rwezaura *et al* 1995 *JLP* 25, 27.
61 Okon 2012 *Afr Human Rights Law Journal* 373, 376.
62 Rwezaura *et al* 1995 *JLP* 25, 27.
63 Rwezaura *et al* 1995 *JLP* 25, 74.
64 Rwezaura *et al* 1995 *JLP* 25, 28.

As far back as 1949 Murdock[65] defined the family as:

> [a] social group characterised by *common residence,* economic co-operation and reproduction. It includes *both sexes,* at least two of whom maintain a *socially-approved* sexual relationship, and one or more children, owned or adopted, of sexually-cohabiting adults.

Similar to the above is Silverstein and Auerbach's[66] definition of the family as "two or more people who are in a relationship created by birth, marriage or choice". The "choice" aspect of this definition, of course will include adoption as captured in the above definition by Murdock.

Strong *et al* [67] attempts a more contemporary and less restrictive definition of family to wit:

> A family is one or more adults related by blood, marriage or affiliation who co-operate economically, who may share a common dwelling place, and who may rear children.

In equal terms to the above definition, Winch[68] describes family as a set of related individuals in various roles within the family who perform duties essential to the family's existence and survival such as reproduction, emotional care and child socialisation.

With reference to the international children's rights instruments considered in this study, the UNCRC does not give a specific or definite definition of family. However, it acknowledges the family as a "fundamental group of society",[69] and describes the family environment as "an atmosphere of happiness, love and understanding".[70]

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65 Murdock Social Structure 1.
66 Silverstein and Auerbach "(Post-) modern families" *33.*
67 Strong *et al* The marriage and family experience: Intimate relationships in a changing society 11-12. See also Benokraitis Marriage and families **-** Changes, choices and constraints 3.
68 Winch "Toward a model of familial organisation" *162-179.*
69 See Articles 9, 10, 20, 21 & 22 of the UNCRC.
70 See the preamble to the UNCRC.

Similarly, the ACRWC in its preamble acknowledges the family and like the African Charter on Human and Peoples' Rights (hereinafter African Charter), describes the family as "the natural unit and basis of society".[71]

What is clear and deducible from the foregoing definitions is that family does not have to be founded on heterosexual adult relationships, but can simply be a single adult-household with a dependent child or adult.[72] More importantly, family members identify with and are linked to a group, which also has its own identity,[73] and perform functions essential to the family's existence and survival.[74]

The discussion below considers the functions of the family in relation to children.

2.2.2.1 Functions of the family

The main functions of the family centre around satisfying human needs. Elmer[75] asserts that the "basic task of the family is to serve human needs". However, as human needs differ, the organisation and activities of the family also differ.[76] In the context of the functions which the family serves in relation to children, the question arises as to what needs do families serve for individuals and society?[77] For this study, there are two perspectives adopted in attempting an answer to the above. First, is the discussion of the individual family functions. Second, is the discussion of the collective family functions. It should, however, be kept in mind that the former involves a brief and general discussion from sociological narratives.[78] The latter involves a broad discussion of Rwezaura *et al*'[79] study on the changing functions of the family within the African context.

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71 See Article 18 of the ACRWC and Article 18 of African Charter.
72 Popenoe 1993 *Journal of Marriage and Family* 529-535.
73 Benokraitis Marriage and families **-** Changes, choices and constraints 3.
74 Winch "Toward a model of familial organisation" *162-179.*
75 Elmer The sociology of the family 17.
76 Elmer The sociology of the family 17.
77 Okon 2012 *Afr Human Rights Law Journal* 384.
78 These narratives are the functional perspective emphasised by Sociologist that social institutions perform several important functions to help social stability and keep a society working.
79 Rwezaura *et al* 1995 *JLP* 25, 74.

On the first perspective, which centres on individual family function, Muncie *et al*[80] posit that "a key function of family is the ability to provide a locus for emotional support and fulfilling relationships." Similar to this view is the assertion that the family performs seven major functions for individual members, which includes "production of economic goods and services, status giving, education of the young, religious training of the young, recreation, protection, and affection".[81]

On the emotional and psychological needs of the child, the primary responsibility lies with the child's parent(s), legal guardians or persons responsible for the child.[82] In most cases, what appears commonly acceptable is the fact that the most important sources of psychological needs within the individual family are companionship, parenthood and intimacy.[83] In this regard, parents double up as a shield for the children against the harshness of the outside environment.[84]

Furthermore, the satisfaction of physical and material needs including security is another responsibility and function of the individual family to the child.[85] The family plays a vital part in the production and consumption of goods and services.[86] However, the absence of this material and physical need, can perhaps be traceable to poverty or other social factors, wherein parents cannot provide food, shelter and clothing for their children. Yet this does not necessarily mean the non-existence of the family.[87] In this scenario, the responsibility falls on the

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80 Muncie *et al* Understanding the family 1.
81 Okon 2012 *Afr. Human Rights Law Journal* 373, 376.
82 Okon 2012 *Afr. Human Rights Law Journal* 373, 384.
83 Strong *et al* The marriage and family experience: Intimate relationships in a changing society 12.
84 Okon 2012 *Afr Human Rights Law Journal* 373, 384.
85 Strong *et al* The marriage and family experience: Intimate relationships in a changing society 13; See Sociology; Understanding and changing the social world. Anon. 2018 https://www.open.lib.umn.edu/sociology/chapter/15-2-sociological-oerspective-on-the-family.
86 See Sociology; Understanding and changing the social world. Anon. 2018 https://www.open.lib.umn.edu/sociology/chapter/15-2-sociological-oerspective-on-the-family.
87 In the past functional perspective study on family by sociologist warn that a shift in the normal arrangement of a bread winner for the family would harm the children and by extension the family as a social institution and even society itself. However, this is not so anymore. See Sociology, understanding and changing the social world. Anon. 2018 https://www.open.lib.umn.edu/sociology/chapter/15-2-sociological-oerspective-on-the-family.

government in modern societies to provide the necessary protection and assistance in the form of material assistance and support programmes, particularly regarding nutrition, clothing and housing for the children, thereby ensuring the preservation of the family. In fact, as indicated in this thesis,[88] with specific reference to Nigeria, South Africa and Australia's children's legislation respectively, the preservation of the family is a goal spelt out in their children's rights laws.

Lastly, the social functions essential for the family's existence depend on the culture within which the family is found.[89] Of course, families nurture, protect and support children from infancy. Therefore, the family is a major unit in which socialisation takes place.[90] A major advantage of family/child socialisation is that, when effectively executed at all stages of a child's development, the child gains life satisfaction, as well as emotional and psychological well-being, both of which are crucial for adolescence.[91] As a result, the child's mental and emotional requirements are met, allowing the child to adjust to his/her social surroundings and responsibilities.

Regarding the second approach to the functions of the family, that is, the collective family functions, Rwezaura *et al*,[92] in analysing the changing functions of the family in some parts of Africa, identified various factors corresponding to various functions performed by the family. These functions include: kinship

88 See paras 4.5, 4.6 and 4.7 of Chapter 4.

89 Rwezaura *et al* 1995 *JLP* 25, 27. The authors stated that "defining the term 'family', and who to acknowledged as family membership, depends on the purpose for which the term is being used and the context in which it is being used." In this regard, it is safe to assume that the social functions essential for the family's existence depend, as well on the culture within which the family is founded.

90 Strong *et al* The marriage and family experience: Intimate relationships in a changing society 13; Sociology; Understanding and changing the social world Anon 2018 https://www.open.lib.umn.edu/sociology/chapter/15-2-sociological-oerspective-on-the-family.

91 Perrino *et al* 2000 *Clinical Child and Family Psychology Review* 81-96; Peterson 2009 https://www.ext.vt.edu; Strong *et al* The marriage and family experience: Intimate relationships in a changing society 12-13.

92 Rwezaura *et al* 1995 *JLP* 25, 74.

obligation, economic production, reproduction function, co-residence, decision-making and the performance of rituals and other customary ceremonies.[93]

In view of these economic functions, what is clear is that in the past – that is in pre-colonial times – the family's economic functions consisted of the production of goods and services necessary for the survival of family members.[94] More so, the kinship[95] ideology in this setting translates property relationships into *family* relationships in a way that a "wife's agricultural work was institutionalised into a wife's service to her husband and his family, or into a mother's support for her own children." So also, the man's claim over his wives "translated into kinship obligations befitting the woman's role as wife and mother."[96] There are also other instances where the role of every member of the family were institutionalised into the kinship obligation. For instance, the agricultural or other productive work of a man was institutionalised into the labour obligations of kinship. Thus, family members material needs were met through the exchange of labour and property, which strengthened and reaffirmed kinship ties and mutual obligations as a social function.[97] Furthermore, the child's role towards its parents and other relatives was also institutionalised through the kinship ideology. For example, and as subsequent discussions in this chapter would show,[98] children were taught to accept and fully embrace their obligations towards their parents, elders and to each other from an early age by performing productive labour. As also shown in

93 The following paragraphs analysed respectively these factors as identified by the authors in their study.

94 African Union (2004), *Plan of Action on the Family in Africa*. Addis Ababa: African Union. 3. This includes family economic support in the production of their daily needs such as their own food, clothing, utensils, shelter etc. Rwezaura *et al* observed that certain sectors of production, like as agriculture and small animal husbandry were largely undertaken by family units consisting of a wife and her children." Others, like house-building, cattle-keeping, hunting and fishing were commonly organised around a larger family unit that included a number of related husbands and their wives (in patrilineal systems) or related wives and their husbands (in matrilineal systems)." See Rwezaura *et al* 1995 *JLP* 25,32.

95 According to Strong *et al,* "kingship system is the social organization of the family. it is based on the reciprocal rights and obligations of the different family members, such as those between parents and children, grandparents and grandchildren, and mother-in-law and sons-in-law." See Strong *et al* The marriage and family experience: Intimate relationships in a changing society 17.

96 Rwezaura *et al* 1995 *JLP* 32-33.

97 Rwezaura *et al* 1995 *JLP* 32-33.

98 See discussion in par 2.5 below.

this chapter, these obligations include respect for elders, obedience to instructions and hard work.[99] The training of children within the family is aimed at socialising them to accept their position in society and to play pre-ordained roles in the family.[100] Bride wealth and spiritual beliefs in relation to land are also two important traditional institutions that helped to enforce kinship obligation functions in the family.[101]

In pre-colonial times, extended families which consist of brothers and their wives (patrilineal) or sisters and their husbands (matrilineal), with their parents and children lived together on family land.[102] Industrialisation and urbanisation had disrupted these traditional co-residence or household structure.[103] However, it does not necessarily mean that families do not live together anymore. Put differently, there are varieties of residence patterns practised in the modern period. For instance, "extended families" still live together on shared land and farm it, despite the fact that these extended families are rarely complete due to members living apart, doing or looking for paid employment outside the home.[104] Thus, family obligations and functions amongst family members who no longer live together, have not been completely eliminated by disruption of co-residence.[105]

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99 See paras 2.5.3 to 2.5.5 below

100 Twum-Danso 2009 *The International Journal of Children's Rights* 421. See also discussion in par 2.5.5 below

101 Rwezaura *et al* argued that Bride wealth was given to a young bridegroom by family member in patrilineal societies who controlled his choice of a wife and acquired claims on his labour time. He stayed under his family influence since he needed their help to pay bride fortune for a wife and complete the requisite ceremonies. Similarly, the bride wealth provided to a young bride was obtained by her birth family and used to produce spouses for the males in the family, providing an incentive for the family to find a husband for the woman as well as to ensure the marriage survived. Bride wealth has thus been described as a means of transferring a woman's productive and reproductive powers to another family, allowing for her replacement in her natal family. While Spiritual beliefs were often used to keep family members under control. Widows and divorcee in patrilineal societies, for example, have powerful incentive to maintain good relations with the family of the father of their children, lest the ancestors punish their children with sickness or bad luck, because belief systems instil the belief that ancestral spirits control a person's fortune or health. See Rwezaura *et al* 1995 *JLP* 33-35.

102 Rwezaura *et al* 1995 *JLP* 39.

103 Rwezaura *et al* 1995 *JLP* 39.

104 Rwezaura *et al* 1995 *JLP* 39-40.

105 Rwezaura *et al* 1995 *JLP* 40.

Furthermore, in pre-colonial times, family places emphasis on reproduction because of the need of human labour for subsistence of the family, as well as the society.[106] The reproductive function "underlies Africa's strongly-held pro-natalist values, which survived to the present."[107] Although, in modern times, due to changes in the system, labour needs are also changing. In other words, industrialisation brought about lower labour needs, which in turn replaced labour-intensive subsistence agriculture. Similarly, since modernisation did affect every stratum of the society including health care, "child survival rates have improved". Therefore, "the reproductive function of the family is also changing."[108]

What is clear in terms of the family decision-making function in pre-colonial times is that the interdependent nature of traditional family ensured that family members make group decisions and arrived at consensus on issues in ways which guarantee peace.[109] In this regard, since the family lived together, sharing food and labour, "consensus of values and principles was easier as people shared a common way of life and common perspectives to life."[110] However, in modern times, industrialisation and urbanisation have also whittled down the power of the family to make shared decisions as well as making negotiated settlements of disputes within the family, and to enforce these settlements. The reason is that family members no longer see each other on the day-to-day basis because of migration occasioned perhaps by economic reasons.[111] It goes to say that members of the family who had travelled to different locations will be influenced by the ideas and values of the place they have been and this will impact or make decision-making at the family level even more difficult, and in a way, destroy the

106 Rwezaura *et al* 1995 *JLP* 41-42. The authors contend that reproduction itself include physical and social reproduction. Regarding social reproduction, some aspects of it, such as the education of children, have largely been taken out of the hands of the family and are now controlled by the State. In pre-colonial times children learned the skills they needed to survive from their parents and other relatives in their family. Today, those parents and other relatives such as brothers and sisters contribute to the education of children by paying school fees.

107 Rwezaura *et al* 1995 *JLP* 41.

108 Rwezaura *et al* 1995 *JLP* 41-42.

109 Rwezaura *et al* 1995 *JLP* 41-42.

110 Rwezaura *et al* 1995 *JLP* 41.

111 Rwezaura *et al* 1995 *JLP* 42-43.

consensus of values upon which the traditional family decision-making process was built.[112]

Finally, among the functions of the family is the performance of rituals and other customary ceremonies, although colonialism with its attendant introduction of modern religion and beliefs necessitated the abandonment or transformation of many rituals hitherto held.[113] Instead, there are modern practices such as, church marriage, burial according to Christian dictates, and seeking modern health-care services in hospitals and clinics. However, these modern practices do not necessarily mean that, hitherto held rituals and other customary ceremonies performed by the family have been totally jettisoned. They are still practised alongside each other and many a time, there are high levels of syncretism. According to Rwezaura *et al*,[114] the family function to perform rituals and other customary ceremonies is now in flux. Consequently, modem and traditional ceremonies are usually performed alongside, and the family are still in control of these traditional ceremonies.[115]

In light of the foregoing discussion on the functions of the family, it becomes clear that the term "family" is a web of complexity, and as such difficult to ascribe a definite meaning. One of the reasons for this situation, as indicated in the discussion so far, is that there are changing modes in the structure and functions of the family. In this regard, functions which were performed exclusively in the past within the purview of the family, that define family membership and mutual obligations, may today be performed in different ways. Thus, the family itself is transforming, re-arranging itself to deal with changes in the society around it, yet still clinging to and reflecting those values necessary for its existence and survival as the natural basis of the society.

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112 Rwezaura *et al* 1995 *JLP* 42-43.
113 Rwezaura *et al* 1995 *JLP* 44.
114 Rwezaura *et al* 1995 *JLP* 44.
115 Rwezaura *et al* 1995 *JLP* 44. The authors agues further that as suggested by studies in modern times, "Many people marry both at church and according to traditional rites. They go to both clinics and traditional healers (for whom many rituals must be performed by the family). They have life insurance and pension policies. They may make wills favouring spouses, but also ensure that some items of property are distributed in accordance with customary practices when someone dies."

Having considered the concept of the family and it functions, I shall now return to the significance of dominant and minority cultures in the legal systems of Nigeria, South Africa and Australia. As stated earlier,[116] it is necessary in order to elucidate and clarify as much as possible cultural conflicts that may occur in a culturally diverse society where individuals may share similar values or no significant similarities in their values.[117] Yet, cultural values are intricate measures in terms of implementation of the Article 12(1) of the UNCRC children participation rights within the family in the legal systems of State Parties.[118]

2.2.3 Addressing the questions of dominant and minority cultures within the society and legal systems

From the definitions of culture already considered in this study, it is clear that culture operates in a society which consists of members who form a cultural community with certain ideals, beliefs, norms and values.[119] However, it cannot be assumed that all individuals or groups within a certain society hold identical views on the content and implications of the values they regard as their culture.[120]

In terms of numerical advantage within a specific socio-cultural context, the dominant members or group usually proclaim their culture as valid. According to An-Na'im:[121]

> [The] dominant groups or classes within a society normally maintain perceptions and interpretations of cultural values and norms that are supportive of their own interests, proclaiming them to be the only valid view of that culture.

Ibhawoh[122] holds a similar view to An-Naim's assertion stated above. He notes that powerful groups and individuals in the society tend to monopolise the

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116 See par 2.2.1 above.
117 An-Na'im "Toward a Cross-Cultural Approach to Defining International Standards of Human Rights" 19-44.
118 See paras 4.4.1.2 to 4.4.1.5, 4.6.2 to 4.6.3.1 and 4.8.1 of Chapter 4 respectively.
119 See the preceding conclusion to par 2.1.1 above.
120 According to Van Broeck, under customary setting, members of a particular community are ascribed with rights on the basis of their communal membership as well as the notion of family, status and achievement. See Van Broeck *Eur J Crime Crim L & Crim Just* 10-11
121 An-Na'im "Toward a Cross-Cultural Approach to Defining International Standards of Human Rights" 19-44.
122 Ibhawoh 2000 *Human Rights Quarterly* 849-851.

meaning ascribed to cultural norms and use them to their advantage.[123] This perception and understanding by the dominant group are enabled by their control of political, economic and cultural power.[124] This "group control" perhaps explains the possible tension in human rights discourse between individuals or groups that are dominated and considered weak and other groups that are dominant and considered strong in the power hierarchy of a society.[125] For example, women and children are seen as belonging to the dominated and weak group, and those most often at risk of having their voices silenced.[126]

However, within the confines of a legal system, the distinction between dominant and minority culture is neither a question of numerical superiority or physical power nor a matter of which culture comes first.[127] To consider numerical superiority or physical power in determining a dominant and minority culture, would be tantamount to saying that the minority culture occupies an insignificant place in the legal system, thereby creating problems of legal acceptance for the minority culture. Hence, it is important to underscore the significance of minority culture in many legal systems. To be specific, the constitutional protection and guarantee of rights to culture in the Nigerian,[128] South African[129] and Australian[130]

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123 Ibhawoh 2000 *Human Rights Quarterly* 849-851. Ibhawoh asserted this type of internal struggle for control and symbols can be said to underline the contemporary discourse on cultural legitimacy of human rights in Africa.

124 Stavenhagen "Cultural Rights: A Social Science Perspective" 96-97.

125 Ibhawoh 2000 *Human Rights Quarterly* 849-851.

126 This further explains why it is possible that a high percentage of the population of a particular society may have been excluded in the present construction of that culture and may in fact not subscribe to it. The implication of non-inclusion in the construction of culture is that what amount to the culture in a given society is often contested and debated. See Ibhawoh 2000 *Human Rights Quarterly* 849-851. As a result, "culture is full of tension, diversity and differentiation, rather than compact and singular as it is sometimes made out to be". See An-Na'im and Hammond "Cultural Transformation and Human Rights in African Societies" 23.

127 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 71; Van Broeck *Eur J Crime Crim L & Crim Just* 5; Bennett *U Botswana LJ* 14. According to Matthee, South Africa can clearly attest to this fact because the majority of the South African population is made up of the indigenous African communities. Yet, "before 1994, the indigenous African majority in South Africa was treated as subordinate and, to a certain degree, this still rings true today".

128 See s 21 (a) and (b) of the of Chapter II of the 1999 Constitution of Nigeria that make provision for the states to protect, preserve and promote the rights of Nigerian people to Nigerian cultures which enhance human dignity, and the development of technological and scientific studies which enhance cultural values of the Nigerian people. It is instructive to state that Chapter II is on Fundamental objectives and Directives Principles of State Policy.

legal systems, as pointed out later in this chapter,[131] can be used to support the significance of minority cultures in culturally diverse societies. According to Bennett,[132] section 31 (1) of the South African Constitution, which guarantees the right to culture "eliminates the problem associated with the term 'minority'".[133] More so, the term "cultural community" in the provision of section 31 (1) allows for the interpretation culture in terms of dominant and subordinate ideas rather than numbers or physical power.[134]

Similar to Bennett's view is that of Van Broeck,[135] who thinks that differentiating between a minority and dominant culture should be based on the "legal system's cultural and ideological background or basis".[136] In this manner, a dominant culture provides the ideological basis for the rules or law in the legal system. "[A] minority culture refers to the cultural background of the minority group", which is different from the cultural norms and values of the dominant culture.[137] Because of the preceding, it is, therefore, the cultural norms and values present in a particular legal system which determine which group can be viewed as the dominant one.[138]

However, the objectives contained in this chapter are non-justiciable. See S. 6 (6) (c) of the 1999 Constitution. See further discussion on this matter in para 2.3.1 below.

129 See s 15, s 30 and s 31 (1) of the Constitution Republic of South Africa*, 1996*. S 15 of the Constitution stipulates the right to freedom of religion every individual in South Africa, whilst s 30 emphasises the right of everyone to participate in a cultural life of his/her own choosing. Furthermore, s 31 guarantees the rights of people belonging to a cultural, religious or language community. They are not to be denied the right to enjoy their culture, with other members of that community or to exercise their religion.

130 See s 116 of the Commonwealth Constitution that provides for religious freedom. See also further discussion on this matter in para 2.3.1 below.

131 See par 2.3 to 2.3.4 below.

132 Bennett *U Botswana LJ* 14

133 Bennett *U Botswana LJ* 14. See also Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 72.

134 Bennett *U Botswana LJ* 14. See also Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 72.

135 Van Broeck *Eur J Crime Crim L & Crim Just* 5.

136 Van Broeck *Eur J Crime Crim L & Crim Just* 5. See also *Matthee One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 72.

137 Van Broeck *Eur J Crime Crim L & Crim Just* 5; Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law*? 72. It is instructive to state that Van Broeck's and Matthee's illustrate the point in terms of the Criminal law rule, their illustration fit into the present discussion which is in terms of children's rights law.

138 Van Broeck *Eur J Crime Crim L & Crim Just* 5; Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 72.

What is clear from the preceding discussion is that when it comes to defining the fundamental features of a particular culture, by implication, the dominant culture can exert influence within the societal structure.[139] But what constitutes the dominant's culture are the cultural norms and values present in a particular legal system.[140]

Within the specific legal system, it is shown in subsequent discussions that culture and traditions form an integral part of the customary law in their recognised legal systems.[141] More so, African cultural values of "duty" and "rights", namely respect, responsibility and reciprocity, are essential cultural values in terms of children's right within African societies.

2.3 The legal status of culture or custom

As indicated later in this thesis,[142] the legal systems in both Nigeria and South Africa consists of, amongst others, common law and customary law.[143] In terms of Australia, though the Commonwealth Constitution did not sufficiently recognise customary law. However, Australian law or legal system can be said to have systematically recognised aboriginal customary law and practices[144] through the courts and legislation.[145] It must, however, be kept in mind that the extent to

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139 Ibhawoh 2000 *Human Rights Quarterly* 849-851.

140 A dominant culture, according to Van Broeck is the cultural norms and values present in a particular legal system. Although the author contention is in relation to criminal law i.e. That its criminal law that determines which group can be viewed as the dominant one. See Van Broeck *Eur J Crime Crim L & Crim Just* 5.

141 See paras 2.3, 2.3.1, 2.3.2, 2.5, 2.5.2 and 2.5.5 below.

142 See paras 4.2.1 to 4.2.1.2 of Chapter 4.

143 Reference to Customary law herein is used synonymously with indigenous law or custom.

144 See Australian Law Reform Commission, Report No 31, The recognition of Aboriginal Customary law (1986), 2 Vols. and summary Report. Available at Australian Law Reform Commission website – www.alrc.gov.au. Accessed 11 May 2019. It is instructive to state that the Australian Law Reform Commission, as part of its terms of reference, was to consider a) proposal for the uniformity between laws of the Territories and laws of states; b) the special interest of the commonwealth in the welfare of the Aboriginal people of Australia; c) the need to ensure that every Aborigine has access to basic human rights; d) the rights to retain their racial identity and traditional life style or, where they so desire, to adopt partially or wholly European way of life, etc. in addition, the Commission was to investigate and report on whether it would be desirable to apply Aboriginal law to Aborigines in whole or in part, whether in general or in specific locations, or to individuals in living tribal conditions. etc. Therefore, unless otherwise noted, all followings references to paragraphs are to paragraphs in this report.

145 See par 2.3.4 below for further discussion.

which culture or customary values are regarded as valid and enforceable, is subject to the necessary applicable laws in these countries respectively.

2.3.1 Recognition and validity of culture and customary values

2.3.1.1 Nigeria

The Nigerian Constitution in Chapter II contains provisions that specifically demands of states to protect, preserve and promote the rights of the Nigerian people, Nigerian cultures and enhance cultural values of the Nigerian people.[146] Aside that the Constitution categorically promotes culture, there is the principle of judicial notice of any native law and customs, particularly those that have been proven in sections 17 and 18 of the Nigerian Evidence Act, 2011.[147]

Although the Nigerian law and courts recognised customary law, it does not mean that the Nigerian law and courts give a blanket recognition to all customs or customary laws. There is a number of validity tests imposed by law and the courts for any custom or customary law to be recognised as valid and enforceable.[148] The first of the validity tests is that such a custom or customary law must not be repugnant to natural justice, equity and good conscience.[149] The repugnancy test has been a subject of many judicial decisions.[150] For example, in *Mojeku v Mojeku*[151] the Court of Appeal held that the *"Oli-Ekpe"* custom of Nnewi in Anambra State under which male children are sole inheritors of their father's

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146 See s 21 (a) and (b) of Chapter II of the 1999 constitution of Nigeria. Chapter II is on Fundamental objectives and Directives Principles of State Policy. However, the objectives as contained in this chapter are non-justiciable. See s 6 (6) (c) of the 1999 Constitution. S. 17 of the Act provides for the judicial notice of customs to the effect that a "custom may be judicially noticed when it has been adjudicated upon once by a superior court of record." And s 18 (1) provides that Where a custom cannot be established as one judicially noticed, it shall be proved as a fact.

148 See the provision of s 18 of the Nigerian Evidence Act.

149 S 18 (3) of the Evidence Act. See also the case of *Egba Native Administration v. Adeyanju* (1936) 13 N.L.R 77; *Edet v. Essien* (1932) 11 N.L.R 47.

150 See e.g., the cases of *Okonkwo v Okagbue* [1994] 9 NWLR (Pt 368) 301; *Yinusa v Adesubokan* (1968) NNLR 97; *Zaidan v Mohsen* (1971) 1 UILR (Pt. II) 283.

151 (1997) 7 NWLR (pt. 512) 228. See also the earlier case of *Sule v. Ajisegiri* (1937) 13 N.L.R. 146 where under the Yoruba customary law, the court held that the partition of the deceased father's property on his death intestate must be equally shared among those entitled regardless of their gender. As a result, the defendant's claim that he is a male and was entitled to a larger propotion of the estate was rejected.

estate is unconstitutional. The Court asked a valid question when it asked if such a custom is consistent with equity and fair play in an egalitarian society such as Nigeria. Accordingly, the Court held that "for a custom or customary law to discriminate against a particular gender, such a custom is repugnant to natural justice, equity and good consciences".[152] Also, in *Ukeje v Ukeje,*[153] the Nigerian Supreme Court endorsed the right of Igbo women to inherit family estates. The Court further held that customary laws prohibiting the female child, regardless of her birth circumstances, from inheriting or sharing in the property and estate of her father, violate her right to equality and against discrimination enshrined in sections 42(1) and (2) of the Constitution.

The second validity test is that such customary law must not be incompatible, either directly or by implication, with any law for the time being in force.[154] Simply put, it means that where there is any inconsistency between a customary law and legislation, such inconsistency will be resolved in favour of the legislation. The third test is that a customary law must not be contrary to public policy**,**[155] although there is no definition of public policy in the Evidence Act.[156] However, the Nigerian Supreme Court in *Okonkwo v Okagbue*[157] concluded that public policy "must objectively relate to contemporary mores, aspirations and sensitivities of the people of this country and to the consensus values in the civilised international community, which we share".[158] It can, therefore, be said that the constitutional test is perhaps is the essential validity test, in the sense that every law, including

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152 *Mojekwu v. Mojekwu* (1997) 7 *N.W.L.R* (pt. 512) p. 283. See also the case of *Muojekwu V Ejikeme* (2000) 5 *N.W.L. R* 403. The Court of Appeal ruled that a female child might inherit from her late father's estate in Igbo land without undertaking the *Nrachi* ceremony. *Nrachi* is a cultural ceremony where in a man keeps one of his daughters at home unmarried for the rest of her life for the purpose of procrations, particularly male issues, to succeed him. According to the court, such a custom plainly discriminated against the daughter of the deceased who did not undertake the ceremony and was thus unconstitutional under section 42 of the Constitution of Nigeria, 1999. The court declined to apply the custom, declaring it repugnant to natural justice, equity and good conscience" and "contrary to public policy".

153 (2014) *LPELR* 22724 (S.C)

154 *Adebusokan v. Yinusa* (1971) ALL N.L.R 227, *Mojekwu v. Mojekwu* (1997) 7 N.W.L.R (pt. 512) p 283.

155 Section 18 (3) Evidence Act 2011. See also *Nzekwu v. Nzekwu* (1989) 2 N.W.L.R (pt.104) p 373 SC.

156 This test is provided for in s14(3) of the Evidence Act.

157 (1994) 9 NWLR (Pt 368) 301 (SC).

158 *Okonkwo v Okagbue* (1994) 9 *N.W.L. R* (Pt 368) 341

customary laws, must pass the constitutional test. While the constitutional test applies to the entire Constitution, it is undeniable that the provisions of Chapter IV of the Constitution which contain all the fundamental human rights, are most appropriate for determining the legality of customary law.[159]

What is clear from the preceding discussion is that for any culture or custom to be regarded as relevant, it must meet the requirements of the law in Nigeria. Therefore, culture or customs that are inconsistent with children's rights protected under the Constitution are invalid and unenforceable within the Nigerian legal system. The question is to what extent does the Nigerian Constitution specifically make provision for children's participation rights? Further discussion on children's rights and the Constitution in Nigeria is undertaken in Chapter 4.[160]

2.3.1.2 South Africa

In relation to the South African position, South African Constitution officially recognises that African customary law is part and parcel of the South African legal system.[161] The Constitution, as well as the Constitutional Court, have brought African customary law to be at a par with the common law of South Africa by according it constitutional recognition subject to the Constitution and other legislation.[162] There are many Constitutional provisions that made reference to African customary law, for example, sections 211(1-3), 212(2) and part A of Schedule 4 of the Constitution.[163] According to Matthee, section 211(3) of the Constitution by stating that South African courts "must apply customary law when

159 Chapter 4 of the Constitution contains the Fundamental Human Rights provisions.
160 See discussion in par 3.2.1.1 of Chapter 3.
161 Matthee argued that it was not until the enactment of the *South African Constitution* 1996 that the African customary law was officially recognised as part and parcel of the Legal system. He posited that before the 1996 Constitution, the recognition of African customary law was regulated by piecemeal legislation in the past. See Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law*?" 37-38.
162 See s. 15 (3)(b); s 39(3) of the Constitution; s 211 of the Constitution. See *Shilubana v Nwamitwa* 2008 9 BCLR 914 (CC) 926. See also Rautenbach *Elec J Comp L* 1-15.
163 See the Constitution Republic of South Africa, 1996. See also Rautenbach *Stell LR* 107 to 108.

that law is applicable" confirmed "the equal status of African customary law to that of the Western common law".[164]

Furthermore, Chapter II of the Constitution enshrines people's right to enjoy and retain their culture.[165] In this regard, section 30 of the Constitution makes provision for the rights of everyone to use his/her language as well as to participate in the cultural life of their choice. However, they may only exercise these rights so long as it is not inconsistent with any provision of the Bill of Rights.[166] In other words, the recognition of customary law in South Africa is subject to the Constitution and other legislation. Traditional leadership's role, institution and status are recognised by section 211(1) to (3) of the Constitution. Furthermore, a traditional authority that follows a system of customary law may function under the terms of applicable legislation and customs, including amendments to or repeal of these laws and customs. Finally, courts must apply customary law where it is applicable in accordance with the Constitution and relevant legislation.[167]

What the preceding discussion reveals is that the applicability of custom or customary law is also subject to the law and constitutional dictates. In other words, for any culture or custom to be regarded as relevant, it must meet the requirements of the law in South Africa. Specifically, within the context of children's Constitutional rights, it is shown in Chapter 4 that the South African Constitution guarantees specific rights for her children[168] and makes provisions for the child's best interests to be of paramount importance in every matter

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164 See Matthee *one Person Culture is another person's Crime: A Cultural Defence in South African Law?* 37-38.

165 Although the Bill of Rights did not categorically mention any provisions on the right to be governed by African customary law, however, it can be inferred from sections 15, 30 and 31 of the Constitution. Also, see s 181(1)(c) of the Constitution on the establishment of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities. See Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law*? 37.

166 S 30 of the Constitution Republic of South Africa, 1996.

167 See s 211 (1) to (3) of the constitution. See *Bhe v. Magistrate, Khayelitsha,* 2005 1 SA 580 (CC) par 148. Justice Langain Bhe's case noted that what the provision of s 211 means is that customary law "is protected by and subject to the Constitution in its own right."

168 See discussion in par 4.5.2 of Chapter 4.

concerning the child.[169] Culture or customs that are inconsistent with children's rights as protected under the Constitution are invalid and unenforceable. Children's rights and the Constitution in South Africa are fully explored in Chapter 4.[170]

2.3.1.3 Australia

There are two groups of indigenous Australians: Aboriginal people and Torres Strait Islanders. They have very distinctive cultures but are linked by their histories and politics.[171] The customary law in Australia thus relates to the systems and practices amongst the indigenous Aboriginal Australians, which have developed over time from accepted moral norms in the indigenous societies.[172] It can be said that the version of customary law in Australia is not codified as they are passed on by word of mouth from generation to generation.[173] Also, it is not singular throughout Australia.[174]

As is shown in Chapter 4,[175] the Australian Commonwealth Constitution (hereafter Commonwealth Constitution) did not contain a Bill of Rights. Still, the Commonwealth Constitution included other rights provisions amongst which are the right to religious freedom and rights of residents against any disability or discrimination in states.[176] These provisions mentioned above seem to be the only

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169 See discussion in par 4.5.3 of Chapter 4.

170 See discussion in par 4.5.1, 4.5.2 and 4.5.3 of Chapter 4.

171 There are two groups of indigenous Australians: Aboriginal people and Torres Strait Islanders. They have very distinctive cultures but are linked by their histories and politics. See Tilbury 2009 *Int J Soc Welfare* 57–64.

172 See Calma 2007 *25 Law Context: A Socio-Legal J 77.* The author pointed out that Customary law in Australia is a comprehensive system of governance and order that regulates "different aspects of many Indigenous peoples' lives. It is not frozen in the past, but a living, changing system that reflects its times, and will continue to grow…" See also Dockery 2010 *Soc Indic Res* 315; Tilbury 2009 *Int J Soc Welfare* 57-64.

173 See the case of *Hort and Verran* [2009] FLC ¶93-418, 83 774 [121], where the Full Court of the Australian Family Court stated that "the cultural heritages of the hundreds of Indigenous tribes in this country vary significantly, and that the culture is preserved and passed on by the Indigenous Elders to whom it is entrusted, via the oral tradition…"

174 See *Re CP (1997) 21 Fam LR 486, 501-504,* where the Full Court of the Australian Family Court held "that it was incorrect to view Aboriginal cultures as homogenous, but instead recognised that there are significant differences between Aboriginal groups." See also See Tilbury 2009 *Int J Soc Welfare* 57–64.

175 See the discussion in paras 4.7 and 4.7.1 of Chapter 4.

176 See ss 116 and 117 of the Commonwealth Constitution.

provisions to which reference can be made in the Commonwealth Constitution in terms of recognition of customary law.[177] The Commonwealth Constitution did not sufficiently recognise customary law in Australia. However, there are other ways in which the Australian law or legal system can be said to have systematically recognised Aboriginal customary law and practices.[178] This recognition is through the courts and legislation.[179] For example, customary law is often recognised through the courts in situations of judicial response;[180] sentencing discretions;[181] criminal law in the assigning of criminal responsibility;[182] compensable injury;[183]

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177 Premised on this, it can safely be assumed that there are no specific provisions in the constitution that specifically reference the term "culture" or "customary law."

178 See Australian Law Reform Commission, Report No 31, The recognition of Aboriginal Customary law (1986), 2 Vols. and summary Report. Available at Australian Law Reform Commission website – www.alrc.gov.au. Accessed 11 May 2019. It is instructive to state that the Australian Law Reform Commission, as part of its terms of reference, was to consider a) proposal for the uniformity between laws of the Territories and laws of states; b) the special interest of the commonwealth in the welfare of the Aboriginal people of Australia; c) the need to ensure that every Aborigine has access to basic human rights; d) the rights to retain their racial identity and traditional life style or, where they so desire, to adopt partially or wholly European way of life, etc. in addition, the Commission was to investigate and report on whether it would be desirable to apply Aboriginal law to Aborigines in whole or in part, whether in general or in specific locations, or to individuals in living tribal conditions. etc. Therefore, subsequent reference to paragraphs is to paragraphs in this report unless otherwise stated.

179 It is instructive to state that the common law rules for the recognition of custom, of communal native title, or of local laws and institutions in territories provide some scope for customary law recognition. As such, there are no specific or general application as to the recognition of customary law in the Australian legal system. See Australian Law Reform Commission, Report No 31, The recognition of Aboriginal Customary law (1986), para 69.

180 Because of the difficulties and potentials for miscarriage of justice which may occur when applying the general law to cultrally inclined Aborigines, the court has often times mitigate the effect of non-recognition of customary law by way of Judicial response. These are often done by acknowledging customary law in the determination courts sentence, and when considering or applying established defences such as provocation, duress and claim of right, and recognition of traditional marriage for the purposes of adoption legislation. Etc. See Australian Law Reform Commission, Report No 31, The recognition of Aboriginal Customary law (1986), para 70.

181 There are cases where the Australian Supreme courts of the Northern Territory, South Australia and Western Australia had regard to Aboriginal customary law as relevant in sentencing. See for example the case of *R v Daniel Jagamara and others* [1980] NTJ 372; where the court takes into consideration traditional punishment and ceremonies in sentencing an offender. See Australian Law Reform Commission, Report No 31, The recognition of Aboriginal Customary law (1986), para 498 to 541.

182 There are cases where Aboriginal customary law and traditions are considered as relevant in the determination of criminal responsibility. In *R v Papipatu* [1951] NTJ 18 and *R v Muddarubba* [1956] NTJ 317, the court was prepared to take account of the defendants Aboriginality in a for a defence of provocation to be established. In *R v Sydney Williams* (1974) 14 SASR 1, the court took account of the fact that an Aboriginal defendant was provoked through uttering of prohibited words or by the disclosure of tribal secrets. See also the following cases *DPP v Camplin* [1978] AC 705*; Mofja v r* (1977) 13 ALR 225 where the

traditional marriage;[184] and interrogation rules through trial.[185] While Customary law is recognised through legislation in the spheres of grants of land rights and native title;[186] protection of sites and sacred sites;[187] hunting and fishing rights;[188] traditional Aboriginal marriages;[189] Aboriginal child care practices;[190] traditional distribution on death;[191] and Aboriginal courts.[192]

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approach above has been followed and extended. See Australian Law Reform Commission, Report No 31, The recognition of Aboriginal Customary law (1986), para 72.

183 In several cases, the court has held that loosing traditional status as a result of brain damage or other severe incapacity, could be included in assessing damages in road accidents cases. See *Napaluma v Baker* (1983) 29 SASR 192; Napuluma's case was followed in the Northern Territory case of *Dixon v Davies* (1982) 17 NTR 31; see also *Robert v Devereux*, unreported, NT Supreme Court (Forster CJ) 22 April 1982 where loss of ability to participate in ceremonies was taken into consideration when assessing damages for assault. See Australian Law Reform Commission, Report No 31, The recognition of Aboriginal Customary law (1986), para 73.

184 The issue of recognition of traditional marriage is not a uniform decision in the judicial recognition of customary law in Australia. However, in an unreported decision in 1981, CJ Forster of the Northern Territory Supreme Court held that reference to 'husband and wife' in s 12 of the Adoption of Children Act 1964 (NT) consists of Aborigines living a traditional life, traditionally married inaccordance to tribal custom and who felt bound by that custom, for the purposes of an adoption. See Australian Law Reform Commission, Report No 31, The recognition of Aboriginal Customary law (1986), para 74.

185 In *R v Anunga* (1976) 11 ALR 412, the court established certain guidelines designed to remedied or stop some of the disadvantage from which the Aboriginal people suffer in dealing with the police. These guidelines include but not limited to providing an interpreter if the suspect is not fluent in English, and the presence of the prisoner's friend. Similar special rules also exist in some other Australian jurisdiction. See Australian Law Reform Commission, Report No 31, The recognition of Aboriginal Customary law (1986), para 75.

186 For example, there are legislation which confers title to land on the basis of Aboriginal tradition or allows traditional claims to land. This legislation can be regarded as a recognition of Aboriginal customary law. These legislations among others includes Aboriginal *Land Rights* 1976 (Cth), s 71(1); *Aboriginal Land Rights* 1978 (NT); and *Pitjantjatjaraku Land Rights Act* 1981 (SA) s 15. See Australian Law Reform Commission, Report No 31, The recognition of Aboriginal Customary law (1986), para 77.

187 As from 1965, there were legislations by several state protecting Aboriginal site. Among which includes *Aboriginal Historical Relics Preservation Act* 1965 (SA); Aboriginal Sacred Sites Act (NT); *Aboriginal Relics Preservation Act* 1967 (Qld); *Aboriginal Relics Act* 1975 (Tas); Archaeological and Aboriginal Relics Preservation Act 1972 (Vic); and Aboriginal Heritage Act 1972 (WA). See also the case of *Onus and Falkland v Alcoa of Australia Ltd* (1981) 36 ALR 425,439. The High Court held that the traditional or customary law responsibilities of the plaintiff with respect to a specific site were recognised or sufficient interest to enable them have the required standing to challenge an industrial development affecting that site. See Australian Law Reform Commission, Report No 31, The recognition of Aboriginal Customary law (1986), para 78.

188 For example, the traditional rights of Aboriginal to hunt and fish received legislative recognition in s 106(2) of *the Land Act* 1933(WA); S 47 of the *Aboriginal Land Rights Act* 1983 (NSW); and s 71(1) of The National Parks and Wildlife Conservation Act 1975 (Cth) among others. See Australian Law Reform Commission, Report No 31, The recognition of Aboriginal Customary law (1986), para 79.

189 For example, several Northern Territory Act such as Status of Children Act 1978; Family Provision Act 1979; Administration of Probate Act 1979; Workmen's Compensation Act 1978;

The differences in the customary law recognition in Australian states and territory can be attributed to the fact that the Australian legal system is a federal based system with its unique system of devolution of power.[193] As a result, there are no specific or general applications as to the recognition of customary law in the Australian legal system. As pointed out in Chapter 4,[194] the federal characteristic also accounts for the fragmented nature of the laws relating to children in Australia. Nonetheless, the main legislative framework for children's rights in Australia is the Child Protection Laws and Family Law.[195] The federal "Family law" is embodied by the Family Law Act*,* 1975 and provides, among others, for the rights and needs of indigenous children.[196] The Family Law Act also protects characteristics unique to indigenous Australian children, such as the right to enjoy

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Motor Accidents (Compensation) Act 1979; and Criminal Code 1983, recognises traditional marriage for specific purposes. Furthermore, Traditional marriage is recognised for the purposes of compensation (Commonwealth Government Employees) Act 1971 (Cth) and in Victoria for the purposes of adoption and guardianship. See Australian Law Reform Commission, Report No 31, The recognition of Aboriginal Customary law (1986), para 80.

190 For example, the s 63 of the Community Welfare Act 1983 (NT) provides for an Aboriginal child placement principle. See Australian Law Reform Commission, Report No 31, The recognition of Aboriginal Customary law (1986), para 81.

191 For instance, the Administration and Probate Act of 1979 (NT) recognises traditional marriage of the Aborigines and provides for the ordering of 'traditional distribution' of property where appropriate i.e. in cases where an aborigine dies intestate. See Australian Law Reform Commission, Report No 31, The recognition of Aboriginal Customary law (1986), para 82

192 For example, there exist courts specifically in Queensland and western Australia where Aboriginal people may be empowered to apply their customary laws in the resolution of disputes within their communities. See Australian Law Reform Commission, Report No 31, The recognition of Aboriginal Customary law (1986), para 83.

193 See discussion in par 4.7.1 of Chapter 4, for further discussion on Australian Federal system of government and its devolution of power. Specifically, it is noted that the *Australian* Commonwealth Constitution divides powers between the States and the central government by specifically enumerating the powers allocated to the Federal government, with the residue to be exercised by the States and territories. S 51 of the Commonwealth Constitution listed most powers which are, in general, powers to be exercised concurrently with those of the States and territories. S 109 of the Commonwealth Constitution however, provides that, to the extent of any inconsistency, a Commonwealth law shall prevail over a State law.

194 See the discussion in par 4.7.1 of Chapter 4.

195 The Child protection laws are legislated by the states and territories. While the Family law is legislated by the Commonwealth parliament. Chapter V of the Commonwealth Constitution of Australia Act recognised this by making provisions in ss. 106 to 108 and s 118 on saving the constitution, for the power of states parliament and states law respectively.

196 The term Indigenous is used to mean Aboriginal and Torres Strait Islander peoples, this indicates the diversity of Aboriginal and Torres Strait Islander identities, language groups, cultures, nations and histories in Australia. The term 'Indigenous' is also used to reflect internationally recognised Indigenous rights across the world, such as recognised in the *Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UN GAOR, 61" sess, 107thplen mtg, Supp No 49, UN Doc A/RES/61/295.

their own culture and the need to have their identity preserved and supported.[197] The law relating to children's rights and the Constitution in Australia is fully explored later in this thesis.[198]

In light of the preceding discussion on the recognition of culture in the legal systems of Nigeria, South Africa and Australia, it can be safely asserted that the Constitution in Nigeria and South Africa, and the legal system in Australia support a formal recognition of custom or customary law.

Despite the above assertion, there are certain matters associated with the recognised custom or customary law that require clarity as to the formal recognition of customary values in the children's law in these multi-ethnic societies as later shown in Chapter 4.[199] One such matter is what can be regarded as valid or legal customs and what is not, within the recognised "custom or customary law". In fact, in the discussion that follows, and as part of the debate on the legal status of culture or custom in cultural diverse societies, it is shown that there is a distinction between valid custom and customs that are mere social habits.[200] While valid or legal custom is regarded as an integral part of customary law, social habits are not so considered. It is valid custom and not social habits that finds expression in the children's law of these cultural diverse countries.

The discussion to follow in terms of the above distinction, is done in general terms as applicable within African societies, drawing where relevant, examples from specific states. The reason for this arises from the fact that many of the cultural values in most African societies are familiar or "shared customary values".[201]

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197 See s 60B (3) *Family Law Act 1975* (Cth). In this nexus, Family law courts considered a child's peculiar situation and circumstances and ordered placements with culturally appropriate carers inaccordance to the best interests of the child. See, e.g., *Re CP* (1997) 21 Fam LR 486 *('ReCP'); Davis v Davis* (2007) 38 Fam LR 671.

198 See paras 4.7.1, 4.8 of Chapter 4.

199 See paras 4.4.1.1, 4.6.3 and 4.8.1. It should, however be noted that there can be legal practices/customs that are not legally recognised, condoned or only informally practised that could also have an influence. However, the focus in this study, are those valid and/or legal customs that finds expression in the domestic law of the identified specific states parties.

200 For analysis on what amount to social habits, see discussion in the subsequent paragraph.

201 It cannot be denied that there are common customary values shared within African countries. Therefore, it is towards these common and/or shared customary values shared

In terms of the distinction between valid custom and customs that are mere social habits, some commentators have asked the critical question of "[w]here do we stop speaking of law and find ourselves simply describing social life?"[202] And how is living customary law "distinguished from customs and practices?"[203]

Hart,[204] in addressing the issue of law, customs and social habits, argued that a sense of obligation distinguishes customs that are mere social habits from customs that are regarded as law. In other words, the duty to conform to a particular belief or act in a way is directly linked to the legitimacy ascribed to a specific belief or values that differentiate that belief from mere social habits.

To further illustrate the above, for example, culture is preferably defined in this study as the values, attitudes, beliefs, orientations, and underlying assumptions prevalent among people in society.[205] These values, attitudes, beliefs and orientations include social habits that are "regular, habitual or convergent behaviour,"[206] many of which are not regarded as law. A typical African example of these social habits not is washing of one's hands before eating.[207] Specific examples of this social habit from Nigeria would be the Yoruba's[208] drumming and dancing at a traditional wedding ceremony. On the other hand, when a custom requires a sense of obligation that attracts "pressure for conformity" on the part of those on whom the obligation rests, it is viewed as law or an integral part of customary law.[209] A typical African example is the strong notion of communitarianism or the well-known African philosophy of *Ubuntu*.

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by most African societies that the discussion in this section is based. However, where necessary, specific example of African states is referred to.

202 Merry 1988 *Law and Society Review* 869-896.

203 Himonga and Bosch 2000 *South African Law Journal* 320.

204 Hart "The Concept of Law" 42-44.

205 See earlier discussion on culture in para 2.1.1 above.

206 Hund 1998 Archives for Philosophy of Law and Social Philosophy 423.

207 Diala 2017 *The Journal of Legal Pluralism and Unofficial Law* 150-151.

208 The Yoruba's are an ethnic tribe that majorly occupies the south-western part of Nigeria, West Africa. However, Yoruba language are also spoken in some part of Togo, Brazil and Cuba in South America.

209 Himonga *et al* "African Customary Law in South Africa" 20.

Ubuntu[210] represents the "shared traditional value and belief system" of the indigenous people of South Africa.[211] It is a holistic worldview that fosters among indigenous people a sense of "community, mutual support, sharing, interconnectedness and respect for one another."[212] It should be kept in mind that enveloped in the cultural value of *ubuntu*[213] are three significant themes regarded as the fundamental precepts underpinning African cultural value of duty and rights, namely respect, responsibility and reciprocity.[214] These fundamental precepts of African cultural values are discussed later in this chapter.[215]

Against the above background, the discussion that follows addresses the recognition of culture and family in the UNCRC. The aim is to highlight the centrality of the UNCRC – the main international children's rights instrument to this study. Also, the recognition and relationship of the UNCRC with cultural values in terms of children's rights to participate within the context of the family.[216]

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210 Defining *uBuntu* in Western language is a difficult undertaking. See Keevy *JJS* 69. According to Keevy the difficulties in describing ubuntu stems from the fact that "there are limits to Western rationality when it comes to the understanding of the philosophy of *ubuntu*". See also Mokgoro *PELJ* 2 who says that defining *ubuntu* in a foreign language and from an abstract rather than a concrete approach defies the fundamental essence of the African world-view and can therefore be particularly elusive. Mokgoro goes on to say that attempting to define *ubuntu* in precise terms is nearly impossible task since *ubuntu* is "one of those things that you recognize when you see it".

211 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law*? 58. See also Keevy *JJS* 64-67 for an overview of some of the definitions ascribes to the value of *ubuntu* by legal scholars.

212 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 58. See also Keevy *JJS* 33, 64; Bennett *PELJ* 30, 48; Cornell and Van Marle *Afr Hum Rts LJ* 206; English *SAJHR* 643.

213 See the South African case of *S v Makwanyane* 1995 3 SA 391 (CC) 481B-481C, *Ubuntu* according to Langa J is a culture that places a premium on communality and interdependence among community members. It acknowledges a person's status as a human being, entitled to unwavering respect, dignity, value and acceptance from the members of the community in which he/she lives. However, it also includes the inverse. Each members of the community must be treated with the same respect, dignity, values and acceptance by the person. More crucially, the emphasis it places on sharing and co-responsibility, as well as the mutual enjoyment of rights by all, governs the exercise of rights.

214 Twum-Danso 2009 *The International Journal of Children's Rights* 421; Devereux 1995 *U.N.S.W.L.J.* 464. Where the author surveyed African authors' views on meaning of duty. See also Cobbah Aug 1987 *Human Rights Quarterly* 309-331 and; Sudarkasa 1980 *Black Scholar* 44.

215 See para 2.5.2 below.

216 In fact, discussion on the relationship between children's rights and culture is of recurrent interest within the available literature on children's rights and legal pluralism. See Giselle et al 2015 *The Journal of Legal Pluralism and Unofficial Law* 226-245; Boezaart 2013 *International journal of private law*. 1-22; Harris-Short 2003 *Human Rights Quarterly* 130-

Again, it should be kept in mind that the discussion on the recognition of culture and family under the UNCRC below, is within a general context of cultures.

2.4 The recognition of culture and family under UNCRC

In terms of the family, the UNCRC places the child within a "web of relationships" with parents, family, and communities. These relationships are apparent from the numerous Articles of the UNCRC on the role and importance of the family. For example, the fifth paragraph in the preamble of the UNCRC affirms the family "as the fundamental group of the society and the natural environment for children's growth and well-being". What is more, the preamble stipulates that "the family should be afforded the necessary protection and assistance so that it can fully assume it's responsibilities within the community."[217]

Furthermore, several other Articles such as 5, 9, 10, 18, 19, 21 and 22 of the UNCRC lend support to the importance of the family in the life of the child. For example, Article 5, on parental guidance, emphasises the responsibility of parents to bring up the child in a way appropriate to his/her developmental capacities. The subject of the separation of children from their parents against their will is prohibited under Article 9, unless a competent authority subject to judicial review concludes that such separation is required in the best interests of the child.[218] In this regards, Article 10 obligates States Parties to deal with an application for the reunification of the child with the family in "a positive, humane and expeditious manner" that entails no detrimental implications for the applicants and their family members.[219] Another example is Article 18 which recognises that both parents share joint responsibilities for the child's upbringing and development. Article 19 guarantees protection from all forms of violence, injury or abuse as well as the formation of social programmes to assist children and those who care for them.

181; Kiame 2005 *African Journal of Human Rights* 221-238; Songca 2011 *Comparative and International Law Journal of Southern Africa* 340-359.

217 See the Preamble to the UNCRC.

218 See Article 9 of the UNCRC. Sub section 3 of Article 9 specifically provides for the "right of the child who is separated from one or both parents to maintain personal relations and direct contact with both parents on a regular basis, except if it is contrary to the child's best interests".

219 See also Article 10 of the UNCRC.

Two further provisions of the UNCRC that emphases and promote the role of the family in the life of the child are the rights to adoption in Articles 21 and protection for refugee children in Article 22.

In light of the preceding, it can be asserted that the UNCRC recognises family relationships and seeks to protect the family as an essential element central to the socialisation of children from childhood to adulthood.[220]

In terms of cultural values, the recognition of normative diversity is discernible throughout the UNCRC provisions. In fact, in its preamble, the UNCRC emphasises the relevance of tradition and cultural values for the preservation and harmonious development of a child. Under Article 24(3) State Parties are obliged to adopt all effective and appropriate steps to eliminate traditional practices that are prejudicial to the health of the children. Furthermore, Article 8(1) of the UNCRC requires State Parties to protect the right of the child to preserve his/her identity when it comes to the acknowledgement of cultural diversity.[221] Similarly, State Parties agree in Article 29(1)(c) that education should be geared towards the development of respect for cultural identity and values. According to Article 30(1) children of indigenous populations have the rights to enjoy their own culture, religion and language. In terms of Article 30(2), State Parties should respect and promote the right of children to fully participate in cultural activities. The rights of an individual to engage in cultural practices is a means of expressing a shared sense of identity, values and tradition.[222]

What is evident from the preceding discussion is that the UNCRC acknowledges the role of family, as well as cultural and traditional values in the realisation of children's rights in the domestic children's legislation of State Parties. Differently put, the formal recognition of culture by the UNCRC is an indication of the vital role culture plays in the realisation of children's participation rights. However, this understanding of the recognition of culture, much in the same way as the complex nature of culture, has significant consequences for the UNCRC on what children's

220 Ncube, "The African Cultural Fingerprint? The Changing Concept of Childhood" 14.
221 All references to the male form also include the female form.
222 Boezaart 2013 *International Journal of Private Law* 3-5.

participation entails within the family and the role of parents as well as its implementation in multicultural States Parties. Chapter 3 of this thesis explores what children participation entails and the various debates on autonomous children's participation and the role of parents. Chapter 4 explores the implementation approaches of Article 12 in Nigeria, South Africa and Australia.[223]

Lastly, although the UNCRC does not spell out in specific terms its conception of "culture and cultural values", it can correctly be asserted that the version of culture and cultural values which it presents concerning children does not denote a monolithic and unchanging entity across the globe. Of course, the foregoing corresponds with the definition of culture adopted for the purpose of this thesis.[224]

2.5 Indigenous cultural values and children's participation within the context of the family

Against the preceding, this section considers the issue of indigenous cultural values and children's participation in the family within a general context of African societies, and later to specific State Parties. Thus, the discussion that follows aims at elucidating on the African cultural values by a) identifying the specific fundamental precepts underpinning the cultural value of duty and rights, namely respect, responsibility and reciprocity, and b) explaining how these values in terms of children's participation within the family are described. The discussion below also aims to show that these cultural values are interlinked or similar in the specific State Parties identified in this study. More so, these values appear to have influenced what the specific States seem to have accomplished in their implementation approaches, as shown later in this thesis. To facilitate such a discussion and to be as clear as possible with regard to the theoretical subtleties

223 See for example the discussion in paras 3.4 to 3.4.4 in chapter 3 on what child's participation entails under Article 12(1) UNCRC and para 3.5 for discussion on the debate of the "role of parents in relations to the children's autonomy rights" i.e., legal paternalism versus autonomy; and second, on the "role of the autonomous child in relation to the family" i.e., autonomy rights versus duties. See also paras 4.4.1.1 to 4.4.1.5 and 4.6.3 to 4.6.3.1 and 4.8.1 of chapter 4 for the specific discussion on the recognition of culture and customary values in terms of child's participation rights in the domestic children's legislation of culturally diverse societies such as Nigeria, South Africa and Australia.

224 See par 2.2.1 above.

involved in the indigenous children participation within the family, a brief meaning of "legitimacy" is provided below. The reason, as subsequently pinpointed, is that "legitimacy" is that which prescribes adherence to specific cultural values placed on children in most indigenous societies.

2.5.1 What is legitimacy?

According to the Oxford Advance Learner's Dictionary[225] "legitimate" is defined firstly, as "for which there is a fair and acceptable reason" and secondly as "allowed and accepted according to the law". From the preceding definition, legitimacy can thus be inferred to mean the stamp or quality of allowing and accepting a particular thing within a specific context. Therefore, legitimacy can be linked to that which brings about conformity with whatever that is accepted and allowed, individually or collectively within a particular context.

2.5.2 Indigenous children's participation in the family within the context of the African societies

As noted above,[226] legitimacy is the stamp that affords acceptance and rejection of a thing whether individually or collectively within a particular context. In the context of culture, Kiame[227] posits that cultural legitimacy "denotes the quality of being in conformity with the accepted principles or rules and standards of a particular culture." [228] To the author, the authority derived from "internal validity of culture within a particular society is what defines the characteristics of cultural legitimacy".[229] Therefore, indigenous cultural norms, rules or values that are legitimate within a particular culture will be respected and observed by members of that culture.[230] The reason for the observance of the legitimate cultural norms,

225 Oxford Advance Learner's Dictionary "On line Edition".
226 See par 2.5.1 above.
227 Kiame 2005 *African Journal of Human Rights* 222.
228 Kiame 2005 *African Journal of Human Rights* 222.
229 Kiame 2005 *African Journal of Human Rights* 222.
230 An- Na'im "problems of universal cultural legitimacy for human rights" 331-336.

rule or value may presumably be because of its benefits to the members of that particular culture.[231]

Viljoen[232] points out that observance of indigenous cultural values in terms of children's participation within African societies are informed by "African cultural heritage". In terms of cultural heritage, children within African societies are regarded as a valuable part of society.[233] This intrinsic value and worth of the children are emphasised and captured by many African expressions. For instance, specific examples from Nigeria would be the Yoruba expression that: "*Omo eni ni ojo o la eni*", literally translated to mean: "one's child is one's future".[234] Kiame further captured the essence of some of these African expressions as follows:

> [C]apturing the essence of such recognition, the Swazi proclaim that *bantfwanabangulimbaloyaembili*; the Nyanja declare *anandiwotsogololathu*; the *Banyarwanda* insist *abananiborwandarwejo*. Translated literally, these expressions mean that 'children are the future' and they convey the notion that children must be protected, and nurtured, else society will die. Thus, African traditional culture recognises the intrinsic worth of children and the need to protect them. [235]

What the preceding African expressions reveal is that African culture recognises traditional responsibility for the survival needs of children, as well as ensuring children's social well-being within the society.[236] Thus, the survival and development of children are considered as "legitimate goals of traditional society".[237]

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231 Kiame 2005 *African Journal of Human Rights* 222-223.

232 Viljoen "The African Charter on the Rights and Welfare of the Child" 214-218. The term "African cultural heritage" was use in the preamble to the ACRWC. The ACRWC preamble urges States Parties to take "into consideration the virtues of their cultural heritage, historical background and the values of African civilization…on the concept of the rights and welfare of the child." See subsequent discussion on the fundamental precepts underpinning the African cultural values.

233 Armstrong *et al International Journal of Children's Rights* 333-368.

234 As indicated earlier the Yoruba is a language spoken by a tribe that majorly occupies the south-western part of Nigeria, West Africa. However, Yoruba language is also spoken in some part of Brazil and Cuba in South America. The author of this study belongs to the Yoruba tribe of the South-western part of Nigeria.

235 Kiame 2005 *African Journal of Human Rights* 222

236 Polis "Cultural relativism revisited: Through a state prism (1996) 18 *Human Rights Quarterly* 342. See also the Preamble to the ACRWC.

237 Kiame 2005 *African Journal of Human Rights* 225; Ludsin Berkeley *J Int'l L* 70.

In ensuring the above stated legitimate goals, traditional African society adopted a communal family system.[238] 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.[239] As earlier mentioned, duties and rights within the African communal system are generally regarded as the fundamental precepts underpinning African cultural values, namely respect, responsibility and reciprocity.[240] These fundamental precepts of African cultural norms, concerning participatory rights of the child within the family, are further highlighted as follows.[241]

2.5.3 Respect

Respect in most African societies is seen as the fundamental guiding principle of behaviour within the family.[242] It governs relationships among all members of the family.[243] Respect is accorded based on age, ability, and gender.[244] For instance, from an early age, children are taught appropriate behaviour including acceptable language, gestures and mannerisms to be accorded older people.[245] These gestures and mannerisms are to be observed in greetings, with bows or curtsies, which indicate the recognition of seniority.[246] For example, in the Yoruba culture of western Nigeria, children greet elders by prostrating (lying down) on the

238 Ludsin *Berkeley J Int'l L* 70; Keevy *JJS* 36-38. Ludsin points out that, the notion of family lies at the heart of African customary law.

239 See Keevy *JJS* 37-38 for an overview of the hierarchy within African communities. See also Van Broeck *Eur J Crime Crim L & Crim Just* 10-11; Bennett *U Botswana LJ* 17.

240 Twum-Danso 2009 *The International Journal of Children's Rights* 421; Devereux 1995 *U.N.S.W.L.J.* 464. Where the author surveyed African authors' views on meaning of duty; See also Cobbah Aug 1987 *Human Rights Quarterly* 309-331 and; Sudarkasa 1980 *Black Scholar* 44.

241 For a comprehensive discussion of respect, reciprocal support obligations and restraint, see Rwezaura 'Changing community obligations to the elderly in contemporary Africa' (1989) 4 *Journal of Social Development in Africa* 5; NA Apt 'Ageing and the changing role of the family and the community: An African perspective' (2002) 55 *International Social Security Review* 39 44; Twum-Danso 'Reciprocity, respect and responsibility: The 3Rs underlying parent child-child relationships in Ghana and the implications for children's rights' (2009) 17 *International Journal of Children's Rights* 415; and NA Apt & M Grieco 'Urbanisation, caring for elderly people and the changing African family: The challenge of social policy' (1994) *International Social Security Review* 111-22.

242 Cobbah 1987 *Human Rights Quarterly* 321; Sudarkasa 1980 *Black Scholar* 44.

243 Motala 1988-1989 *Hastings Int'l & Comp L Rev* 381.

244 Motala 1988-1989 *Hastings Int'l & Comp L Rev* 382.

245 Nwoye 1993 African Languages and Cultures 37-48.

246 Cobbah 1987 *Human Rights Quarterly* 321.

ground.[247] While in the Igbo culture of Eastern Nigeria, children must extend two hands to shake the hand of an older person.[248] It is usually considered a sign of disrespect and proof of poor upbringing for a child not to behave in this manner.[249] The emphasis on gestures that show respect is to ensure that children behave appropriately and show deference to adults.[250] Also, the focus on respect is to promote cohesion and mutual supportiveness within the community at large.[251] Thus, it can be said that the socialisation goals and participation within the family and society, is one that focuses on raising responsible children who obey and respect their parents and elders.

2.5.4 Responsibility and obligation

A well-known and established norm in African societies is to support and provide care for a needy and deserving parent.[252] In other words, there exists a responsibility and obligation to others within the societies.[253] This responsibility and obligation to others are aptly captured in the typical African phrase to be

247 Hallen The good, the bad, and the beautiful: discourse about values in Yoruba culture; Obafemi *et al* Character is beauty: redefining Yoruba culture & identity.

248 These gestures are accepted and widely practiced. See Dike The resilience of Igbo culture: a case study of Awka town (Enugu, Nigeria); Duru 1983 *Anthropological Quarterly* 1.

249 Akindele 1990 African Languages and Cultures 1.

250 This is because parents' status in the society is seen as dependent *inter alia,* upon their children's comportment. Hence, inappropriate behaviour would bring shame upon the family. See Twum-Danso 2009 *The International Journal of Children's Rights* 421.

251 Twum-Danso 2009 *The International Journal of Children's Rights* 421.

252 Himonga "African Customary Law and Children's Rights: Intersections and Domains in a New Era" 74. This duty arises prima facie by virtue of membership of the family or community. However, there is also a presumption that the beneficiaries of such a duty deserves of it based on the expectation that they too owe or have discharged the same duties to others (see the following section on reciprocity)

253 In terms of duty and responsibilities towards others, most African societies children are taught and expected to perform some form of work from an early age. See Rwezaura 1995 *Legal Pluralism & Unofficial Law* 33; Ogunaike and Houser 2002 *International Journal of Behavioural Development* 145-153.The form of work may include looking after younger infants, fetching water, cooking and tending herd. See Brems "Children's Rights and Universality" 40. Citing a Lesotho study, the author points out that it is difficult for parents to view child labour as against the interest of the child because of its positive cultural perceptions, i.e., that of educational value and economic contribution to the family.

one's "brother's keeper",[254] and in the Nguni proverb of *umuntungumuntungabantu* ("a person is a person through persons").[255]

Furthermore, describing in clear terms the importance of the African cultural value of responsibility and obligations in the socialisation of Gikuyu children in Kenya, Jomo Kenyatta stated that:

> [t]he Children are also taught definitely at circumcision, the theory, as it were, of respect to their parents and kinsfolk. Under all circumstances, they must stay with them and share their joys and sorrows. It will never do to leave them and go off to see the world whenever they take the notion, especially when their parents are in their old age… It thus becomes part of their outlook on life that their parents shall not suffer want nor continue to labour strenuously in their old age while their children can lend a hand and do things to give them comfort.[256]

What the above statement affirms is that there is an engagement with children at an early age in terms of their responsibilities and obligations considered as part and parcel of the child's education, recreation, development, and participation, which lead to their gradual assumption of responsibilities of adulthood.[257]

2.5.5 Reciprocity

The duty of reciprocity is closely related to that of responsibility and obligation as described above.[258] It follows, therefore, that when the child also becomes a parent, the child is similarly obligated to support his children. In this manner, the mutually reinforcing cycle of support and entitlement, obligations and rights is

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254 Motala 1988-1989 *Hastings Int'l & Comp L Rev* 373. See also earlier reference to Ubuntu in this chapter.

255 Keevy *JJS* 65, 71-72, 74 the author states that this proverb could also be translated as "I am because we are", "I am because we are and because we are, therefore, I am" and "injury to one is injury to all". See also Mollema and Naidoo *JJS* 51; Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law*? 57-58.

256 Facing Mount Kenya: The tribal Life of the Gikuyu. Quoted in Steiner *et al International Human Rights in context; Law, Politics Morals* 499.

257 Brems "Children's Rights and Universality" 40. It is important to state that there are objections raised about this approach which correspond with that of the ACRWC combining rights with the duty to assist. In fact, Van Buren, for example, argues that there is a danger of exploitation of the child and that the practice might be viewed as a debt owed to family. However, she agrees that for the child to have responsibility gives him a "sense of value", which, in turn reinforces his sense of and proper adaptation to his community and environment. See Van Bueren, *The International Law on the Rights of the Child* 76-78.

258 See Facing Mount Kenya: The tribal Life of the Gikuyu. Quoted in Steiner *et al International* Human Rights in context; Law, Politics Morals 499.

sustained, and everyone benefits from the exercise of their duties to others.[259] The essence of reciprocity is, therefore, to ensure the continuity of a system of intergenerational bonds and interdependence in the community.[260] The context and socialisation of a child in this regard relate closely to the duties and functions of the child in the community and in his or her later life as an adult in the same community.[261]

In light of the above discussion on African communal conception, the interests of the child and those of the community are mutually beneficial. Thus, as noted earlier,[262] the preservation of communal or group identity is thought to be in the interests of the child and the interests of the family.[263] More so, in this communal conception, relationships are built in tandem with the extended family model paradigm.[264] Parenthood in this setting is mainly social, and all child-related decisions are to be made after consulting with all members of the kinship group, not just the child's biological parents.[265] Although broadly speaking, collective good takes precedence over an individual child's claims, the welfare of the community is inextricably tied to the interests of the individual child. Accordingly, the child is treated not as an individual but as a member of the family,[266] who "serves the family and the family serves her".[267] The individual interests of the child and those of the family are therefore inextricably linked.

In recent times significant changes had occurred in most communities in Africa, due to external cultural influences, migration and socio-economic situations.[268]

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259 Rwezaura *et al* 1995 *JLP* 32-38.
260 Ncube, "The African Cultural Fingerprint? The Changing Concept of Childhood" 21.
261 Armstrong *et al* 1995 *Int'l J Child Rts*. 336; Mollema and Naidoo *JJS* 51; Bennett *PELJ* 48, 52; Keevy *JJS* 72; Cornell and Van Marle *Afr Hum Rts LJ* 206.
262 See par 1.2.2.3 of Chapter 1.
263 Alston, 1994 *International Journal of Law, Policy, and the Family* 1–25; Moyo 2012 *African Human Rights Law Journal* 151.
264 Moyo 2012 *African Human Rights Law Journal* 151;
265 Rwezaura *et a*l 1995 *JLP* 40.
266 Ludsin Berkeley *J Int'l L* 70; Keevy *JJS* 70.
267 Moyo 2012 12 *African Human Rights Law Journal* 151; Armstrong A child belongs to everyone: Law, family and the construction of the best interests in Zimbabwe Innocenti Occasional Papers, Child Rights Series 11 19955; Kaime *The African Charter on the Rights and Welfare of the Child: A socio-legal perspective* 2009 114.
268 Rwezaura *et al* 1995 *JLP* 25, 74.

However, the core values as described above remain valid and prevalent.[269] Therefore, implementing children's right to participation within African states cannot escape the specific cultural values of duty and rights, namely respect, responsibility and reciprocity. The influence of ACRWC cannot be overemphasised in this regard. Chapter 3 further explores ACRWC and the preservation of African cultural values.[270]

Specifically, Nigeria is an example of a State Party in Africa, where these cultural values play an essential role in children's rights to participation in decision-making within the family.[271] As indicated in this thesis,[272] the Nigerian Child Rights Act 2003 omits Article 12(1) on the right of the child to be heard as contemplated under the UNCRC. This right is not included in those listed in sections 3 to 18 of the Act as being applicable to a child. This exclusion is noteworthy, as it acknowledges the fact that in many parts of Nigeria, culture and tradition play an important role in the construction of childhood, child-rearing and their participation in decision-making within the family. In most cases, children are regarded to be incapable of making decisions, even on matters pertaining to them, thus decisions concerning children are often made by the fathers or the male elders.[273] This undoubtedly constitutes a real threat to the enforcement and implementations of the child's right to be heard in the light of Article 12(1) of the UNCRC. Furthermore, as is shown in Chapter 4,[274] the emphasis on children's participation rights within the family in Nigeria's children domestic legislation seems to be on the African cultural values of connectedness, interdependence, duties, respect, responsibilities, obedience and loyalty. [275] The extent to which

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269 Rwezaura *et al* 1995 *JLP* 33
270 See paras 3.6, 3.6.1, 3.6.2 of Chapter 3 for discussion on ACRWC.
271 See paras 4.4.1.1 to 4.4.1.3 of Chapter 4.
272 See par 4.4.1.4 of Chapter 4.
273 Ekundayo 2014 *The International Journal of Humanities & Social Studies* 184.
274 See paras 4.4.1.1, 4.4.1.2, 4.4.1.3 and 4.4.1.4 of Chapter 4.
275 Ibhawoh 1999 "*Between Culture and Constitution: The Cultural Legitimacy of Human Rights in Nigeria*." See also S. 19 of the Nigerian Children's Rights Act, 2003, most particularly s. 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.

these cultural values influenced the Nigerian specific legislation on children's rights is explored fully in Chapter 4.[276]

South Africa is another specific example of a multi-cultural society in Africa where these cultural values appear to play an essential role in child-rearing and their participation in decision-making within the family.[277] As pointed out earlier,[278] one of the features of African customary law is that groups, rather than individuals, constitute a legal entity. As a result, children in traditional communities in South Africa generally do not only belong to their parents but are part of the extended family and therefore their welfare is inseparable from that of their families. [279] Aside from this, families under African traditional society are majorly arranged along patrilineal lines, and in this line, adult males, usually of the paternal family are the most influential persons in the decision-making process relating to the child. Relationships in traditional communities in South Africa are built along the extended family model, with family units grouped together along kinship lines to form clans.[280] This system allows for the inclusion of a huge number of people into the family circle. As a result, parenthood is mostly social and all child-related decisions are most often made after consulting all members of the kinship group, not just the child's biological parents. Furthermore, the Children's Act specifically includes aspects of customary law, particularly concerning parental rights, duties and responsibility towards the best interest of the child in a culturally responsive way within the family.[281] The extent to which these African customary values are

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276 See paras 4.3.1, 4.4.1.1 to 4.4.1.3.

277 Songca, analysing the evolution of children's rights in South Africa, stated that the idiom that "a child belongs to everyone" or a "child belongs to the village" aptly captured African communal and collective child-rearing practice. According to him, communal and collective practice is more common in rural areas where traditional child-rearing practices are still prevalent. In terms of its communal and collective practice nature, it goes to say, that child rearing and upbringing seems not solely the responsibilities of a child immediate family. Rather, it is the collective responsibilities of the extended family and by extension the entire group or community where such child lives. See Songca 2011 *Comparative and International Law Journal of Southern Africa 352.* See also See Ncube 1998 "The African Cultural Fingerprint? The Changing Concept of Childhood" 10-13.

278 See discussion in par 2.5.5 above. See also Bekker and Rautenbach 'Nature and sphere of application of African customary law in South Africa' 26; Maluleke *PER* 5/428.

279 Moyo 2012 *African Human Rights Law Journal* 151-152; Nhlapo *International Journal of Law, Policy and Family* 208, 221.

280 Moyo 2012 *African Human Rights Law Journal* 151-152.

281 See Chapter 1, No 2 (a) and (e) of the Children's Act, where among objects of the Children's

incorporated in the South African children's rights legislation is further explored in detail in this thesis.[282]

In light of the preceding examples based on the Nigerian and South African models, it becomes necessary also to consider the Australian example. The Australian Aborigines[283] as indigenous people maintained customs and practices that have a common feature that emphasises "kinship and relationships within families and other members of Indigenous communities."[284] Studies conducted on Australian indigenous Aboriginal by Christie[285], Greer and Patel,[286] Long *et al*.,[287] and Thompson *et al* [288] shows that kinship and relationships within the families have "special meanings, and recognition of them as an important part of Indigenous culture seems pervasive across Indigenous groups".[289] According to Thompson *et al* characteristics of indigenous culture in Australia are distinguished as:

> centrality of family and the extended kinship system; low emphasis on individual ownership of possessions relative to obligations and contributions to the other members of the family and community; the role of connections to land and to the past in their sense of self-identity. [290]

Further, the authors posit that "[i]ndividuals identify with where they come from because this indicates who they are and where their 'home country' is."[291] Similarly to Thompson's *et al* view is Greer and Patel's, which identify kinship and

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Act is stated to be: (a) to promote the preservation and strengthening of families; and (e) to strengthen and develop community structures which can assist in providing care and protection for children. This provision of chapter 1 recognizes the value of connectedness, interdependence, and loyalty within the family, which is a typical African traditional practice.

282 See paras 4.6.3, 4.6.3.1 and 4.6.3.2 of Chapter 4.

283 According to Tilbury, there are two groups of indigenous Australians: Aboriginal people and Torres Strait Islanders. They have very distinctive cultures but are linked by their histories and politics. See Tilbury 2009 *Int J Soc Welfare* 57-64.

284 Dockery 2010 *Soc Indic Res* 315.

285 Christie "Aboriginal perspectives on experience and learning".

286 Greer and Patel 2000 *Accounting, Auditing and Accountability Journal* 307-329.

287 Long *et al* 2007 "An audit and review of Australian Indigenous housing research" AHURI Final Report No. 102, Australian Housing and Urban Research Institute, July.

288 Thompson *et al* 2000 Health Education and Behavior 725-743.

289 Dockery 2010 *Soc Indic Res* 321.

290 Thompson *et al* 2000 Health Education and Behavior 725-743.

291 Thompson *et al* 2000 Health Education and Behavior 728; Calma 2007 *A Socio-Legal Journal* 87.

"reciprocal relationships with" the land as identifying characteristics of indigenous Australian culture.[292]

In light of the above-stated characteristics of indigenous culture in Australia, it can, therefore, be deduced that the Australian multi-cultural societies boast of indigenous kinship cultural practices similar to those of the African communal practices.[293] In other words, within the context of Australia's multicultural society, communalism or kinship practices in terms of children's participation within the family exist.[294] Perhaps, this explains why the Australian Family Law Act emphasises and gives effect to the UNCRC Article 30 provision, which acknowledges the rights of indigenous children.[295] The extent to which these indigenous customary values can be said to have influenced the Australian children's rights legislation is further explored in detail later in Chapter 4.[296]

From the discussion so far, it can be stated in general that how children's rights are integrated and accepted by a society depends mostly on how those rights are construed and fit into the existing legal rules and cultural norms of that society.[297]

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292 Greer and Patel 2000 *Accounting, Auditing and Accountability Journal* 307-329.

293 These characteristics of indigenous culture in Australia as above identified are distinguished as: "centrality of family and the extended kinship system; low emphasis on individual ownership of possessions relative to obligations; and contributions to the other members of the family and community." See Thompson *et al* 2000 *Health Education and Behavior* 725-743; Dockery 2010 *Soc Indic Res* 321.

294 As mentioned in Chapter 1, Australia has a multi-ethnic society characterised by indigenous and non-indigenous Australians. In recognition of the diversity of Torres Strait Islander identities, language groups, cultures, nations and histories in Australia, the word Indigenous is used to mean Aboriginal and Torres Strait Islander peoples. The term 'Indigenous' is also used worldwide in relation internationally recognised Indigenous rights across the world, such as is recognised in the *UN Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UN GAOR, 61" sess, 107thplen mtg, Supp No 49, UN Doc A/RES/61/295.

295 See s 60B (3) of the *Family Law Act.* Article 30 UNCRC stipulates that Indigenous children must not be denied the right to enjoy their own culture in community with other members of their group; to profess and practise their religion, or to speak their own language.

296 See par 4.8.1 of Chapter 4.

297 Kiame 2005 *African Journal of Human Rights* 222. According to some commentators, the advantage of legitimising human rights and specifically children's rights within the local communities cannot be dismissed. As An-Na'im and Hammond assert, "local acceptance enriches the universal idea by giving it meaning and relevance to people's lives". See An-Na'im and Hammond "Cultural Transformation and Human Rights in African Societies".

What is more, various approaches to children's participation within the family are not limited to a particular region or continent.[298]

2.6 Conclusion

In this chapter it was indicated that the preferred definition of culture among the various definitions considered is tied to the values, attitudes, beliefs, orientations and underlying assumptions prevalent among people in the society.[299] In the above definition of culture, critical elements that influence family practices in culturally diverse societies are present, that is orientations, lifestyles, and ways of living together, value systems, traditions and belief.

Furthermore, the term "family" is a web of complexity and as such difficult to ascribe a definite meaning to. One of the reasons for this situation is the changing modes in the structure and functions of the family. Functions, which were performed exclusively in the past within the purview of the family, and which defines family membership and mutual obligations, may today be performed in different ways. Thus, the family itself is transforming, and re-arranging itself in response to changes within and outside the society, even when it is still clinging to and reflecting those values necessary for its existence and survival as the natural basis of the society.

Regardless of the difficulty in agreeing to a universally acceptable definition of the term family, the preferred definition among the various definitions considered defines family as a group of relatives in different positions within the family and who carry out functions which are necessary for the existence and survival of the family reproduction, emotional care and child socialisation.[300] The inclusiveness of

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298 Mason and Bolzan 2010 "Questioning Understandings of Children's Participation" 130. The authors in their study from across five countries located in the Asia–Pacific region, concluded that while in each of the countries involved in the research there was a commitment to children being 'part of' activities, and what they were able to be part of was culturally specific.

299 See par 2.2.1 above. This preferable definition clearly resonates with the UNESCO definitions of culture in its preamble to the 2001 Universal Declaration of Cultural Diversity, which introduced more elaborate definition of culture. *Universal Declaration of Cultural Diversity* (UNESCO Doc. 31C/Res 25, Annex 1 (2001)) adopted unanimously by the organisation's General Conference at its 31st session, 2 November 2001.

300 See par 2.2.2.1.

"group of related persons in different positions within the family" with functions that ensures the existence and survival of the family as well as the socialisation of the child informed why the definition is accepted and considered preferable for the purpose of this study.

In terms of values system, customs and beliefs, this Chapter indicates that specific cultural values derived from indigenous practice influence children's participation rights in the family within the general context of African societies.[301] These cultural values, as identified, are the critical African cultural values of rights and duties, namely respect, responsibility (obligation) and reciprocity.[302] As is later shown in Chapters 3 and 4, these cultural values are not exclusive to the ACRWC as a regional children's document, but are also present in specific domestic children' rights laws in terms of the implementation of Article 12(1) of the UNCRC in Nigeria and South Africa, and to an extent, Australia.

Further discussions in this Chapter on the legal status of customary law show that customary values form an integral part of both the Nigerian and South African as well as Australian legal systems, and as such are valid norms in these multi-cultural countries.[303] However, the extent to which customary values are regarded and accepted as valid is subject to the constitutions and other laws operating in these countries.[304] In light of the above, it is submitted that in terms of children's participation in decision-making within the family in these multi-ethnic societies, the norms of respect, responsibility (obligation) and reciprocity are dominant cultural values of fundamental principles of their recognised customary law.[305]

This Chapter also shows that the provisions and principles of the UNCRC recognise and relate with culture, tradition and the family.[306] It is submitted that these recognitions demonstrate that the UNCRC accedes to the centrality of culture and

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301 See discussion in paras 2.5.1 to 2.5.5.
302 See paras 2.5.3, 2.5.4 and 2.5.5.
303 See paras 2.3.2, 2.3.3 and 2.3.4
304 See paras 2.3.2, 2.3.3 and 2.3.4.
305 See earlier discussion in par 2.2.2 on the conflict between dominant and minority culture within a legal system.
306 See par 2.4.

family, not only in the socialisation process of children from childhood to adulthood, but also in the realisation of Article 12(1) on children's participation rights in the domestic legal systems of the various State Parties.[307]

307 See par 2.4.

CHAPTER 3

ARTICLE 12(1) OF THE UNCRC AND THE ACRWC WITHIN THE CONTEXT OF CHILDREN'S RIGHT TO PARTICIPATION IN THE FAMILY

3.1 Introduction

In Chapter 2[1] it was indicated that cultural values are an integral part of the legal systems of culturally diverse State Parties to the UNCRC such as Nigeria, South Africa and Australia. Within the context of children's right to participation in African communities, it was also observed that cultural values of duty and rights, namely respect, responsibility and reciprocity are essential factors in such culturally diverse State Parties.[2] In Chapter 4[3] it is also shown that these cultural values of duty and rights found their way in the implementation of the child's participation rights in decision-making within the family in the domestic children's law of State Parties such as Nigeria, South Africa and Australia. In Chapter 5,[4] it is shown that specific cultural practices that are considered "harmful" practices may be used under the pretext of family child-rearing and upbringing in terms of the value of "duty and rights".

However, before proceeding to discuss the implementation of Article 12(1) in the domestic legal systems of the aforementioned State Parties, one must first consider the main features and perspectives of children's right to participation under Article 12(1) of the UNCRC. Once these features, and in the contexts in which they have been used, are discussed, a discussion on the approach of Article 12(1) implementation adopted in the domestic legal systems of those culturally diverse State Parties can continue.

In light of the preceding, the focus of this chapter is to discuss what children's right to participation entails, particularly, how Article 12(1) of the UNCRC – the

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1 See earlier discussion in paras 2.3.2, 2.3.3 and 2.3.4 of Chapter 2.
2 See earlier discussion in paras 2.5, 2.5.1 and 2.5.2.
3 See generally the discussion on the implementation of Article 12(1) in Nigeria, South Africa and Australia in Chapter 4.
4 See generally the discussion in Chapter 5 on harmful cultural practices in Nigeria, South Africa and Australia. Particularly see the discussion in par 5.2 and 5.3.

right to participation is addressed, and how, participation rights occur within the context of the family.[5] The various theoretical arguments on the Article 12(1) rights of the child to participate and make an independent decision within the family are also discussed.[6] Again, the relationship between thee UNCRC and ACRWC within the context of children's right to participation in the family is discussed.[7] This discussion is necessary because as indicated in Chapter 4,[8] cultural values similar to those contained in the ACRWC are reflected in the specific domestic children's legislation of Nigeria and South Africa. It is, therefore appropriate to compare the UNCRC and the regional ACRWC in terms of the extent of their provisions on children's participation rights within the family.

Developments within international law leading up to the adoption of the UNCRC and the scope, nature and applicability of the UNCRC requires some clarifications.

3.2 The development of international children's right instrument

The twentieth century witnessed the development of international law on the rights of the child, which ran parallel to the changing notion of childhood.[9] Traditionally, before international children's rights instruments came into existence, children were mostly undifferentiated from adults as there was no recognition of the unique state of youth, or of "life cycle stages".[10] A significant modification in children's perceptions did not occur until the eighteenth-century enlightenment age.[11] These attitudinal changes toward children cannot be delinked from the increasing recognition and general acceptance of the concept of childhood as an innocent stage in human life cycle, and that adults have a duty

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5 See discussion in paras 3.4 to 3.4.4 below.
6 See par 3.5 below.
7 See par 3.7 below.
8 See earlier discussion in par 2.5.5 of Chapter 2 and later paras 4.4.1.1 to 4.4.1.3 and 4.6.3, 4.6.3.1 of Chapter 4.
9 Stern *The Child's Right to Participation – Reality or Rhetoric*? 30.
10 Hoyles The Politics of Childhood 18; Heywood A History of Childhood: Children and Childhood in the West; Cunningham Children and Childhood in Western Society Since 1500; Plumb *In the Light of History* 175-178.
11 Plumb *In the Light of History* 158; Heywood A History of Childhood: Children and Childhood in the West; Orme Medieval Children; Cunningham Children and Childhood in Western Society Since 1500; Archard Children: Rights and Childhood 17. Archard buttressed on this issue stating that "at this time a more elaborate, explicitly stated and abstract appreciation of what is involved in being a child emerged."

towards it.[12] According to Ncube,[13] childhood was view as a transitional period leading up to maturity, which needed to be well-managed to guarantee that children grow up to become responsible, well-rounded and autonomous adults. [14]

The first and second world wars and colonialism were three key developments in the 20th century that led to the enlargement of the image of the child to take on a more global focus.[15] What is more, the adoption of a series of international laws on children was central to the expansion.[16]

The first international instrument that first dealt with the rights of the child is the 1924 Declaration of the Rights of the Child,[17] also known as the Declaration of Geneva.[18] The 1924 Declaration was more concerned with protection and

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12 Plumb *In the Light of History* 158; Somerville *The Rise and Fall of Childhood* 147. Somerville explains the change in attitudes towards children stating that parents were made aware that some things are suitable for children and other things are not; parents were also encouraged to regards amusement as beneficial in itself. Thus, it was part of a child's right to a happy childhood and its widespread acceptance was regarded as a watershed moments childhood history.

13 Ncube "The African Cultural Fingerprint? The Changing Concept of Childhood" 15.

14 As a result of children's immaturity, inability to make sound judgment as well as little or no experience in the ways of the world, they deserve specific protection and rights specifically designed for them. See Ncube "The African Cultural Fingerprint? The Changing Concept of Childhood" 15.

15 The government of Poland involvement in the adoption of the Convention on the Rights of the Child, for example, underlies its commitment to child protection, which as far back as the second war, when two million Polish children were slaughtered. Many were prosecuted by the Nazis and subjected to medical experimentation. During its formative years at the United Nations, the Polish delegation pressured the Commission on Human Rights to address the myriad child-related issues that had arisen as a result of the war. See LeBlanc *The Convention on the Rights of the Child: United Nations Law-making on Human Rights* 16. See also Ibhawoh 2000 *Human Rights Quarterly* 846. The author contends that colonial rule and the authoritarianism that accompanied it, hampered the recognition and protection of human rights in traditional African societies.

16 When Eglantyne Jebb, the founder of the Save the Children movement, commenced to promote the concept of an international declaration of Rights of the Child as part of her mission to expand Save the children's work, particularly in war-torn countries. She is the first to attempt the internationalising of this notion of childhood that developed in Western Europe during 18th and 19th centuries. She believed that in order for her work to be effective, it needed to be recognised on a global scale. As a result, Jebb drafted a five-point Charter, which she submitted in 1923 to the League of Nations, the forerunners of the United Nation. It was then accepted as the Geneva Declaration of 1924 at the League's fifth Assembly the following year. See Detrick *A Commentary on the United Nations Convention on the Rights of the Child* 13; Alston 1986 *Cultural Survival Quarterly* 59-61.

17 *Declaration of the Rights of the Child* adopted 26 September 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924).

18 As noted in the preceding footnote 505, Save the Children International Union submitted the first draft of the Declaration to the League of Nations. Simultaneously, the International Council of Women was also working towards a charter on the rights of the child. The

provision than rights, and established the claim that "mankind owes to the child the best it has to give".[19] In other words, the Declaration of Geneva did not strictly speak of the "rights of the child" nor outline any form of obligations towards children.[20] Interestingly, apart from that, the Declaration only sought to establish and place the duties of the children directly upon "men and women of all nations".[21] It was never intended to be a legally-binding instrument, but more of a prelude to the development of legally-binding norms.[22] The subsequent instrument to the 1924 Declaration was the 1959 Declaration on the Rights of the Child.

3.2.1 The 1959 Declaration on the Rights of the Child

The fundamental premise enshrined in the 1959 Declaration is that children are entitled to a particular protection, and that such protection should be implemented with the best interests of the child as the primary consideration.[23] Aside the above, the 1959 Declaration goes into greater depth about the protection and well-being of the child than its predecessor, the 1924 Declaration.[24] The preamble not only refers to that of the 1924 Declaration, which states that "mankind owes to the child the best it has to give", but also describes the Declarations principles as enunciating rights and freedoms that governments should uphold by legislative

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combinations of this two Organisation's efforts led to the 1924 resolution. See Sharon: *A Commentary on the United Nations Convention on the Rights of the Child* 13. See also Alston *Cultural Survival Quarterly* 59-61.

19 See the preamble to the Declaration of the Rights of Child 1924.

20 The declaration's five principles were as follows: the child must be given the means necessary for normal development, both materially and spiritually; the child who is hungry must be fed, the child who is sick must be nursed, the child who is behind in school must be assisted, the delinquent child must be reclaimed and the orphan and waif must be sheltered and succoured; the child must be the first to receive assistance in times of need; the child must be protected from all forms of exploitation; and the child must be raised with the understanding that his/her skills must be dedicated to the service of others. See Declaration of the Rights of the Child, adopted 26 September 1924, League of Nations O.J. Spec. Supp. 21, at 43 (1924).

21 Stern 2006 *The Child's Right to Participation – Reality or Rhetoric*? 31-32.

22 According to Heintze, the 1924 declaration contributed to the progressive development of international norms, even though it was essentially an aspirational document. See Heintze "The UN Convention and the Network of International Human Rights Protection by the UN" 72. See also Van Bueren: The International Law on the Rights of the Child 5-8.

23 Van Bueren The International Law on the Rights of the Child 11.

24 Van Bueren The International Law on the Rights of the Child 11. The 1959 Declaration consists of a preamble and 10 principles, thereby improving the image of childhood beyond the five points outlined in the 1924.

and other means.[25] In other words, the 1959 Declaration adoption of the language of protection coupled with the language of entitlements and rights,[26] serves as the turning point in the perception of children, from recipients of rights and welfare to subjects/holders of rights who should benefits from specific rights and freedoms.[27] However, like its predecessor (1929 Declaration), the 1959 Declaration was also non-binding.[28] A binding Convention later came into existence in 1989 via the adoption of the United Nations Convention on the Rights of the Child.[29]

3.3 The scope, nature and applicability of the UNCRC

The United Nations Convention on the Rights of the Child is one of the international instruments that broadened the rights of the child and placed it on the world's political agenda.[30] As shown below,[31] the fundamental objective of the UNCRC is to establish the status of children as rights-bearers and for their rights to be considered as equally important to those of adults when it comes to respect and fulfilment. The goal of the UNCRC is to assist and to ensure that the world's more than 2.5 billion children have access to their rights, as well as the opportunity to exercise these rights as individuals in line with the Universal Declaration on Human Rights.[32]

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25 See the preamble to *Declaration of the Rights of the Child* G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959).

26 Heintze "The UN Convention and the Network of International Human Rights Protection by the UN" 72.

27 During the 1960s and 1970s, the Declaration helped to raise awareness of the condition of children and of the significance of endowing children with rights in order to address some of the world most pressing issues. Twenty years later in 1979, the International Year of the Child as designated by the UN, the General Assembly concluded "that the principles had played a significant role in the promotion of the rights of children throughout the world as well as in shaping various forms of international cooperation in this sphere." See Van Bueren The International Law on the Rights of the Child 12.

28 Mower: The Convention on the Rights of the Child: international law support for children 10-11; Stern 2006 The Child's Right to Participation – Reality or Rhetoric? 31.

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

30 As is shown in the discussion above the idea of children's rights is not a new one. See also Todres 1998 *Colum Hum Rts L Rev* 161-162.

31 See discussion in par 3.4 and 3.4.1 below.

32 The Convention's preamble specifically refers to the Universal Declaration in which it is stated that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind. See preamble 4 of the UNCRC.

3.3.1 Main perspective and principles of the UNCRC

The main perspectives in terms of the UNCRC seem to comprise of two elements, namely the right to protection and the right to participation.[33] However, Van Bueren[34] canvassed four categories, which she refers to as "the four P's": participation, protection, prevention and provision.

In terms of the protection and participation themes of the UNCRC, the protection perspective is visible in most of the substantive articles.[35] It is the inclusion of participation rights in the UNCRC that has been considered a most radical and progressive step in the struggle to guarantee and protect the rights of the child.[36] However, according to Van Bueren,[37] neither of the two perspectives should be regarded as more significant than the other, because their primary purpose is the same: to enhance children's lives and living conditions.

These perspectives can be placed in two categories – the *needs-oriented* perspective and the *competence-oriented* perspective, which takes into consideration the wishes and capacity of the child as an individual.[38] As indicated in later discussions in this Chapter[39] on arguments in favour and against autonomous children participation's rights, the needs-oriented critics lay more emphasis on the protection and care of children. This perspective primarily sees children as having needs that have to be met by adults, and who must without fail take such needs and wishes into consideration.[40]

In other words, it is for the adult to determine whether the child's viewpoints are significant and taken into account in any decision finally made on behalf of the child. Children are thus not considered as capable of making independently critical

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33 Stern 2006 *The Child's Right to Participation – Reality or Rhetoric*? 13,38. However, the author further describes these two themes of *protection* and *participation* as a simplified description of what the Convention is based around.
34 Van Bueren The International Law on the Rights of the Child 15.
35 A few examples: the right to life (article 6), the rights of refugee children (article 22), the right to health (article 24), the right to protection against sexual exploitation (article 34).
36 Stern 2006 The Child's Right to Participation – Reality or Rhetoric? 13,38.
37 Van Bueren The International Law on the Rights of the Child 15.
38 Singer *Föräldraskap i rättslig belysning* 83-98.
39 See par 3.5 below.
40 Lansdown "The realisation of children's participation rights; Critical reflections" 12.

decisions on their own since they are perceived as neither having the capacity for making rational choices, nor are they mature enough to do so. Article 3(1) of the UNCRC can be seen as an example of this perspective since it underlines the importance of making the best interests of the child a paramount concern in all actions concerning children, and not necessarily the fulfilment of the child's wishes.[41] It is thus both the responsibility and the privilege of the adult to make the final judgement about what is best for the child in question.

However, the best interests principle in Article 3(1) should not be seen as a straightforward application of a typical welfare approach to children, but rather as a requirement that the states must meet.[42] The UNCRC did not specifically mention what amounts to the best interests of the child or what is to be considered in determining the best interests of the child. However, there seems to be a consensus by scholars that it is more significant to acknowledge that cultural or other circumstances will, and should, influence what is best for the child in their particular setting, as long as the conclusion is consistent with the UNCRC's values.[43] In fact, as indicated later in this thesis,[44] cultural values do have an impact on what is best for the child in its particular context.

The competence-oriented perspective posits that a child's capacity to express wishes and to influence matters of personal importance is equal to that of an adult. The first paragraph of Article 12's requirement to respect the views of the child and give them due weight – in relation to the child's age and maturity – is a profound example of this perspective. What Article 12(1) of the UNCRC entails and

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41 Specific references to the best interests of the child are also found in other Articles of the Convention: articles 9, 18, 20, 21, 37 and 40.

42 Alston *The best interests of the child: reconciling culture and human rights*; Van Bueren *The International Law on the rights of the Child* 45-50; Joachim "The Concept of the Best Interest in Terms of the UN Convention on the Rights of the Child" 125-135.

43 The literature on the principle of the best interest of the child is extensive. The following are few examples of the extensive literature on the best interests' principle: Alston *et al Children, Rights and the Law;* Detrick *A Commentary on the United Nations Convention on the Rights of the Child* 85-94; Douglas and Sebba *Children's Rights and Traditional Values;* Goonesekere *International Journal of Law, Policy and the Family* 117-149; Hodgkin and Newell *UNICEF Implementation Handbook for the Convention on the Rights of the Child* 39-53; Purdy *In Their Best Interest?*; and Van Bueren *The International Law on the Rights of the Child*.

44 See Paras 4.4.1.1 to 4.4.1.5, 4.6.3 to 4.6.3.2 and 4.8, 4.8.1 of Chapter 4 respectively.

how participation is perceived will be analysed thoroughly later in subsequent sections.[45]

Apart from the foregoing perspectives, the UNCRC contains guiding principles as could be seen from some of its provisions, that is non-discrimination (Article 2), the best interests of the child (Article 3), survival and development (Article 6), and the right to participate (Article 12).[46] Together these provisions, form the backdrop against which all actions of the State Parties to the UNCRC are to be measured. They serve as a guide to the UNCRC's interpretation and implementation. They are reflected in the treaty articulation of specific rights.[47]

In the interpretation of the UNCRC, two of the above-mentioned fundamental principles are very essential. These are the best interests of the child as stated in Article 3(1) – which also serves as a fundamental article of the UNCRC – and the evolving capacities of the child as mentioned in Article 5.[48] As indicated below,[49] the concept of "evolving capacities" is an acknowledgement that children's continuous development towards independent maturity must be respected and fostered throughout. It is linked, for example, to the provision in Article 12(1), which states that children's opinions should be given due weight based on their age and maturity and to Article 14(2), which states that children's right to freedom of thought, conscience and religion should be exercised "in a manner consistent with its evolving capacities".[50] Van Bueren describes the two principles – best interests and the evolving capacities of the child – as the "umbrella principles underlying the exercise of all the rights in the Convention".[51] She asserts that:

> it is only by considering the two principles of interpretation together that the best interest standard becomes an instrument of progress for children's rights. [52]

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45 See paras 3.4, 3.4.1, 3.4.2, 3.4.3 and 3.4.4 below.
46 Kiame 2005 *African Journal of Human Rights* 227. See also discussion in par 3.4 below.
47 See discussion in paras 3.3.2 and 3.3.3 below on implementation and measure of implementation of the UNCRC.
48 See Lansdown "Participation and young Children" 5; Varanda *International Journal of Children's Rights* 323-324. See also discussion in par 3.4.4 below.
49 See par 3.3.4 below.
50 See pars 3.4.2 and 3.4.4 below.
51 Van Bueren The International Law on the Rights of the Child 15.
52 Van Bueren The International Law on the Rights of the Child 15.

What should be clear from the above and the discussion so far, is that the principles of the UNCRC are intertwined and enjoy mutual dependence. Their mutual dependence in terms of their application is an excellent example of the holistic perspective.[53] According to Parkes,[54] the UNCRC enjoys a holistic nature of interpretation and implementation approach. Therefore, that even though most of the UNCRC articles include elements that amount to either civil or political rights, there is no distinction in terms of the human rights elements contained in the UNCRC. As further advocated by the Committee on the Rights of the Child, the holistic perspective should be borne in mind when interpreting, realising or implementing the UNCRC by the State Parties.[55] The Committee in its General Comment number five on implementation emphasises that the "enjoyment of economic, social and cultural rights is inextricably intertwined with enjoyment of civil and political rights". More so, the Committee noted that "there is no simple or authoritative division of human rights in general or of the UNCRC rights into the two categories"[56] This intertwining or connectedness of Article 12 and other provisions of the UNCRC are further highlighted later in this chapter,[57] specifically when addressing what participation rights entail under Article 12(1) of the UNCRC. The extent to which the best interests and evolving capacities principle of the child are implemented in the specific domestic children's law of Nigeria, South Africa and Australia is discussed in Chapter 4.[58]

3.3.2 Implementation of the UNCRC

Generally, under international law, when a state ratifies a treaty, it enters an agreement with the other contracting parties and accepts the responsibility to carry out the treaty's provisions.[59] Thus, a State Party to a convention is obliged to

53 Parkes 2013 Routledge Research in Human Right Law 260–261.
54 Parkes 2013 Routledge Research in Human Right Law 260–261
55 General Comment 5 CRC/C/GC/2003/5 para. 6.
56 General Comment 5 CRC/C/GC/2003/5 para. 6.
57 See paras 3.4.1, 3.4.2 3.4.3 and 3.4.4 below.
58 See discussion in paras 4.4.1, 4.6.1.1 and 4.8.1 of Chapter 4 respectively.
59 The principle of *pacta sunt servanda* is thus as applicable to these kinds of agreement as to any other kind. See article 26 of the 1969 Vienna Convention on the Law of Treaties (VCLT).

interpret the treaty it has ratified in good faith[60] and not to submit reservations incompatible with the object and purpose of the Convention.[61] To ensure effectiveness and enforcement, most international agreements oblige State Parties to report periodically on their efforts to implement their commitments.[62] In the context of the UNCRC, the mechanism for monitoring and enforcement was established under Articles 43-45 of the UNCRC.

Article 43 of the UNCRC establishes the Committee on the Rights of the Child.[63] The primary function of the Committee is to evaluate the progress made by states in fulfilling their commitments under the UNCRC. Article 44 of the UNCRC obliges State Parties to submit reports on their efforts at implementing the rights recognised in the UNCRC.[64] In turn, the Committee submits a report biennially to the UN General Assembly, updating the organisation and its members on the progress of the Committee's work.[65] It should be kept in mind that as the treaty-monitoring body of the UNCRC, the general comment of the Committee is an authoritative statement on the implementation, interpretation and meaning of provisions under the UNCRC.[66]

Furthermore, in the process of monitoring and enforcement established under the UNCRC, the Committee seeks information on general measures of implementation, including those taken to harmonise national law and policies.[67] However, the Committee is not only interested in legal regulations, but also the practices of State Parties. On many occasions, the Committee has reported that the poor

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60 Article 31(1) of the VCLT. See, also, the following paragraphs of article 31 as well as articles 32 and 33 on interpretation.

61 Article 51(2) of the UNCRC, see also article 19(3) of the VCLT.

62 There are many factors that determine the effectiveness of an international treaty. These among others include; the compliance, inclusiveness of its provision, implementation and other exogenous factors. See Raustiala and Slaughter, "International Law, International Relations and Compliance" 107,539.

63 Consisting of 10 experts of "high moral standing and recognised competence in the field covered by the Convention." See Article 43(2) UNCRC.

64 See Article 44 UNCRC.

65 See Article 44(5) UNCRC.

66 UN Committee on the Rights of the Child, "Rules of Procedure" 18 March 2015, CRC/ C / Rev 4 Rule 77. See also Varanda *International Journal of Children's Rights* 308.

67 See Article 44 (2) UNCRC. The process is that a State Party must provide a comprehensive initial report within two years after the UNCRC was ratified, followed by subsequent reports every five years.

implementation of the UNCRC is not sufficient proof that a state has followed its requirements.[68] For instance, in Nigeria's first report on the implementation of the UNCRC to the Committee on the Rights of the Child submitted in 1996, the Committee noted in its concluding observations the concerns that Nigeria was not giving adequate attention to the provisions of Articles 12 to 17 on the autonomy rights of the child.[69] In a subsequent report submitted by Nigeria, the Committee explicitly expressed its concern that Articles 3 and 12 were not properly incorporated into the implementation of state policies and programme due to the persistency of traditional beliefs on the status of children in the "hierarchical social order."[70] The Committee was worried about children's opinions not given sufficient regard and respect because children's views remain constrained "within the family and at school, in courts, before administrative authorities, and in the society at large."[71] The above comments by the Committee in its concluding observations support the submission in Chapter 4 of this study that the Nigerian implementation of Article 12(1) child's participation rights in decision-making within the family is solely within the context of accepted local norms and cultural values in the society.[72]

As a result of the resistance and non-compliance with Article 12(1) UNCRC provision, the Committee has always recommended in its observations that states should not only implement, but also comply with the law. This recommendation demonstrates the vital role that the State Parties must play in the advancement and protection of the rights of the child at the national level.

3.3.3 Measure of implementation – Article 4

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68 Costa Rica, Second Report Concluding Observations, OHCHR, 2000, UN Doc CRC/C/Add117 para 16. See also Hodgkin and Newell Implementation Handbook for the Convention on the Rights of the Child 168.

69 Committee on the Rights of the Child, Concluding Observations, OHCHR, 1996 U.N. Doc. CRC/C/15/Add 61 para 14.

70 Concluding Observation of the Committee on the Rights of the Child, OHCHR, 2005, UN Doc. CRC/C/15 Add 257 para 34.

71 Concluding Observation of the Committee on the Rights of the Child, OHCHR, 2005, UN Doc. CRC/C/15 Add 257 para 34.

72 See para 4.4.1.5 of Chapter 4.

The specific framework for the implementation of the UNCRC is outlined in Article 4, which provides as follows:

> State Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognised in the present Convention. With regard to economic, social and cultural rights, State Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation.

From the above provision, it is evident that Article 4 is of fundamental importance for the UNCRC. More so, Article 4 with Articles 42, 43, 44 and 45(6) describes the general legal obligations of states' parties regarding implementation. Article 42 enshrines the obligation to make the content of the UNCRC widely known, Article 43 established the Committee on the Rights of the Child and Articles 44 and 44(6) stipulated on the obligation to submit reports of efforts at implementing the rights recognised in the UNCRC. These rights are grouped by the Committee on the Rights of the Child in its general Guidelines for Periodic Reports, as "general measures of implementation", to which the Committee pays attention.[73]

Furthermore, the legislative measures, as required by Article 4 for the implementation of the UNCRC, is the first step to be taken by states when becoming a party to the UNCRC. Therefore, upon ratification of the UNCRC, State Parties are under obligation to ensure that their domestic legislation is compatible with the UNCRC.[74] The role of State Parties in this regard must be that of "fulfilling clear legal obligations to each and every child" and not to be taken "as a charitable process, aimed at bestowing favours on children."[75] The implication of

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73 See General guidelines for periodic reports: 20/11/96 CRC/C/58. (Basic Reference Document). See also Committee on the Rights of the Child General Comment 5 CRC/C/GC/2003/5, para 26-73.

74 See General Comment 5 CRC/C/GC/2003/5 para. 18, see also para. 1. In General Comment 5 on implementation, the Committee on the Rights of the Child emphasises that it: "…believes a comprehensive review of all domestic legislation and related administrative guidance to ensure full compliance with the Convention is an obligation. Its [the Committee's] experience in examining not only initial but now second and third periodic reports under the Convention suggests that the review process at the national level has, in most cases, been started, but needs to be more rigorous. The review needs to consider the Convention not only article by article, but also holistically, recognizing the interdependence and indivisibility of human rights. The review needs to be continuous rather than one-off, reviewing proposed as well as existing legislation."

75 General Comment 5 CRC/C/GC/2003/5 para 11.

the preceding is that State Parties are required in their domestic legislation to adopt new laws or codes or to revise already existing legislation.[76] As Chapter 4 of this study demonstrates, different ways had been adopted by specific culturally diverse State Parties who have ratified the UNCRC by the inclusion of its provisions in their national legal framework.[77] The adoption of the UNCRC by the State Parties is to make it possible to invoke the requirements of the UNCRC directly before courts and for its application by national authorities.[78]

In furtherance of the preceding, the "administrative and other measures" reference in Article 4 of the UNCRC entails that State Parties should take proactive steps to implement the UNCRC. The Committee on the Rights of Child has identified specific actions as advice for states, which are elaborately highlighted in the General Comment on general measures of implementation.[79] These include developing a comprehensive national strategy rooted in the UNCRC, implementing cross-sectoral coordination to recognise and realise children's rights across governments at different levels and between government and civil society. Furthermore, it includes data collection, training and capacity building, and most importantly, making the UNCRC known to adults and children are vital measures of implementation identified by the Committee.[80]

3.4 Article 12(1) of the UNCRC: The right to participation

In view of the preceding discussions on the implementation and measures for the implementation of the UNCRC, it is apt to shift focus to the provisions of Article 12(1) of the UNCRC. The aim of such a discussion is to describe the contents of the provisions of Article 12(1), and to consequently determine what a child's participation rights entails? Where necessary its connectedness with other

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76 Santos Pais *et al* 2006 *The Lancet* 689.

77 See also Summary Report Study on the Impact of the Implementation of the Convention on the Rights of the Child UNICEF 3.

78 General Comment 5 CRC/C/GC/2003/5, para 20 which refers to the Vienna Convention on the Law of Treaties, article 27.

79 General Comment 5 CRC/C/GC/2003/5, para 26-73.

80 General Comment 5 CRC/C/GC/2003/5, para 26-73. In other words, rigorous monitoring of the implementation of the UNCRC built into government process at all levels including independent oversight by national human rights institutions, NGOs and other groups are what is required by the committee. See General Comment 5 CRC/C/GC/2003/5, para 27.

participation rights provisions in the UNCRC is considered. Therefore, the discussion that follow describes various components of the provisions of Article 12(1) which are central to this study.

3.4.1 The child who is capable of forming his or her own views

What is noticeable is that the above component does not refer to any age limit.[81] Commenting on the above element of Article 12(1) of the UNCRC, Stern pointed out that:

> [C]hildren from a very early age can express their 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.[82]

Similarly, Lansdown[83] points out areas in which young children can display equal or greater competence, for example, their ability to learn new languages, recall where things are, use their imaginations, mediate between bickering parents, demonstrate a readiness to forgive, "to acquire IT skills or display creativity, love and compassion."[84]

In other words, 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 ages who can express their views, even where they are unable to communicate them verbally. Put differently, 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.[85] Implementation of Article 12(1) requires recognition of, and respect for, non-verbal means of communication such as "play, body language, facial expression, or drawing and

81 See Article 12(1) of the UNCRC.
82 Stern *The Child's Right to Participation – Reality or Rhetoric*? 160.
83 Lansdown "Participation and young Children" 4-5.
84 Lansdown "Participation and young Children" 4-5.
85 Stern 2006 *The Child's Right to Participation – Reality or Rhetoric?* 160; Lansdown "The realisation of children's participation rights; Critical reflections"12; Lansdown *"Participation and young Children"* 4-5.

painting, through which very young children make choices, express preferences and demonstrate an understanding of their environment".[86]

In terms of the intertwining nature of participation rights under the UNCRC, it seems clear that there is a connection between Article 12(1) and Article 13 on freedom of expression as well as the critical principle of non-discrimination of the UNCRC as established in Article 2, which does not allow for any child to be denied rights based on sex, race, colour, ethnic origin or disability.[87] Besides, the Committee on the Rights of the Child recommended in its report from General Day of Discussion on early childhood as follows:

> State parties must take all appropriate measures to ensure that the concept of child as rights-holders is anchored in the child's daily life from the earliest stage […] in this regard, special attention must be given to the freedom of expression.[88]

From the foregoing, it is safe to conclude that Article 12(1) places at the core of participation for children, the necessity of appreciating a child's presumed capacity and competence of forming opinions and expressing same independently even at a young age to the extent to which it is possible.

3.4.2 The right to express those views freely

This component of Article 12(1) ensures that children who wish to participate, have a right to express their views and opinions without limitations. Children should not be subjected to parental, governmental, or other sources of influence, restraint, or pressure which might limit or "prevent the expression of the child's views."[89] Included in this components of Article 12(1) is the right to be provided with access to appropriate information that will engender an informed decision,

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86 Lansdown "The realisation of children's participation rights; Critical reflections" 12; Lansdown *"Participation and young Children"* 4-5.

87 Hodgkin & Newell UNICEF Implementation Handbook 167. See also Stern 2006 *The Child's Right to Participation – Reality or Rhetoric?* 161.

88 2004 Day of General Discussion on Implementing child rights in early childhood (Committee on the Rights of the Child Report of the 37th session, 13 September – 1 October 2004, CRC/C/143) para. 10.

89 Stern 2006 *The Child's Right to Participation – Reality or Rhetoric?* 161.

because a decision cannot be considered as free if it is not an informed one.[90] It includes the right not to express a view or position, as freedom of expression can mean the right to choose to remain silent.[91] To contribute their views, children need access to appropriate information and to safe spaces where they are given the time, encouragement and support needed to develop and articulate their views.[92]

Relating the foregoing to the cultural values of rights and duties, it goes without saying that the obligations to respect parents at all time may affect the expression of the child's views within the family. It is usually considered a sign of disrespect and proof of poor upbringing for a child not to behave in a manner considered inappropriate by his/her parents.[93] However, as already indicated,[94] the focus on respect is to promote cohesion and mutual supportiveness within the family and the community at large. Thus, the socialisation goals and participation within the family and society focuses on raising responsible children who obey and respect their parents and elders.[95]

3.4.3 In all matters affecting the child

The reference to "in all matters" implies that the participatory rights in Article 12(1) of the UNCRC are not limited to matters that are explicitly dealt with in the UNCRC.[96] In other words, "in all matters" entails that participation rights extends to all actions and decisions which affect children's lives as individual children, and children as a group.[97] Tisdall *et al.*[98] in explaining children's participation, stated that:

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90 Lansdown "The realisation of children's participation rights; Critical reflections"12.
91 Santos Pais "The Convention on the Rights of the Child" 426.
92 Lansdown "The realisation of children's participation rights; Critical reflections"12.
93 Akindele 1990 African Languages and Cultures 1.
94 See para 2.5.3 of Chapter 2. See also Motala 1988-1989 *Hastings Int'l & Comp. L. Rev.* 381; Twum-Danso 2009 *The International Journal of Children's Rights* 421.
95 See Sloth Nelson and Mezmur *Journal of African Law* 177. See also later discussion in par 3.6.2.
96 Subsequent discussion described participation.
97 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 "The realisation of children's participation rights; Critical reflections"12; Stern 2006 *The Child's Right to*

> 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.[99]

Similarly, Hart[100] described 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". Moosa-Mitha[101] describes participation as "[t]he expression of one's agency in the multiple relationships within which citizens are present in society".[102]

The above description of participation points to the fact that the scope of Article 12 participation rights is more comprehensive, covers both the private and public spheres of society and creates duties for the State concerning matters left for actors in the private domain such as in the family. Juxtaposing the foregoing to the cultural values identified in this thesis, it is clear from the discussion in Chapter 2 on cultural values that the ultimate purpose behind the values of communalism is to secure the preservation of the interests of the group as a whole, including children.[103] In this regard, individual interest are not totally, if at all, overlooked, but are assessed in the light of communal interests.[104] Therefore, under the communal arrangement, matters concerning the child both in public and private areas such as the family are also covered. The difference is that under Article 12(1) of the UNCRC the state has an obligation to intervene in matters of protection concerning the children within the family.

In terms of "in all matters" within the family, decisions that affect a child taken in the family setting may be considered as trivial or casual, and formal or significant

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Participation – Reality or Rhetoric? 162; Lücker-Babel 1995 *International Journal of Children's Rights* 396

98 Tisdall *et al* 2009 *International Journal of Children's Rights* (Special Issue) 16 (3) 419-429.

99 Tisdall *et al* 2009 *International Journal of Children's Rights* (Special Issue) 16 (3) 419. See also See Guidelines for periodic reports para III D.

100 Hart 1992 Children's Participation: From Tokenism to Citizenship Florence: UNICEF International Development Centre.

101 Moosa-Mitha 2005 *Citizenship Studies* 369-388.

102 Moosa-Mitha 2005 *Citizenship Studies* 375.

103 See earlier discussion in par 2.5.5 of Chapter 2.

104 Moyo 2012 *African Human Rights Law Journal* 151-152; Nhlapo *International Journal of Law, Policy and Family* 208, 221.

decisions.[105] Trivial or everyday decision-making includes but 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.[106] Sutherland[107] captured the above succinctly stating that:

> 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.[108]

In terms of formal or significant participation, this may involve the legal aspects of family decisions regarding health matters,[109] choice of school and other significant matters that may affect the child, such as cultural practices, values or religious belief(s) or faith[110] – that is, cultural practices, values or beliefs that violate the participatory rights or the development of children. For instance, the duty to respect parents and family[111] could easily be relied upon to curtail children's rights to participation in decision-making within the family.[112] And, as indicated later in Chapter 5,[113] specific cultural practices, which are "harmful" to the child that is FGC/M may be used under the pretext of proper cultural upbringing and child-rearing.

It should, however, be kept in mind that for this study, the reference to participation in decision-making within the family is used in the context of formal

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105 Sutherland 2014 *Child & Fam L Q* 156. It is not within the focus of this thesis to examine one after the other all forms of child participation in the family as they are endless. Succinct explanations only, are offered under this heading. Hence, references to participation within the family herein are used interchangeably and within the context of both trivial and major participation.

106 Mason and Bolzan 2010 "Questioning Understandings of Children's Participation" 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.

107 Sutherland 2014 *Child & Fam L Q* 152-172.

108 Sutherland 2014 *Child & Fam L Q* 152, 156.

109 Specifically, in Chapter 5, the extent to which this major participation by the child in health matters under South African Legislations will be elaborated upon.

110 Article 14(3) of the UNCRC provides for the freedom of a child to manifest his/her 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.

111 See par 2.5.3 of Chapter 2.

112 Ncube "Recognition and monitoring children's rights in Africa: Challenges and Prospects" 612

113 See para 5.6 to 5.6.3 of Chapter 5 for a detail discussion on FGM/C.

or significant decisions. It involves the legal aspect of decisions with both short and long-term consequences on the family and within the confines of "all matters concerning the child".[114]

3.4.4 The views of the child being given due weight in accordance with the age and maturity of the child

The above component of Article 12(1) indicates that not only do children have the right to express their views, but also to have those views taken seriously.[115] Therefore, the State Parties must provide for all children capable of self-expression, a platform to air their views through verbal and non-verbal means, with the possibility of those views influencing any decisions taken. [116]

By requiring that attention be given to both age and maturity when considering the views of the child, it shows that Article 12(1) makes clear that age on its own should not be used to limit the significance accorded to children's views.[117] Lansdown,[118] points out that age alone is neither a sufficient criterion nor reliable indicator of an individual's ability to seek and analyse information, as well as understand the consequences of decisions made.[119] An individual child's 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.[120] Therefore, to be considered alongside age

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114 Sutherland 2014 *Child & Fam L Q* 152, 156. It should, however, not be taken to mean that decision-making within the family is a strait jacket affair. In fact, as indicated earlier in Chapter 2 discussion on family, decision-making within the family is a web of complexity, partly because of the crucial role and functions of family in the overall development of its member. More so, the concept "family" itself defies a definite definition. See paras 2.2.2 and 2.2.2.1 of Chapter 2. See also Rwezaura *et al* 1995 *JLP* 25, 27-28; DH Demo *et al (eds) Handbook of family diversity (2000)* 1.

115 Lansdown "The realisation of children's participation rights; Critical reflections"12.

116 Committee on the Rights of the Child, General Comment 12 'The right of the child to be heard' CRC/C/GC/12 (2009) para 21.

117 Lansdown "The realisation of children's participation rights; Critical reflections"12.

118 Lansdown "Participation and young Children".

119 Lansdown "Participation and young Children" 3-5.

120 Lansdown Promoting Children's Participation in Democratic Decision-making 3.

and maturity are the rights and duties of parents as expressed in Article 5 – to provide the child with appropriate direction and guidance.[121]

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.[122] According to Lansdown "consideration has to be given to their level of understanding of the issues involved while also protecting their best interests".[123] In other words, the extent to which the child's views should be considered must "reflect the risks associated with the decision involved."[124] For instance, a 2-year old child cannot be left to determine whether or not 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.[125]

In terms of the connectedness of the UNCRC provisions, the phrase "age and maturity" as used by Article 12(1) provides the link between the two main principles of interpretation in the Convention, namely the child's best interests and the evolving capacities of the child as described above.[126]

Apart from the principal components of Article 12(1) of the UNCRC on a child's participation referred to above, Article 12 together with the other intertwining provisions has been broadly and variously conceptualised as "participatory

121 Stern 2006 *The Child's Right to Participation – Reality or Rhetoric?* 164. She is of the view that these factors can somewhat limit the extent to which children's voices are appreciated.
122 Moyo 2015 31 *SAJHR* 176.
123 Lansdown "Participation and young Children" 5.
124 Lansdown; "Participation and young Children" 5.
125 Lansdown; "Participation and young Children" 5-6.
126 See Article 3(1) and Article 5 of the UNCRC. See also Varanda *International Journal of Children's Rights* 323 – 324.

rights",[127] empowerment rights or "autonomous participation rights."[128] For example, the general comment of the Committee on the Right of Child 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."[129]

Lansdown's analysis of the degree of child participation also affords us a broader view of three different degrees of involvement.[130] The first degree is the "consultative processes" which occur when adults recognise that children have views and experiences that can help them contribute to matters that impact them.[131] The second degree is "participatory processes" which allow children to actively participate in the "development, implementation, monitoring and evaluation of projects, programmes, research or activities".[132] This process will allow children to share power with adults and to have a substantial influence over activities in which they participate.[133] The final degree of participation, according to Lansdown, is the "self-initiated processes", which involves that children themselves are empowered to take action, rather than just responding to an

127 UNICEF: A handbook on child participation in parliament. No. 18 – 2011.

128 It is important to note that Commentators on the UNCRC use varied terminologies to describe these provisions, for example, "participatory rights" and "empowerment rights," and some have referred to them as "autonomous participation rights." See Couzens, "Autonomy Rights versus Parental Autonomy" 419-439; Lüker-Babel *Int'l J Child Rts 392.* Therefore, in this thesis, these terminologies are used interchangeably.

129 UN Doc. General comment CRC/C/CGC/2009/12 para 2.

130 Lansdown *"Participation and young Children"* November *2004.* Lansdown pointed out that all degrees of participation as identified are valid and they necessitate a commitment to listening to children and taking them seriously but allow for differing degrees of actual engagement. However, Lansdown acknowledges that the boundaries between them are rarely clear cut, and many initiatives can span more than one level.

131 Lansdown *"Participation and young Children"* 6-7. This entails an acknowledgement that adults do not necessary possessed all expertise through which to provide adequately for children and thus set up mechanisms to elicit children's perspectives towards using them to influence and inform any matters relevant to children's lives. This process of consultation was characterised generally by being: adult initiated; adult led and managed; lacking any possibility for children to control outcomes.

132 Lansdown "Participation and young Children" 6-7.

133 Lansdown "Participation and young Children" 6-7.

adult-defined agenda.[134] In this way, adults recognise children's ability to identify their concerns and priorities, as well as the strategies for dealing with them, in their way.

Another example of a broader view of participation is that of Parkinson and Cashmore.[135] They described children's participation broadly as a process, which 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.[136]

In light of the preceding, participation can be summarised to include specific characteristics such as inclusion, transparency, communication, equality and empowerment.[137] Children's participation can thus, generally and usefully be described as a joint task which is difference-centred, acted out in private and public spaces individually and collectively.[138] It necessarily entails a relational space, where children play, grow, learn, and work.[139] Thus, participation encompasses a broad understanding of recognising children's everyday experiences, including being autonomous individuals capable of making and participating in decision-making within the family.[140]

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134 Lansdown *"Participation and young Children" 6-7.* This degree is characterised by: "the issues of concern being identified by children themselves; adults serving as facilitators rather than leaders and; children controlling the process".

135 Parkinson and Cashmore 2008 The voice of a child in family law disputes 20-21.

136 Moyo 2015 31 *SAJHR* 173.

137 See the analysis above on degrees of participation and participation generally. See also Stern 2006 *The Child's Right to Participation – Reality or Rhetoric*? 153.

138 Deirdre *et al* 2016 Children's Geographies 3.

139 Deirdre *et al* 2016 Children's Geographies 3-4.

140 Such and Walker 2005 *Journal of Social policy* 39-57; Freeman 2007 *International Journal of Children's Rights* 5-23.

3.5 Arguments in favour and against Article 12 UNCRC children's participation rights within the context of the family

What is clear is that Article 12(1) of the UNCRC and other clusters of rights termed as participatory or autonomous rights view a child as a rights holder[141] and an independent individual capable of making and participating in decision-making within the family.[142] As earlier indicated,[143] it is also clear that the UNCRC recognised or acknowledged culture, tradition and the family as central to the socialisation of children from childhood to adulthood. It follows logically that the implementation of the UNCRC within the culturally diverse State Parties will bear specific socio-cultural context.[144]

However, in the determination of which values must take precedence between Article 12(1) children's autonomous participation right and the cultural values within the context of the family, recourse must be had to the interpretation principle of the UNCRC in terms of its holistic approach, 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 practises that are prejudicial to the health of the children The Committee on the Rights of Child had consistently stated in their response to State Parties reports on the implementation of UNCRC to prioritise Article 12 rights of the child over cultural considerations. It submitted that under the UNCRC Article 12(1) rights supersede cultural consideration or practices.[145]

The above position rationally ought to have settled likely conflict or dispute at the domestic level for all States Parties. However, this seems not to be the case in

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141 Mower Jr. The Convention on the Rights of the Child: International Law Support for Children 4.

142 Such and Walker 2005 *Journal of Social policy* 39-57; Freeman 2007 *International Journal of Children's Rights* 5-23.

143 See par 2.4 of Chapter 2.

144 See Mutua *Virginia Journal of International Law* 351. According to Mutua, the implementation of UNCRC within the African context, for example must bear what he terms the "the African cultural fingerprint". See Mutua *Virginia Journal of International Law* 351.

145 See General Comment 5 CRC/C/GC/2003/5, para. 20 where the committee recommended that the articles provisions of the UNCRC should prevail where there is a conflict with domestic legislation or common practice. See also Kiame 2005 *African Journal of Human Rights* 227.

certain state jurisdictions. For example, as shown later in this thesis,[146] Nigeria's implementation of the UNCRC in her Childs Right Act excludes the Article 12(1) autonomous children provision. This omission seems to be an indication of the rejection of autonomous rights of children as superseding cultural values that emphasise rights and duties within the family.[147] Moreover, autonomous children's participation rights have been a subject of several theoretical debates among children's rights scholars who are in favour of or against Article 12(1) autonomous children's participation rights within the family.[148]

The starting point in terms of the debates is the meaning of the word "autonomy" as a result of the complexity and the challenge it poses in the context of rights and relationships.[149] Aside from the challenges of conflict between parental power and children's duty and responsibility within the family, the word "autonomy" has several synonyms such as "independence," "self-sufficiency," "sovereignty," "volition," and "self-rule". In fact, several commentators who had attempted to define it described it in various ways.[150] Eekelaar,[151] for instance, observes that autonomy for a child means the freedom to choose, which includes what lifestyle and to pursue "social relations according to his inclinations uncontrolled by the authority of the adult world, whether parents or institutions."[152]

Similarly, Lansdown[153] notes that it refers to "the right to assert one's own personal and physical integrity," which includes expressing views freely, and taking "responsibility for one's life and to have decisions regarding one's choices respected."[154] Dwivedi[155] takes a similar approach as Lansdown stating that

146 See par 4.4.1.4 of Chapter 4.
147 See par 4.4.1.5 of Chapter 4.
148 The conclusion in this Chapter addresses the justification of the argument in favour and against autonomous rights of the child under Article 12 of the UNCRC by supporting the position in favour of Article 12 Children's participation rights within the family.
149 Nedelsky 1989 *Yale J L & Feminism* 7.
150 Kagitcibasi 2005 *Journal of Cross-Cultural Psychology* 403.
151 Eekelaar 1986 *Oxford Journal of Legal Studies* 161-182.
152 Eekelaar 1986 *Oxford Journal of Legal Studies* 161-182.
153 Lansdown, The Evolving Capacities of the Child.
154 Lansdown, *The Evolving Capacities of the Child* 4; See also Couzens, "Autonomy Rights versus Parental Autonomy" 420.
155 Dwivedi "Race and Children Perspective" cited in Morrow 1991 *International Journal of* Children Rights 149.

autonomy emphasises separateness and "clear boundaries, individuality within relationships." Lastly, Nedelsky[156] posits that autonomy means to be "governed by one's law." Of course, all the preceding meanings of autonomy seems to reflect a tendency towards independence from others rather than interdependence with others.[157]

Some commentators challenging the emphasis on independent autonomous identity are of the view that the UNCRC autonomous identity concerning children cannot be secured or achieved in a vacuum. Van Praagh,[158] for instance, assert that "children, after all, are not looked after, fed, clothed, taught and raised by a United Nations Convention."[159] A similar view was held by Sheppard,[160] who points out that the emphasis on "independence" of children does not consider the care and nurture needed by children.[161] The result, as Minow,[162] points out is that children in any society are not autonomous persons, but are dependent, and that their dependency is construed "by legal rules and in their lives as lived." [163] In other words, for their physical, mental, emotional and psychological need, children depend on their families, communities, and the State.[164]

In favour of children's autonomy rights, Freeman[165] and Federle[166] argue that children's dependency should not be a reason to deprive them of their choice and respect.[167] Freeman argues that children are "not all that different" from adults because both groups face similar social problems and constraints.[168] As a result,

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156 Nedelsky 1989 *Yale JL & Feminism* 10.
157 Kagitcibasi 2005 *Journal of Cross-Cultural Psychology* 403.
158 Van Praagh "Who owns our Children?"18
159 Van Praagh "Who owns our Children?"18.
160 Sheppard 1992 *Annals Health Law* 197.
161 Sheppard 1992 *Annals Health Law* 197. The author notes the conflict as: "Children's rights may take the form of claims for autonomy and non-interference; they may, however, entail claims for care and protection, or claims for relationships with others."
162 Minow "Rights for the Next Generations: A Feminist Approach to Children's Rights".
163 Minow "Rights for the Next Generations: A Feminist Approach to Children's Rights" 18.
164 Campbell 2003 *Vermont Law Review* 400.
165 Freeman, "Taking Children's Rights More Seriously".
166 Federle 1994 *Int'l J Child Rts* 343-368.
167 Freeman, "Taking Children's Rights More Seriously" 184; Federle 1994 *Int'l J Child Rts* 343-368.
168 Freeman, "Taking Children's Rights More Seriously"184; Roche, "Rights, Participation and Citizenship" 283.

children deserve equal respect and recognition for their present autonomy, as well as in their capacity for eventual independence as adults.[169] Federle, canvassing a similar view as Freeman but adopting the feminist approach to child rights, cautions on the dangers of focusing on children's dependency.[170] Federle emphasises that children's dependencies do not account for the power inequity that exists within the parent-child relationship.[171] Federle further points out that the feminist linking of autonomy rights to a relationship only succeeds in promoting the idea that children should only have rights because of their incompetence.[172]

In light of the foregoing, even though children may be dependent on the family and the society because of their lesser abilities, capabilities and vulnerability, their capacity for autonomy should be respected. As opined by Federle,[173] failure to do so will perpetuate hierarchies in parent-child relationships, which will ultimately have negative impacts on the children.

Another point in the debate on autonomous children's rights to participation within the family is the "legitimacy" and authenticity of autonomous rights within the various cultural contexts.[174] The main concerns or criticisms levelled against the autonomy rights provisions here can be summarised into two overlapping, but distinct, arguments[175] first, on the "role of parents in relations to the children's autonomy rights," that is, legal paternalism versus autonomy; and second, on the

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169 Freeman, "Taking Children's Rights More Seriously" 183.
170 Federle 1994 *Int'l J Child Rts* 343-368.
171 Federle 1994 *Int'l J Child Rts* 356.
172 Federle 1994 *Int'l J Child Rts* 357.
173 Federle 1994 *Int'l J Child Rts* 364.
174 Twum-Danso 2009 *The International Journal of Children's Rights* 415–432; Wihstutz 2011 *Childhood* 447–459; Tisdall and Punch 2012 *Children's Geographies* 249–264; Stoecklin 2012 *Childhood* 443–457; Mason and Bolzan 2010 "Questioning Understandings of Children's Participation" 128; and Isabelle *et al* 2008 21 *Social Justice Research* 432-456, in which the authors in this study raised a legitimate question as to the applicability and desirability of the UNCRC construction of an autonomous child within those socio – cultural context wherein the autonomy of individual is not emphasized as much as his interdependence with and duties within the community.
175 These arguments are related to those as earlier analysed in the preceding paragraph. However, the difference is that the earlier arguments are in relation to "dependence of the children." While the present are specifically categorized as legal paternalism versus autonomy; and autonomy rights versus duties.

"role of the autonomous child within the family," that is, autonomy rights versus duties.[176]

Addressing the role of parents in relation to the children's autonomy rights, some commentators have argued that as autonomy rights tends to entrench the independence of the child, it is, likely to destabilise the family by disrupting the relationship between children and their parents.[177] This situation has been called a "dangerous centre" noting that "the idea of the child having a right to express an opinion or right of access to information, challenges the relationships within the family".[178] In other words, autonomy rights are regarded as equivalent to putting children and parents on the same level as co-autonomous persons in their relationship on the one hand and in their relationship with the State on the other hand.[179] Thus, the autonomous rights of the child will create an opportunity for the State to interfere in family life.

In light of the above, a major concern of children's autonomy rights hinges on the fact that family relationships might suffer some disruptions due to the enforcement of the rights. Such situations, according to Tomaovic,[180] might arise where a child, in a bid to assert her/his autonomy disagrees with the parents' strategy for balancing care and control.[181] Of course, this is in contrast with the cultural values of the child responsibility and duty to respect parents and elders, as the heads of the family in the decision-making process relating to the child.

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176 The following paragraph analysed arguments by various commentators respectively on this two overlapping, but distinct argument.

177 Hafen and Hafen 1996 *Harv Int'l L J* 449; See also Bruce 1991 *BYU L. Rev.7-18;* Glendon, *Rights Talk, The impoverishment of Political Discourse* 72. Both authors argue that the impact on the family is negative and detrimental to its unity.

178 Hillary and Roche "Feminism and Children's Rights: The Politics of Voice" 52.

179 Wardle, "The Use and Abuse of Rights Rhetoric: Constitutional Rights of Children" 335. The author stated that "When we infuse the language of Rights into a controversy, we invite some form of Government to become involve..." See also Otlowski and Tsamenyi *Australian Journal of Family Law* 144, where the authors state that even though the Convention provides for the protection of the family and respect for the guidance of parents, this guidance is constrained by the reference to the "evolving capability" of the child. Therefore, it could be argued that a possibility exists that the right of parents to provide guidance and direction to their children might be subject to external scrutiny or open to confirmation by law in the event of a conflict. Thus, this parental right may be overridden in certain circumstances.

180 Tomaovic 2003-2004 *Int'l J Child Rts* 51-71.

181 Tomaovic 2003-2004 *Int'l J Child Rts* 51.

Furthermore, on the "role of the autonomous child concerning the family," that is, autonomy rights versus family, some commentators have challenged the extent to which the UNCRC acknowledgement of the family protects the family units.[182] Hodgson,[183] is of the view that the protection of the family under the UNCRC does not go far enough in guaranteeing its success, maintenance, and development. Hodgson further argues that emphasis ought to have been placed on the fact that family members, including the child within the family, owe duties to one another.[184] Instead, the approach adopted by the UNCRC provides extensively for the role that parents and the family should play towards the realisation of a "child's autonomy – child's self-realisation", but without the reciprocal obligations between children and their parents.[185]

Similar to the above assertion is one by Mosikatsana,[186] who in her consideration of children's rights and family autonomy in the South African context, asks some fundamental questions concerning the approach of excluding the duties of the child: "Is it appropriate to give children rights without cementing their obligations to their families? Does the protection of children's rights without protecting the family as a basic unit erode family autonomy?" She argues that excluding duties from the discourse of autonomy undermines family autonomy.[187]

The above viewpoints seem to support the contention that non-recognition of children's duties by the UNCRC[188] is because Article 12(1) children's rights are derived from a model that is primarily based on the Western liberal perspective, which values and promotes individuality, the self and rights over responsibilities.[189]

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182 Otlowski and Tsamenyi *Australian Journal of Family Law* 144; Todres *Columbia Human Rights Law Review* 190; Cantwell "Children's rights in relation to the family" 398.

183 Hodgson, Individual Duty Within a Human Rights Discourse 150.

184 Hodgson, Individual Duty Within a Human Rights Discourse 151.

185 Purdy 1994 *International Journal of Children's Rights* 224-241.

186 Mosikatsana 1993 *Michigan Journal of Race and Law* 341 - 370.

187 Mosikatsana 1993 *Michigan Journal of Race and Law* 341.

188 There is nowhere in the provision of the UNCRC where duties and responsibilities of the child are within the family stated. However, see par 3.6.2 below for discussion on the ACRWC and its recognition of duties and responsibilities of the child within the family.

189 Brems, "Children's Rights and Universality" 27. Eva Brems, in her discussion of cultural pluralism in the UNCRC, agrees with this view and notes that the drafters of the UNCRC seemed to have focused more on the context and circumstances of Western children than children from the rest of the world.

In other words, the characterisation of children as autonomous will logically raise the question of legitimacy, desirability and applicability of this rights within different socio-cultural contexts.[190] For instance, the question of legitimacy may arise among ethnic groups in Western societies[191] and within African societies[192] in which the autonomy of the individual is not privileged as much as interdependence and fulfilment of duties within the family as earlier shown in Chapter 2.[193]

Regardless of the concern on the question of legitimacy, desirability and applicability of autonomous children's rights within different socio-cultural contexts, what should be clear is that the value of recognising Article 12(1) UNCRC children's autonomy rights is undeniable. At the core of Article 12(1) UNCRC rights is a close connection between rights and dignity as well as rights and respect – a connection vital not least in reference to "children in their often-vulnerable position *vis-à-vis* adults."[194] As rightly stated by Stern, a person who is not granted "dignity and respect is very easily reduced to an object of intervention, a commodity or someone's property."[195] Therefore, Article 12 rights are tied to the respect and dignity, as well as the development of children.

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190 Mason and Bolzan 2010 "Questioning Understandings of Children's Participation" 130. The authors in their study conducted across five countries located in the Asia–Pacific region, concluded that experiences from across these five countries reveals an ambiguity in the interpretation and implementation of participation – an ambiguity easily obscured by assumptions associated with cultural meanings of participation.

191 It can be said that in most multi-cultural countries' socio-cultural context, the concept of the independent and autonomous child without attendant duties and responsibilities is considered a threat to the family unit. Dockery 2010 *Soc Indic Res* 321; Twum-Danso 2009 *The International Journal of Children's Rights* 415–432; Wihstutz 2011 *Childhood* 447–459; Tisdall and Punch 2012 *Children's Geographies* 249–264; Stoecklin 2012 *Childhood* 443–457; Mason and Bolzan 2010 "Questioning Understandings of Children's Participation" 128; and Isabelle *et al* 2008 21 *Social Justice Research* 432-456, in which the authors in this study raised a legitimate question as to the applicability and desirability of the UNCRC construction of an autonomous child within those socio – cultural context wherein the autonomy of individual is not emphasised as much as his interdependence with and duties within the community.

192 Kiame 2005 *African Journal of Human Rights* 221-238; Mosikatsana 1993 *Michigan Journal of Race and Law* 370.

193 See earlier discussion in paras 2.5.3 to 2.5.5 of Chapter 2.

194 Freeman *International Journal of Law and the Family* 52-71.

195 Stern 2006 *The Child's Right to Participation – Reality or Rhetoric*? 81.

Against this background, it is submitted that the value of human dignity and respect should always prevail in situations where indigenous values, beliefs and customs conflict with human freedoms and human rights. As indicated earlier,[196] customary values are subjected to constitutional values in Nigeria, South Africa and Australia, hence, whenever custom or traditional values are inconsistent with the constitutional values, the latter must prevail. State Parties should therefore, look towards respect, dignity and the development of the child in their implementation of Article 12(1) participation rights within the family. This view forms the backdrop for the conclusion in this thesis.

Against the preceding debates on the applicability of autonomous rights within other socio-cultural contexts, it is considered necessary to draw a comparative example on the UNCRC as an international children's rights legislation, and the regional ACRWC.

The aim is to show the differences and similarities in terms of children's participation rights in the two children's rights legislations, and in what way the "duties" of the child towards the family as explicitly encapsulated in Article 31 of ACRWC are described. The discussion sets the scene for later analysis in the subsequent chapters on specific harmful cultural practices that may be used under the pretext of family child-rearing and upbringing in terms of the value of duty and rights, and on the recognition of cultural values in the implementation of Article 12 of the UNCRC in the Nigerian and South African domestic legislations.

3.6 ACRWC – African Charter on the Rights and Welfare of the Child

The ACRWC was adopted by the Organisation of African Unity (OAU), now rechristened African Union (AU), on 11 July 1990, and came into effect on 29 November 1999.[197] The Charter was developed in response to the need for a document that expressly considered the qualities of African cultural heritage,

196 See earlier discussion on the recognition and validity of culture and Traditional values in Nigeria, South Africa and Australia legal system in paras 2.3.1, 2.3.2, 2.3.3 and 2.3.4 of Chapter 2.

197 Established on 9 July 2002, the AU was formed as a successor to the Organisation of African Unity (OAU) and consists of 53 African Member States.

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".[198] The need for the ACRWC was predicated on the perceived failure of the UNCRC to take into cognisance the essential values and the economic realities of the African region.[199]

3.6.1 Preservation of African cultural value

A critical value ACRWC puts on the front burner is the preservation of tradition and culture. In its preamble, the ACRWC urges State Parties to consider the virtues of cultural heritage, "historical background and the values of African civilisation".[200] The Charter also alludes to the negative impact of, among other things, culture on the situation of children in Africa.[201] Article 1(3) of the ACRWC 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.[202] 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 ACRWC.[203]

In light of the above, and as indicated later in Chapter 4,[204] cultural values are intricate measures of implementation of the UNCRC in Nigeria and South Africa respectively.

3.6.2 Article 31 on the duties of the child: A forward leap for UNCRC?

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198 See the Preamble to the ACRWC. See also Boezaart 2013 *International journal of private law* 2.

199 Olowu *International Journal of Children's Rights* 127; Viljoen 1999 *South African Law Journal* 661; Viljoen 2000 *Journal of African Law* 110. The author alluded 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".

200 See the preamble to the ACRWC.

201 Boezaart 2013 *International Journal of Private Law* 2.

202 Boezaart 2013 *International Journal of Private Law* 2.

203 Lloyd "The African Regional System for the Protection of Children's Rights" 33.

204 See paras 4.4.1.1 to 4.4.5 and 4.6.3 to 4.6.3.3 of Chapter 4.

The most significant of the addition to the ACRWC not contained in the UNCRC is Article 31. Article 31 of the ACRWC imparts duties and responsibilities on children. Thus, the ACRWC provides extensively for the duties of the child toward his family, community and society.[205] Earlier in this thesis,[206] it was shown that the conception of an individual (whether a child or an adult) and based on the traditional African view of the individual as part of the community, all have rights and duties.[207] As a result, an individual has a responsibility and duties towards the family and society, and to contribute to their greater good.

However, the recognition of duties and responsibility by the ACWRC does not mean or suggest that children are subjected to the whims and caprices of their families and society. There are specific limitations as to the exercise of the duties and responsibility towards the family. For example, the preamble of Article 31 that introduces duties, involves two internal limitations.[208] First, the duties of the child are subject to his/her age and ability. Second, the child's duties are subject to limitations as contained in the Charter.[209] What the first qualifier requires is an open-ended assessment of the child's evolving capacity and ability, which is similar to that of the UNCRC in its acknowledgement of children's participation rights.[210] While the second qualifier subjects the duties of the child to the general clauses,

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205 Article 31 of the ACRWC provides as follows:

> "Every child shall have responsibilities towards his family and society, the State and other legally recognized communities and the international community. The child, subject to his age and ability, and such limitations as may be contained in the present Charter, shall have the duty:
> (a) to work for the cohesion of the family, to respect his parents, superiors and elders at all times and to assist them in case of need;
> (b) to serve his national community by placing his physical and intellectual abilities at its service;
> (c) to preserve and strengthen social and national solidarity;
> (d) to preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society;
> (e) to preserve and strengthen the independence and the integrity of his country;
> (f) to contribute to the best of his abilities at all times, and at all levels, to the promotion and achievement of African Unity."

206 See paras 2.5.3 to 2.5.5 of Chapter 2.

207 See also Motala 1988-1989 *Hastings Int'l & Comp L Rev.*403.

208 For a further discussion on this matter See Sloth Nelson and Mezmur *Journal of African Law* 177.

209 See the preamble paragraph of article 31 of the ACRWC. See also Sloth Nelson and Mezmur *Journal of African Law* 177.

210 See earlier discussion in par 4.3.1.

and other specific protections contained elsewhere in the Charter. For example such provisions protecting children from abuse, neglect and sexual exploitation.[211] Lastly, what must be considered in terms of limitations in Article 31 are the three general principles of the Charter, namely "the best interests of the child, non-discrimination and the right to life, survival and development."[212]

Furthermore, Sloth-Nelson and Mezmur[213] argue that the obligation to respect parents, elders and superiors is similar to positive traditions identified by the ACRWC as "constituting an asset to the upbringing of African children and it does not entail docility or unquestioning subservience."[214] Thus, the intention of the drafters of the Charter was not to limit or prevent children from being heard, but rather to celebrate the "positive aspects of the African child-rearing practices in nurturing a respectful society".[215] Despite the laudable intention of the drafters of the Charter, cultural practices which are potentially harmful such as the custom of *ukuthwala*, male circumcision in South Africa and FGM/C in Nigeria and South Africa, still persist and in practice may be used under the pretext of proper cultural upbringing in line with the values of rights and duties within the family.[216]

From the foregoing discussion, it becomes clear that the ACRWC did not only imitate the UNCRC but also went further to establish new and innovative provisions, which are considered relevant, useful and peculiar to Africa and for African children.[217] As shown in the subsequent discussion, there are many other ways in which the ACRCW closely resembles the UNCRC within the context of children's participation rights.

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211 Sloth Nelson and Mezmur *Journal of African Law* 170-173.
212 Sloth Nelson and Mezmur *Journal of African Law* 173-177. Of course, these authors position in this regard seem to correspond with what is also applicable in the UNCRC as is earlier shown in this chapter. See discussion in par 3.3.1.
213 Sloth Nelson and Mezmur *Journal of African Law* 159-189.
214 Sloth Nelson and Mezmur *Journal of African Law* 177.
215 Sloth Nelson and Mezmur *Journal of African Law* 177.
216 See later discussion on this matter in chapter 5, particularly in paras 5.4.1, 5.5.1, 5.6.1, 5.6.2 and 5.6.3 on theory and practices of ukuthwala, male circumcision in South Africa and FGM/C in Nigeria, South Africa and Australia respectively.
217 See earlier discussion in par 3.6.2 above.

3.7 The relationship between UNCRC and ACRWC within the context of the children's right to participation within the family

In terms of similarity, the ACRWC, like the UNCRC, has four fundamental principles. These are the principles of non-discrimination (Article 3 and 26), the best interests of the child (Article 4), the right to life, survival and development (Article 5), and the participation of the child, which is further subdivided into two principles, namely respect for the child's views (Article 7) and the provision of information to children and promotion of their participation (Articles 4, 7 and 12).

Other instances of the similarity between the ACRWC and the UNCRC are that the ACRWC also adopts the same protection, participation, and prevention concepts as its guiding principles for defining child rights akin to the UNCRC as earlier indicated.[218] Similar to the UNCRC, the ACRWC also protects the child's right to life,[219] right to equality,[220] the right to a name and nationality,[221] rights to survival and development,[222] right to health,[223] and the best interest of the child.[224] among others.[225] Therefore, the ACRWC was developed in "tandem" with the UNCRC, and not in opposition to it.[226] More so, the ACRWC strengthens for the African child, the rights already provided for under the UNCRC.[227] Therefore, both the UNCRC and the ACRWC can both be said to provide a framework upon which children's rights are considered and fostered in the African continent, with the latter aligning more to Africa's historical and cultural heritage, as well as taking the value systems of the continent into account.

However, what should, be kept in mind is that the extent to which children may exercise their autonomous participatory rights under the UNCRC and ACRWC

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218 See earlier discussion in par 1.1.4 of Chapter 1.
219 Article 6 of the UNCRC and Article 5 of ACRWC.
220 Article 2 of the UNCRC and Article 3 of ACRWC
221 Article 7 of the UNCRC and Article 6 of the ACRWC.
222 Article 14 of the ACRWC.
223 Article 16 of the ACRWC.
224 Article 4 of the ACRWC.
225 See Sloth-Nielsen and Mezmur 2007 *Afr Hum Rts LJ 353* for a comprehensive listing of comparative rights.
226 Olowu 2002 *International Journal of Children's Rights* 127.
227 Elhers and Frank, "Child Participation in Africa" 113.

differs. To illustrate, the ACRWC, like the UNCRC, provides for several participation rights for the child including the right to freedom of expression,[228] freedom of association and assembly,[229] freedom of thought, conscience and religion,[230] and right to privacy.[231] With these rights, it may seem that the ACRWC presents the child as an autonomous individual, at least to the extent that the UNCRC makes provision for such rights.[232] However, a closer look at these provisions reveals that the exercise of these rights is limited. For example, the ACRWC in Article 7 only grants these rights to children capable of expressing their views, and subjects it to "such restriction as are prescribed by law".

Similarly, the ACRWC 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". These limitations may affect the exercise or enjoyment of those rights and seem to suggest that children are less considered as autonomous human beings in the ACRWC than in the UNCRC, as earlier shown in this chapter.[233] For instance, under the UNCRC parental supervision entails directing and guiding a child in a manner consistent with the evolving capacities of the child.[234] Also, under the ACRWC, parents are "to exercise reasonable supervision over the conduct of their children" subject to the child's age and ability.[235] However, in Article 20(1)(c), the ACRWC empowers parents to ensure that

228 Article 7 of the ACRWC.
229 Article 8 of the ACRWC.
230 Article 9 of the ACRWC.
231 Article 10 of the ACRWC.
232 For further analysis of the difference between the UNCRC and the ACRWC, See Chirwa 2002 *International journal of children's Rights* 157. The inclusion of articles on autonomy rights is argued to represent a "copy-cat" approach by the drafters of the ACRWC, because the principles do not account for the reality of individuals in Africa, since, as Chirwa points out, African children are not considered entirely autonomous beings. For discussions of rights protected only in ACRWC but not in the UNCRC, see Brems *Human Rights: Universality and Diversity* 142.
233 See the discussion in par 3.4.1 above. See also Brems *Human Rights: Universality and Diversity* 145.
234 See earlier discussion in par 3.3.4. See also Boezaart 2013*International journal of private law* 6.
235 See earlier discussion in par 3.6.2 above on this matter.

domestic discipline is administered humanely and consistent with the child's dignity.[236]

What this implies is that parents have a right to discipline a child, and that discipline includes corporal punishment.[237] The duty to discipline will affect and limit children's rights to participation in decision-making within the family. For example, a child who is aware of a possible corporal punishment would exercise restraint from expressing views in matters affecting him/her, particularly when those views may be seen as being against the interests of the parent or the family.

In light of the above, it can safely be stated that in terms of autonomous children participation in decision-making within the family, the UNCRC seems to offer a more unrestricted or "extensive" rights to the child, while the ACRWC appears to provide a more "restricted" participation rights within the family, which is a reflection of African cultural values and heritage. As shown later in Chapter 4,[238] Nigeria's implementation methods of UNCRC children's rights in her specific domestic children's rights law seem to favour a more restricted rights approach.

3.8 Conclusion

As indicated in this chapter, the main perspectives in terms of the UNCRC seem to comprise of two elements, namely the right to protection and the right to participation as well as the guiding principles which include non-discrimination (Article 2), the best interests of the child (Article 3), survival and development (Article 6), and the right to participate (Article 12).[239] Together, these provisions form the backdrop against which all actions of the State Parties to the UNCRC are to be measured. They serve as a guide to the UNCRC interpretation and

236 Article 20(1)(c) of ACRWC.
237 Boezaart 2013 *International Journal of Private Law* 5-6.
238 See the discussion on the implementation approach of Article 12(1) UNCRC in the Nigeria in paras 4.4 to 4.4.15 of Chapter 4.
239 See par 3.3.1.

implementation, and they are reflected in the treaty's articulation of specific rights.[240]

Furthermore, in the context of the Article 12(1) UNCRC provision, the reference to "in all matters" indicates that the participatory rights in Article 12(1) are not restricted only to matters that are expressly mentioned. It covers both the private and public spheres of society and creates duties for the State concerning matters left for actors in the private area, such as the family, to decide.[241] More so, the right to participation under Article 12(1) refers to every child's right to be heard and participate in all matters that affect their lives, including decision-making within the family.[242] What this entails is that children are autonomous individuals capable of making and participating in decision making within the family.[243]

As further shown in this chapter, a strong argument against Article 12(1) children autonomous rights to participate in decision-making within the family may be advanced to support the argument that Article 12(1) autonomous children provisions will most likely affect the realisation of these rights within the family. What is more, the lack of provisions recognising the duties and responsibilities of the child under the UNCRC seems to imply that the primary goal of the family is to be of benefit to the child alone and not the family as a whole.[244] The "duties" as promoted by African societies constitutes the cultural values of respect,[245] responsibility[246] and reciprocal relationships[247] has as been shown in Chapter 2, and as considered by the ACRWC.[248]

Nonetheless, it is submitted that considering the interpretation principles of the UNCRC, a child's ability to make decisions independently within the family is linked to the best interests' principles of the child and the evolving capacity of the child.

240 See paras 3.3.1 and 3.3.2.
241 See par 3.4.3.
242 See paras 3.4.1 to 3.4.4.
243 See paras 3.4.1 to 3.4.4.
244 See par 3.5, 3.6.2.
245 See par 2.5.3.
246 See par 2.5.4.
247 See par 2.5.5.
248 See paras 3.6.1, 3.6.2.

These act as a limitation to a child's choices and decision-making.[249] Furthermore, in terms of the scope of participation rights between the UNCRC and ACRCW, the UNCRC offers a more unrestricted and extensive/rights, more than the ACRWC, which provides a more restricted participation rights within the family.[250] Therefore, for this study, the arguments and criticism against Article 12(1) UNCRC autonomous children's rights are not considered to be and accepted as a valid excuse for denying children participation in decision-making within the family. Discussions in the subsequent chapter of this thesis further lend support to the above conclusion.

Against the preceding discussions, the next chapter, Chapter 4 continues the discussion by focusing not only on the constitutional protection of children's rights, but also the approach of implementation of Article 12(1) of the UNCRC adopted in cultural diverse societies such as Nigerian, South African and Australian specific domestic children's rights law. The implications of these implementation approaches of Article 12(1) of the UNCRC in the states specific domestic children's legislation are also discussed.

249 See paras 3.4.1 to 3.4.4. See also Otlowski and Tsamenyi 1992 *Australian Journal of Family Law* 151.

250 See discussion in par 3.7 on the relationship between UNCRC and ACRWC within the context of children's participation rights within the family.

CHAPTER 4

IMPLEMENTATION OF ARTICLE 12(1) OF THE UNCRC IN THE LAWS OF NIGERIA, SOUTH AFRICA AND AUSTRALIA

4.1 Introduction

Discussions in the previous chapter established that Article 12(1) of the UNCRC provides for the right of children to express their views and to have those views respected and given due weight in accordance with age and maturity.[1] However, it is a question whether Article 12(1) has or can achieve an equal level of acceptance in terms of implementation of children's right to participation in decision-making within the family in some specific multi-ethnic State Parties.[2]

Against this background, this chapter will attempt to proffer an answer to the question posed above by focusing on efforts by State Parties such as Nigeria, South Africa and Australia to implement the provisions of Article 12(1) of the UNCRC within the context of a child's right to participate in decision-making. In specific terms, the aim of this chapter is to show how certain State Parties have been influenced by the provisions of Article 12(1) of the UNCRC, and if so, how the indigenous cultural and traditional values discussed in this thesis, reflect on its implementation or its infusion into the domestic legal systems of the said multi-ethnic societies.[3]

The diversities in these societies and the complexity attending the task of implementing legislation such as the UNCRC, is one important reason for choosing these countries as points of discussion.[4] An equally important reason is hinged on the fact that Nigeria and South Africa are emerging democracies with a population of more than one hundred and eighty million for Nigeria, and more than fifty-four million for South Africa, with a sizable population of children respectively.[5] As at

1 See paras 3.4 to 3.4.4 of Chapter 3
2 See paras 3.5.
3 See discussion in paras 4.4, 4.5 and 4.7 below.
4 See discussion in paras 4.2.1.1, 4.2.1.2 and 4.2.1.3 below.
5 See discussion in paras 4.2.1.1 and 4.2.1.3 below.

2015, the Australia's population was estimated at more than twenty-three million.[6] It has therefore become imperative to study how their UNCRC implementation obligations are exercised. The study will not only enable a distinct choice of West Africa, Southern Africa and Australian legal examples, but also serve as vital jurisdictional lessons on how multi-ethnic State Parties implement children's right to participation within the specific context of the family under Article 12(1) of the UNCRC in their legal systems. [7]

What should be kept in mind[8] is that the approach adopted for investigating the issue of Article 12(1) of the UNCRC implementation in this chapter focuses on two levels of implementation, which are critical to the overall execution of the UNCRC. First, is the perspective on relevant children's right in the Constitutions of Nigeria, South Africa and Australia.[9] Second, is the specific Children's legislation domesticating the UNCRC in these countries.[10] In respect of the latter, discussions on the specific children's right legislations that domesticated the UNCRC such as the Nigerian Child's Rights Act, the South African Children's Act, and the Australian Family Law Act will be discussed.[11] The extent to which this domestic children's laws accommodate the spirit and intent of Article 12(1) of the UNCRC is examined[12] and more particularly, the extent to which they accommodate the cultural and traditional values placed on child participation rights within the family.[13]

Furthermore, discussion on the implications of these countries' adopted approaches of implementation is undertaken.[14] Specifically, it is shown in this chapter that the implementation approach of the Nigerian Children's Rights Act, 2003 appears situated within the context of the acceptable local norms and

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6 See par 4.2.1.3.
7 See discussion on the implication of Nigerian, South Africa and Australian implementation approach in paras 4.4.1.5, 4.6.3.2 and 4.8.1 below.
8 See par 1.3 of Chapter 1.
9 See later discussion in paras 4.3.1.1, 4.5.2, 4.5.3 and 4.7.1.
10 See discussion in paras 4.4, 4.6 and 4.8 below.
11 See later discussion in paras 4.4, 4.6 and 4.8.
12 See discussion in paras 4.4.1.4, 4.6.1.2 and 4.8.1 below.
13 See later discussion in paras 4.4.1.1 to 4.4.1.3, 4.6.3 and 4.8.1.
14 See later discussion in paras 4.4.1.5, 4.6.3.2 and 4.8.1.

culture, which dictate the role and nature of the relationship between the child and his parents.[15] The Nigerian implementation approach sharply contrasts with the South African and Australian approaches where there is an inclusion of Article 12(1) of the UNCRC provisions in both the South African Children's Act, 2005 and Australian Family Law Act, 1975.[16] What is more, this chapter will show that the integration of Article 12(1) UNCRC rights and cultural value in the South African Children's Act and Australian Family Law is an approach that transforms the application and interpretation of children's rights to participate in decision-making within the family.[17] Lastly, this chapter is concluded with an indication that culture and tradition are intricate values, which continues to influence the implementation of children's right in multi-ethnic societies' domestic legislation.[18]

To facilitate the foregoing discussion, more importantly, to indicate the nature and the complexity in terms of their legal systems, this chapter provides some brief basic characteristics, overview and scope of the Nigerian, South African and Australian legal systems respectively.

4.2 Overview of the Nations of Nigeria, South Africa and Australia

4.2.1 Basic facts

4.2.1.1 Nigeria

The Federal of Republic of Nigeria covers a total land area of 923,768 km sq.[19] The peoples of Nigeria are extremely culturally diverse with over 250 ethnic groups speaking over 500 indigenous languages.[20] The diversity can be seen from

15 See par 4.4.1.5 below.
16 See discussion in paras 4.6.1.2, 4.6.3.2 and 4.8.1 below.
17 See discussion later in paras 4.6.3.2 and 4.8.1.
18 See par 4.9 below for the conclusion in this Chapter.
19 The country is bordered by Benin 809 km to the West, Chad 85 km and Cameroon 1,975 km to the East, Niger 1,608 km to the north and the Gulf of Guinea to the south. The Niger River runs from the country's north west down to the Southward coast, where it forms the Niger Delta, which is home to most of Nigerian oil reserves. See Central Intelligence Agency *Country Profile: Nigeria* 2018 https://www.cia.gov/library/publications/theworldfactbook/geos/ni.html
See Durojaiye *et al* 2014 Gender & Behaviour 6169 – 6181; Oluyede *Constitutional law in Nigeria* 21; Oba 2011 *Emory Law Review* 881-895; Crawford the politics of cultural pluralism

the various ethnic groups which make up the country. The main ethnic groups of people are Hausa-Fulani, Yoruba and Ibo. The Hausa-Fulani's constituted almost half of the country's population (50%) – mainly Muslims are largely found in Northern part of the country.[21] The Yoruba's inhabit the South-western part of Nigeria with about 20% of the country population. The Igbo constituted 17% of the population are in the South-eastern and the Ijaw, Ishekiri, Efik, Uhorobo and Ibibio's inhabit the South-Southern part of the country.[22] Combined (40%) of the country's population-mainly Christians are in the Southern part. The other (10%) practice indigenous beliefs and are widely spread throughout the country.[23]

Nigeria ranked seventh in the world and is among the most populous and fastest growing countries in Africa.[24] In 2015, the population was estimated at 183 million people.[25] As of 2018, the estimated population of the country was over 190.88 million with a growth rate of 2.63%. Of this figure, 49.4% are women and 50.6% are men,[26] 40. 9% of the population is under 15 years of age.[27]

In terms of children's living arrangements, a total of 74% under the age of 18 in Nigeria live in households with both biological parents.[28] Another 16% between the age of 0-17 live with one biological parent, out of which 11% live with their

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276–281; Central Intelligence Agency Country Profile: Nigeria 2018 https://www.cia.gov/library/publications/theworldfactbook/geos/ni.html

21 See Durojaiye *et al* 2014 *Gender & Behaviour* 6169-6181; Oluyede *Constitutional law in Nigeria* 21; Crawford *the politics of cultural pluralism* 276–281; Central Intelligence Agency Country Profile: Nigeria 2018 https://www.cia.gov/library/publications/theworldfactbook/geos/ni.html

22 See Durojaiye *et al* 2014 *Gender & Behaviour* 6169-6181; Oluyede Constitutional law in Nigeria 21; Crawford *the politics of cultural pluralism* 276–281; Central Intelligence Agency Country Profile: Nigeria 2018 https://www.cia.gov/library/publications/theworldfactbook/geos/ni.html

23 See Durojaiye *et al* 2014 *Gender & Behaviour* 6169 – 6181; Oluyede Constitutional law in Nigeria 21; Oba 2011 *Emory Law Review* 881-895; Crawford the politics of cultural pluralism 276–281.

24 The population of Nigeria has increased threefold since independence in 1960, approximately constituting a change of about 268% between the year 1960 and the year 2012. See Nigeria population 2018 World population Review https://www.Worldpopulationreview.com It is noted that the entire population of Nigeria account for 2,35% of the entire world population. This means that about 1 out of every 43 people in the world is a Nigerian.

25 See National Bureau of Statistics; Demographic Statistic Bulletin 2015.

26 See Nigeria population 2018 World population Review. https://www.Worldpopulationreview.com

27 See Nigerian population 2018 https://www.Countrymeters.info/en/Nigeria.

28 See Better Care Network 2015; Children's Care and Living Arrangements 11. This percentage represent the great majority of children living in households in the country.

biological mother and 5% with their biological father.[29] The remaining 10% of children live with neither biological parent.[30] Factors such as gender and age appear to significantly influence living arrangements among children in Nigeria. In this regard, the larger majority of children at an early age still live with both biological parent, this proportion declines rapidly with age, ranging from 84% among those under 2 years of age to 54% for those between 15 and 17 years of age.[31] In terms of gender, 75% of boys have a slightly improved likelihood of living with both biological parents than 72% of girls living with both their mother and their father.[32] Conversely, 12% of girls in Nigeria are more likely to live with neither biological parent when both are alive – as compared to the 8% among boys.[33] Moreover, among children who live with a single biological parent, a slightly higher proportion of boys (6%) live with their fathers as compared to girls (4.7%).[34]

The Federal republic of Nigeria operates a constitutional presidential democracy. The president is the head of government and together with appointed cabinet ministers forms the executive arm of government.[35] The legislative arms comprises of the Senate and House of Representatives, collectively they known as the National Assembly.[36] At the state level, each state government is led by an elected governor, with a State House of Assembly acting as the legislature.[37] As a former British colony, Nigeria is a pluralist state with multiple laws, norms and a fora that co-exist to function as a legal systems.[38] Thus, each component state under the constitution is empowered to make laws, that is federal government

29 See Better Care Network 2015; Children's Care and Living Arrangements 2,11. This percentage indicates twice as many children living with their mothers versus with their biological fathers.
30 See Better Care Network 2015; Children's Care and Living Arrangements 11.
31 Overall the proportion of children living with a single biological parent increases as children get older in Nigeria, this is because as children go through adolescence, a large number experience the loss of a parent. See Better Care Network 2015; Children's Care and Living Arrangements 11.
32 Better Care Network 2015; Children's Care and Living Arrangements 11.
33 Better Care Network 2015; Children's Care and Living Arrangements 2,11.
34 Better Care Network 2015; Children's Care and Living Arrangements 11-12.
35 See s. 5 (1) (a) of the 1999 Constitution of Nigeria.
36 See S 4 (1) of the 1999 Constitution of Nigeria.
37 See s 5 (2) (a) of the 1999 Constitution of Nigeria.
38 Durojaiye *et al* 2014 *Gender & Behaviour* 6169-6181.

makes laws on all matter in the exclusive legislative lists and share law-making power with the state on the concurrent legislative list.[39]

Furthermore, although common law has been adopted and operates as a dominant legal system, the country derives it sources of law from legislation, customary law and the *Shari'ah*.[40] The 1999 Constitution of Nigeria (as amended) (hereinafter the Constitution) is the highest law of the Country. The Constitution provides in section 6 for an independent judiciary for the determination of any questions with regards to civil rights and obligations. The Constitution equally allows for the establishment of Customary and *Shari'ah* Courts of Appeal respectively.[41] The customary courts' jurisdiction as provided for in section 282(1) and (2) relate to civil proceedings involving questions of customary Law and succession as may be prescribed by the House of Assembly of the State.[42] It should be kept in mind, that the discussion on *Shari'ah* law or courts in Nigeria fall outside the scope of this study. The reason for the exclusion is that *Shari'ah* law in the Nigerian context is entirely a distinct and complex subject matter which requires a separate thesis for a thorough analysis.

In light of the foregoing discussion, it is clear that Nigerian society vary greatly in terms of language, culture, human and economic development. Nigeria therefore has a multi-cultural society in which a variety of legal systems are observed.

4.2.1.2 South Africa

By population, South Africa is the twenty-sixth largest country in the world. South Africa occupies a geographical Area of 1 219 090 square kilometres.[43] It is a democratic republic of nine provinces, reflecting not only its geographical spread,

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39 See Section 4 and 2nd Schedule, Parts I and II of the 1999 Constitution of Nigeria.
40 Durojaiye *et al* 2014 *Gender & Behaviour* 6170.
41 See ss 275 and 280 of the 1999 *Constitution of Nigeria*. The *Shari'ah* courts according to section 277 (1) (2) of the Constitution have jurisdiction in "civil proceedings involving questions of Islamic personal law regarding marriage concluded in accordance to that law and relating to family relationship or the guardianship of an infant; where all the parties to the proceedings are Muslims."
42 See s 282 (1) (2) of the 1999 Constitution.
43 Brand South African Information get away to South Africa 2017. http://www.southafrica.info/about/.

but also a rich cultural diversity.[44] According to statistic South Africa 2021, the mid-year population of South Africa is estimated at 60.14 million, with a population of children under the age of 15 at 17.4 million constituting just over 28.3% of the total population.[45]

Based on the previous census, only 35% of children in South Africa live with both of their parents.[46] 23% live with neither of their parents, 3 percent live with their father only and almost 30% live only with their mothers, whilst almost 8% live in skip-generation households with their grandparents.[47] Also, 90% of children live in households where there are two or more adults in residence, which are extended family members such as grandparents, aunts and uncles who play a caregiver role to them.[48] The most common type of family in which children reside in South Africa is not nuclear, but the extended family.[49] A much larger percentage of black African and coloured children, and children living in poverty live in extended families rather than with their biological parents.[50] Several factors are accountable for the above, among which includes poverty,[51] labour migration, educational opportunities and cultural practice.[52]

Furthermore, South African population comprises of various African communities who speak a variety languages and follow a variety of cultures.[53] The minority of

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44 Brand South African Information get away to South African 2017. http://www.southafrica.info/about/.

45 See Statistic South Africa 2021 https://www.staatssa.gov.za.

46 See Martin "Analysis of the children's sector in South Africa".

47 See Martin "Analysis of the children's sector in South Africa".18-19.

48 See Martin "Analysis of the children's sector in South Africa" 18-19.

49 64 percent of children live in extended families and 33 percent in nuclear families and lastly 8 percent of children live in households with their grandparents. See Martin "Analysis of the children's sector in South Africa" 19.

50 The term "coloured" is used to refer to people of "mixed blood between the European settlers and African women".

51 It should be noted that South Africa like other countries in African continue to wage its battle against poverty and its attendant negative ramifications such unemployment, crime and the devastation brought by HIV/AIDS and orphanage which have resulted into increasing number of children living without parental care and living on the streets. See Songca 2011 *Comparative and International Law Journal of Southern Africa* 355.

52 See Martin "Analysis of the children's sector in South Africa" 19.

53 See Momoti Law and Culture 79. According to Statistics South Africa 2013 http://www.statssa.gov.za/publications/P0302/P03022013.pdf3 it is estimated that the indigenous African communities make up 79,8 percent of South Africa's population.

the South African population consists of coloured people,[54] Indians/Asians[55] and white people.[56] It is instructive that religion is also a feature central to South African culture affecting people's lives in a multitude of ways.[57]

Lastly, South Africa operates a constitutional democracy with three tiers of Government – National, Provincial and Local Government – each with its distinct executive authority.[58] It operates a national legislature with a bicameral Parliament elected every five years, comprising a 400-seat National Assembly and a 90-seat National Council of Provinces.[59] Its legal systems is based on Roman-Dutch law, Common law and to an extent, African customary (indigenous) law.[60] The 1996 South Africa Constitution is the highest law of the Country.

In light of the foregoing discussion, it is clear that South Africa society vary greatly in terms of language, culture, human and economic development.[61] The South African constitution lay credence to the above by its recognition of eleven distinct languages.[62] South Africa therefore has a multi-cultural society in which a variety of legal systems 0are observed.[63]

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54 See Statistics South Africa 2013 http://www.statssa.gov.za/publications/P0302/P03022013.pdf 3.

55 See Momoti Law and Culture 79. Estimated to make up 2,5 per cent of South Africa's population. See Statistics South Africa 2013 http://www.statssa.gov.za/publications/P0302/P030220-13.pdf 3.

56 Momoti Law and Culture 79. Estimated to make up 8 per cent of the population in South Africa. See Statistics South Africa 2013 http://www.statssa.gov.za/publications/P0302/P0302-2013.pdf 3.

57 Although the Constitution did not specifically mention any form or sect of religion, the dominant religion and its values and practices have influenced not only the practitioner of this specific religion sect but South Africa society as a whole. The majority of the South African (79 per cent) are Christians, with Catholics accounting for 7,1 per cent of the population. Islam is practiced by 1,5 per cent of South Africans, while the remaining 3,7 per cent practice an unknown or an unidentified religion. It is also estimated that 15,1 per cent of South Africa's population does not follow any religion. See Central Intelligence Agency 2018 https://www.cia.gov/library/publications/theworldfactbook/geos/sf.html

58 Brand South African Information get away to South African 2017 http://www.southafrica.info/about/.

59 Brand South African Information get away to South African 2017 http://www.southafrica.info/about/.

60 See Rautenbach 2008 *Electronic Journal of Comparative Law* 1-15.

61 See s 10 of the Constitution. See s 23 and 23 of the South African Constitution.

62 See ss 10, 23 and 23 of the South African Constitution. Also see s 6 of the 1996 South African Constitution. S 6 (1) categorically recognised the official languages of the Republic which

4.2.1.3 Australia

Australia, is the sixth-largest country in terms of land area and is the only nation to govern an entire Continent.[64] Australia's surface area encompasses 7.69 million sq. kms (2.96 million sq. miles).[65] In 2021, Australia has approximately a population of 25.76 million people of which about 20% of the total population are child population (aged 0–14 years).[66]

Australia has a culturally diverse society characterised by indigenous and other Australians.[67] There are two groups of indigenous Australians, namely Aboriginal people and Torres Strait Islanders.[68] They have very distinctive cultures but are linked by their histories and politics.[69] Indigenous culture is diverse and strong and it makes a vital contribution to Australia's national identity.[70]

Australia's federal system of government is tailored along the British (Westminster) tradition[71] consisting of the Commonwealth, six states and two territories.[72] Commonwealth ministers, are appointed by the Governor-General and

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are Sepedi, Sesotho, Setswana, siSwati, Tshivenda, Xitsonga, Afrikaans, English, isiNdebele, isiXhosa and isiZulu.

63 Rautenbach *SAJHR* 326; Rautenbach, Bekker and Goolam *Introduction to Legal Pluralism* 3, 5 and 17.

64 See Australia in Brief, Australian Government Department of Foreign Affairs and Trade 6-7.

65 Australia in Brief, Australian Government Department of Foreign Affairs and Trade 5.

66 See www.statista.com See also Tilbury 2009 *Int J Soc Welfare* 57-64.

67 See Australia in Brief, Australian Government Department of Foreign Affairs and Trade 15.

68 Aboriginal people in Australia are regarded as the custodians of one of the oldest continuous living cultures in the world. This is because Archaeological evidence suggests that Australia has been continuously inhabited for more than 60,000 years. While the Torres Strait Islander peoples are another distinct group, of Melanesian origin who first settled on islands north of the mainland, between the tip of Queensland and Papua New Guinea, thousands of years ago. See Australia in Brief, Australian Government Department of Foreign Affairs and Trade 15.

69 See Tilbury 2009 *Int J Soc Welfare* 57-64.

70 See Australia in Brief, Australian Government Department of Foreign Affairs and Trade 15.

71 Under this system of government, the Governor-General, representing the Crown, exercises the supreme executive power of the Commonwealth. See Chapter 2, s 61 of the Commonwealth Constitution. In practice, the Governor-General acts on the advice of the head of the Government, the Prime Minister, and other ministers. See ss 62 and 63 of the Commonwealth Constitution. See also Australia in Brief, Australian Government Department of Foreign Affairs and Trade 17.

72 The States and Territories are responsible for child welfare and consequently there are eight different child welfare systems, each with their own legislation. The Commonwealth has constitutional responsibility for indigenous affairs. There are no federal laws governing indigenous child welfare issues. See Tilbury 2009 *Int J Soc Welfare* 57-64.

this include the Prime Minister. The appointment is based on the advice of the leader of a political party or coalition that represents a majority of the House of Representatives in the federal parliament.[73] The Prime Minister is in charge of a cabinet of ministers, each of whom is in charge of a different aspect of government.[74] Similar systems operate in the states and territories.[75]

The Australian Commonwealth Constitution divide powers between the states and the central government by specifically enumerating the powers allocated to the federal government. Residue powers are to be exercised by the states and territories. Section 51 of the Commonwealth Constitution listed most powers which are, in general, powers to be exercised concurrently with those of the states and territories. Section 109 of the Commonwealth Constitution however, provide that where there are any inconsistency, a Commonwealth law shall prevail over a state law.[76]

From the discussion so far, it becomes clear that Nigeria, South Africa and Australia share a lot in common in terms of their diverse ethnic groupings with multiple languages, customs, children's populations, as well as operating a constitutional democracy based on common-law tradition. More so, these three jurisdictions were all formerly colonised by an external power. These shared characteristics did not only enable for a distinct west Africa, southern Africa and Australian legal examples, but also affords a vital jurisdictional lesson on multi-cultural States Parties implementation of Article 12 of the UNCRC in their legal systems.

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73 See Chapter 2, s 62 and 64 of the Commonwealth Constitution. See also Australia in Brief, Australian Government Department of Foreign Affairs and Trade 17.

74 See s 62 of the Commonwealth Constitution. The section provides for a Federal Executive Council to advise the Governor-General in the government of the Commonwealth, and "the members of the Council shall be chosen and summoned by the Governor-General and sworn as Executive Councillors and shall hold office during his pleasure."

75 See Australia in Brief, Australian Government Department of Foreign Affairs and Trade 17.

76 See s 109 of the Commonwealth Constitution. Application of s 109 in the family law context Came up for determination in *AIFS v AMS* (1999) 24 Fam LR 756. The High Court considered whether where s 35 of the Family Court Act 1975 (WA) was inconsistent with s. 63F of the Family Law Act 1975 and, if so, whether it was rendered invalid by s 109 of the Constitution to the extent of the inconsistency.

In light of the foregoing, the following sections discuss the rights of children to be heard in Nigeria, South Africa and Australia respectively.

4.3 The right of children to be heard in Nigeria, South Africa and Australia

4.3.1 Nigeria

4.3.1.1 The constitution and children

The 1999 Constitution of the Federal Republic of Nigeria (as amended) (hereafter 1999 Constitution) has no specific reference to children's fundamental rights.[77] However, these does not necessarily suggest that a child in Nigeria is not entitled to enjoy the rights as enshrined under the provision of Chapter IV of the 1999 Constitution of Nigeria which contains the fundamental human rights.[78] The rights guaranteed under Chapter IV includes the right to life,[79] the right to personal liberty,[80] the right to dignity of human person,[81] the right to fair hearing[82] and the right to freedom of movement.[83] Furthermore, section 42 of the Constitution prohibits unjustifiable discrimination on the basis of "ethnic group, place of origin, sex, religion or political opinion".

What is clear in terms of the rights as contained in Chapter IV, is that all the sections on fundamental human rights by its wording provides that "everyone has the right."[84] This presupposes that children as citizens and part of everyone in the country have an enforceable constitutional guarantee of right to life**,** dignity of human person, personal liberty, fair hearing, freedom of movement and

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77 See generally the 1999 Constitution of the Federal Republic of Nigeria (As Amended).
78 See the provision of s 3(1) of the Nigerian Children's Rights Act, 2003. See also Enyinna 2015 *AHRLJ* 421-232.
79 S. 33 of the 1999 Constitution.
80 S. 35 of the 1999 Constitution.
81 S. 34 of the 1999 Constitution.
82 S. 36 of the 1999 Constitution.
83 S. 41 of the 1999 Constitution.
84 See for example s 33 (1) on rights to life which provides that "Every person has a right to life, and no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria." See also s 34 (1) on human dignity which provides that "Every individual is entitled to respect for the dignity of his person, and accordingly…"

unjustifiable discrimination in Nigeria. In other words, chapter IV rights are general rights pertaining to every citizen and did not spell out specific rights pertaining to children in terms of their participation rights within the family.

Apart from Chapter IV provisions, the 1999 Nigerian Constitution also provides in its Chapter II the Fundamental Objectives and Directive Principles of the Nigerian State which aims at the promotion and protection of the interests of every Nigerian citizen – which includes the children. In this regard, under Chapter II, the Constitution requires the government to provide free, compulsory and universal primary education, free secondary education, free university education, and free adult literacy programmes when practicable.[85] By section 13**,** a constitutional obligation is imposed on all arms and tiers of government to observe the fundamental objectives relating to socio-political, economic, educational and cultural matters. Section 14 provides that the security and welfare of the people shall be the primary purpose of government. Also, section 16 provides for the control of the economy to secure maximum welfare, freedom and happiness of every citizen on the basis of social justice, equality of status and opportunity, harnessing and distribution of material resources of the community to serve the common good. This include provisions of suitable and adequate shelter, suitable and adequate food for all Nigerians by the state. Under section 17 of the Constitution**,** the state social order is to be founded on freedom, equality and justice and the state shall direct its policy towards ensuring that all citizens without discrimination, whatsoever, have opportunity for securing adequate means of employment, conditions of work are just and humane, and that there are adequate facilities for leisure and for social, religious and cultural life.[86] Further, the state should ensure that the health, safety and welfare of all persons in employment are to be safeguarded and not endangered or abused. There should be adequate medical health facilities for all persons, and there should be equal pay for all work without discrimination on account of sex, or any other

85 See s 18 of the 1999 Constitution.
86 See s 17 (3) (a -b) of the Constitution.

ground.[87] The state shall also ensure that children and young persons and the aged are protected against any exploitation and against moral and material neglect and that provision is made for public assistance in deserving cases or other conditions of needs. Lastly, the evolution and promotion of family life is encouraged.[88]

In light of the foregoing provisions of Chapter II, it is evident that the Nigerian Constitution makes adequate provisions to cater for her citizen. The implication for the children is that states has the duty and obligations to promote and protect their interests in various matters concerning them which includes social, religious and cultural life and promotion of family. However, it is important to note that as lofty and beneficial to the children in terms of their development and participation as the provisions of Chapter II are, they are merely directive principles of state policy. No judicial action can be brought against the government for the enforcement of these provisions. Chapter II provisions are not justiciable as stipulated by section 6(6) (c) the Constitution.[89] In the case of *A.G Ondo v A.G federation*,[90] the supreme court of Nigeria held "that courts cannot enforce any of the provisions of Chapter II of the Constitution until the National Assembly has enacted specific laws for their enforcement." According to the supreme court, those objectives and principles that serve as the constitutional policy of governance remains mere declarations which cannot be enforced by legal process but would be seen as failure of duty and responsibilities of state organs if they acted in clear disregard of them.[91] Put differently, the directive principles of Chapter II of the Constitution are not enforceable in a court of law, but they (or some of them) can be made justiciable by legislation.

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87 See s 17 (3) (c - e) of the Constitution.
88 See s 17 (3) (f - h) of the 1999 Constitution.
89 See s 6 (6) (c) of the 1999 Constitution of Nigeria. Which provides that the judicial powers vested in accordance with the provisions of the constitution "shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution".
90 (2002) 9 NWLR (Pt 772) 222. See also the earlier case of *Anthony Okojie v AG Lagos state* (1981) 2 NCLR 333, 350.
91 (2002) 9 NWLR (Pt 772) 222.

In light of the foregoing, constitutional protection in terms of provisions that guarantee specific children's rights cannot be overemphasised. O'mahony[92] in his study on constitutional protection of children's rights is of the view that making provisions for children's rights in the constitution "is just a starting point; the extent to which it takes a genuine child's rights approach depends on the quality of the constitutional provisions in question."[93] In assessing the approach by any given constitution towards the protection of children's rights, O'mahony provides a typology – in line with child's rights approach envisaged by the UNCRC. This typology is along three spectrums – visibility, agency and enforcement.[94] The visibility spectrum indicate the extent the constitution explicitly protect children's rights. The agency spectrum determines whether children are considered as autonomous rights-holder or merely objects in need of protection. The enforcement spectrum specifies how far children's rights can be enforced through various remedies.[95]

The forgoing typology and approach towards assessing constitutional protection of children's rights allow for a multiple dimension analysis as opposed to a single category analysis.[96] In this regard, a particular constitution might rate high on one of the spectrums, while at the same time, rate low on the other spectrums. Above all, O'Mahony's classification convey the understanding that, merely mentioning children in the constitution is insufficient if they are viewed as "objects" in need of

92 See O'Mahony *Human Rights Law Review* 401-434.
93 See O'Mahony *Human Rights Law Review* 401.
94 See O'Mahony *Human Rights Law Review* 403-432
95 See O'Mahony *Human Rights Law Review* 402-434.
96 For other typologies of children's constitutional rights, see Tobin *South African Journal on Human Rights* 86-126; Habashi *et al International Journal of Children's Rights* 267– 290. Tobin in his analysis uses the categories of 'invisible child', 'special protection' and 'child rights' constitutions, which is considered as a more rudimentary typology when compare to measuring the spectrums of visibility and agency. Furthermore, while Tobin mentions "justiciability, access to justice, judicial conservatism and social legitimacy", when discussing enforcement, the component of enforcement is not well developed in his typology. Habashi *et al* on their part uses linguistic content analysis to give quantitative statistics on the prevalence of protection, provision and participation rights in constitutions of countries with a high, medium and low Human Development Index. For the sake of present discussion, this methodology is considered as too basic.

protection rather than individuals who can exercise agency and when rights are mere symbols without adequate remedies attached to them.[97]

Using O'Mahony classifications, the Nigerian Constitution rate low in terms of children because it assigns little to nothing visibility to children. The constitution leaves little room for children's agency. Agency according to O'Mahony is a measure of the extent to which children are treated as autonomous rights-holders rather than objects in need of protection.[98] As indicated from the earlier discussion on the Nigerian constitutional provisions and the children,[99] the only explicit provision in the constitution devoted to children does not convey agency.[100] Again,[101] the Nigeria constitution in chapter IV provides for fundamental rights applicable to every citizens, but this rights are not absolute, they are limited rights in nature.[102] Also, the directive principles of Chapter II of the Constitution on states duty and obligations to promote and protect children's interests in matters concerning them which includes social, religious and cultural life and promotion of family are not enforceable in a court of law. The inevitable consequence is that some constitutional provisions on rights applicable to everyone are merely "aspirational or declaratory and could be limited in scope."[103] It is therefore, not enough that the constitution simply includes rights as fundamental rights for everyone, it is essential and very important that it indicate the extent these rights specifically apply to children.[104]

Although, it is valid to argue that the reason why specific rights for the children are not explicitly included in the Constitutions could be that children are included

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97 See Freeman *International Journal of Children's Rights* 8.
98 See O'Mahony *Human Rights Law Review* 402-434.
99 See earlier discussion in this section on the constitutional provisions and children in Nigeria.
100 See s 17 (3) (f - h) of the 1999 Constitution. This section provides that the state shall ensure that "Children and young persons and the aged are protected against any exploitation whatsoever, and against moral and material neglect; and that provision is made for public assistance in deserving cases or other conditions of needs; and that the evolution and promotion of family life is encouraged."
101 See par 4.3.1.1 above.
102 See generally s 45 of the 1999 Constitution.
103 See Hodgkin and Newell "Implementation Handbook for the Convention on the Rights of the Child" 187.
104 See Hodgkin and Newell "Implementation Handbook for the Convention on the Rights of the Child" 187.

in the general rights as provided regardless of whether they are explicitly mention or not.[105] Therefore, explicitly mentioning children could be considered redundant. Conversely, it is submitted that failing to provide specific protection for key children's rights such as participation rights within the family in the highest law of a country could be seen as lack of recognition of the particular vulnerability of children *vis- à- vis* their parents and other stakeholders. The Nigerian Constitution could therefore, be seen and characterised as primarily paternalistic.

It is submitted that enumerating children's specific rights in the Constitution will not only serves as a tool for advocacy but also as a beacon guiding implementation and for developing policies.[106] For instance, in the case of protecting children from abuse within the family as a result of parental rights and responsibilities over their children, provisions recognising the specific vulnerabilities of children in relations to power hierarchies and children's autonomy such as Article 12(1) of the UNCRC are likely to be more powerful tools than general provisions on children's rights or on equality in the constitution.

In light of the discussion so far, particularly on the lack of specific provisions recognising children as autonomous, independent persons in the constitution, Nigeria obligations in terms of specific children's right to participate in decision-making thus, reside in the Nigerian government's ratification of international children's rights instruments. Accordingly, in 1991, Nigeria ratified the UNCRC and domesticated same by enacting the Nigerian Children's Rights Act, 2003.[107] The following discussion explore in details the Nigerian Children's Rights Act, 2003.

4.4 The Nigerian Children's Rights Act

4.4.1 Scope and status of the Act

105 As indicated earlier in terms of the rights as contained in Chapter IV of the Nigerian Constitution all the sections on fundamental human rights, by its wording provides that "everyone has the right." Children are regarded as part of everyone. See s 33(1) and 34(1) of the Constitution.

106 The Norwegian Constitution is an example of countries constitution in this regard, since it explicitly bestows children the right to participation. See Haugli "Constitutional Rights for Children in Norway" section 4.2.

107 See Nigerian Children's Rights Act 2003 Cap C50, LFN 2004.

Nigeria was among the first African countries to ratify the UNCRC in March 1991.[108] However, as indicated in the previous chapter,[109] a mere ratification of the UNCRC is only an expression of commitment to its principles, the major aspect is in its implementation. This require incorporating the UNCRC provisions into the legal and administrative structures, as well as the practices and belief systems of a country.[110] Nigeria fulfilled her legal and administrative obligation under the convention by the National Assembly enactment of the Nigerian Children's Rights Act*,* 2003.[111] (Hereinafter Children's Rights Act).

Despite the above fulfilment, the pledge to promote children's rights nationally in Nigeria seems not to have been successful.[112] Again,[113] Nigeria is a pluralist state with multiple laws, norms and fora that co-exist to function as a legal system.[114] The federal system of government practised is a key factor in terms of the national applicability of the Children's Rights Act in Nigeria.[115] To illustrate, under the constitution, the federal government and each of the component federating state government is empowered to make laws. Section 4 and the second schedule, part 1 and 2 to the Constitution categorically empowered the federal government to make laws on all matter in the exclusive lists and shares law making with the states on the concurrent list.[116] However, what is noticeable is that matters pertaining to children are not specifically listed in either the exclusive or the concurrent list.[117]

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108 See Office of the High Commissioner of Human Rights, Status of Ratification of the Convention on the Rights of the Child https://www.ohcrh.org.

109 See earlier discussion in par 3.3.2, 3.3.3 of Chapter 3.

110 See Lenzer, "Children's Studies as Equals: Exploring and the Human Rights of Children: Toward a Unified Approach" 215.

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

112 See Oyeyemi and La-kadri 2017 *Unimaid Journal of Private and Property Law* 22-32; Oba 2011 *Emory Law Review* 881-895; Ladan 2004 *Nigerian Bar Journal* 219-230; Olaleye 2005 *University of Ibadan Journal of Private and Business Law* 162.

113 See discussion in par 4.2.1.1. above.

114 See Durojaiye *et al* 2014 *Gender & Behaviour* 6169-6181. See also earlier par 4.3.1.1 above

115 See Oyeyemi and La-kadri 2017 *Unimaid Journal of Private and Property Law* 22-32; Oba 2011 *Emory Law Review* 881-895; Ladan 2004 *Nigerian Bar Journal* 219-230; Olaleye 2005 *University of Ibadan Journal of Private and Business Law* 162.

116 See Section 4 and 2nd Schedule, Parts I and II of the 1999 Constitution of Nigeria.

117 There is no-where in the exclusive and concurrent legislative list where matters pertaining to children where mentioned or listed. See section 4 and 1st and 2nd Schedule, Parts I and II of the 1999 Constitution of the Federal Republic of Nigeria.

In light of the above, what is applicable in Nigeria in terms of legislating on children's rights is that federating states may adopt or refuse any provisions pertaining to children that was enacted at the federal level.[118] Put differently, children's rights in Nigeria involves a matter also within the legislative competence of the states. Therefore, federal Act on children's rights must be ratified or separately enacted by each states' Houses of Assembly before it becomes applicable in the states.[119] The author of the thesis, however expresses another point of view on this issue which is address later in the closing part of this section.

The position as applicable, perhaps explains why even where the federal enacted Children's Rights Act gives recognition to specific children's rights, cultural practices contrary to established children's rights may often deprive the child of these rights because of adherence to customary or religious values at state level.[120] In addition, not all states in Nigeria has adopted or enacted children's rights law. In fact, since the enactment of the Children's Rights Act in 2003, only more than 26 states out of the 36 states in Nigeria have adopted the Children's Rights Act into their state legislation.[121]

Notwithstanding the foregoing, there are a wide range of relevant rights under the Children's Rights Act that fulfil Nigeria's obligations as required by the UNCRC. These rights among others include section 10 of the Act, which outlaws all forms of discrimination against children, and section 11 which highlights the protection of the child against child abuse and torture. Section 13 of the Children's Rights Act lists the child's various rights to health care and the government's obligation to provide care facilities for the child's health. Section 15 ensures that every child has a right to free, compulsory and universal primary education and specifically states that it shall be the duty of the state to provide it.

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118 See Oba 2011 *Emory Law Review* 893. This further explain why since the enactment of the *Nigerian Childs Rights Act* 2003, which is over a decade, so far, only more than 26 states out of the 36 states in Nigeria have adopted the Children's Rights Act into their state legislation.

119 See Oba 2011 *Emory Law Review* 893.

120 Sections 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. See Oyeyemi and La-kadri 2017 *Unimaid Journal of Private and Property Law* 31.

121 See Oyeyemi and La-kadri 2017 *Unimaid Journal of Private and Property* Law 27-28.

Also, sections 21 to 28 of the Children's Act provide for the protection of children against harmful cultural practices and criminal activities, including exposure to use and trafficking of narcotic drugs and abduction by any person. Furthermore, sections 21 and 22 of the Children's Rights Act specifically states that children must be protected against harmful cultural practices such as early marriage and betrothal. It prohibits the betrothal and marriage of children and specifies that the minimum age of marriage to be 18 years and provide sanctions for its contravention.[122]

Aside the forgoing rights, the Children's Rights Act also take cognisance of cultural values peculiar to the Nigerian states. As shown in the subsequent discussion, the recognition of cultural values by the Children's Rights Act appears situated within the context of the acceptable local norms and culture, which dictate the role and nature of the relationship between the child and his parents.

But before proceeding further, it is apt, to return to the issue of the applicability of Children' Rights Act nationally in Nigeria. In the opinion of the author of the thesis, it may be stated that the Children's rights Act is applicable throughout the federation. This is because, item 67 and 68 of part I, 2nd schedule to the Constitution of Nigeria empowers the National Assembly to make law on "any matter incidental and supplementary" to any matter mentioned elsewhere in the exclusive list. Since citizenship is an item specifically listed as number 10 on the exclusive legislative list, it is deducible that children's rights are matters incidental or supplementary as *bona fide* citizen of Nigeria. In view of the foregoing, children's rights may be said to be within the exclusive legislative power of the National Assembly to the exclusion of the federating states.

However, the above point of view remains an academic exercise requiring a judicial pronouncement to confirm the validity of such view. This view form a part of suggested recommendation in the concluding part of this thesis.[123]

4.4.1.1 Recognition of cultural values in the Act

122 See s 23 of the Nigerian Children's Rights Act, 2003.
123 See par 7.5.2 of Chapter 7.

The co-existence of multiple sources in a diverse country such as Nigeria with different ethnic groups and religious beliefs has implication for children's participation in decision-making within the family.[124] The Children's Rights Act, was drafted by specifically including aspects of customary law considered to be in the best interests of the child. These aspects of customary law that is recognised by the Act are those regarded as fundamental precepts underpinning the African concept of "duty" earlier discussed in the thesis.[125] This aspect of customary law, as shown in the discussion that follows are in relation to parental rights and responsibilities, and duties and responsibilities of the child within the family.

4.4.1.2 Parental responsibilities and rights

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.[126] It should be kept in mind that the principle of the best interest of the child is part of the Nigerian family law in matrimonial causes as relates to guardianship and custody issues,[127] the Children's Rights Act emphasise the importance of this principle. [128] It is notable that the Act did not state categorically what amounts to the standard of best interests of the child. Therefore, to determine the standard of best interests of the child, aside inferences from other provisions of the Act, recourse is usually had to other

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124 The constitution recognised this and thus, matters pertaining to children are not specifically listed in either the exclusive or the concurrent list. Each component state under the Constitution is empowered to make laws i.e., federal government makes laws on all matter in the exclusive lists and share law making with the state on the concurrent list. See s 4 and 1st and 2nd Schedule, Parts I and II of the 1999 Constitution of the Federal Republic of Nigeria.

125 See earlier discussion in paras 2.5.2, 2.5.3, 2.5.4 of Chapter 2.

126 See Part 1, s 1 of the Nigerian Child's Rights Act, 2003.

127 See s 71 of the Matrimonial Causes Act 1970 and the respective provisions of the *Children & Young Persons Act,* Cap *32***,** Laws of the Federation of Nigeria and Lagos 1958, whereby parents can be deprived of their right to custody if it is in the children's welfare to do so. See also the cases of *Head of Federal Military Government v. Warri Juvenile Court, ex parte* Saka. (1981) 3 L.R.N. 208; *Ibitoye v. Permanent Secretary, Ministry of Labour and Social Welfare* (1967) N.M.L.R. 76, where some parents were deprived of their parental custody in relation to the welfare and interest of the child. For general analysis of law on parental rights in Nigeria, see Uzodike 1990 *Afr J Int'l & Comp L* 282-297. See also Ekundayo 2014 *The International Journal of Humanities & Social Studies* 183.

128 See s 1 of the Nigerian Child's Rights Act, 2003. Under the Children's Rights Act, individuals, the public or private bodies, institutions or services, courts of law, administrative or legislative authorities in Nigeria shall ensure in their duties the best interest of the child.

existing legislations and case law in the Nigerian family law in matrimonial causes as relates to guardianship and custody issues.[129] Discussion on other existing legislations in the Nigerian family law, however, falls outside the scope of this study.

The fact that there is no precise definition of the phrase interest of a child was emphasised in the case of *Odogwu v Odogwu*[130] where the supreme court of Nigeria stated that the phrase interest of the child is not restricted only to material provisions but also includes what will assist the psychological, physical and moral development of the child, something that would promote the happiness and security which a child of tender years requires.

The interest of children envisaged under the Children's Rights Act, thus, embodies several factors that depend on the peculiar circumstance of each case. In the case of *Williams v. Williams,*[131] the learned justice of the supreme court summed up that these factors interpreted the phrase "paramount consideration" to mean "preeminent and superior consideration."

In *Alabi v. Alabi,*[132] the court examine the principles governing grant of custody of children in matrimonial causes and held that the court in matters concerning custody, guardianship, welfare, advancement or education of children of a failed marriage, must take the interest of the children "as paramount consideration and the court in this regard is given wide discretionary powers which it can exercise according to the peculiar circumstances of each case. The welfare of the instance is not only the paramount consideration but a condition precedent."[133]

In view of the foregoing, cases have shown that the court considers a variety of factors in the child's interests. These considerations help them to decide to whom

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129 For example, see s 71 of the Matrimonial Causes Act 1970 and the respective provisions of the Children & Young Persons Act, Cap 32, Laws of the Federation of Nigeria 1958 and similar Legislations that exist in the other states of Nigeria, whereby parents can be deprived of their right to custody if it is in the children's welfare to do so.

130 (1992) 2 NWLR (Pt.225) 339.

131 (1987) 2 NWLR [Pt.54] 66 at 74.

132 (2008) All FWLR (Pt 418) 245 at 258-264, see also *Afonja v Afonja* (1971) 1 ULR 105, *Otti v Otti* (1992) 7 NWLR (Pt 252) 187 at 210.

133 *Alabi v. Alabi* (2008) All FWLR (Pt 418) 245 at 258-264.

between the parties' custody should be granted. Of prominence are such factors as the adequacy of arrangement respectively made by the parties,[134] their conduct,[135] age of the child,[136] sex and social background of the child,[137] and the wishes of the child.[138]

It is observed that the above mentioned factors can be more elaborately considered if there is adequate child participation in grant of custody proceedings. The welfare of the child and what elements may constitute his best interests differ with each child and his/her environments. Thus, the need to do custody cases at the family court where welfare staff trained in special cases concerning children are available.[139] The specialised personnel will help in ensuring child participation and meeting the best interests of the child and assist the judge in the decision-making process. It must be added, however, that the courts generally ought to be mindful of these measures and exercise its discretion towards ensuring the participation of all parties including the child. this can be done by examining the child and his peculiarities, observing the conduct of the child in appropriate cases, obtaining welfare reports and independent professional evidence and opinion, in addition to presentations by parents and his private determinations.

Aside the foregoing, inferences from other provisions of the Children's Rights Act, also points 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

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134 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's case, the 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.

135 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 to be taken into account too. See also *Lafin v. Lafin* [1967] NMLR 101, *Oduneye v Oduneye* [1976] 2 CCHCJ 85.

136 See *Williams v Williams* (1987) 2 NWLR [Pt.54] 66 at 74.

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

138 See the case of *Odogwu v Odogwu* (1992) 2 NWLR (Pt.225) 339, where Megaw LJ has described the practice as most desirable mainly where the child has attained an age where he is capable of expressing his wishes. He added that if it is done, it should not be in the open court, and the judge should not make a promise to the child that what was said would not be told anyone else.

139 At the moment there is no specialised family law court in Nigeria where custody cases are considered.

be given to the child for his/her 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.[140] 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 is 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 that the Children's Rights Act limit 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.[141] For example, on the protection of the privacy and family life of the child, section 8 of the Children's Rights Act provides that "every child is entitled to his privacy, family life, home, correspondence, telephone conversation and telegraphic communications, except as provided in subsection (3) of this section."[142] However, subsection 3 of section 8 is to the effect that nothing in the provision of section 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."[143]

Similarly, under section 9(1) of the Children's Right Act on freedom of movement, it is noticeable that subsection (2) of section 9 therein, subjected the application of the child freedom of movement rights 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."[144]

Furthermore, the term "reasonable supervision and control" as used in section 8(3) of the Act, indicates the intention of the drafters of the Nigerian Children's

140 See Part 1, s 2 (1) of the Nigerian Child's Rights Act, 2003.
141 See s 8 (1) (2) (3) and s 9 (1)(2) and s 20 of the Nigerian Child's Rights Act.
142 See s 8 of the Nigerian Child's Rights Act.
143 See S 8 (3) of the Nigerian Child's Rights Act.
144 See s 9 (1) and (2) of the Nigerian Child's Rights Act.

Rights Act to ensure that parents maintain authority over the child's exercise of his/her right in the daily activities of the family life.[145]

It is observed from the foregoing provisions that parents and guardian 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. This further affirms the earlier argument made in this thesis,[146] that within the context of Nigerian multi-cultural society, communalism or collective solidarity in relation to child's participation within the family exists. That culture and tradition play an important role in child-rearing and their participation in decision-making within the family. Parents and guardian are expected to consider the best interests of the child in all actions they take. Unfortunately, parents, guardian and many care givers have been found wanting in terms of compliance with the best interests' principle. The concluding observation of the UNCRC,[147] 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 are still common in Nigeria. As indicated later in Chapter 5,[148] FGM/C is an example of such harmful traditional practices prevalent in Nigeria.

4.4.1.3 Duties and responsibilities of the child

Section 19 of the Children's Rights Act specifically makes provisions for the responsibilities of children, which include working towards the cohesion of the family, respecting of their parents and elders at all times, and assisting them in their time of need.[149]

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145 See part 1, s 1-2 (1) and s 8 (1) (2) and (3) of the CRA. So more so, that s 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 his/her responsibilities set out in the Act.

146 See earlier discussion in par 2.5.4 of Chapter 2. See also earlier discussion in paras 2.5.2, 2.5.3 on the cultural values within the family. See also Twum–Danso 2010 "The construction of childhood and socialisation of children in Ghana" 133–139.

147 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).

148 See par 5.6.1 of chapter 5 for detailed discussion on theory and practice of FGM/C in Nigeria.

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

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."[150] In other word, parents and guardian should ensure that children in their care understand and observe their responsibilities towards the cohesion of the family. Therefore, the obligation on parents and guardian of the child to secure assimilation and observance of their responsibilities emphasise the importance of the duties and responsibilities of the child *vis-a-vis* exercising his/her rights and the children's relationships within the family.[151]

It is observed that despite the importance of the duties and responsibilities of the child as above indicated, there are many issues yet to be resolved around the responsibilities of the child under the Children's Rights Act. Prominent among the issues is the fact that many children are confronted with circumstance that restrict their participatory right. To illustrate, children are expected to work conscientiously towards the cohesion of their family and community and show respect to elders at all time and assist them in case of need. This approach focuses only on duties and responsibilities and not participatory rights.[152] According to a study on children's participation rights conducted in the Niger Delta region of Nigeria on the barrier to the implementation of UNCRC, it was found that section 19 of the Children's Rights Act particularly the duties and responsibilities on the child to respect and obey all elder to them at all time further erodes their participatory rights within the family.[153]

In light of the foregoing, the approach of Children's Rights 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 his/her parents and family. The responsibilities and duties of child recognised in section 19 of the Children's Rights

150 See s. 20 of the Nigerian Child's Rights Act.
151 See s. 20 of the Nigerian Child's Rights Act.
152 See Secker "Barrier to the implementation of the UN Convention on the Rights of Child in the Niger Delta" 215.
153 See Secker "Barrier to the implementation of the UN Convention on the Rights of Child in the Niger Delta" 215.

Act are the same with the cultural values of rights and duties discussed earlier in Chapter 2.[154] These cultural values of rights and duties, hinges on connectedness, interdependence and loyalty within the society and the family.[155]

In light of the recognition of cultural values in the Act, it becomes important to also considered the extent, if any, to which the Nigerian Children's Rights Act recognised the provision of Article 12(1) of the UNCRC on child's participation rights. As the following discussion shows, the Act, indeed noticeably omits the right of the child to participation in decision-making as contemplated by Article 12(1) of the UNCRC.[156]

4.4.1.4 Omission of the child's right provision of Article 12(1) of the UNCRC in the Act

Conspicuously, the Nigerian Children's Rights Act omits the right of the child to participation in decision-making and to have freedom of expression as contemplated under the UNCRC. In other words, Article 12(1) of the UNCRC provision on child's rights 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.[157]

What appears as the closest interpretation of Article 12(1) of the UNCRC provision in the Children's rights Act, is section 3 which refers to provisions in Chapter IV of the Constitution of the Federal Republic of Nigeria 1999 relating to fundamental rights of the citizens. [158] The provisions of Chapter IV of the Constitution have been highlighted above.[159]

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154 See earlier discussion in paras 2.5.2,2.5.3, 2.5.4 of Chapter 2 respectively.
155 See generally earlier discussion in paras 2.6.3, 2.6.3.1, 2.6.3.2 and 2.6.3.3 of Chapter 2 on the norms of respect, responsibility (obligation) and reciprocity as traditional and cultural practices forming fundamental principles of African customary law.
156 See earlier discussion in paras 3.4, 3.4.1, 3.4.2, 3.4.3, 3.4.4 of Chapter 3.
157 See generally, the Nigerian Child's Rights Act. More particularly, part II — Rights and Responsibilities of a child.
158 See s 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.
159 See discussion in par 4.3.1.1 above.

The lack of a specific provision for the rights to participation in decision-making under the Children's Rights Act may be as a result of the controversial nature of such rights in the context of children in Nigeria. Recall, that in the previous Chapter 3,[160] some of the argument against Article 12(1) of the UNCRC provision by critics is that the characterisation of children as autonomous raised the questions of legitimacy, desirability and applicability of these rights within other socio-cultural contexts wherein the autonomy of the individual is not privileged as much as his/her interdependence and fulfilment of duties. Thus, it can be stated that Nigeria seem to be a specific example of such socio-cultural states.

The omission of Article 12(1) of the UNCRC provisions in the Nigerian Children's Rights Act, is not without its implications for the child's participation rights in decision-making within the family. The following discussion addresses the implications of the Nigerian implementation approach in her specific domestic children's rights legislation.

4.4.1.5 Implications of the Nigeria's implementation approach of Article 12(1)

From the discussion in the above section, it is clear that the legislative provisions of the Nigerian Children's Rights Act*,* 2003 are not consistent with the aspiration and intent of the UNCRC in Articles 12.[161] In other words, under the specific legislations for the protection of children's rights in Nigeria, key provisions that guarantee participation rights of children in decision-making concerning them is omitted. Thus, the foundation to clamour specifically for the participation rights for the children within the family under the Children's Rights Act did not exist.

In light of the foregoing, it seems suggestive that under the prevalent protective model practised in Nigeria, adults customarily stand in the gap to protect the interests of children and adolescents. Recall that in Chapter 2,[162] it was indicated that under the communal family arrangement in most African countries – Nigeria inclusive, the interests of children are not entirely separated from that of the

160 See earlier discussion in par 3.5 of Chapter 3.
161 See paras 3.4 to 3.4.4 on the analysis of the Article 12(1) of the UNCRC.
162 See par 2.5.2 of Chapter 2.

family. Hence, individual children's interests have a symbiotic relationship with that of the rest of the family. These relationship is further indicated by the cultural values of duties and responsibilities of children within the family. As also noted earlier,[163] the emphasis in section 19 of the Children's Rights Act on children's duties and responsibilities is indicative of the cultural values which hinges on respect to elders and obedience to parents at all times. Put differently, under the Children's Rights Act, the exercise of some of the rights of the child as championed by the UNCRC is linked to the child's relationship with his/her family, especially within parental control and not the child's evolving capacity or ability to make independent decisions. The foregoing, affirms the argument made in this thesis[164] that within the context of Nigerian multi-cultural society, communalism or collective solidarity in relation to child's participation within the family exists and that culture and tradition play an important role in child-rearing and their participation in decision-making within the family.

The implications of emphasising on the values of duties and responsibilities in the exercise of children's rights without corresponding provisions such as the Article 12(1) participation rights, is that the Children's Rights Act accommodates the bias that decision-making concerning the child within the family are made exclusively by parents or guardians. The danger therein, is that those who observe strict adherent to traditional views of children in Nigeria will continue to see children as subordinates to adults and should not be autonomous rights bearer.[165] In most cultures in Nigeria, children are often silenced with regards to exercising their participation rights. They are seldom allowed to express their views on issues related to them within the family.[166] The foregoing, sadly is the reason why in most cases, child abuse, particularly those occasioned by harmful cultural practices within the family are treated as "family matters" not to be spoken about or reported to the authorities in order to protect the image of such family and the

163 See earlier discussion in paras 4.5.1.3 and 4.5.1.4 above.
164 See earlier discussion in par 2.5.5 of Chapter 2.
165 See Ekundayo 2014 *The International Journal of Humanities & Social Studies* 184; Kiame *African Human Rights Journal* 227. See also EASO (European Asylum Support Office), 'Country Guidance: Nigeria' February 2019 63.
166 See Ekundayo 2014 *The International Journal of Humanities & Social Studies* 184; See also EASO (European Asylum Support Office), 'Country Guidance: Nigeria' February 2019 63.

child affected.[167] The discussion in Chapter 5[168] on the theory and practice of FGM/C in Nigeria clearly demonstrate the extent to which such harmful cultural practices against the children have degenerated in Nigeria.

In lights of the foregoing, it can be stated that Nigeria's implementation examples show that the way in which laws that concern children are made and interpreted by the government is largely influenced by the beliefs and moral codes of the society.[169] Again, this is illustrative of the values of rights, duties and responsibilities which dictate the role and nature of the relationship between the child and his/her parents within the family in the Nigerian socio-cultural context. This adopted approach, will undoubtedly constitute a grave impediment to the enforcement and implementations of the child's right to participation within the family in the light of Article 12(1) of the UNCRC.

Nevertheless, the UNCRC[170] and children's rights legislations of South Africa[171] and Australia[172] as well as scholarly studies considered in this thesis, progressively suggested the importance of involving children in their daily activities and other matters affecting them within the family.[173]

At this juncture, it becomes desirable to discuss the South African implementation approaches of Article 12(1) of the UNCRC in her domestic Children's Act. As shown in the discussion that follows, South Africa adopted an integrated approach in her implementation of Article 12(1) of the UNCRC and local norms and culture in her domestic Children's Act. Before undertaking this discussion on the South Africa's

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167 See Amadi "Building Nigeria capacity to implement economic, social and cultural rights; Lessons learned, challenges and the way forward" 2006.

168 See par 5.6.1 of Chapter 5.

169 See earlier discussion in par 2.5.2 of Chapter 2 on indigenous children participation in the family within the context of African societies. See also Rwezaura, "The duty to Hear the Child: A View from Tanzania" 58.

170 See earlier discussion in paras 3.4 to 3.4.4 of Chapter 3 on Article 12(1) UNCRC; the rights to participation.

171 See later discussion in this Chapter in paras 4.6 to 4.6.1.3.4, particularly par 4.6.3.2 on the implications of the South African Implementation approach.

172 See later discussion in this Chapter in paras 4.8 and 4.8.1 on the inclusion of Article 12(1) UNCRC and its implication in the Australian Children's Law.

173 See earlier discussion in par 3.5 of Chapter 3 on the various arguments of scholars in favour and against Article 12(1) of the UNCRC participation rights within the context of the family.

Children's Act, it is utmost to first consider the approaches adopted by South Africa's Constitution in relation to children's right.

4.5 South Africa

4.5.1 The constitution in general

What is today the democratic Constitution of South Africa is largely a factor of historical and legal formation of the union of South Africa.[174] In a nutshell, the historical European incursion into South Africa's legal systems resulted into a mixed legal systems of predominantly English commercial and public law and Roman-Dutch private law, pervaded by the constitutional principles of personal freedom and the rule of law, and to an extent African customary (indigenous) law.[175]

The new democratic Constitution of the Republic of South Africa was adopted in 1996, (hereinafter South African Constitution) two years after independence.[176] The preamble affirm the constitution as the supreme law of the land, and one which aimed at healing the division of the past and identifies democracy, liberty, equality and dignity of the individual as values fundamental to the constitution and the society.[177] Specifically, Chapter 2 on the Bill of Rights serves as a cornerstone of democracy in South Africa that emphasis and affirm the democratic values of human dignity, equality and freedom.[178] Thus, the state is enjoined to respect, protect, promote and fulfil the rights in the Bill of Rights.[179] The South African constitution in general is a radical transformation aimed at healing the wounds of the apartheid regime that once held sway in South Africa.[180] In fact, the preamble and Chapter 2 of the constitution lay the foundation for the human rights-related

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174 See Thomas 2008 (14-2) *Fundamina 134-154.*

175 See Van der Merwe 2012 18 (1) *Fundamina* 91-114; Rautenbach 2008 *Electronic Journal of Comparative Law* 1-15.

176 South Africa officially became an independent nation in 1994, after a long historical apartheid regime.

177 See the preamble to the South African Constitution.

178 S.7 (1) of the South African Constitution.

179 S.7 (2) of the South African Constitution.

180 See the 6th and 7th paragraph of the preamble to the Constitution where it is stated that the Constitution is adopted to "Heal the divisions of the past and establish a society based on democratic values, social justice and fundamental human rights…"

law in South Africa – a law influenced by the principles identified in the Universal Declaration of Human Rights[181] and by subsequent international human rights standards.[182]

4.5.2 The constitution and the children

The Bill of Rights Chapter in the South African Constitution contains specific references to children. In fact, section 28 particularly make provisions for the rights of children. This section provides for every child's rights to a name and nationality from birth;[183] to family or parental care, or to appropriate alternative care when removed from the family environment;[184] to basic nutrition, shelter, basic health care services and social services;[185] protection from maltreatment, neglect, abuse or degradation;[186] to be protected from exploitative labour practices, etc.[187] Furthermore, section 28(2) states that "[a] child's best interests are of paramount importance in every matter concerning the child." Specifically, section 28(2) on the child's best interests as of paramount importance in every matter concerning the child is later discussed in this chapter.[188]

Before proceeding to discussion on section 28 on the best interests of the child, it is considered necessary to briefly shed light on the nature of other rights as applicable generally in the constitution which are applicable to the children. In this regard, the right to equality,[189] the right to education[190] and the right to personal autonomy derived from the right to privacy,[191] freedom of religion,[192] freedom of

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181 See Thomas 2008 (14-2) *Fundamina* 134-154.
182 See Thomas 2008 (14-2) *Fundamina* 134-154. More so, see for instance discussion on the *South African Children's Act*, 2005 in par 4.6. below. Of course, by the provision of s 10 of the Children's Act which incorporated Article 12 of the UNCRC, it can be safely concluded that the UNCRC indeed influenced the South African Children's Act.
183 S. 28 (1) (a) of the South African Constitution.
184 S. 28 (1) (b) of the South African Constitution.
185 S. 28 (1) (c) of the South African Constitution.
186 S. 28 (1) (d) of the South African Constitution.
187 S. 28 (1) (e) and (f) of the South African Constitution.
188 See discussion in par 5.5.3 below.
189 S 9 of the South African Constitution.
190 S 29 of the South African Constitution.
191 S 14 of the South African Constitution.
192 S 15 of the South African Constitution.

expression[193] and freedom of association[194] read together are other rights, and perhaps the most important rights that children also enjoy under the constitution.[195] It should be kept in mind, that all these rights are not without their limitations,[196] because the constitution itself provides for the limitation of fundamental rights in section 36.

According to section 36(1), the limitation of a constitutionally protected right must meet a variety of criteria which includes that:

> [T]he limitation must be sanctioned by law of general application; the limitation must be reasonable; and the limitation must be justifiable in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including the nature of the right, the importance of the purpose of the limitation, the nature and extent of the limitation, the relation between the limitation and its purpose, and also less restrictive means to achieve the purpose.

In the case of *Coetzee v Government of the Republic of South Africa,*[197] the requirement of reasonableness was interpreted to indicate that legislation or action limiting a right must have a reasonable objective and that the measures used to achieve that objective must be reasonable. However, in *S v Makwanyane and Another*[198] the constitutional court took a more cautious stance on this requirement as follows:

> [T]he limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, and ultimately an assessment based on proportionality… The fact that different rights have different implications for democracy and, in the case of our Constitution, for 'an open and democratic society based on freedom and equality', means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can be established, but the application of those principles to particular circumstances can only be done on a case-by-case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests. In the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality; the purpose for which the right is limited and the importance of that purpose to

193 S 16 of the South African Constitution.
194 S 18 of the South African Constitution.
195 See Robinson 2003 *Potchefstroom Electronic Law Journal* 12.
196 See Robinson 2003 *Potchefstroom Electronic Law Journal* 12-14.
197 1995 4 SA 631 (CC).
198 1995 3 SA 391 (CC) at par 104.

> such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question. In the process regard must be had to the provisions of section 33 and the underlying values of the Constitution, bearing in mind that… the role of the court is not to second-guess the wisdom of policy choices made by legislators.

A number of subsequent judgements echoed the aforesaid cautious approach.[199] In *S v Manamela* [200] the court stated that it is necessary to engage in a balancing exercise in order to arrive at a global judgment on proportionality, rather than just following a sequential checklist. As a general rule, the more serious the measures impact on the right, the more convincing or compelling the reason must be. Ultimately, the question is one of degree which must be considered in the context of the legislative and social setting taking into account the means which are realistically available in the country, not losing sight of the ultimate values to be safeguard.[201] These values are those that underlie an open and democratic society based on human dignity, equality and freedom and must be considered when interpreting the Bill.[202]

In light of the discussion so far, it can thus be stated that section 28 on the best interests of the child[203] does not automatically confer a right to individual self-determination on children. There are limitations in terms of competing interests to be considered. Robinson[204] discussing children's rights in the constitution explains that:

> when questions regarding the lifestyle of children, or religion are addressed, a balance must be struck between their interests, and the interests of their parents and the State. In such instances children must, like everyone else, derive their claims to personal autonomy and self-fulfilment from the right to privacy, and from the rights to freedom of religion, speech and association.

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199 See *S v Lawrence; S v Negal; S v Solberg* [1997] 10 BCLR 1348 (CC) paras 142 165 and 166; *De Reuck v Director of Public Prosecutions, Witwatersrand Local Division* 2004 1 SA 406 (CC) par 55.

200 2000 3 SA 1 (CC).

201 See also *Christian Education South Africa v Minister of Education* 2000 4 SA 757 (CC) par 29-35.

202 See *Coetzee v Government of the Republic of South Africa* 1995 4 SA 631 (CC).

203 See the next section par 4.5.3 for a detailed discussion on s 28 on the best interest of the child.

204 See Robinson 2003 *Potchefstroom Electronic Law Journal* 13-14.

The above viewpoints seem to indicates that the interests of children in maintaining their own autonomy could be seen in the context of the child-parent dependency relationship. Therefore, the extent to which a child can assert his/her right to self-determination will be limited by a parent's responsibilities of care and the support of parents towards the child, as well as the rights a parent can exercise toward a child in order to meet those responsibilities.[205] However, as the child advances in age, it becomes increasingly difficult to justify the restriction of these rights.[206] In other words, the responsibilities of parents and the state toward children are proportional to the age of the child. As a child progresses in age and develop the capacity to participate or make independent decision, the child personal autonomy must be recognised. As shown later in this chapter,[207] the provision of section 10 of the South African Children's Act*, 2005*, specifically provide for personal autonomy in terms of decision-making to the child that is of such an "age, maturity and stage of development." Further instances where the Children's Act recognise decisional autonomy of a child are discussed later in this chapter.[208]

4.5.3 S 28(2): Child's best interests of paramount importance in every matter concerning the child

The best interests of the child standard in the South African Constitution is a common-law rule that has been applied by the courts over the years, mostly in cases where children's rights were at stake.[209] It has even been termed the "golden thread that runs through the law relating to children in South Africa."[210] Aside from the fact that international law also requires State Parties to adhere to the best interests standard when children are involved,[211] the Constitution of the

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205 See Robinson 2003 *Potchefstroom Electronic Law Journal* 16-17.
206 See Robinson 2003 *Potchefstroom Electronic Law Journal* 16-17.
207 See par 4.6.1.4 below.
208 See par 4.6.5 below.
209 See Songca 2011 *Comparative and International Law Journal of Southern Africa* 347. 6
210 This is because all the provisions relating to minors must be read in light of the *Constitution of the Republic of South Africa* with specific emphasis to be placed on the principle that the best interests of the child are of paramount importance in any matter relating to the child. See also Clark 2000 *Stellenbosch Law Review* 3.
211 See Article 3(1) of the United Nations Convention on the Rights of the Child 1989, which

Republic of South Africa, 1996 raised this standard to a principle of paramountcy in section 28(2). Section 28(2) provides that:

> [a] child's best interests are of paramount importance in every matter concerning the child.

Despite the simplistic wordings of the provision of section 28(2) of the constitution above, South Africa's Constitutional Court in the case of *Minister of Welfare and Population Development v Fitzpatrick*[212] held that:

> Section 28 requires that a child's best interests have paramount importance in every matter concerning the child. The plain meaning of the words clearly indicates that the reach of section 28(2) cannot be limited to the rights enumerated in section 28(1) and section 28(2) must be interpreted to extend beyond those provisions. It creates a right that is independent of those specified in section 28(1).[213]

In other words, the court has taken an approach that expanded the scope of section 28(2) beyond rights listed in section 28(1) of the constitution.[214] The

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describes the best interests of the child as a basic consideration. See also Article 4(1) The *African Charter on the Rights and Welfare of the Child* 1990.

212 2000 3 SA 422 (CC) 428 C-D, [2000] 7 BCLR 713 (CC).

213 See Per Goldstone J in *Minister for Welfare and Population Development v Fitzpatrick* 2000 3 SA 422 (CC) 428 C-D, [2000] 7 BCLR 713 (CC) par 18.

214 S 28(1) provides that: "Every child has the right –
(a) to a name and nationality from birth;
(b) to family care or parental care, or to appropriate alternative care when removed from the family environment;
(c) to basic nutrition, shelter, basic health care services and social services;
(d) to be protected from maltreatment, neglect, abuse or degradation;
(e) to be protected from exploitative labour practices;
(f) not to be required or permitted to perform work or provoke services that –
(i) are inappropriate for a person of that child's age; or
(ii) place at risk the child's well-being, education, physical or mental health or spiritual, moral or social development;
(g) not to be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12 and 35, the child may be detained only for the shortest appropriate period of time, and has the right to be –
(i) kept separately from detained persons over the age of 18 years, and
(ii) treated in a manner, and kept in conditions, that take account of the child's age;
(h) to have a legal practitioner assigned to the child by the state, and at state expense, in civil proceedings affecting the child, if substantial injustice would otherwise result; and
(i) not to be used directly in armed conflict, and to be protected in times of armed conflict."

above approach has been followed by the courts in many instances regarding a child, for example, in maintenance matters such as determining the effective mechanisms for the enforcement of maintenance obligations,[215] extending the duty of support to a paternal grandparents of a child born out of wedlock's,[216] and making order for the payment of child's future maintenance from pension funds.[217] Other instances include in decisions on medical treatment notwithstanding the minor's parents unwillingness to consent to such treatment[218] and in decisions about a child's involvement in religious activities in a particular church.[219] In all the instances above mentioned, section 28(2) of the Constitution has direct application in their specific context and in every situation concerning the interest of the child.

It is against this backdrop that the best interests of the child should be conceptualised. The question however, has to be addressed as to the standard of the best interests to be employed in relation to children.[220] Keep in mind that what exactly is in a child's best interests is an extremely important factor that has to be determined in accordance with the circumstances of each case.[221]

Nevertheless, there are certain laid down guidelines by the South African judiciary, which must be considered, when deciding on what is in the best interests of the

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See also Davel 2007 *Commonwealth Education Partnerships* 222. Davel is of the view that the south African Court has been following this approach in variety of ways. For instance, the approach was used to justify an expansive interpretation of the High Court's review jurisdiction of a protection order in terms of the Domestic Violence Act, among others.

215 See *Bannatyne v Bannatyne* 2003 2 SA 363 (C).

216 See *Petersen v Maintenance Officer, Simon's Town Maintenance Court* 2004 2 SA 56 (C).

217 See *Soller v Maintenance Magistrate, Wynberg* 2006 2 SA 66 (C).

218 See *Hay v. B* 2003 3 SA 492 (W).

219 See *Kotzé v Kotzé* 2003 3 SA 628 (T) 630-631.

220 The standard in determining any matter regarding guardianship, custody or access has been the best interests of the child. See *Fletcher v Fletcher* (1948 1 SA 130 (A) 143) the court reiterated the view that the best interests of the child must be the main consideration in matters concerning the child; in *Sonderup v Tondelli* (2001 1 SA 1171 (CC)) section 28(2) was understood as giving a guarantee that a child's best interests would be paramount in every matter concerning the child. See also Bekink and Bekink 2004 *De Jure* 22–23.

221 See Heaton 2009 Journal for Juridical Science 1-18; Moyo 2012 African Human Rights Law *Journal* 143-177.

child. For example, in *Van Deijl v Van Deijl* [222] the court held that when deciding on the best interests of the child the following facts have to be considered:

> The interests of the minor mean the welfare of the minor and the term welfare must be taken in its widest sense to include economic, social, moral and religious considerations. Emotional needs and the ties of affection must also be taken into account and in the case of older children their wishes in the matter cannot be ignored.[223]

Additional valuable guidelines such as, for instance, a feeling of safety, stability and security are important factors also to be considered.[224] The most comprehensive list of factors specifically designed for resolving custodial dispute was proposed in *McCall v McCall* [225] by King J. Among the factors stated by King J are:[226]

> [t]he love, affection and other emotional ties, which exist between parent and child and the parent's compatibility with the child; the ability of the parent to

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222 *Van Deijl v Van Deijl* 1966 4 SA 260 (R) in a matter concerning custody and guardianship. Cited in Davel 2007 Commonwealth Education Partnerships 223.

223 At 261H.

224 See the case of *French v French* 1971 4 SA 298 (W) 298H.

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

226 For the sake of clarity, these guiding factors are chronologically listed as follows:
(a) the love, affection and other emotional ties which exist between parent and child and the parent's compatibility with the child;
(b) the capabilities, character and temperament of the parent and the impact thereof on the child's needs and desires;
(c) the ability of the parent to communicate with the child and the parent's insight into, understanding of and sensitivity to the child's feelings;
(d) the capacity and disposition of the parent to give the child the guidance which he requires;
(e) the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and the other material needs – generally speaking, the provision of economic security;
(f) the ability of the parent to provide for the educational well-being and security of the child, both religious and secular;
(g) the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development;
(h) the mental and physical health and moral fitness of the parent;
(i) the stability or otherwise of the child's existing environment, having regard to the desirability of maintaining the *status quo*;
(j) the desirability or otherwise of keeping siblings together;
(k) the child's preference, if the Court is satisfied that in particular circumstances the child's preference should be taken into consideration;
(l) the desirability or otherwise of applying the doctrine of same-sex matching, particularly here, whether the minor children should be placed in the custody of their father; and
(m) any other factor which is relevant to the particular case with which the court is concerned.

> communicate with the child and the parent's insight into the understanding of and sensitivity to the child's feelings; the ability of the parent to provide for the basic physical needs of the child, the so-called 'creature comforts', such as food, clothing, housing and other material needs – generally speaking, the provision of economic security; the ability of the parent to provide for the educational well-being and security of the child, both religious and secular; the ability of the parent to provide for the child's emotional, psychological, cultural and environmental development; the desirability or otherwise of keeping siblings together; the child's preference, if the Court is satisfied that in particular circumstances the child's preference should be taken into consideration; and any other factor relevant to the particular case in which the court is concerned.[227]

Apart from the above judicial guidelines, there are also statutory guidelines concerning the best interests of the child.[228] The Children's Act, for example is one of the statutory enactments which makes it very clear that the best interests are standards to be followed and lists at least fourteen factors to consider when evaluating the best interests of the child when applying the provisions of the Act.[229] These guiding factors stipulated by the Children's Act are discussed in detail later in this chapter.[230]

From the foregoing discussions, it can be stated that section 28(2) of the South African Constitution is a specific right applicable to children, which guarantees the paramountcy of his/her best interests. Just like all other specific rights of children, the best interests right is a fundamental right endorsed in the Bill of Rights in Chapter 2, and as such are subject to applications and limitations the same way as other rights endorsed in the Bill of rights.[231] As earlier pointed out,[232] this rights in relation to children, like all the other rights most particularly the autonomy and self-determination rights will in the process of determining the interest of the child

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227 *McCall* at 205 A-F.

228 See Natural Fathers of Children Born out of Wedlock Act. 86 of 1997 wherein factors were stipulated to establish the best interests of the child whenever a court considers the father's application for access, custody or guardianship of his extra marital child. See s 2(5) of *Natural Fathers of Children Born out of Wedlock* Act. 86 of 1997.

229 See s 7 of the Children's Act on the best interests' standard of the child. See also later discussion in par 4.6.1.1.

230 See par 4.6.1.1 below.

231 See s 36 of the South African Constitution. Therefore, the best interests' rights, like all other fundamental rights have limitations, the Constitution itself provides for the limitation of fundamental rights in section 36

232 See earlier discussion in par 4.5.4 above.

be balanced with the competing interests and other rights of all the various role players or stakeholders in matters concerning the child.[233]

In light of the foregoing, it can be stated that South Africa gives full recognition of children's rights at the very highest level – in the Constitution. This gives credence to fact that children are seen and regarded as full participants in society and as legitimate rights-bearers. However, despite according children a range of special rights, the constitution noticeably, does not specifically refer to the autonomous rights of children to participate in decision-making within the family. Again, as applicable under the Nigerian example earlier discussed,[234] the South African state's obligations in filling the gap in terms of children's right to participate in decision-making within the specific context of the family, resides in her ratification of international children's rights treaties in this regard. Accordingly, South Africa ratified the UNCRC in the year 1995 and domesticated same by enacting the Children's Act 2005.[235] As shown in the subsequent discussion, South Africa adopted an integrated implementation approach of Article 12(1) of the UNCRC participation rights and customary values in her domestic Children's Act.[236]

4.6 Children's Act

4.6.1 Overview of the Children's Act

The Children's Act came into full operation in April 2010. The preamble to the Children's Act reinforces the rights provided for in section 28 of the South African Constitution.[237] 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.[238] The Children's Act embraces a notion of childhood that is based on the idea that for a child to fully assume his/her responsibility in the community,

233 See the discussion on the constitution and the child at par 4.5.2 above.
234 See discussion in par 4.3.1.1 above.
235 See South African Children's Act 38 of 2005.
236 See paras 4.6 to 4.6.1.5 that discussed fully the South African Children's Act 2005.
237 S 28 (2) of the Constitution indicates that child's best interest is of paramount importance in every matter concerning the child. See also earlier discussion in par 4.5.3 above.
238 See s 9 of the Children's Act.

and for a full and harmonious development of his/her personality, a child should ideally grow up in a family environment, and in an atmosphere of happiness, love and understanding.[239] To a certain extent, this recognises the African cultural values of connectedness, interdependence, and loyalty within the family earlier discussed in chapter 2.[240] This recognition are seen in the Children's Act inclusion of specific cultural value discussed later in this Chapter.[241] The Children's Act also recognises that some children are capable of "acting autonomously and in their own best interests".[242] In this regard, the Children's Act recognise that children are human beings and individuals with the right to have a say in matters that affect or concern them.[243] Moreover, the Children's Act recognise that because of their age and special circumstance, children are most vulnerable to the debilitating effects of poverty and diseases thus, the recognition in the Act of child-headed households as family units.[244]

In light of the foregoing, the next section will start with a discussion on the best interests' principle, followed by discussion on the inclusion of Article 12(1) of the UNCRC – highlighting its replica provision in section 10 of the Children's Act. Lastly, the African cultural values that reflects in the Children's Act are discussed.

4.6.1.1 The best interests' principle under section 7 of the Children's Act

Aside from the judicial guidelines in terms of Children's best interests' principle stipulated by section 28(2) of the Constitution,[245] the Children's Act explicitly provide for a set of guidelines on the standard of the best interests of the child. These guidelines on the best interests of the child are stipulated in section 7(1) of the Children's Act.[246]

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239 See the last part of the preamble to the Children's Act.
240 See paras 2.5.3 to 2.5.5. of Chapter 2.
241 See par 4.6.3.1 below on the inclusion of parental rights and responsibilities in the Children's Act.
242 See Chapter 2, s 6 (3) of the Children's Act.
243 See Songca 2011 *Comparative and International Law Journal of Southern Africa* 340-359.
244 See Songca 2011 *Comparative and International Law Journal of Southern Africa* 344.
245 See earlier discussion on this in par 4.5.3 above.
246 For clarity purpose, s 7 (1) of the Children's Act provides as follows:

Although, many of the guiding factors as listed by King J in *McCall V. McCall*[247] find expression in section 7 of the Children's Act, however, in terms of the totality of the listed factors, section 7 not the least, provides "remarkably a realistic legislative scheme revealing the holistic nature of the concept of the best interests of the child."[248] This is because the section recognise not only the parental role and influence in the overall development of the child, but also that children are part of a larger family and community.[249] 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

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'Whenever a provision of this Act requires the best interests of the child standard to be applied the following factors must be taken into consideration where relevant, namely:

(a) "the nature of the personal relationship between (i) the child and the parents, or any specific parent; and (ii) the child and any other care-giver or person relevant in those circumstances;
(b) the attitude of the parents, or any specific parent, towards (i) the child; and (ii) the exercise of parental responsibilities and rights in respect of the child;
(c) the capacity of the parents, or any specific parent, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs;
(d) the likely effect on the child of any change in the child's circumstances, including the likely effect on the child of any separation from (i) both or either of the parents; or (ii) any brother or sister or other child, or any other care-giver or person, with whom the child has been living;
(e) the practical difficulty and expense of a child having contact with the parents, or any specific parent, and whether that difficulty or expense will substantially affect the child's right to maintain personal relations and direct contact with the parents, or any specific parent, on a regular basis;
(f) the need for the child (i) to remain in the care of his or her parent, family and extended family; and (ii) to maintain a connection with his or her family, extended family, culture or tradition;
(g) the child's age, maturity and stage of development; gender; background; and any other relevant characteristics of the child;
(h) the child's physical and emotional security and his or her intellectual, emotional, social and cultural development; (i) any disability that a child may have;
(j) any chronic illness from which a child may suffer;
(k) the need for a child to be brought up within a stable family environment and, where this is not possible, in an environment resembling as closely as possible a caring family environment;
(l) the need to protect the child from any physical or psychological harm that may be caused by (i) subjecting the child to maltreatment, abuse, neglect, exploitation or degradation or exposing the child to violence or exploitation or other harmful behaviour; or (ii) exposing the child to maltreatment, abuse, degradation, ill treatment, violence or harmful behaviour towards another person;
(m) any family violence involving the child or a family member of the child; and
(n) which action or decision would avoid or minimise further legal or administrative proceedings in relation to the child."

247 1994 3 SA 201 (C) 205B-G.
248 See Moyo 2012 *African Human Rights Law Journal* 142-267.
249 See Article 7 (1) (a)(b)(c) and (f) of the Children's Act.

specific parent, be it a care-giver or any person are relevant in those circumstances.[250] It is interesting to note that the relevance of the behaviour of other persons to determine what is in the interests of the child in a custodial matter is fully acknowledged in the provision of section 7. Such behaviour acknowledged, includes the attitude and capacity of the parents, or of any other care-giver or person, to provide for the needs of the child, including emotional and intellectual needs.[251] More so, there are factors provided by section 7 of the Children's Act, that may compel parents and other decision makers in the public and private domain 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 exposing the child to violence or exploitation or other harmful behaviour.[252]

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 if that is not possible, in an environment that is as close to a caring family environment as possible.[253] Similarly, provided by section 7 is the need for the child not only to remain in the care of his/her parent, family and extended family, but also keep ties to his/her family, extended family, culture or tradition.[254] It goes without saying that the foregoing provisions reflect the wide range of family models, value systems and traditions obtainable in South African society.[255]

What is clear from the provision of section 7 of the Children's Act is that it underlines not only the importance of stability in the upbringing of the child, but also gives credence to the assumption that it is in the best interests of the child to remain in the care of one's parent, family and extended family.[256] What is also

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250 See s 7(1)(a) of the Children's Act.
251 See s 7(1) (b)(i) (ii) and (c) of the Children's Act.
252 See s 7(1)(l) of the Children's Act.
253 See s 7 (1)(k) of the Children's Act.
254 See s 7(1)(f) of the Children's Act.
255 See Moyo 2012 *African Human Rights Law Journal* 142-177.
256 The reference to a close connection with the family, extended family culture and tradition is a specific example of an African practice that has found expression in the Children's Act. This are more analysed under the children's Act and Africa customary law value in par 4.6.3 later in this Chapter.

clear is the that while children's best interests remain paramount, parents, the nuclear family and the extended family interest may be regarded as relevant in determining what defines the child's best interests. To this end, Moyo[257] believes that "children's right to have their best interests considered as 'paramount' may be sacrificed for the family's good in special circumstances." [258]

In terms of the standard of the best interests of the child, section 6 (2)(a) of the Children's Act demands that the standard of the best interests of the child be respected, protected, promoted and fulfilled in all proceedings, actions or decisions in a matter concerning a child.[259] It goes on to say, that section 7(1) of the Children's Act on the best interests of the child applies to all proceedings, actions or decisions in a matter concerning a child.[260]

The main point from the discussion so far, is that section 7 of the Children's Act explicitly acknowledges that parents wield a great deal of power in moulding and deciding what constitute the best interests of the child. It recognises the nature of the personal relationship, attitude, capacity between the child and the parents, or any specific parent. It also recognises the need for the child to remain and maintain a connection with his /her family, extended family, culture or tradition among others as relevant. For these obvious reasons, the Children's Act encapsulates a notion of childhood based on the idea that for a child to fully assume his/her responsibility in the community, and for a full and harmonious development of his/her personality, a child should ideally grow up in a family environment and in an atmosphere of happiness, love and understanding.[261] Furthermore, where it is likely to be established that there were neglect or abuse of parental responsibilities, public interventions meant to rescue the affected children must not be aimed at separating children from their families, but must

257 See Moyo 2012 *African Human Rights Law Journal* 142-177.
258 See Moyo 2012 *African Human Rights Law Journal* 170; Heaton 2009 *Journal for Juridical Science* 1-18.
259 See s 6 (2) (a) of the Children's Act.
260 See Heaton 2009 *Journal for Juridical Science* 8.
261 This conclusion resonates with the preamble of the Children Act. See the last part of the preamble to the Children's Act.

have the ultimate aim of re-uniting children to their families.[262] To this end, King[263] believes that the child's right to grow up in the context of a family and culture is based on the fundamental truth that this can be crucial to the "basic dignity, survival and development" of everyone in the society.[264] The interest of the child to ideally grow up in a family environment for a full and harmonious development of his/her personality, could therefore, be linked to the interest of the society.

4.6.1.2 Section 10 of the South Africa Children's Act: A replica of Article 12(1) of the UNCRC

From the discussion in the preceding section, it is obvious that Children's Act portrays parents and children as partners who should assume joint responsibility for the harmonious development of the child's personality. Accordingly, the child and his/her family are not seen as adversaries contesting for who controls the child's life, but as partners in the enterprise of promoting and making the best decisions for the child in any matter concerning the child. Towards this end, section 10 of the Children's Act states as follows:

> [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.

The inclusion of the above provision, largely incorporate Article 12(1) of the UNCRC into the Children's Act. As earlier indicated in this thesis,[265] Article 12(1) of the UNCRC view children as being an autonomous individual capable of making and participating in decision-making within the family. Therefore, the implication of the inclusion of section 10 in the Children's Act – a replica of Article 12(1) of the UNCRC is that all children that is of such an "age, maturity and stage of development" are entitled to influence decision-making in all matters affecting

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262 See Moyo 2012 *African Human Rights Law Journal* 170.
263 See 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" 257.
264 See 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" 259.
265 See earlier discussion in paras 3.4 to 3.4.4 of Chapter 3.

them.[266] The words "in all matters" include participating in decision-making within the family.[267]

In light of the foregoing, the approach of section 10 of the Children's Act on child participation rights symbolise the separate personhood of the child, and the need to take seriously the views expressed by the child. In other words, section 10 affirm and regard children as a complete human being and a bearer of autonomous rights, same way as Article 12(1) of the UNCRC expresses it. [268]

However, the questions should not only be on the similarities in terms of the provisions of Article 12(1) of the UNCRC and section 10 of the Children's Act. The questions also remain whether there are any enhanced differences in the content of both provisions? It is therefore, considered necessary to further discuss and juxtapose how child's participation rights are protected under section 10 of the Children's Act and Article 12(1) of the UNCRC.[269] The essence of such a discussion is to facilitate a better and further understanding thereof, and to show in what respect these rights are similar, and of course, if any, enjoy enhanced protection at the domestic level. To achieve the above, the following discussion break down the component's provisions of section 10 of the Children's Act with a view to unveiling its true intent and meaning.

4.6.1.3 The right to participate in an appropriate way

As indicated in this thesis,[270] Article 12(1) of the UNCRC obligates States Parties to ensure that children who can participate, has a right to convey their views without any form of coercion.[271] Further, that freedom of expression imposes a duty on the authorities to create and develop the conditions for the free exercise of this right, whether in terms of competence and acceptable places for the child to be

266 See Mushcroft Children's Rights: Reality or Rhetoric? 16.
267 See earlier discussion in par 3.4.3 of Chapter 3.
268 See Brems "Children's Rights and Universality" 19-22.
269 See earlier discussion in paras 3.4, 3.4.1, 3.4.2, 3.4.3, 3.4.4. of Chapter 3.
270 See earlier discussion in par 3.4.1 of Chapter 3.
271 See also Bessner "The Voice of the Child in Divorce, Custody and Access Proceedings" 7.

heard.[272] Section 10 of the Children's Act fulfils the above on the rights of the child to express his/her views freely by the choice of words couched in the provision – "that child has the right to participate in an appropriate way". Although the words "the right to express those views freely" were used under Article 12(1) of the UNCRC, the choice of "in an appropriate way" used under section 10 of the Children's Act can be said to enable the child to express his/her views freely and not otherwise.

However, the choice of words "in an appropriate way" under section 10 and not "to express his or her views freely" under Article 12(1) may be termed as not providing a specific link between the right to participate and freedom of expression as it does under the UNCRC.[273] Freedom of expression imposes a duty for the free exercise of this right, whether in terms of competence, and appropriate places for the child to be heard or participate.[274] Therefore, subjecting children's participation rights to "in an appropriate way" within the family may unfortunately be perceived as a serious shortcoming that potentially leaves room for adults to become mouthpieces of children. This is because as indicated earlier, children under cultural setting participate in decision-making in several ways, for instance through dances and cultural ceremonies, through elderly people or grandparents. Thus, "appropriate way" may be construed in a way that limits children participation within the family. For example, a parents may insist that he has the rights and responsibilities to subject his/her child to any of his/her cultural and traditional practices such as traditional circumcision or initiation ceremony to womanhood without the consent of the child.[275] More so, the cultural values of duty and responsibilities on the children to respect and obey parent and elders at

272 See earlier discussion in par 3.4.2 of Chapter 3. See also Lucker-Babel 1995 *International Journal of Children's Rights* 398.
273 See discussion in par 3.4.2 of Chapter 3.
274 Lucker-Babel *Int J of Children's Rights* 391, 398.
275 See paras 5.6.1, 5.6.2 and 5.6.3 for the discussion on theory and practices of FGM/C as cultural practices in Nigeria, South Africa and Australia respectively.

all time may limit the free expression of children in matters concerning them within the family.[276]

An express statement that the child should participate "freely" as done by the Article 12(1) of the UNCRC would ensure that parents are under the obligations to recognise that children are at liberty to elect to express or not to express the views they form without any form of coercion.[277]

4.6.1.4 Child that is of such an age, maturity and stage of development

The inclusion of the words "age, maturity and stage of development" at best formally imports into the Children's Act the concept of the evolving capacities of the child under Article 12(1) of the UNCRC.[278] Aside from the fact that it justifies autonomous decision-making by the child, in so far as the child is competent to make such a decision, it also justifies parental guidance or influence on the child's preferences which are not in his/her the best interests.[279] In other words, some level of parental intrusion may be allowed into the domain of child autonomy, especially if criteria such as age and lack of maturity indicate that implementing the child's view will be detrimental to the child's best interests. The reasoning for this is that parental guidance and protection intrinsic in the best interests of the child are related to the "child's capacities and age, given that the ability to reason develops with one's maturation."[280] As a result, parental guidance arises from the child's lack of reason as well as an inability to care for herself/himself.[281] However, the extent to which parents are permitted to exercise parental guidance over their children should correspond to the extent to which children, based on their level of maturity, requires such guidance.[282] Therefore, the child interests should be equated with his/her wishes, views and preferences. As the child grows older

276 Van Bueren *The International Law on the Rights of the Child* 76; Chirwa "The Merits and Demerits of the ACRWC" 157-177.
277 See Moyo 2015 *SAJHR* 175.
278 See earlier discussion in par 3.4.4 of Chapter 3.
279 See Moyo 2015 *SAJHR* 175.
280 Locke Some thoughts concerning education (1693) para 81; Locke Two treatises of government paras 55-57, 304-05 and paras 58, 61 & 63, 306-309; and Purdy In their best interest? The case against equal rights for children.
281 See Moyo 2015 *SAJHR* 165.
282 See Moyo 2015 *SAJHR* 165.

his/her capacities improve. In *Christian Lawyers Association v National Minister of Health,*[283] the court rely on the concept of informed consent in deciding whether a child is mature enough to exercise self-determination in the context of health-care decision-making. This means that where the child is above the required age and possesses sufficient maturity and the mental capacity to understand the benefits and risks of giving or denying consent to medical interventions, the child is endowed with the freedom to choose whether to take medical treatment without parental guidance or consent. This alone is an improvement on the provisions of the UNCRC because the UNCRC do not specify contexts in which children possess relative decisional autonomy rights. The extent to which the Children's Act recognises children's decisional autonomy rights in certain medical decisions are discuss in detail later in the paragraph 4.6.2 of this Chapter.

4.6.1.5 The circumstances in which children should be heard

As indicated in the thesis, Article 12(1) guarantees every child capable of forming his/her own views, the right to express those views freely in all matters affecting the child.[284] Section 10 of the Children's Act reflects the words "in all matter affecting the child" as "any matter concerning that child". The reference to "in all matters", as earlier alluded to reveals that Article 12 – the participatory rights applies to both the private and public spheres of society and confers duties on the state in matters that are traditionally left for private actors to decide – such as the family.[285] Thus, while Article 12(1) of the UNCRC creates "an active obligation" on the state to offer the child the opportunity to participate in decision making, the Children's Act directly applies and binds on families and other private actors to consider the children's views before making decisions concerning them[286]

283 2005 (1) SA 509 (T) para 19.
284 See earlier discussion in par 3.4.2 of Chapter 3.
285 See earlier discussion in par 3.4.3 of Chapter 3. See also Stern 2006 *The Child's Right to Participation – Reality or Rhetoric?* 161.
286 See par 3.4.3 of chapter 3. See also Hodgkin and Newell *Implementation Handbook for the Convention on the Rights of the Child* 156. See s 8(3) of the Children's Act and s 8(2) of the Constitution.

In support of the above assertion that participation rights apply to family proceedings in South Africa is found in the provision of section 31(1)(a) of the Children's Act, which provides thus:

> Before a person holding parental responsibilities and rights in respect of a child takes any decision contemplated in paragraph (b) involving the child, that person must give due consideration to any views and wishes expressed by the child, bearing in mind the child's age, maturity and stage of development.

Section 31(1)(b) of the Children's Act listed decisions such as, any decision affecting contact between the child and a co-holder of parental responsibility, relating to the assignment of guardianship or care of the child or "any decision which is likely to significantly change, or to have an adverse effect on the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's wellbeing."[287] Similarly, section 18(3)(c) of the Children's Act listed decisions which include the duty to administer the child's property, assist the child in administrative, contractual and other matters, give or refuse any consent in matters relating to the child's marriage, adoption, departure from South Africa or application for a passport, and gives or refuses consent to the alienation or encumbrance of the child's immovable property.[288] The above provisions do not only expand the scope of the circumstance in which children should participate in decision-making, but also emphasise the importance of child participation in family proceedings that are not necessarily administrative and judicial in nature.

In light of the discussion so far, the following section discusses the extent to which the Children's Act fully embraced decisional autonomy of the children certain instance. The essence of such a discussion is not only to indicate the extent of such decisional autonomy but also to describe further examples of one aspect of the integrated approach adopted in the implementation of Article 12(1) of the UNCRC children's participation rights in the Children's Act.

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287 See s 31(1)(b)(ii)–(iv) of the Children's Act.
288 See s 31(1)(b)(i) and 18(3) of the Children's Act read together.

4.6.2 The extent to which children's decisional autonomy right are protected in certain medical decisions under the Children's Act

As will be shown shortly, it seems that Children's Act – in line with the intent and spirit of the UNCRC[289] – creates a yawning gap for children's autonomy or self-determination in medical decision-making in many contexts.

To start with, decisional autonomy is guaranteed for every child under the Children's Act with the capacity for rational action.[290] For instance, 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 operation.[291] However, section 129(3)(c) provides for due assistance by the parent or guardian of the child to validly consent to a surgical operation.[292] It is interesting to note that section 129 (3)(c) only covers consent in relation to surgical operation 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 themselves."[293]

Another instance in the Children's Act which further depicts the foregoing, is the provisions of sections 130 (2)(a) and 133 (2)(a) of the Children's Act on HIV test. This provisions only enables consent to an HIV test of a child or to the disclosure of the child's HIV status by a child who has reached 12 years or is under 12 years, but has sufficient maturity to understand the benefits, risks and social implications of such a test or disclosure.[294] Therefore, to consent to an HIV test and the disclosure of the results of the test, the child must have reached the age of 12

289 As established in this thesis, Article 12(1) UNCRC views a child as being an autonomous individual capable of making and participating in decision-making in all matters that concerns the child. See paras 3.4 to 3.4.1 of Chapter 3. See also Article 5 of the UNCRC.
290 See the provisions under part 3, protective measure relating to the health of the children, of the children's Act.
291 See ss 129(2)(a) and (b); 129(3)(a) and (b) of the Children's Act.
292 See s 129(3)(c) of the Children's Act.
293 See Moyo 2015 *SAJHR* 181.
294 Ss 130(2)(a) and 133(2)(a) of the Children's Act.

years or endowed with sufficient maturity for the law to ascribe competence that enables the child to exercise self-determination in respect of these decisions.[295] There are however, other criteria such as informed consent that may be required when deciding issues of a child's sufficient maturity to enable the child exercise self-determination. [296] In the case of *Castell v De Greeff* [297] the court emphasise that for consent to be regarded as valid, it must be informed, voluntary and comprehensive. According to Van Bueren,[298] 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 a refusal could entail.

In light of the above, where a child is above the age of 12 and possesses sufficient maturity and mental capacity, the child as a matter of rights should be given the freedom to make choices of their own accord. Thus, children above the age of 12 enjoys a large measure for personal decisions than children below the age 12 as a result sufficient maturity and mental capacity.[299]

Further instances where decisional autonomy is guaranteed for every child under the Children's Act with the capacity for rational action is on virginity testing. For example, the provisions of section 12(5)(a)(b) of the Children's Act, on virginity testing of children older than 16 years is only possible if the child gives her consent to the testing in the prescribed manner and after proper counselling to the child.[300] Section 12(6) allows the results of the virginity test to be disclosed only with the child's consent.[301] Similarly, concerning circumcision for male children over the age of 16 years, section 12(9)(a) and (b) only makes the circumcision possible when the male child gives his consent to be circumcised in

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295 Ss 130(2)(a) and 133(2)(a) of the Children's Act.
296 See s 7 of the National Health Act 61 of 2003.
297 1994 (4) SA 408 (C) 425.
298 Van Bueren The International Law on the Rights of the Child 310.
299 See earlier discussion in par 4.6.1.4 above.
300 See s 12(5)(a) and (b) of the Children's Act.
301 See s 12(6) of the Children's Act.

the prescribed manner and after proper counselling to the child.[302] 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.[303] Finally, under section 134 of the Children's Act, a child who is 12 years or older may be provided with contraceptives on request by the child and without the consent of the child's parent or caregiver.[304]

The implications of the above provisions of the Children's Act are that it creates a presumption of competence for the children and therefore seems to take away the parental responsibility to guide the child that have acquired the requisite capacities and maturity to make particular decisions.[305] It goes on to say that the Children's Act ensures that children with developed capacities enjoy a large measure of decisional autonomy in the stipulated areas of the law. However, this is not to say that parents are devoid totally of their rights and responsibility on their children in this regard. In fact, one of the general principles of the Children's Act as stipulated in section 6(5) is that any action or decision taken in a matter concerning the child that has a significant impact on the child must be communicated to both the child and the person who has parental responsibilities and rights in respect of the child. Hence, regardless of the protection afforded the child in terms of decisional autonomy, one can still argue that it is the responsibility of the parents to guide their child in such matter as medical treatment. Again, this protection is accorded to a child only to the extent of his/her age, maturity and stage of development. The obligation to inform children and persons with parental responsibilities and rights in section 6(5) arises only "where appropriate".[306]

From the discussion so far, it's obvious that the Children's Act adopted an approach that acknowledge the evolving capacities of children, as well as, allows children with the required level of maturity to make independent decisions. This

302 See s 12(9)(a) and (b) of the Children's Act.
303 See s 12(10) of the Children's Act.
304 See s 134(1) and (2) of the Children's Act.
305 See Moyo 2015 *SAJHR* 182.
306 See section 6(5) of the Children's Act.

approach is in accordance with "individualised child-centred approach to the application of the best interests of the child" as envisage by the UNCRC.[307] This approach did not only recognise that it is in a child's best interests to be safeguarded from his/her own immaturity, but also that the best interests of the child criterion requires that children who have attain the requisite level of maturity should be permitted to make their own decisions. If this approach is taken to its logical conclusion, it would mean that a child who is capable of making independent decisions be allowed to make decisions that appear to be contrary to his/her best interests, such as declining medical treatment, just as any adult is entitled to make such decisions.

In light of the foregoing discussion on the extent to which the Children's Act embraced the autonomous status of the child to participate in decision-making. It became necessary to describe the second aspect of the integrated approach adopted in the implementation of the Article 12(1) of the UNCRC in the South African Children's Act which is the inclusion of aspects of African cultural value.

4.6.3 Cultural value and the Children's Act

The Constitution enshrines the right of persons to enjoy and maintain their culture and the same can be said of participation in cultural practices.[308] According to Boezaart,[309] an individual's and a group's right to participate in cultural practices is a way of expressing a common sense of identity, values and tradition. It appears the Children's Act takes a cue from the foregoing, because the Children's Act was also drafted by specifically including aspects of cultural values, particularly in relation to parental rights, duties and responsibility towards the best interests of the child in a culturally responsive way within the family. These aspects of cultural values included in the Children's Act are discussed below.

4.6.3.1 Parental responsibilities and rights

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307 See Heaton 2009 *JJS* 1

308 See Ss 15(3), 30 and 31 of the Constitution. See also s 181(1)(c) of the Constitution on the establishment of the Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

309 See Boezaart *International Journal of Private Law* 395-413.

As indicated in the thesis,[310] African indigenous society is based on a communal living in which child-rearing and upbringing is not solely the responsibilities of his/ her immediate family. It is a collective responsibility of the extended family and by extension the entire group or community where such child lives.[311] In other words, shared parental rights and responsibilities are typical situation common among members of a community.

In terms of the Children's Act, such parental rights and responsibility seem to have been extended to include members of the extended family and other family members.[312] For example, Chapter 1 of the Children's Act, indicate a family member to include any person with whom the child has developed a significant relationship, based on an emotional or psychological attachment, which resembles a family relationship.[313] Moyo,[314] points out the rationale for this provision stating that it reflects the "variety of family models, value systems and traditions that presently obtain in South African society." As a result, a child must be raised in a stable family setting or, if that is not possible, in a setting as closely as possible a caring family environment.[315] Apart from emphasising the value of stability in the upbringing of the child, it also underscore the premise that the child best interests are better served by remaining in the care of one parent, family and extended family. The main point is that the Children's Act emphasis on the need for children to grow up in the context of their families and culture.

Of course, it is a typical African practice that children at times regard their neighbours or other adults as family members, especially where an emotional

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310 See earlier discussion in paras 2.5.2 to 2.5.5 of Chapter 2.

311 See earlier discussion in paras 2.5.5 of Chapter 2. In other words, Communalism or collective solidarity is an attribute of African indigenous society, and such communal structures within which children's interests and welfare are protected, are borne from the principle of collective solidarity.

312 See chapter 1, No 2 (a) and (e) of the Children's Act, where among objects of the Children's Act is stated to be: (a) to promote the preservation and strengthening of families; and (e) to strengthen and develop community structures which can assist in providing care and protection for children. This provision of Chapter 1 recognizes the value of connectedness, interdependence, and loyalty within the family, which is a typical African traditional practice.

313 See definition (e) of family member in Chapter 1 of the Children's Act.

314 See Moyo 2015 *SAJHR* 182.

315 See s 7(1)(k) Children's Act.

bond or trust is established over time.[316] Therefore, it can be stated that the survival and development of children under the Children's Act are not only on parental rights and responsibilities situated within the individual family, but also within the context of extended family, the group or communal collective solidarity. This further affirm the earlier argument made in Chapter 2 of the thesis[317] that within the context of South African multi-cultural society, communalism or collective solidarity in relation to child's participation within the family exists, and that culture and tradition play an important role in child-rearing and their participation in decision-making within the family.

Furthermore, other important African cultural value integrated into the Children's Act are the responsibilities expected of the children.[318] As earlier indicated in the thesis,[319] African societies imbibe and inculcate the cultural values of respect, duties, responsibility and reciprocity in relation to Children's rights within the family. Section 16 of the Children's Act articulates specifically what reflects and embellishes these African cultural values by recognising the responsibilities of children to their families, community, and state.[320] This responsibilities includes maintaining unity and cohesion within the family and assisting the family where needed for example "to herd cattle and assist with ploughing, in line with a general concept of communities bearing responsibilities."[321]

What emerges as particularly striking from the Children's Act recognition of parental rights and responsibility is that, while children's best interests remain important,[322] the interests of parents, the nuclear family and the extended family plays a role in determining what constitute the child's best interests. To that end, under exceptional circumstance, children's right to have their best interests

316 See Songca 2011 *Comparative and International Law Journal of Southern Africa* 352. These however, as earlier contended, and as it will be argued later depends on the individual circumstance of the child.
317 See earlier discussion in par 2.5.5 of Chapter 2.
318 See s 16 of the Children's Act on children's responsibilities.
319 See earlier discussion in paras 2.5.2, 2.5.3, 2.5.4, 2.5.5 of Chapter 2.
320 See s 16 of the Children's Act.
321 Boezaart *International Journal of Private Law* 397.
322 Songca 2011 *Comparative and International Law Journal of Southern Africa* 352.

considered may be surrendered for the sake of the family. The court in *MS v M*[323] held that the principle of best interests of the child is not a "overbearing and unrealistic trump of other rights". Consequently, they must consider how they interact with other rights, which may necessitate limiting their scope.[324]

Speaking in terms of the best interests of the child under cultural value, one of the features of cultural values is that groups, rather than individuals constitute a legal entity.[325] As a result, and as earlier indicated,[326] children's welfare is inseparable from that of their families and the group. Put differently, family under African cultural value are majorly arranged along patrilineal lines, where adult males; usually the paternal family, such as the head of the family are the most influential persons in the decision-making process relating to the child.[327] Relationships are built along the extended family model, and family units are aggregated together along kinship lines.[328] Under these arrangement, the child is considered not as an individual but as a family member whose individual interests and those of the family are inextricably linked.[329] As a result, under communal or collective arrangements, it is often stressed that it is in the child's interests to support and to maintain family bonds.[330]

The above illustrations on family or communal interest arrangements has important consequence for the child and the welfare or interests of the child. One such consequence, as noted above, is that parental rights and authority are exercised by a large number of people, and each one is entitled to make or

323 *MS v M* 2008 3 SA 232 CC.
324 *MS v M* 2008 3 SA 232 CC para 25,26.
325 See discussion in the preceding section 4.6.3.1 on parental rights and responsibilities. See also Bekker and Rautenbach "Nature and sphere of application of African customary law in South Africa" 26; Maluleke 2012 (15) *PER* 428.
326 See earlier discussion par 2.5.5 of Chapter 2.
327 Ekundayo 2014 *The International Journal of Humanities & Social Studies* 184.
328 This system allows a large number of people to be incorporated into the family circle. Its makes parenthood, largely social and all decisions concerning children are most often taken after consulting members of the group, not just the child's biological parents.
329 Kaime "The African Charter on the Rights and Welfare of the Child: a socio-legal perspective" 116.
330 See Armstrong 1995 Innocenti Occasional Papers Child Rights Series 5; Kaime "The African Charter on the Rights and Welfare of the Child: A socio-legal perspective" 114.

contribute to decisions relating to the child's best interests.[331] Although, this arrangement aims at serving the child's best interests, since it ensures a broad base of support and care that goes beyond a child's immediate family, it can also work to the disadvantage of the child,[332] because elements that may undermine the rights of children or induce the exploitation or abuse of children are often visible in such arrangements.[333] As indicated later in Chapter 5,[334] the practice of *ukuthwala,* traditional male circumcision and FGM/C is an example of such specific harmful practice that may be invoked under this arrangement. It should, however, be kept in mind, that although social and economic conditions prevalent in today's society have to some extent weakened the notion of the communal or extended family, yet, it is still relevant to the welfare of many peoples of Africa particularly in South Africa.[335] Therefore, communitarianism and parental rights still pose an enduring challenge to the individualistic conception of the principle of child best interests.

From the discussion so far, it has been established that the South African Children's Act include African cultural values and practices. On the other hand, the Children's Act also recognise that some children are capable of acting autonomously and in their own best interests. While the former is particularly so, in relation to the family and communal interest arrangement. The later reflects Article 12(1) of the UNCRC system of a child's individual interest described earlier in the thesis.[336] These integration approach of both autonomous individual child as well as African cultural values into the Children's Act, no doubt portends a progressive application and interpretation of the law on Children's rights to participation in decision-making within the family.[337] Subsequent discussion focuses on describing the extent of the application and interpretations of these

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331 Kaime "The African Charter on the Rights and Welfare of the Child: A socio-legal perspective" 116.
332 See Himonga "African customary law and children's rights: intersections and domains in a new era" 79.
333 See Himonga "African customary law and children's rights: intersections and domains in a new era" 79-80.
334 See paras 5.4.2, 5.5.1.1 and 5.6.2 of Chapter 5.
335 See Songca 2011 *Comparative and International Law Journal of Southern Africa* 354.
336 See paras 3.4 to 3.4.4 Chapter 3. See also paras 4.6.1.2 to 4.6.1.5 and 4.6.1 above.
337 See par 4.6.1.1 above.

integration approach in the South African Children's Act from the angle of best interests of the child.

4.6.3.2 Extent of the application and interpretations of the integration approach in the Children's Act in relation to the best interests of the child

The integration of both Article 12(1) of the UNCRC, as well as African cultural values into the Children's Act provides for a unique interpretation of Children's rights to participation in decision-making within the family in South Africa.

As established in this chapter,[338] aside from the best interests of the child provisions, 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.[339] In fact, the rights and responsibilities of the parent over their child under Section 18(1) of the Children's Act, focuses on the right of the child to parental care and not on parental powers as would be assumed under customary model.[340]

Accordingly, under Section 18(1) of the Children's Act, parental responsibilities and rights that a person may have in respect of a child include, but are not limited to the right and responsibility 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.[341] The implication of the foregoing is that there is a shifts in emphasis in terms of the parent-child relationships in the Children's Act- that is placing the responsibility on the parent to care for the child instead of parental authority or control over a child, which is to promote the best interests of the child.[342]

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338 See par 4.6.1.1 above.

339 See par 4.6.1.5. See also s 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.

340 See par 4.6.3.1.

341 Ss 18(1)(a), 18 (1)(b), 18()1(c), 18 (1)(c) of the Children's Act.

342 See par 4.6.1.1 above.

Furthermore, as also earlier indicated,[343] 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 in South Africa.[344] More so, it is shown that the importance of each guiding factor to be considered depends on the circumstances of each individual interests of the child as well as the social realities and interpersonal relations of the child.[345] It goes, therefore to say that Section 7 provisions of the Children's Act on best interests of the child and the constitutional value of tolerance, respect for diversity and pluralism in South Africa, may allow for an approach that takes cultural, traditional and religious circumstance of an individual child into account when considering the best interest for the child in all matters affecting the child - in this instance the child's rights to participate in decision making-within the family. [346]

The inevitable consequence of the above illustrations is that the integrated approach of implementation of Article 12(1) of the UNCRC portends an implication for flexible application of children's right to participation in South Africa. The reason, worthy of re-emphasise is that, with the provision of section 7 of the Children's Act on the best interests of the child, children can exercise their participation rights in decision-making within the family in an autonomous manner. So much so, that with the constitutional value of tolerance, respect for diversity and pluralism in South Africa, children may also exercise their

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343 See par 4.6.1.1 above. See also s 9 of the Children's Act.

344 See par 4.6.1.1 above. See also *McCall V. McCall* 1994 3 SA 201 (C) 205B-G.

345 See 4.6.1.1. See s 7 of the children's Act. See also Moyo 2012 *African Human Rights Law Journa*l 177.

346 See Heaton. 2009 *Journal for Juridical Science* 1-18. Heaton is of the that there is need to move away from the "Judaeo- Christian and Eurocentric" interpretation of the "best interest of the child" to an approach that takes cultural and religious circumstance, interest and need of an individual child into account. He stressed the need for an individualised and contextualised evaluation of the position of each child from the point of view of how each factor affects the child. He cautioned for a balanced approach as he did not suggest that the child's cultural and religious background should bear more weight than any of the other factors that must be taken into account. But submitted that, in view of constitutional values of tolerance of and respect for diversity and pluralism, the child's best interests must be determined in a manner that takes cognisance of and is sensitive to culture and religion. He is of the view that, like all other factors, culture and religion must be viewed in a child-centred manner and the focus should be the role that culture, and religion play in the child's life.

participation rights in decision-making within the family in a culturally responsive manner, so far it is in the best interests of the child.

In the final analysis, the thesis adopts the position that in the event of the tension between, the cultural values or interests of the group and, on the other, the individual interests of the child, individual interests should be recognised in all facets of children's life, including decision making within the family. The reason being that an undiluted emphasis on cultural values or group interests may perpetuate the subordinate status of children and their exclusion from the domain of decision making – a problem which the thesis seeks to challenge in terms of the Nigerian implementation approach.

Against the foregoing discussions on the implementation approaches of Article 12(1) provisions by Nigeria and South Africa in their domestic Children's laws respectively, the coast is clear to discuss the Australian Implementation approach of Article 12(1) of the UNCRC. Therefore, following section will discuss the implementation approach in the Australian Children's Act. However, before undertaking the discussion on the Australia's implementation of Article 12(1) of the UNCRC in the Australian Children's law and the implication of such implementation approach, it is important at this point, to also discuss the approach adopted by the Australian Constitution in relation to children's right.

4.7 Australia

4.7.1 The Constitution and the children

Like Nigeria and South Africa, Australia operates a constitutional democracy consisting of three arms of government (legislative, executive and judicial). Further, like the 1999 Constitution of the Federal Republic of Nigeria, but unlike the Constitution of the Republic of South Africa, 1996, which provides for the specific rights of children contained in the Bill of Rights,[347] the Australian Commonwealth Constitution (hereinafter Commonwealth Constitution) does not

347 See the provision of section 28 of the Constitution of the Republic of South Africa, 1996.

contain a Bill of Rights.[348] However, the Commonwealth Constitution includes other rights provisions such as child endowment, benefits to students and family allowances,[349] trial by jury, religious freedom and rights of residents against any disability or discrimination in states.[350]

Apart from the above, it is notable that under the preamble to the Commonwealth Constitution, particularly number 5 on the operation of the constitution and laws, the Commonwealth Constitution is applicable and "binding on the courts, judges, people of every state and of every part of the Commonwealth, notwithstanding anything in the laws of any state."[351] Therefore, children as citizens and part of everyone in the commonwealth of Australia, have an immediately enforceable constitutionally guaranteed rights as highlighted above.

Furthermore, as provided for by the Commonwealth Constitution, neither the Commonwealth nor the states have exclusive legislative competence in family law.[352] In other words, specific children's rights protection was addressed in the law enacted by the commonwealth parliament and the states respectively.[353] In fact, Sections 51 (xxi) and (xxii) of the Constitution restricts the commonwealth's involvement in family law by expressly vesting the commonwealth parliament with the power to make laws with respect to: (i) marriage; and (ii) divorce and matrimonial causes and "in relation thereto parental rights and the custody and guardianship of children".[354] However, this is not to say that where there is inconsistency between the commonwealth law and state law, the commonwealth

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348 See the Commonwealth Constitution of Australia Act, 1900. However, the Commonwealth Constitution of Australia have been re-enacted at different time stage. Yet there is no provision on Bill of rights.

349 See ss 51(xxxi) and 51 (xxiiiA) of the Commonwealth Constitution.

350 See ss 80, 116 and 117 of the Commonwealth Constitution.

351 See the preamble to Commonwealth Constitution, particularly No 5 on the operation of the constitution and laws.

352 See Australian Law Reform Commission and New South Wales Law Reform Commission, *Family Violence: A National Legal Response,* ALRC Report No 114, NSWLRC Report No 128 (2010) 52 *('Family Violence: A National Legal Response').* Wherein the Australian Law Reform Commission are of the view that the family law system is a fragmented system, particularly in terms of legislative issues relating to children.

353 Chapter V of the Commonwealth Constitution of Australia Act recognised this by making provisions in ss. 106 to 108 and s 118 on saving the constitution, the power of states parliament and states law respectively.

354 See s 51 (xxi) and (xxii) of the Commonwealth Constitution

law would not prevail. Section 109 Commonwealth Constitution categorically provides that, to the extent of any inconsistency, a Commonwealth law shall prevail over a state law.[355]

As earlier noted,[356] the common-law tradition, as well as the federal characteristic of Australia accounts for the fragmentary nature of the laws relating to children in Australia. Therefore, like the Nigerian and South African constitutions, the Commonwealth constitution also did not specifically enshrine provisions on children's right to participate in decision-making. Consequently, the Commonwealth's obligations in terms of children's right to participate in decision-making, resides in government's ratification of the provisions of Article 12 of UNCRC. Accordingly, it is the federal family law embodied in the Family Law Act 1975 that provides, among others, for the rights and needs of children in Australia.

At this point, considering the foregoing discussions on the extent to which the constitution accords rights to children in Nigeria, South Africa and Australia respectively, the time is now ripe to shift focus to Australia's children's law with a view to examining the second level of approach adopted to investigate the issue of Article 12 (1) implementation in this Chapter.

4.8 The Australian children's law

4.8.1 Scope, status, cultural values and the Article 12(1) inclusion in the children's law and its implications

As already noted above, the federal characteristic of Australia accounts for the fragmentary nature of the laws relating to children in Australia.[357] Nonetheless,

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355 The commonwealth Constitution s 109. Application of s. 109 in the family law context was dealt within the High Court decision of *AIFS v AMS* (1999) 24 Fam LR 756, where an aspect of the case was whether s. 35 of the Family Court Act 1975 (WA) was inconsistent with s. 63F of the Family Law Act 1975 and, if so, rendered invalid by s. 109 of the Constitution to the extent of the inconsistency.

356 See par 4.2.1.3 above on brief fact on Australia and its legal system.

357 See par 4.7.1 above. The Australian Law Reform Commission and New South Wales Law Reform Commission 2010 expresses the view that the family law system is a fragmented system, particularly in terms of legislative issues relating to children.

the main legislative framework for children's rights in Australia are the Child Protection Laws and Family Law.[358] Of course, while the Child Protection Law is legislated by the states and territories, and is an area of public law, the family law is an area of federal law and falls within the purview of private law.[359] The federal family law embodied by the Family Law Act, 1975 (hereinafter Family law Act) provides among others, for the rights and needs of indigenous children.[360] The Family law Act also safeguards indigenous children distinctive characteristics such as the right to enjoy their own culture and the need to have their identity preserved and supported.[361]

The fundamental principle of the Australian Family Law Act is that the child's best interests must enjoy paramount consideration.[362] In fact, the purpose of Part VII of the Family Law Act is to guarantee that children have adequate and proper parenting in order to help reach their full potential, and that parents fulfil their duties and responsibilities for their children's care, welfare and development.[363] To

358 The Child protection laws are legislated by the states and territories. While the Family law is legislated by the Commonwealth parliament. Chapter V of the Commonwealth Constitution of Australia Act recognised this by making provisions in ss. 106 to 108 and s 118 on saving the constitution, for the power of states parliament and states law respectively.

359 Generally, child protection legislation allows the state to intervene in family life to ensure the safety of children. Child welfare authorities have authority to examine complaints of neglect, abuse, and other risk factors. If the claim is 'substantiated' a child's removal from their family may be necessary. For a short, lengthy or indeterminate duration, the child may be placed in kinship care or foster care (also known as out-of-home-care). It is notable that each state and territory have their child protection legislation. The various Child protection law are, Children and Young People Act 2008 (ACT); Children and Young Persons (Care and Protection) Act 1998 (NSW); Care and Protection of Children Act 2007 (NT); Child Protection Act 1999 (Qld); Children's Protection Act 1993 (SA); Children, Young Persons and Their Families Act 1997 (Tas); Children, Youth and Families Act 2005 (Vic); Children and Community Services Act 2004 (WA). See also Titterton 2017 *U.N.S.W. Law Journal* 146.

360 As indicated severally, the term Indigenous is used to mean Aboriginal and Torres Strait Islander peoples, this is in respect of the diversity of Aboriginal and Torres Strait Islander identities, language groups, cultures, nations and histories in Australia. The term also reflects its international usage in respect it recognition in the *Declaration on the Rights of Indigenous Peoples,* GA Res 61/295, UN GAOR, 61" sess, 107thplen mtg, Supp No 49, UN Doc A/RES/61/295.

361 See s 60B (3) Family Law Act 1975 (Cth). In this nexus, Family law courts consider a child's peculiar situation and circumstances and odered the placement of the child with culturally appropriate carers having regard to the best interests of the child. See, e.g., *Re CP* (1997) 21 Fam LR 486 *('Re CP'); Davis v Davis* (2007) 38 Fam LR 671.

362 See s 65E, Family Law Act 1975 (Cth).

363 Section 60B(l), Family Law Act 1975 (Cth). The principles underlying the objects are that, except when it is or would be contrary to a child's best interests:

further engender the best interests of the child, section 60B(3) of the Family law Act expanded the underlying principles of Part VII to include aboriginal and torres strait islander children rights to culture in the family law process of determining what is in that child's best interests.[364]

Further, and more importantly, section 68F (3) of the Family Law Act, obliged the court in determining the best interests, to show regard for several factors that derive from a statutory checklist. These includes the consideration of the wishes of the child in the light of any factor that the court deems relevant, such as the child's age and level of understanding.[365]

In view of the principles and provisions of the Family Law Act, what is clear is that the paramountcy of the welfare and best interests of the child under the Family Law Act is consistent with the intent of the UNCRC.[366] Therefore, the Family Law Act, particularly section 68F(3) imbibed Articles 12 provisions of the UNCRC which provides for the right of child to participate in all matters affecting the child[367] - including participation in decision-making within the context of the family as contemplated under the UNCRC as earlier discussed in this thesis.[368]

(a) "Children have the right to know and be cared for by both their parents, regardless of whether the parents are married, separated, have never been married or have never lived together; and
(b) Children have a right of contact, on a regular basis, with both their parents and with other people significant to their care, welfare and development; and
(c) Parents share duties and responsibilities concerning the care, welfare and development of their children;
(d) Parents should agree about the future parenting of their children."

364 The Family Law Act in 2006 was significantly amended taking into consideration Indigenous children. This section falls within the new provisions introduced by the amendment. See Family Law Amendment (Shared Parental Responsibility) Act 2006 (Cth).

365 See s 68F (3) of the Family Law Act.

366 See earlier discussion in paras 3.3.5 to 3.3.6.4 of Chapter 3. See also Article 3 (1) UNCRC which provides that "In all actions concerning children, whether undertaken by courts of law the best interests of the child shall be a primary consideration."

367 See Fitzgerald 2002 *S. Cross U. L. Rev*. 183. The author posited that under the Family Law Act 1975, the legislative principles clearly make provisions for the child the right to express his/her wishes, and that in the determination of what constitute the best interest of the child, right of expression is only one of many factors to be considered. He argued further that implicit "these legal principles are the fact that the obligation to apply the "best interests" checklist applies only to contested proceedings." More so, he contends that it is obvious "no 'right' to be heard in *any* proceeding that affect the child exists, and nor does the child have the opportunity to express his/her views freely."

368 See earlier discussion in para 3.4.3 of Chapter 3.

Of course, the above recognition of Article 12(1) of the UNCRC rights to participate, albeit in culturally responsive way by the Family Law Act is noteworthy. It acknowledges the fact that in many parts of Australia, culture and tradition play an important role in child-rearing and their participation in decision-making within the family.[369] This explains why the Family Law Act emphasis and give effect to the UNCRC Article 30 provision that acknowledges the rights of indigenous children, which stipulate that indigenous children in community with other members of their group, must not under any circumstances be denied the rights to their culture, to profess and practise their religion, or to the use of their language.[370] Similarly, Section 60B (3) of the Family Law Act states that the indigenous rights to culture includes the right to:

> (a) Maintain a connection with that culture
> (b) To have the support, opportunity and encouragement necessary to:
> (i) To explore the full extent of that culture, consistent with the child's age and developmental level and the child's views;
> (ii) To develop a positive appreciation of that culture.[371]

The emphasis on the consideration of indigenous culture and children's rights in the Family Law Act seem to play a very significant role in the Australian legal systems because Australian courts has since interpreted the meaning of "connection" with culture to requiring an active and participatory connection to culture as follows:

> [a]n active view of the child's need to participate in the lifestyle, culture and traditions of the community to which they belong ... This need goes beyond a child being simply provided with information and knowledge about their heritage but encompasses an active experience of their lifestyle, culture and traditions. This can only come from spending time with family members and community. Through participation in the everyday lifestyle of family and community the child comes to know their place within the community, to know who they are and what their obligations are and by that means gain their identity and sense of belonging.[372]

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369 See analysis in par 2.5.4 of Chapter 2 on the characteristics of Indigenous culture in Australia.

370 See s 60B (3) of the Family Law Act.

371 S 60B (3), Family Law Acts.

372 *B and F* [1998] FamCA 239, 29-30 (Moore J), affirmed and cited in, *for example, Davis v Davis* (2007) 38 FamLR 671, 690-1 *[77];* [2007] FamCA 1149, 77 *(Young J); Drake and*

What is clear from the above decision of the Australian court is that the Family Law Act introduced provision requiring the need to consider the right of the child to enjoy their indigenous culture by way of participation in the everyday lifestyle of the family in any matter concerning the child, and with regard to kinship and childrearing practices of indigenous cultures.[373] This further affirm the argument made in the thesis,[374] that within the context of Australia's multi-cultural society, communalism or collective solidarity in relation to child's participation within the family exists, and that culture and tradition play an important role in child-rearing and their participation in decision-making within the family.

What the foregoing discussion point at, is that the implementation approach of Article 12(1) of the UNCRC in the Australian Family Law Act allows for flexibility in the determination of the child's best interests in terms of participation rights in decision-making within the family. This mean that while the Family Law Act recognise the autonomous mode of child's participation, it also recognises child's participation in a culturally responsive manner. It therefore, goes to say that the implication of the above adopted approach of implementation of the child's participation right is that the Australian Family Law Act – as applicable under the Nigerian Children's Right Act 2003 – embraced the cultural values of connectedness, interdependence and loyalty within the family.[375] On the other hand – as applicable under South Africa's children's legislations – the Family Law Act also imbibed the autonomous view of the child being capable of making and participating in decision-making.[376] Put differently, the Australian Family Law Act by its consideration of indigenous culture, which embraces the value of tolerance and respect for diversity and pluralism in Australia, adopted a flexible approach that takes the cultural, traditional and religious circumstances of an individual child into account when considering the best interests for the child in matters

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Drake [2014] FCCA 2950, [193] (Sexton J); *Offer and Wayne* [2012] FMCAfam 912, [90] (Brown FM); *Jerome and Tanzer [2012]* FamCA 548, [94] (Johnston J).

373 See analysis in par 2.5.2 of chapter 2 on the characteristics of indigenous culture in Australia. See also *s* 61F of the Family Law Act. See Moodie 2010 1 *Family Law Review* 61, 61; Ralph 2006 75 *Family Matters* 82, 83.

374 See earlier discussion in par 2.5.5 of Chapter 2.

375 See paras 4.4.1.1 and 4.4.1.5 above.

376 See par 4.6.3.2 above.

concerning the child, and in this instance, the child's rights to participate in decision-making within the family.

4.9 Conclusion

These Chapter discussed the implementation approaches of Article 12(1) of the UNCRC in the domestic laws of Nigeria, South Africa and Australia. As stated in the introductory section of this Chapter, the approaches adopted focuses on the constitutionalism and specific children's rights legislation that domesticated the provisions of the UNCRC.[377]

In this Chapter, it was established that Nigeria, South Africa and Australia are a multi-ethnic society, encompassing a wide variety of cultures, languages and religion.[378] With regard to South Africa, her pluralistic nature is expressed in the constitutional recognition of many distinct languages,[379] which is similar to Nigeria and Australia. South Africa operates a constitutional democracy with three tiers of government – national, provincial and local government – each with its distinct executive authority.[380] However, unlike Nigeria[381] and Australia,[382] the Constitution of South Africa stipulate specific rights for children and accords them protection of other rights enshrined in the bill pertaining to them.[383] This, however, does not preclude children from having access to other human rights provisions in the Nigerian and Australian Constitutions respectively.[384] Also, unlike the Constitution of Nigeria and Australia, which has no specific provisions on the best interests of the child,[385] the South African Constitution specifically makes the best interests of the child in all matters affecting them to be paramount.[386] However, like all the other specific rights enjoyed under the Nigeria and Australian Constitutions,[387] the

377 See paras 4.1.
378 See paras 4.2.1.1, 4.2.1.2 and 4.2.1.3.
379 See par 4.2.1.2.
380 See paras 4.3.1.2 and 4.3.2.1.
381 See par 4.3.1.1.
382 See par 4.7.1.
383 See par 4.5.2.
384 See paras 4.3.1.1 and 3.7.1.
385 See paras 4.3.1.1 and 3.7.1.
386 See par 4.5.3.
387 See paras 4.3.1.1 and 3.7.1.

best interests right of the child under the South African Constitution are subject to applications and limitations same as other rights endorsed in the Bill of rights.[388]

Also, indicated in this Chapter, is that the constitution of these three countries, despite according a range of human rights, noticeably does not specifically refer to the rights of children to participate in decision-making within the family.[389] Their obligations in terms of children's right to participate in decision-making, resides in their government's ratification of international children's rights instruments.[390] Nigeria, South Africa and Australia in fulfilling their legal and administrative obligations under the UNCRC[391] enacted children's rights law respectively in their countries.[392]

Aside, that the preamble to the Nigerian Children's Rights Act and the South African Children's Act specifically reinforces and endorses rights provided for in Chapter 4 of the Nigerian Constitution (Fundamental Human Rights provisions) and section 28 of the South African Constitution respectively (Children's rights under the Bills of Rights).[393] Nigerian, South African and Australian children's rights laws embraces a notion of childhood that is based on the idea that for a child to fully assume his/her responsibility in the community and for a full and harmonious development of his/her personality, a child should ideally grow up in a family environment, and in an atmosphere of happiness, love and understanding.[394] It is submitted that the above notion of childhood common to these culturally diverse countries, to a certain extent, recognizes the indigenous cultural values of communalism and collectiveness predicated on rights and duties within the family.[395]

Similarly, the South African and Australian children's right laws also recognises that children are capable of acting autonomously and in their own best interests in

388 See par 4.5.3.
389 See paras 4.3.1.1, 4.5.2 and 3.7.1.
390 See paras 4.3.1.1, 4.5.2 and 3.7.1.
391 See Article 4 of the UNCRC.
392 See paras 4.4, 4.6 and 4.8.
393 See paras 4.4.1 and 4.6.1.
394 See paras 4.4.1.5, 4.6.3.2 and 4.8.1.
395 See paras 2.5.2, 2.5.3 and 2.5.4.

all matters affecting them including decision-making within the family.[396] It goes on to conclude that, the South African and Australian children's rights laws recognises that children are capable to participate in matters that affect them. To support this assertion, is the provision of section 10 of the South African Children's Act and section 68F (3) of the Australian Family Law, which largely incorporated Article 12(1) of the UNCRC into their domestic children's rights laws.[397] The Nigerian Children's Rights Act, on the other hand, clearly omitted Article 12(1) of the UNCRC provisions in the Children's Rights Act.[398]

Finally, this Chapter shows the implication of the implementation approaches of Nigeria, South Africa and Australia of Article 12(1) of the UNCRC. As observed, Nigeria's implementation approach falls solely within the acceptable local norms and culture, which dictates the role and nature of the relationship between the child and his parents within the Nigerian context. While, the South African and Australian children's laws did not only accommodate the indigenous cultural values of communalism predicated on the rights and duties of children within the family,[399] but also incorporated the UNCRC autonomous child's rights approach of children being capable of making and participating in decision-making within the family.[400] These integration approach of Article 12(1) of the UNCRC and the cultural values in South Africa's Children's Act, reflect an approach to children's rights, which progressively transforms the interpretation and application of the law relating to children participation rights in South Africa.[401] This is because the section 7 provisions of the Children's Act on the best interests of the child and the constitutional values of tolerance and respect for diversity and pluralism in South Africa may allow for an approach that takes cultural, traditional and religious circumstances of an individual child into account when considering the best interest for the child in all matters affecting the child – in this instance the child's

396 See paras 4.6.3.2 and 4.8.1.
397 See paras 4.6.1.2 to 4.6.1.5 and 4.8.1.
398 See par 4.5.1.4 on the omission of Child's right provision of Article 12 UNCRC in the Nigerian Child's Rights Act.
399 See paras 4.6.3, 4.6.3.1. and 4.8.1.
400 See paras 4.6.1.2 to 4.6.1.5 and 4.6.2.
401 See par 4.6.3.2.

rights to participate in decision making within the family.[402] The above-stated view, also applies within the Australian context.[403]

In light of the discussion in this Chapter, and previous Chapters, it is submitted that cultural and traditional values influenced – in one way or the other the implementation of Article 12(1) of the UNCRC child's participation right in decision-making within the family in the jurisdictions under focus. Ultimately, it is concluded that a single approach – that is, autonomous child's rights and/or cultural values approach to the implementation of child's participation rights is antithetical to Article 12(1) of the UNCRC participation rights of the child in decision-making within the family. The integration approaches portend a progressive application and interpretation of children's rights to participate in decision-making within the family. Furthermore, it is submitted that in the event of the tension between, on the one hand, the cultural values or interests of the group and, on the other, the individual interests of the child, individual interests should be recognised in all facets of children's life, including decision-making within the family. The reason been that an undiluted emphasis on cultural values or group interests may perpetuate the subordinate status of children and their exclusion from the domain of decision making within the family – a problem which the thesis seek to challenge in terms of the Nigerian implementation.

The considerations above are important in the debate on the recognition of cultural values of rights and duties within the family, because although many sound arguments has been advanced in favour of cultural values within the family, the arguments must still be "tempered by fundamental considerations of human rights".[404] This is because specific harmful practices may be and are used under the pretext of proper cultural upbringing in line with the values of rights and duties within the family. The significance of human rights in this context is highlighted by Fischer who states that:

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402 See par 4.6.3.2.
403 See par 4.8.1.
404 Fischer S *Cal Interdisc L J* 666.

> Human rights... presents the claim that certain rights are inherent to us as people through no other reason than merely being born... These rights are not subject to governmental regulation; they are above all political or societal manipulations.[405]

Against this background, the next Chapter, will address specific "harmful" cultural practices that can and may be used under the pretext of proper cultural upbringing in line with the cultural values of rights and duties within the family in Nigeria, South Africa and Australia respectively. The Chapter also juxtaposes those specific harmful practices with Article 12(1) UNCRC and canvass an approach in favour of Article 12(1) children's participation rights in Nigeria.

405 Fischer *S Cal Interdisc LJ* 666.

CHAPTER 5

CULTURAL PRACTICES AND ARTICLE 12(1) OF THE UNCRC CHILDREN'S PARTICIPATION RIGHTS: PRIORITISING CHILDREN'S RIGHTS

5.1 Introduction

In Chapter 2,[1] it was shown that the provisions and principles of the UNCRC recognises or relates to culture, tradition and the family. Also, in Chapter 4,[2] it is shown that in Nigeria, South Africa and Australia, the cultural values of "duty and rights" such as respect, responsibility and reciprocity in terms of children participation within the family exists.

The question at this point is no longer about the importance of the above cultural values, but about the specific cultural practices in these cultural values that may be applied under the pretext of value of "duties and rights. Put differently, as indicated in the thesis, the cultural value of "duties and rights" can result in complex "conflict" situations within the family with regard to children participation in decision-making.[3] For instance, if a family have to deal with situations where indigenous practices and culture play a role in child-rearing and upbringing. In doing so, the parental rights and responsibility to raise their children in accordance to his/her culture and the duty of the child to respect parents could easily be relied upon to curtail children's rights to participation in decision-making and matters affecting the child in particular.[4] As indicated by later discussion on theory and practice of FGM/C in this Chapter,[5] cultural reason in terms of parental duties towards child-rearing and upbringing is one of the major factors in subjecting children to harmful practices in Nigeria, South Africa and Australia respectively.

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1 See earlier discussion in par 2.4 of Chapter 2.

2 See earlier discussion on the recognition of cultural values in the children's laws of Nigeria, South Africa and Australia in paras 4.4.1.1, 4.4.1.2, 4.6.3, 4.6.3.1, and 4.8.1 of Chapter 4. See also discussion in paras 2.5 to 2.5.5 of Chapter 2.

3 See earlier discussion in paras 2.5 to 2.5.5 of Chapter 2. This conflict arises when a particular person's actions is being viewed as harmful in terms of the UNCRC while simultaneously being viewed as a traditional practice or custom in terms of African customary law.

4 Ncube "Recognition and monitoring children's rights in Africa. Challenges and Prospects" 612; Chirwa "The Merits and Demerits of the ACRWC" 157-177.

5 See paras 5.6.1, 5.6.2 and 5.6.3 below.

Consequently, the female children who are the victims of this harmful practice are not usually consulted or involved in the process of decision-making.[6] Van Bueren[7] refers to the responsibility and duties to respect parents and elders at all times as "too unquestioning and general".[8] Similarly, Chirwa[9] points out that the obligation to respect at all times may undermine the child's right to participate in decision-making in matters affecting the child in particular.

Some of these cultural practices that could applied within the family are those related to "legitimate" cultural practices with distorted components, that is, that may be regarded as "harmful" to the child. Specific example of a legitimate cultural practice includes the custom of male circumcision, which is a prevalent cultural practice in South Africa. Another prevalent cultural practices in South Africa that may be regarded as legitimate but with distorted aspect of practise is the custom of *ukuthwala*. While practices such as Female genital mutilation/cutting is other specific example of a "harmful" practice, which may hide under the banner of cultural value of duty and rights within the family in Nigeria, South Africa and Australia. Again, the thesis will focus only on the above mentioned harmful cultural practices – that is the custom of *ukuthwala*, male circumcision and FGM/C.

In light of the foregoing, it would be a wasteful exercise in this Chapter to engender a discussion on the cultural values of duties and rights without a proper understanding of the above cultural practices that fall within the scope of these cultural values. What is more, these practices should also be assessed within the entire context of their possible application within the family, children's law and Article 12(1) of the UNCRC provision.

Furthermore, to be clear as to what constitute "legitimate" cultural practices and "harmful" cultural practices, this Chapter contextualises what are "legitimate" cultural practices and what "harmful" cultural practices entails under the UNCRC.

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6 See later discussion in paras 5.6.1 and 5.6.2 on theory and practices of FGM/C in Nigeria and South Africa respectively.
7 Van Bueren The International Law on the Rights of the Child 76.
8 Van Bueren The International Law on the Rights of the Child 76.
9 Chirwa "The Merits and Demerits of the ACRWC" 157-177.

More specifically, in the discussion that follows, the custom of *ukuthwala* and male circumcision in South Africa, as well as FGM/C in Nigeria, South Africa and Australia are discussed in theory and practice. The aim is to foster a better understanding of these cultural practices within the context of these culturally diverse countries. What is more is that these cultural practices should also be assessed within the entire context of their link to children's participation rights in decision-making within the family. Ultimately, it is shown that these cultural practices violate Article 12(1) of the UNCRC participation rights of the child within the family.

5.2 "Legitimate" cultural practices

According to the Oxford Advance Learner's dictionary, "legitimate" is firstly defined as that "for which there is a fair and acceptable reason" and secondly, as that "allowed and accepted according to the law".[10] According to Crossman,[11] legitimation is a process through which a social system or some part of it is accepted as suitable and widely supported by those who engage in it. Deephouse and Suchman[12] defined legitimacy as a generalised perception or presumption that the "actions of an entity are desirable, proper, or appropriate within some socially formed system of norms, values, belief and definitions." Given the foregoing definitions, the word "legitimate" can thus, be inferred to mean the stamp or quality of allowing and accepting a particular thing within a specific context. Put differently, legitimacy can be said to be that which brings about conformity with whatever that is accepted and allowed, individually or collectively within a particular context.

In light of the above, a legitimate cultural practice can be said to be those practices that are within the ambit of what the law accepted or that which the law regulates. Conversely, those cultural practices that do not go against the dictates of the law or which the law does not expressly prohibits. As mentioned earlier,

10 Oxford Advance Learner's Dictionary "on line edition". Available at http://www.oxfordadvancedlearnersdictionaries.com Accessed on 19th May 2020.
11 Crossman 2013 "Legitimation" available at http://sociology.about.com/od/L_Index/g/Legitimation.htm Accessed June 2020.
12 Deephouse and Suchman 2008 "Legitimacy in Organisational Institutionalism" 49-77.

male circumcision in South Africa is an example of such practices. It is considered a legitimate cultural practice because the law does not entirely prohibit such practices, but largely regulated.[13] The custom of *ukuthwala* can be said to be another example of such cultural practices that is not expressly prohibited by law but sanctioned because of the harmful nature of the components of the practices.[14]

There are several statutory and common law provisions that serves as protection for young girls and male child against such cultural practices in South Africa.[15] Two examples of statutes that can be said to protect young girls and male child include the Recognition of Customary Marriages Act[16] and the Children's Act[17] which are both aimed at ensuring that:

> [M]arriages, including customary marriages, are entered into only with the free and full consent of the intending spouses; that cultural practices affecting the welfare, dignity, normal growth and development of children are eliminated; and that harmful practices that negatively affect the rights of women are completely eradicated as required by numerous conventions acceded to by South Africa.[18]

Notwithstanding the above, there are still challenges associated with the legislation, chief of which is that they do not make specific provision for the challenges surrounding *ukuthwala*, and "their provisions are therefore rendered nugatory when it comes to this practice".[19] In fact, the South African Law Reform

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13 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 163; South African Law Reform Commission Thirty Eighth Annual Report 45.

14 Jokani "The Customary Law Practice of *Ukuthwala* – An Antithesis in the South African Constitutional Order". See also the discussion in par 5.4.1 below on the theory and practice of *ukuthwala*.

15 The statutory protection cut across the domain of criminal law, family law and constitutional law among others.

16 120 of 1998.

17 38 of 2005.

18 The South African Law Reform Commission also conducted a cursory review of the South African law to determine whether there are adequate protections for the young girls and women who could potentially fall victim to *ukuthwala.* The outcome of their findings indicated that to a certain extent, there are indeed laws and statutes in place to protect young girls and women against harmful cultural practices. The provisions of the above two statutes were quoted by the Law commission. See Secretary SALC 2010 http://www.justice.gov.za/salrc/media/2010_ukuthwala.pdf. See also Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law*? 161-162.

19 Secretary SALC 2010 http://www.justice.gov.za/salrc/media/2010_ukuthwala.pdf. See also Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law*? 161-162

Commission in 2010 realised that there is no single items of legislation in South Africa that addresses "exclusively and comprehensively the problem of *ukuthwala"*.[20]

Aside the above, the custom of *ukuthwala* and male circumcision are also fraught with several issues affecting children's right to participate in decision-making within the family. For example, and as indicated later in this Chapter, a girl cannot and should not be *thwala'd* without her consent[21] and male circumcision should not only be performed by trained and skilled traditional surgeons, but consent of a child above 16 years is also required and in some cases that does not happen.[22] More so, most children may wish not to be part of these cultural practices, but due to cultural upbringing/background are "forced" or pressurised to undergo the procedure under the pretext of the cultural values of rights and duties within the family.

5.3 Harmful cultural practices

According to the Oxford Advanced Learners dictionary, the word "harmful" is the act of "causing damage or inflicting injury to somebody/something, especially to a person's health or the environment".[23] This meaning presupposes that any practice that violates a person's rights by way of causing "damage or injury to that person's health" is a "harmful practice". In the UN Office of the High Commissioner for Human Rights (OHCHR) *Fact Sheet No.23,*[24] every forms of women's and girls' rights violations may be described as harmful practices, and "particular forms of violence against women and girls, which are permissible in

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20 Secretary SALC 2010 http://www.justice.gov.za/salrc/media/2010_ukuthwala.pdf. See also Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law*? 161-162.

21 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law*? 170; Kemp *et al Criminal law* 367; Rautenbach and Matthee *JLP* 120-121. See the case of *Ncedani v R* 1908 EDC 245; where the court categorically made it obvious that, where a minor girl is removed with force without her or her guardian's consent, such removal would constitute the crime of abduction.

22 See subsequent discussion in this chapter on *Ukuthwala* and Male circumcision.

23 Oxford Advance Learner's Dictionary "on line edition". Available at http://www.oxfordadvancedlearnersdictionaries.com Accessed on 19th May 2020.

24 OHCHR, Fact Sheet No.23, http://www.ohchr.org/Documents/Publications/FactSheet23en.pdf

tradition, culture, religion or superstition by some community members" are known as harmful cultural and traditional practices.[25] The above notion by UNOHCHR has been used to include a wide range of practices as "cultural" and "harmful", that is FGM/C, forced marriage, gender based violence, traditional birth practices among others.[26] Furthermore, it has mainly be used in referring to discriminatory practices against women, especially in Africa and Asia; it has also been used referring to problems of gender inequalities in the Global North.[27] Therefore, the term "harmful cultural practices" can be said to be subjective, depending on what practices is been referred to and the context it is been used. According to Longman and Bradley:[28]

> Human rights philosophy that underlies the concept of harmful cultural practices ultimately prioritizes individual rights over cultural traditions which have the potential to harm, either physically or emotionally, yet the debate abounds on what notions such as "harm," "dignity," and "bodily integrity" might mean from one context and situations to the next.

In terms of the UNCRC, there was no explicit mention of any practice as harmful. Instead, Article 24(3) of the UNCRC obliges state parties to take all effective and appropriate measures to abolish traditional practises that are prejudicial to the health of the children.[29] By the dictate of Article 24(3), the term "prejudicial to the health of the children" is not restricted only to those "harmful practices" that cause direct "bodily harm" to the children, that is, FGM/C. Practices that are "prejudicial to the health of the children" also encompasses all aspect of traditional practices which are not necessarily physical in nature but which may affect the general well-being of the child. In support of this assertion, and as indicated in the thesis,[30] is the fact that the UNCRC enjoys a holistic interpretation of its

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25 OHCHR, Fact Sheet No.23, http://www.ohchr.org/Documents/Publications/FactSheet23en.pdf

26 See Longman and Bradley "Interrogating the Concept of Harmful Cultural Practices" 6.

27 See Longman and Coene "Harmful cultural practices: a critical analysis of cross-cultural discourses and moral understanding of gender, sexuality and embodiment" 51-66; Longman and Bradley "Interrogating the Concept of Harmful Cultural Practices" 6-8.

28 See Longman and Bradley "Interrogating the Concept of Harmful Cultural Practices" 14.

29 Though these provisions did not specifically mention children's rights to participation, however, denying children rights to participate in matters affecting them can be regarded as traditional practices harmful to them. See Kiame 2005 *African Journal of Human Rights* 227.

30 See earlier discussion in paras 3.3 and 3.3.1 of Chapter 3.

provisions, and there are four anchoring principles, that are so fundamental and therefore, considered as underpinning the whole Convention.[31] These principles are, non-discrimination, participation, survival and development and the best interests of the child. Therefore, all cultural and traditional practices or notions that are incompatible with these principles are also considered to be harmful to the child's rights under the UNCRC.[32]

Relating the foregoing to participation rights of the child – which is the focus of this study – any cultural practice or notion that denies participation rights to children is harmful to the child. According to Stern:[33]

> Oppression of a person's right to express views and to have those views respected is not specifically included in what is referred to as harmful practices. A denial of this right – as women and children in many societies traditionally are not considered to have the right to make their voices heard – is, however, as harmful a traditional practice as any.[34]

A similar view in support of Stern is Kiame's[35] who argues that the UNCRC provides children with the right to express their opinions freely. As a result, cultural practices or notions, which restrict a child from expressing his/her views or which do not give the child views due weight must be regarded as incompatible with the child's rights and harmful to the child.[36]

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31 Parkes 2013 Routledge Research in Human Right Law 260-261; Kiame 2005 *African Journal of Human Rights* 228.

32 See Kiame 2005 *African Journal of Human Rights* 228.

33 See Stern 2006 The child's right to participation – reality or rhetoric? 186.

34 See Stern 2006 *The child's right to participation – reality or rhetoric?* 186. Stern further point out that "The UN Special Rapporteur on Violence Against Women in several reports has pointed to the prevalence of cultural practices in families, and elsewhere in society, constituting violations of women's human rights that have "avoided national and international scrutiny because they are seen as cultural practices that deserve tolerance and respect."

35 Kiame 2005 *African Journal of Human Rights* 228.

36 Kiame 2005 *African Journal of Human Rights* 231. The author is of the view that in many African traditional societies, children's autonomy is severaly limited since they are taught to respect and defer elders from an earliy age. As a result, the connection between children and adults is 'characterised by immense filial respect which is then reinforced by the dominance ethic. The author continues that the denial of participation rights to children results in a paternalistic and dysfunctional structuring of child-adult relationship. This scenario is not conducive to the realisation of the rights guaranteed in the UNCRC, and only helps to facilitate the continuance of other hamful practices to children.

What should be clear from the discussion so far, is that harmful cultural practices are not only those specific cultural practice that causes direct and irreversible bodily harm to the child. Rather, harmful cultural practices include all aspects of cultural practices that affect and violate the participation rights of the child.

Thus, subsequent sections will investigate specific cultural practices both in theory and practice and within the entire context of their link, and possible application within the family, children's law and Article 12(1) of the UNCRC provision in Nigeria, South Africa and Australia respectively.

5.4 Ukuthwala

The practice of *ukuthwala* relates to preparation for customary law marriage.[37] *Ukuthwala* is a widespread practice, associated with the Nguni cultures in the Eastern and South-Eastern parts of South Africa.[38] The practice entail that a bride will have to leave her house to reside with the groom after the marriage.[39] Therefore, to bridge the physical and social distance between the marrying couples, there is a need for a careful marriage negotiation.[40] However, this seem not to be the case in all instances, rather "women are forced into marriage through the practice of *ukuthwala,* which in short, 'sanctions the abduction of

37 *Ukuthwala* is also referred to as "*baleka*" or "*ukutheleka*". See in this regard Rautenbach and Matthee *JLP* 118, Bennett *Customary Law* 212, Olivier *et al Privaatreg van die Suid-Afrikaanse Bantoesprekendes* 17-19, 352-358, Labuschagne and Schoeman *JJS* 33, Labuschagne *SACJ* 472.

38 See Mwambene and Sloth-Nielsen *J Fam L & Prac* 6. It is pointed out by the arthor that the cultural practice "enjoys popular support in the areas where it is still practiced". The Nguni people of South Africa are made up of the Zulu, Xhosa, Ndebele, Thembu, Bomvana, Pondo and Bhaca. See Olivier *et al* "Indigenous Law" par 89 and Anon 2012 http://www.southafrica.com/blog/the-nguni-people-ofsouth-africa. See Bennett *U Botswana LJ* 6; Dukada *De Rebus* 387; Rautenbach and Matthee *JLP* 118-119; Maluleke *Justice Today* 1; Kruger and Oosthuizen *PELJ* 286; Koyana and Bekker *De Jure* 139. See Secretary SALC 2010 http://www.justice.gov.za/salrc/media/2010_ukuthwala.pdf.

39 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 159; Bennett *U Botswana LJ* 6.

40 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law*? 159; Bennett *U Botswana LJ* 6.

women for the purpose of marriage"'.[41] This in a way can be described as forced marriage.

5.4.1 Ukuthwala in theory and practice

Ukuthwala is a traditional practice of marriage negotiation by way of an "intermediary who bears a formal proposal by the groom's family to the family of the prospective bride".[42] Marriage negotiations are usually initiated by the groom's family and not by the bride's family.[43]

According to Maluleke,[44] the practice of *ukuthwala* is:

> [a] form of abduction that involves kidnapping a young girl or a young woman by a man and his friends or peers with the intention of compelling the girl or young woman's family to endorse marriage negotiations.[45]

From the above description, it goes to show that the main aim of *ukuthwala* is to force the girl's family to enter into negotiations that must result in customary marriage.[46] Therefore, *ukuthwala* is not a customary marriage or an engagement in customary marriage per se, but rather a means of achieving customary marriage.[47]

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41 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 159. See also Secretary SALC 2010 http://www.justice.gov.za/salrc/media/2010_ukuthwala.pdf. Also see Kruger and Oosthuizen *PELJ* 286 and Koyana and Bekker *De Jure* 139.

42 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 159; Bennett *U Botswana LJ* 6.

43 Bennett *U Botswana LJ* 6-7; Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law*? 159. When the bride family initiated the negotiation, the process is considered as irregular.

44 Maluleke *Justice Today* 1.

45 Other definitions similar to the above can also be found in Koyana and Bekker *De Jure* 139, Bennett *U Botswana LJ* 7, Rautenbach and Matthee *JLP* 119, Mwambene and Sloth-Nielsen *J Fam L & Prac* 6 and Olivier *et al* "Indigenous Law" par 89. For practical examples of *ukuthwala* scenarios see the facts in the cases of *R v Njova* 1906 20 EDC 71, *Ncedani v R* 1908 22 EDC 243, *R v Swartbooi* 1916 EDL 170, *R v Mane* 1948 1 All SA 128 (E) and *R v Sita* 1954 4 SA 20 (E).

46 Mwambene and Sloth-Nielsen *J Fam L & Prac* 6; Koyana and Bekker *De Jure* 139; Bennett *U Botswana LJ* 7; Rautenbach and Matthee *JLP* 119.

47 Mwambene and Sloth-Nielsen *J Fam L & Prac* 6, 7.

There is no clear-cut requirement for a valid *ukuthwala* because there are many various forms of *ukuthwala* practiced by different communities.[48] For instance, the Xhosa communities, distinguish between three forms of *ukuthwala*.[49] The first form of *ukuthwala* as distinguished by these communities entail an agreement between the girl and the man, which involves the man carrying the girl away or from her father's residence without the consent of the girl's parent or guardian, but with the permission of the man's father or guardian.[50] Usually, a compensation in the form of heads of cow are paid to the girl's parent or guardian in this instance.[51] The compensation of heads of cow, however, does not form part of the *lobolo* negotiations that may ensue afterwards.[52]

The second form of *ukuthwala* is referred to as *"ukuthwala kobulawu".*[53] This form entails that both the parent of the girl and the man involved consented that the girl be carried away without the girl's permission.[54] Under this form, the girl is usually unaware of the agreement between the two families. However, there are certain remedies at her disposal in case she chooses or refuses to marry the prospective suitor. For example, she can smear her face with her own excrement or call the young man's father by his name.[55] Also, under this form of *ukuthwala*, "the man is permitted to seduce the girl into sexual intercourse as he has the tacit permission of the girl's father or guardian".[56] However, in the situation where the marriage does not take place and the couple had engaged in sexual intercourse,

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48 Rautenbach and Matthee *JLP* 119.

49 Labuschagne and Schoeman *JJS* 34-35; Rautenbach and Matthee *JLP* 119. The Xhosas are not only the communities which practice *ukuthwala*, however, they are also the cultural group who predominantly practice it. See Mwambene and Sloth-Nielsen *J Fam L & Prac* 5.

50 Labuschagne and Schoeman *JJS* 34; Rautenbach and Matthee *JLP* 119; Bennett *U Botswana LJ* 7; Mwambene and Sloth-Nielsen *J Fam L & Prac* 7; Olivier *et al* "Indigenous Law" par 89.

51 Labuschagne and Schoeman *JJS* 34; Bennett *U Botswana LJ* 7;

52 Labuschagne and Schoeman *JJS* 34; Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 165.

53 See Olivier et al "Indigenous Law" par *89.*

54 Labuschagne and Schoeman *JJS* 34; Rautenbach and Matthee *JLP* 119; Mwambene and Sloth-Nielsen *J Fam L & Prac* 7; Olivier *et al* "Indigenous Law" par 89.

55 See Olivier *et al* "Indigenous Law" par 89 and Rautenbach and Matthee *JLP* 119.

56 Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law?* 165; Rautenbach and Matthee *JLP* 119.

with or without the girl getting pregnant, the man will have to pay compensation to the girl's father or guardian.[57]

The third form of *ukuthwala* is one that is comes with violence, and without the girl's permission, as well as that of her father or guardian.[58] This form of *ukuthwala* aptly captures what Maluleke, describes "as a form of abduction that involves kidnapping a young girl or a young woman with the intention of compelling the girl or young woman's family to endorse marriage negotiations."[59] However, before the man is allowed to negotiate a marriage with the girl father, he must pay restitution for his acts.[60] In addition, the consent of the girl and her father or guardian must be secured before a marriage relationship can be allowed.[61] Also, with this form of *ukuthwala* just like the preceding forms, the man will, in addition to the compensation of heads of cow, pay a seduction involving heads of cow if he engages in sexual intercourse with the girl without the requisite consent from the girl's father or guardian.[62]

Regardless of the form of *ukuthwala*, the practice is that a girl that undergoes this process is supposed to "exude maidenly pride", and expected to "put up a show of resistance" when being carried off, whether or not she is in the know of the plot to carry her away or not.[63] Usually, the carrying off is done at night and on the same day of the *thwala*, or early the following day, but the girl's father or guardian has to be duly informed of the carrying off, for the purpose of easing her family's mind as to her safety.[64] At the homestead where the girl is taken to, she is placed in the care of women who then treat her with the utmost kindness and

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57 Rautenbach and Matthee *JLP* 119.
58 Labuschagne and Schoeman *JJS* 35; Rautenbach and Matthee *JLP* 119; Mwambene and Sloth-Nielsen *J Fam L & Prac* 8; Olivier *et al* "Indigenous Law" par 89.
59 Maluleke *Justice Today* 1.
60 Rautenbach and Matthee *JLP* 119; Olivier *et al* "Indigenous Law" par 89.
61 Rautenbach and Matthee *JLP* 119.
62 Koyana and Bekker *De Jure* 141; Bennett *U Botswana LJ* 7-8; Mwambene and Sloth-Nielsen *J Fam L & Prac* 7.
63 Koyana and Bekker *De Jure* 139; Bennett *U Botswana LJ* 7; Mwambene and Sloth-Nielsen *J Fam L & Prac* 6, 7. Rautenbach and Matthee *JLP* 119 point out that, the show of resistance by the girl might be merely a front because most often, the girl may want to elope with the man.
64 Koyana and Bekker *De Jure* 139; Labuschagne and Schoeman *JJS* 34; Bennett *U Botswana LJ* 7; Mwambene and Sloth-Nielsen *J Fam L & Prac* 6.

respect.[65] According to Koyana and Bekker,[66] this is an attempt to convince the girl to go through with the marriage rites and subsequently become part of the man's caring family. After the process of carrying off, the man should tender a cattle or *lobolo* to the girl's father or guardian, which "transforms the incident into a formal marriage proposal".[67] This gesture is an indication of the man's intention to establish a marital relationship between the families and thus elevate the girl's status to that of a prospective wife.[68] It is when this offer is accepted that negotiations between the two families continue.[69] The girl will then be released and returned to her father's home to commence preparation to finally move to her prospective husband's home.[70] In the situation where the girl's family rejects the tendered cattle or where there is no offer for marriage after the *thwala* has taken place, then the *thwala* is deemed to be wrongful.[71] The suitor is therefore, required to pay a fine of one head of cattle because the act of carrying off is considered as an insult to the girl and to her father or guardian.[72]

According to Mwambene and Sloth-Nielsen, there are several reasons for the existence of *ukuthwala*. These include:

> to force the father of the girl to give his consent; to avoid the expense of the wedding; to hasten matters if the woman is pregnant; to persuade the woman of the seriousness of the suitor's intent; and to avoid the need to pay an immediate *lobolo* where the suitor and his or her family were unable to afford the bride wealth.[73]

The above reasons is an indication that the custom of *ukuthwala* serves an important cultural purpose within indigenous communities living according to

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65 Bennett *U Botswana LJ* 7; Mwambene and Sloth-Nielsen *J Fam L & Prac* 6.
66 Koyana and Bekker *De Jure* 141
67 Koyana and Bekker *De Jure* 141; Bennett *U Botswana LJ* 7.
68 Koyana and Bekker *De Jure* 141.
69 Koyana and Bekker *De Jure* 141; Bennett *U Botswana LJ* 7.
70 Koyana and Bekker *De Jure* 141. The ceremony is usually done with fanfare and the girl will be followed by a so-called "*dull*" party to the man's house, the *dull* party consists of many friends and relatives. This ceremony confirms the relationship between the two families.
71 Koyana and Bekker *De Jure* 141; Bennett *U Botswana LJ* 7; Mwambene and Sloth-Nielsen *J Fam L & Prac* 6.
72 Koyana and Bekker *De Jure* 141; Bennett *U Botswana LJ* 7; Mwambene and Sloth-Nielsen *J Fam L & Prac* 6.
73 Mwambene and Sloth-Nielsen *J Fam L & Prac* 7

African customary law.[74] More so, what these reasons also illustrates is that a young girl can be *thwala*'d without her consent or without taking part in the process of decision-making involving her *thwala'd*.[75] It is, of course, here that the custom of *ukuthwala* and Article 12 of the UNCRC on the rights to participation within the family clashes. As already indicated in this thesis, a cultural practice that violates the rights to participation are considered to be harmful to the child's rights under the UNCRC. Such practices are regarded as harmful because it does not align with the development of children.

5.4.2 Ukuthwala and Article 12(1) of the UNCRC rights to participation

Despite the fact that *ukuthwala* is a common practice among the indigenous communities of South Africa,[76] Article 12(1) of the UNCRC rights to participation's approach in dealing with such a custom is clear-cut. This is quite understandable, considering the fact that, *ukuthwala,* regardless of whichever form, can give rise to the violation of the various components of Article 12(1) rights, the first of which is the young girls capability and capacity to form views and hold opinions in all matters affecting them. As indicated in this thesis, 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 ages who can form views, even where they are not able to communicate them verbally.

When considering the above, it becomes clear that the custom of *ukuthwala* infringes the legal interests protected in the stated Article 12(1) component. The protected legal interests referred to here is the young girl's right to hold views and opinions over matters affecting her. These interests also refer to the two most important requirements in holding views and opinions, namely to ensure that a young girl who wishes to participate, have a right to convey their views and opinions without limitations and the right to be provided with access to

74 Mwambene and Sloth-Nielsen *J Fam L & Prac* 7.
75 Mwambene and Sloth-Nielsen *J Fam L & Prac* 7.
76 Vincent 2007 Male circumcision policy, practices and services in Eastern Cape Province of South Africa.

appropriate information that should help her make an informed decision, because a decision cannot be considered free if it is not an informed decision.[77] Therefore, the girl 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."[78]

Therefore, it should be clear that the carrying off of a young girl without seeking her opinion and views in matters affecting her under the guise of the *ukuthwala*-custom would amount to a violation of this important component of Article 12(1) rights.

Apart from the capacity to hold views and opinion, the man who *thwala* a girl can also be said to have violated another important component of Article 12(1), which is giving the young girl's views due weight in accordance with her age and maturity. As indicated earlier in the discussion on the above component of Article 12(1),[79] 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.[80] Their 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.[81] Therefore, to be considered alongside age and maturity is the rights and duties of parents to provide the child with appropriate direction and guidance.[82] Put differently, "consideration has to be given to their level of understanding of the issues involved while also protecting their best interests".[83]

When considering the above, it becomes clear that the custom of *ukuthwala* infringes the twofold legal interests protected in this component of Article 12(1) of

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77 Lansdown "The realisation of children's participation rights; Critical reflections" 12.
78 Stern 2006 *The Child's Right to Participation – Reality or Rhetoric?* 161.
79 See earlier discussion in par 3.4.1 of Chapter 3.
80 See also Lansdown "Participation and young Children" 3-5.
81 See also Lansdown Promoting Children's Participation in Democratic Decision-making 3.
82 Stern 2006 *The Child's Right to Participation – Reality or Rhetoric*? 164. She is of the view that these factors can somewhat limit the extent to which children's voices are appreciated.
83 Lansdown "Participation and young Children" 5.

the UNCRC. The protected legal interests referred to, are failure to give due weight to the young girl's views regardless of her age and the parents' or guardian's actual exercise of control over the young girl, as well as the parents' or guardian's right to consent to the young girl's marriage. These interests also refer to the most important requirements of the components, namely considering what is the young girl's best interest and her right to consent to the process of the *ukuthwala* custom. In terms of the South African law, it is, of course, no defence for the wrongdoer to say that the young girl consented to the wrongdoer's acts, that is, the removal of the young girl from her parents' or guardian's control.[84] In the case of *Ncedani v R*[85] the South African court held that, should a minor girl be forcibly removed without her or her parent's/guardian's consent, such removal would constitute the crime of abduction.[86]

5.5 Male circumcision

Male circumcision is the removal of the foreskin, which is the fold of skin that covers the head of the penis. It is widely practised for religious and traditional reasons, usually within the first two weeks after birth, or as a rite of passage into adulthood at the start of puberty. It is also done for medical reasons, such as to treat foreskin disorder. Male circumcision is a widespread practice generally associated with traditional communities in the Eastern and South-Eastern parts of South Africa.[87] In these communities, traditional circumcision is a rite of passage into adulthood for the male members of the community. According to Nkateko,[88] traditional circumcision rites for boys is referred to as *Murundu* and in some other areas it is called *mula/hogo*. *Murundu* circumcision is a preparatory stage for boys

84 Kemp *et al Criminal law* 367; Rautenbach and Matthee *JLP* 120.

85 1908 EDC 245; Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law*? 170; Rautenbach and Matthee *JLP* 120-121. The case is an example of where the girl was not carried off by the prospective husband himself. But, by three other persons for the purpose of marriage to the prospective husband, without the necessary consent given.

86 See Matthee *One Person's Culture is another Person's Crime: A Cultural Defence in South African law*? 170. For a detailed analysis on the Custom of *ukuthwala* and the South African Criminal law.

87 Vincent 2007 Male circumcision policy, practices and services in Eastern Cape Province of South Africa.

88 Nkateko *The silenced voice of initiated Venda Women* 38.

to transit to manhood and is seen as a preventative precaution against sexually transmitted diseases. the ceremonies for this rite of passage are normally "hosted during winter in the bush far away from the village."[89] In other words, boys are sent away or secluded for weeks whilst the transitioning to manhood ceremonies are performed.[90] According to Milubi,[91] boys at *murundun* are taught certain behavioural expectations of adult men by the society.

A major concern facing circumcision performed in alignment with these practices is the significant incidence of serious injury and sometimes death.[92] For example, between 2008 and 2014, more than half a million boys were hospitalized due to botched circumcision sessions in South Africa alone, and more than 400 lost their lives.[93] However, not all communities practice traditional circumcision, there are those communities that opt for medical male circumcision instead. Hence not all provinces are affected by the harmful consequences of circumcisions that go wrong.

5.5.1 Male circumcision in theory and practice

5.5.1.1 Traditional male circumcision

In traditional male circumcision sessions, a practitioner with no formal medical training and whose expertise, and safety precautions are unclear carries out the procedure.[94] In most traditional communities, the traditional male circumcision is usually done in stages; starting with the preparation stage, which eventually leads to the actual circumcision.[95] This is then followed by a period of seclusion in which the participants are confined in a specially prepared area, during which the wound

89 Nkateko *The silenced voice of initiated Venda Women* 38.
90 Van der Zalm 2008 22 *Emory Int'l Law Review* 891, 906.
91 Milubi South African Journal for Folklore Studies 56-61,
92 In the Eastern Cape alone, between January 2008 and December 2009, 144 circumcision-related deaths were recorded. *See* Lazarus *South African Medical Journal* 544; Le Roux (note 11) 71-74.
93 Gonzalez L. South Africa: over half a million initiates maimed under the knife. *All Africa*. 2014. See also Maseko When circumcision can mean death in South Africa. *BBC News Africa*. 2013. Available at http://www.bbc.co.uk/news/world-africa-23378694.
94 Wilcken *et al.* 2009 Bulletin of the World Health Organization 907-914. See also WHO (2009) Traditional male circumcision among young people: a public health perspective in the context of HIV prevention. World Health Organization, Geneva.
95 See earlier discussion in par 5.5 above.

is allowed to heal, and finally the re-integration stage in which the participants re-join the community.[96] Most traditional circumcision practitioners in some parts where it is mainly practiced; reveal that a major instrument in the circumcision process is a sharp knife or razor specifically prepared for this purpose. For example, circumcision is traditionally done in the bush as a rite of passage among the Xhosa of South Africa, often with spearheads and dirty knives, and usually by medically unskilled practitioners.[97] The above forms of traditional operations often cause haemorrhage, infection, mangling, and loss of the sexual organ.[98] There are neither specific antiseptics nor antibiotics or analgesics used.[99] The practitioners and the societies where the practice is rampant believe that boys who are circumcised without any forms of analgesics are braver and stronger, as a result, the use of analgesia is often associated with cowardice and weakness on the part of the boy.[100]

There are several reasons canvassed for the practise of traditional circumcision. One of the main reasons prominently adduced for traditional male circumcision is the rite of passage to adulthood. In most ethnic groups, traditional male circumcision is done as a way of preserving cultural identity and continuation of the traditions of the community.[101] Most ethnic groups do circumcise their young males at around puberty, although the actual age can range from 6 to adults years depending on the ethnic group or country.[102] The procedure also aims at assessing and imparting strength and bravery as it is expected that during the act of circumcision, the participant should show strength by showing that he is not

96 WHO (2009) Traditional male circumcision among young people: a public health perspective in the context of HIV prevention. World Health Organization, Geneva.
97 Anike *et al* 2013 African Primary Health Care and Family Medicine 1-5
98 Anike *et al* 2013 African Primary Health Care and Family Medicine 1-5
99 Vincent 2007 Male circumcision policy, practices and services in Eastern Cape Province of South Africa.
100 Vincent 2007 Male circumcision policy, practices and services in Eastern Cape Province of South Africa.
101 WHO (2009) Traditional male circumcision among young people: a public health perspective in the context of HIV prevention. World Health Organization, Geneva.
102 Wilcken *et al* 2009 *Bulletin of the World Health Organization* 907-914. See also WHO (2009) Traditional male circumcision among young people: a public health perspective in the context of HIV prevention. World Health Organization, Geneva.

feeling any pain.[103] More so, during circumcision ceremonies, educational sessions are carried out as part of the socialisation process, and the transmission of ethnic traditions to each successful generation.

5.5.1.2 Medical circumcision

This refers to circumcision carried out in proper clinical settings by trained medical officers and professionals. There are many techniques used in male circumcision in the medical world. The first uses special circumcision rings of various sizes made of either metal or plastic. The ring is usually placed around the circumference of the foreskin, and slowly but steadily compresses the blood supply to the distal part of the foreskin which causes necrosis and sloughing and thereafter achieving circumcision. It is a bloodless procedure, which does not require anaesthesia, sutures, or a sterile setting, and it can be performed by a non-surgeon after a brief training.[104] The second type is an open method in which one has to be taken into a theatre, which therefore requires sterile techniques, anaesthesia, antibiotics and other pre- and post-operative care. The prepuce is then excised around the glans and sutures placed to achieve haemostasis. Studies have indicated that, although the former takes a short time, it commonly leads to delayed healing when compared to the later.[105]

Medical circumcision is widely practised for medical or religious reasons either to treat problems involving the foreskin on the recommendation of a medical practitioner, or often within the first two weeks after birth in accordance with the religious practice/dictates of those concerned.[106] Circumcision carried out under a

103 Mwita *et al* 2009 Situational analysis for male circumcision in Tanzania: Final report.

104 The author of this thesis witnessed this form of circumcision procedure undertaken by a trained medical practitioner at a Federal medical hospital in Nigeria in 2012 when one of his cousin's son – a three weeks old baby – was circumcised.

105 Mutabazi *et al Journal of Acquired Immune Deficiency Syndromes* 49-55.

106 See for example Children's Act Section 12(8)(a) and (b) which permit circumcision of a child under 16 years on this ground. See also discussion on this issue in par 5.5.3 below.

medical setting are safer than the traditional circumcision settings, however, medical circumcisions are not without their risks and complications.[107]

What should be clear, from the discussion so far, is that circumcision be it traditional or medical fall on a wide spectrum, and that their inherent medical challenges may substantially overlap. For example, many parents or legal guardians may elect to have their children or young boys in their care circumcised under cultural or religious practice, and older boys themselves may wish to be circumcised using the traditional mode, as well. This raises a number of children's human rights concerns regarding the practice. Firstly, how can children be protected from possible adverse consequences, such as botched cultural circumcisions?[108] Secondly, how can the bodily integrity and autonomy rights of children or young boys be promoted, given that in many instances, their parents or legal guardians may make the decision on their behalf?[109]

The following sections of the thesis discuss the legal position of the practice of male circumcision, and the UNCRC children's participation rights and the South African children's law respectively.

5.5.2 Male circumcision and the UNCRC children's participation rights

Because of their recognised vulnerability, children are protected both by rights that apply to all persons and by rights pertaining specifically to them. Therefore, the UNCRC, to which South Africa have acceded to, affords children protection from all violence, injury or abuse, and obliges states to do away with "traditional practices prejudicial to the health of children".[110]

In terms of children's participation, the thesis indicates that Article 12(1) of the UNCRC provides for participation rights of the child in all matters affecting them.

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107 For example, in 2011, nearly a dozen infant boys were treated for "life threatening haemorrhage, shock or sepsis" as a result of their non-therapeutic circumcisions at a single children's hospital in Birmingham, England. See Checketts 2012 Response to freedom of information request, FOI/0742. Birmingham Children's Hospital, NHS Foundation Trust

108 Child Rights International Network (CRIN). South Africa: Clamping down on botched circumcisions, 2007

109 Svoboda *J Med Ethics* 469-474

110 See Article 19 and 24(3) of the UNCRC.

Therefore, since circumcision as a cultural practice is a matter that directly affects the male child, it follows that making the decision or participating in the process of decision-making towards their circumcision is paramount, of course taking into consideration the child's age, maturity and stage of development.[111]

In light of the foregoing, it should be clear that children are entitled to the same right of choice accorded to adult males on the issue of circumcision. More so, since they have a right to freedom of conscience, religion, thought, belief and opinion, that is distinct from any beliefs and opinions held by their parents, and should be equally respected.[112] Once individuals has sufficient capacity and maturity enough to apply their mind to issues, it cannot be assumed that they will embrace the opinions of either their parents or a particular branch of the medical fraternity on the issue of circumcision. Therefore, children's rights should not be infringed upon in the name of culture and religion, or on the grounds of medical opinion based on lifestyle choices that will be made during adulthood.

The following section discuss the extent to which the children's rights law in South Africa imbibed the foregoing spirit and intent of the UNCRC.

5.5.3 Male circumcision and children's rights laws in South Africa

As previously indicated, male circumcision is widely practised in South Africa for both religious, cultural and medical reasons. As a result of the adverse effects resulting primarily from botched cultural circumcision, male circumcision has been recognised and regulated, with the aim of causing minimal infringement of the rights of children, while ensuring their protection. The main legal instrument for the protection of children is the South African Children's Act 38 of 2005, which provides a major regulation in terms of the practice. There are also provincial legislation regulating cultural circumcision in the Northern Province, the Eastern Cape and the Free State. These regulations are the Northern Province

111 See Article 12 (1) of the UNCRC. See also Chapter 4 of this thesis for a detailed discussion on what Article 12 (1) provisions entails and its various components.
112 See Article 14(1) of the UNCRC.

Circumcision Schools Act 6 of 1996;[113] the Application of Health Standards in Traditional Circumcision Act 6 of 2001[114] and the Free State Initiation School Health Act 1 of 2004,[115] respectively. While the former – that is the Children's Act will be discussed subsequently, the later – provincial legislations fall outside the scope of this thesis.

Male circumcision is regulated in three main ways by the Children's Act and Regulations.[116] First, section 12(8), prevents male minor under the age of 16 years from being circumcised, with two exception: religious and medical circumcision. Then, in section 12(9), the general age of consent to circumcision is set at 16 years. This age of consent does not apply only to traditional or customary circumcision, it also applies to all other types and forms of circumcision such as religious and medical circumcision. For example, if a child is of age and matured enough to consent. The child's decision is paramount, and consent must be granted in writing, on the prescribed form and following proper counselling by a parent, guardian, caregiver or social service professional, as required by law.[117]

Second, as detailed in Regulation 5(2), concerning circumcision for social and cultural purposes, and Regulation 6, which relates to circumcision for religious purposes, the Children's Act and Regulations provides for certain health requirements and protection during the circumcision process.[118] These health requirements involves the use of sterile surgical instruments to prevent the transmission of HIV Aids or other STDs, the safe disposal of instruments and gloves after each circumcision, unless the instruments are appropriately sterilised,

113 Northern Province Circumcision Schools Act 6 of 1996,
114 Application of Health Standards in Traditional Circumcision Act 6 2001
115 Free State Initiation School Health Act 1 of 2004.
116 The procedures that should be followed to implement these provisions are detailed in the General Regulations Regarding Children of 2010 (hereafter referred to as the Regulations).
117 See Children's Act Regulation 5, and Form 2 (Consent to Social or Cultural Circumcision).
118 General Regulations Regarding Children (published under GN R261 in GG 33076 of 1 April 2010). There are no provisions in the Regulations regarding circumcision for medical purposes.

the avoidance of direct blood contact or contact with any other bodily fluids, again an HIV prevention measure, and the proper disposal of any human tissue.[119]

Third, the Children's Act establishes for two exceptions to the 16-year-old age restriction for circumcision prohibition: circumcision for religious purposes in conformity with religion's practice, and circumcision for medical reasons on a medical practitioner suggestion.[120] As regards religious and medical circumcisions, independent consent of a child over 16 years suffice. It is not necessary to obtain parental consent. Conversely, consent must be given by a parent or guardian for children below the age of 16 years, and where there are more than one person with parental rights and obligations, both holders of parental rights and responsibilities must grant the necessary permission.[121] Section 12(10) of the Children's Act also gives any male child the rights to refuse to be circumcised, taking into account the child's age, maturity and stage of development. In other words, minors under the age of 16 years who are capable of expressing their refusal are obviously covered by the Children's Act.

What should be clear from the discussion so far, is that the South Africa Children Act deals explicitly with male circumcision of boys under 16 years by stipulating when and how circumcision may be performed. More so, there are various protections for all male children, as well as some additional restrictions for boys under 16 who have less legal capacity. The Children's Act's approach seems to be guided by two broad principles: *(i)"* that every child has the right not to be subjected to social, cultural and religious practices that are detrimental to his/her well-being", and this includes the right, in certain circumstances, to choose not to be circumcised; and (*ii*) "that a child, depending on his/her age, maturity and stage of development, has the right to participate in any matter concerning him/her."[122]

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119 General Regulations Regarding Children (published under GN R261 in GG 33076 of 1 April 2010).
120 See ss 12(8)(a) and 12(8)(b) of the Children's Act.
121 See Regulations 6(3)(a).
122 See ss 12(10) and 10 of the Children's Act.

In light of the foregoing, it is clear that the provision of the Children's Act that protect children against the harmful practices of traditional male circumcision aligns with the intent and spirit of Article 12(1) of the UNCRC participation rights of the child. The implication of these provisions on the protection of children as envisaged by the UNCRC is that children who are capable of making decisions are entitled to the same right of choice afforded to adult males on the issue of circumcision.

5.6 Female Genital Mutilation/Cutting (FGM/C): An overview

Female Genital Mutilation/Cutting[123] which encompasses all procedure involving the removal of parts or all of the most sensitive parts of the female genital organ for non-medical reasons.[124] World Health Organization[125] (WHO) categorises FGM/C into four types, namely, Type 1— clitoridectomy: the removal of the clitoris or the prepuce (the fold of skin surrounding the clitoris).[126] Type 2— excision: "the partial or complete removal of the clitoris and the labia minora (inner folds of the vulva)."[127] Type 3— infibulation: the narrowing of the vaginal orifice and creating a covering seal, with or without excision of the clitoris.[128] Type 4— other: this

123 See earlier par 1.2.3.4 of Chapter 1 on the choice of the term Female genital mutilation/cutting in this study. See also the publication *Respectful dialogue: a guide for responsible reporting on female genital cutting* (AMWCHR 2014).

124 WHO 2018 https://www.who.int/reproductivehealth/publications/health-care-girls-women-living-with-FGM/en/

125 WHO 2018 https://www.who.int/reproductivehealth/publications/health-care-girls-women-living-with-FGM/en/.

126 According to Daniyan *et al*, clitoridectomy includes "removal of the prepuce of the clitoris, removal of both the prepuce and the glans (also called circumcision or Sunna) or removal of the entire clitoris." See Daniyan *et al Epidemiology (Sunnyvale)* 1.

127 Daniyan *et al* points out that type 2 is the most common form of FGM/C which account for up to 80% of the procedure practiced globally and also in Nigeria. See Daniyan *et al*, *Epidemiology (Sunnyvale)* 1. See also Asekun-Olarinmoye and Amusan, *Eur J Contracept Reprod Health Care* 289-297.

128 Daniyan *et al*, explain that the covering seal will leave a little opening for the purpose of urination and menstruation. The seal will need to be opened up (deinfibulation) later in life to allow intercourse or to facilitate childbirth. The authors pointed out that this type of female genital mutilation is the "most extreme (severe) form of FGM accounting for about 15% of all procedures." See Daniyan et al, *Epidemiology (Sunnyvale)* 1; Garba *et al*, *Archives of Gynecology* 423-428.

includes other procedures that are harmful to the genitalia such as pricking, piercing, incising, scraping and cauterisation.[129]

FGM/C is an age-old practice perpetuated in many communities around the world.[130] According to Daniyan *et al*,[131] traditional cutters, sometimes known as circumcisers in the practicing community, traditional birth attendants or grandmothers, and in some situations, nurses/midwives, perform FGM/C procedures.[132]

As noticed in the subsequent discussion of specific countries in this chapter,[133] the reasons accountable for the practices of FGM/C are complex, and it involves a combination of social and cultural factors that vary across time, ethnicity and region.[134] Commonly cited reasons for FGM/C includes, to prepare for marriage and adulthood; to preserve socially accepted values, and to ensure premarital and marital fidelity.[135]

In terms of the age for the practise, FGM/C preferably is performed by practising communities before the age of puberty, ranging from infants of a few days old to

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129 Daniyan *et al* further point out other forms of female genital mutilations which involves "stretching of the clitoris or labia, scrapping of the vaginal orifice (angurya cut) or making incision on the vagina walls (gishiri cut) for treatment of dysmenorrhoea, infertility, uterovaginal prolapse, prolonged labour and insertion of corrosive substances into the vagina to tighten it." See Daniyan et al, *Epidemiology (Sunnyvale)* 1; Garba *et al*, *Archives of Gynecology* 423-428.

130 See WHO 2018. http://www.who.int/ mediacentre/factsheets/fs241/en. It is notable that FGM/C has no backing in religion and many faiths in various ethnic groups practised it. See AMWCHR (Australian Muslim Women's Centre for Human Rights) 2014. http://ausmuslimwomenscentre.org.au/wpcontent/uploads/2014/08/Respectful-Dialogue.pdf.

131 See Daniyan *et al*, Epidemiology (Sunnyvale)2-3.

132 See Ahanonu and Victor *Health Education Research* 683–689; Population Reference Bureau. 2010. http://www.prb.org/pdf10/fgm-wallchart2010.pdf. See also Federal Ministry of Health Nigeria, World Health Organisation. Elimination of Female Genital Circumcision in Nigeria. 2007, Abuja.

133 See the subsequent discussion in paras 5.6.1, 5.6.2 and 5.6.3 below on the theory and practice of Female Genital mutilation in Nigeria, South Africa and Australia respectively.

134 See AMWCHR (Australian Muslim Women's Centre for Human Rights) 2014. http://ausmuslimwomenscentre.org.au/wpcontent/uploads/2014/08/Respectful-Dialogue.pdf. See also WHO 2018. https://www.who.int/reproductivehealth/publications/health-care-girls-women-living-with-FGM/en/.

135 WHO 2018. https://www.who.int/reproductivehealth/publications/health-care-girls-women-living-with-FGM/en/ See later discussion in paras 5.6.1, 5.6.2 and 5.6.3 below

children ranging from 8 to 18 years old.[136] However, the age for the practice among practising communities vary, but a vast majority of female children undergo FGM/C by the age of 15, and for many, before the age of 9.[137]

Furthermore, according to the WHO clinical handbook,[138] FGM/C has no health benefits, and there is no medical justification for it. Rather, the practice of FGM/C imposes on the female child a variety of health complications and psychological issues.[139] For instance, FGM/C negative impact on body functioning and can lead to long-term physical and sexual health issues.[140] Anxiety and depression and post-traumatic stress disorder, are all frequent psychological repercussions among persons who had undergone the FGM/C.[141] The impacts of FGM/C on the female child have both immediate, short-term and long-term implications.[142]

Lastly, it is worthy of emphasis that FGM/C as a cultural practice had been experienced by over 200 million female children and women across the world.[143] Although FGM/C practice is concentrated in Africa and some Asian nations,[144] it has been reported worldwide.[145]

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136 See, generally, Hosken The Hosken Report: Genital and Sexual Mutilation of Females

137 DHS (Demographic and Health Surveys) 2018. http://dhsprogram.com/Publications/Publications-by-Country.cfm.

138 WHO 2018 https://www.who.int/reproductivehealth/publications/health-care-girls-women living-with-FGM/en/.

139 See Daniyan *et al*, Epidemiology (Sunnyvale) 1.

140 See Bishai *et al* Bull World Health Organ 281–8; Dare *et al J Obstet Gynaecol*; 281-3; Abdulcadir *et al Swiss Med Wkly* 1–8.

141 See Daniyan *et al Epidemiology (Sunnyvale)* 3-4. 6

142 Short term implications include pain, bleeding, shock, urination problem, infection, genital tissue swelling and death. While long term implication includes "Menstrual problems (for example, difficulty passing blood or painful periods), Increased risk of childbirth complications, scar tissue complications (e.g., keloids and epidermal inclusion cysts), Chronic pain, Urinary tract infections, reproductive tract infections and Sexual health complications." See WHO 2016 www.who.int/reproductivehealth/topics/fgm/health_consequences_fgm/en.

143 WHO 2018http://www.who.int/mediacentre/factsheets/fs241/en

144 Office of the High Commissioner for Human Rights, Joint United Nations Programme on HIV/AIDS, United Nations Development Programme, et al2008.

145 WHO 2018 http://www.who.int/mediacentre/factsheets/fs241/en See also Barstow *Child Abuse Negl* 501-510.

5.6.1 Female Genital Mutilation/Cutting in Nigeria: Theory and practices

The practice of FGM/C forms an integral part of the traditional and social heritage,[146] especially of South-western, Northern and South-Eastern parts of Nigeria.[147] According to the Department of Foreign Affairs and Trade Country Information Report 2018 (DFAT report),[148] "[F]emale genital mutilation (FGM) is widely practised in Nigeria. The practice is closely tied to concepts of family honour and girls' marriageability".[149] A similar view to that of DFAT report is that of Okeke *et al*,[150] whose study reveals that there is a prevalence of the practice of FGM/C in Nigeria.[151] FGM/C, is therefore, a practice deeply entrenched in the Nigerian society.

A closer scrutiny of the harmful practice of FGM/C in Nigeria shows that the practice seems to have been fuelled by several factors, which includes socio-cultural, ignorance, poverty and to an extent, religion.[152] Out of these factors', the socio-cultural factor seems to be the most pronounced and this varies from one community to the other. According to Ahanonu and Victor,[153] socio-cultural factors such as the need to preserve virginity or the prevent "premarital sex; the prevention of promiscuity; spiritual satisfaction; social acceptance; family honour; cleanliness or hygiene; aesthetic reasons; increased sexual pleasure for the

146 UNICEF, 'Nigeria Country Profile', February 2019.
147 See Daniyan *et al, Epidemiology (Sunnyvale)* 2.
148 DFAT, Country of Information Report – Nigeria, 2018 (para 1.4).
149 DFAT, Country of Information Report – Nigeria, 2018, 21. It should be noted that in 2011, the prevalence rate for women aged 15-49 was 27%. See UNICEF – FGM/C: A statistical overview, 99, July 2013. In 2013, that rate had dropped to 24.8%. See NPC - Nigeria Demographic and Health Survey 2013, 350. In 2016/17, that rate had dropped further to 18.4%. See NBS/UNICEF, Multiple Indicator Cluster Survey (MICS), 2016-17.
150 Okeke *et al* Annals of Medical and Health Sciences Research 70-3.
151 Okeke *et al* supports their argument by pointing out that, "In Nigeria, FGM has the highest prevalence in the south-south (77%) (among adult women), followed by the south east (68%) and south west (65%), but practiced on a smaller scale in the north, paradoxically tending to in a more extreme form." See Okeke *et al* Annals of Medical and Health Sciences Research 70-3
152 In fact, according to Daniyan *et al* "in a study in South-East Nigeria, the reasons for FGM are prevention of promiscuity (38.3%), cultural beliefs (27.5%), hygiene (4.4%), promotion of future childbirth (1.8%) and religion (1.2%). In another study done in Benin-City, religio-cultural and superstitious beliefs were the main reasons for FGM. The study in Kano, North-West Nigeria, reported tradition/culture as the commonest reason for FGM accounting for 73.1%. Other reasons included were religion in 11.5%, hygiene in 11.5% and preservation of virginity in 3.8%." See Daniyan *et al, Epidemiology (Sunnyvale)* 2.
153 Ahanonu and Victor Health Education Research 683–689.

husband; enhancing fertility and increasing marriageability" are mainly accountable for FGM/C in Nigeria.[154] From the preceding, it is safe to assert that the practice of FGM/C by some communities in Nigeria serves as a tool employed to "control women's sexuality and ensure chastity," and to guard against "premarital sex and ensuring a woman's faithfulness to her husband."[155]

Poverty is another factor that fuel FGM/C practice in Nigeria. Hence the practice is very common in many poverty-stricken indigenous communities, both in rural and urban Nigeria communities. Many female children are not only made to undergo genital cutting as a cultural rite of passage or initiation into womanhood, but also as a prerequisite for better marriage prospects to them.[156] In fact, according to Daniyan *et al*,[157] a female is considered unfit for marriage in some communities until she had undergone through the process of FGM/C. The author states that "in extreme cases, it is both a stigma and a taboo to get married without being cut as the practice is believed to preserve virginity before marriage".[158]

Another factor that is accountable for FGM/C in Nigeria is lack of knowledge about the health implications of the practice.[159] Ahanonu and Victor[160] pointed out that even those who are responsible for caring and protecting children, i.e. mothers may in good faith subject their daughters to the harmful practice of FGM/C because of certain misconceptions of the practice. Thus, it becomes imperative that adequate and proper information of the health implications of FGM/C is necessary for the protection of the health and rights of the female child and women.

FGM/C is also practised in several communities in Nigeria, under the erroneous belief that certain religions demand it. Okeke *et al*[161] argued that the "practice of FGM has no relationship with religion. Muslims and Christians practice it, but it is

154 Ahanonu and Victor Health Education Research 684.
155 Daniyan *et al Epidemiology* (Sunnyvale) 2.
156 Oyekale *Ethno Med* 187-195; Daniyan *et al.* Epidemiology (Sunnyvale) 2.
157 Daniyan *et al Epidemiology* (Sunnyvale) 2.
158 Daniyan *et al Epidemiology* (Sunnyvale)2.
159 Ahanonu and Victor Health Education Research 688.
160 Ahanonu and Victor Health Education Research 688.
161 Okeke *et a*l Annals of Medical and Health Sciences Research 70-3.

more widely spread in Christian predominated parts of Nigeria." In other words, the practice of FGM/C has no basis in religion, yet some practising communities lay claim to faith as their justification for the practice.

Furthermore, in some communities, the practice of FGM/C is believed to enhance fertility, aids childbirth and promotes child survival. For example, as pointed out by Ahanonu and Victor,[162] a "local myth among some Igbos of south-east Nigeria is that if a baby's head touches the clitoris, the baby will die or the breastmilk will become poisonous".[163] Daniyan *et al*.[164] corroborates this assertion by Ahanonu and Victor, which notes that in some parts of South-West Nigeria, it was believed that at childbirth if the head of the new-born child touches the clitoris, the baby would die. In other communities in Nigeria, FGM/C are practised to ensure the survival of a future spouse.[165]

In terms of the stipulated age for the practice of FGM/C, it is usually done at puberty, just before the female's menstrual circle or before marriage.[166] In support of the above is the NBS/UNICEF, Multiple Indicator Cluster Survey (MICS) 2016-17 February 2018, which puts the percentage of female in Nigeria aged 15-49 who had undergone FGM/C at 18.4 per cent, and that of female children aged 0-14 years reported to have experienced FGM/C at 25.3 per cent.[167] More so, in the earlier 2013 Nigeria Demographic and Health Survey (DHS 2013), 82 per cent of women are said to have undergone FGM/C before the age of 5, 4 per cent between 5 and 9 years, 5 per cent between 10 and 14 years and 7 per cent were 15 or older.[168] Furthermore, in terms of the variations in age among ethnic groups at circumcision in Nigeria, 92 per cent of Hausa women underwent the procedure before age 5. 38 per cent of Ijaw/Izon women were circumcised at age 15 or older. By zone, 90 per cent of women in the South-East were circumcised before

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162 Ahanonu and Victor *Health Education Research* 683–689.
163 Ahanonu and Victor *Health Education Research* 684; Adewale and Adewale *West Afr J Nurs* 20-21.
164 Daniyan *et al Epidemiology (*Sunnyvale*)* 2; UNICEF (2018) Nigeria: Female genital mutilation. New York: UNICEF.
165 UNICEF (2018) Nigeria: Female genital mutilation. New York: UNICEF
166 See Daniyan *et al Epidemiology (*Sunnyvale) 2.
167 NBS/UNICEF, Multiple Indicator Cluster Survey (MICS), 2016-17, February 2018.
168 NPC – Nigeria Demographic and Health Survey of 2013 351, published June 2014

age 5, while 34 per cent in the North East were circumcised at age 15 or older.[169] In light of the preceding statistics, it is clear that those who are susceptible to FGM/C in Nigeria are female children aged 0-15 years.

Speaking of a female child who has undergone FGM/C in Nigeria, a factor which is considered common among them is that the practice is usually carried out without their consent. According to the recent EASO (European Asylum Support Office), "Country Guidance: Nigeria":[170]

> [T]he final decision whether or not to circumcise their daughter is most often with the parents, but there is a considerable variation both individually and among different ethnic groups whether it is the father or the mother who makes this decision. [171]

The above affirm the argument made in Chapter 2,[172] that decisions concerning children in Nigeria are usually made by their father or elderly person in the family. More so, that parenthood in African culture is mostly social, and significant decisions concerning children are taken after consulting members of the kinship group or family, not just the child's biological parents.[173] In this regard, the grandparents or the eldest female on the paternal side, and other relatives of the child also have a decisive role in decision-making process as it relates to the FGM/C of the female child.[174] Sometimes, threats to withhold support due to refusal to subject the child to the practice could be made on the parents. However, in all of the instances of FGM/C practices, it is most often considered a "family issue" and the parents are usually not subjected to violence or threats of violence. In fact, as pointed out by EASO, "Country Guidance: Nigeria":

> [A] few cases of relatives disregarding the parents' decision and subjecting the girl to FGM/C in Nigeria are reported, although this is considered to be very unusual.[175]

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169 NPC – Nigeria Demographic and Health Survey of 2013 351, published June 2014. The high percentage may be as result of a ritual for initiation into womanhood.
170 EASO, 'Country Guidance: Nigeria', February 2019.
171 EASO, 'Country Guidance: Nigeria', February 2019 63.
172 See earlier discussion in paras 2.5.3 to 2.5.5 of Chapter 2.
173 Rwezaura *et al* 1995 *JLP* 40.
174 EASO, 'Country Guidance: Nigeria' February 2019 63.
175 EASO, 'Country Guidance: Nigeria', February 2019 62-63.

What is evident from the above is that there is a strong emphasis on "intergroup relationship[s]" and parental authority in terms of decision-making concerning the practice of FGM/C in Nigeria.[176] Consequently, the female children who are the victims of this harmful practice are not usually consulted or involved in the process of decision-making.

5.6.2 Female Genital Mutilation/Cutting in South Africa: Theory and practices

The practice of FGM/C is not considered to be widespread in South Africa.[177] However, FGM/C is one cultural practice embedded among the Venda community of the North-East[178] and Kwazulu-Natal of South Africa.[179] FGM/C is practised among the Venda community as part of initiation rites for girls into womanhood.[180] Although, the forms of initiation may differ according to ethnic groups, what is familiar to the practitioners is that the elderly ceremoniously welcome the young adolescents into womanhood by performing a communal ritual.[181]

An example of such initiation among the Venda communities is what is Known *Musevhetho.*[182] *Musevhetho* is the initiation rite for girls.[183] In other words, the ceremony of initiating a female child into the puberty stage (that is, before the girl

176 EASO, 'Country Guidance: Nigeria', February 2019 63.

177 See Canada: Immigration and Refugee Board of Canada, South Africa: 2003 https://www.refworld.org/docid/3f7d4e3e2a.html See also Country Reports on Human Rights Practices for 2001 2002. United States Department of State. Washington, DC.

178 Kitui date unknown https//africlaw.com

179 See Canada: Immigration and Refugee Board of Canada, South Africa: 2003 https://www.refworld.org/docid/3f7d4e3e2a.html

180 Nkateko: *The silenced voice of initiated Venda Women;* Kitui date unknown https//africlaw.com See also Stayt *The Bavenda*. According to Van de Walle and Franklin women are taught about future obligations, i.e. commitments to their counterpart (husband), the rules of etiquette, controlling relations with in-laws and that the proper place is one of submission and to obey their husband. See Van de Walle and Franklin *Sexual of Initiation and the Transmission*. *Reproductive Knowledge*.

181 Milubi *South African Journal for Folklore Studies* 56-61; Nkateko *The silenced voice of initiated Venda Women* 38.

182 Nkateko *The silenced voice of initiated Venda Women* 38.

183 According to Mlama the Vha-Venda people considered the individual growth as a succession of phases, the most important of which were puberty and marriage. External forces, like as the ancestors and good and evil spirits, they believed, may have negative effects on humans. Initiation schools were utilised to help adolescents handle the responsibilities of the next phase in their lives in order to guide them through these potentially challenging times. The initiate were given the opportunity to let go of the past mistake and embrace the future through dances and initiation rites. The ceremonies were also intended to gain the ancestors' blessing and empower the initiates. See Mlama *Tanzanian traditional theatre as a pedagogical institution*: *The Kaguru as a Case Study.*

begins her menstrual circle)".[184] According to Nkateko,[185] the initiation rite among the Venda communities is referred to "as '*u kwevha*', which involves the elongation of the girls' labia minora, sometimes called '*sungwi*', and is said to be equivalent to the *murundu",* which is the circumcision rite for the boys.[186]

Many girls attend such initiation ceremonies to conform to the expectations of their culture, which earns them society's esteem and respect. Curiosity also plays a significant part in attracting participation in these puberty rites of passage.[187] For instance, most girls who choose to attend the rites want to experience what it's like to go through the initiation process.[188]

Other reasons for the practice of this initiation rite is the belief that it confers better marital life and sexual satisfaction. In the Venda communities, women who have undergone elongation of the labia minora are seen or see "themselves as having attained a higher social status in the community than those who have not."[189] In other words, they see themselves as having an advantage over those yet to undergo the initiation rites in terms of marriage and sexual satisfaction of their men. It is, therefore, common to see initiated females ridicule those to yet to be initiated "calling them names such as *shuvhuru*, master-mistress and other derogatory labels."[190]

Furthermore, many parents indulged the children in the practice of *Musevhetho* or the initiation rite for girls because of the belief that its plays a great role in the socialisation and education of young girls and boys with regards to their culture.[191]

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184 Milubi South *African Journal for Folklore Studies* 56-61.

185 Nkateko *The silenced voice of initiated Venda Women* 38.

186 See Nkateko *The silenced voice of initiated Venda Women* 38; Milubi *South African Journal for Folklore Studies* 56-61. See also earlier discussion on male circumcision in South Africa in paras 5.1 and 5.5.1 above

187 Van de Walle and Franklin "Sexual of Initiation and the Transmission. Reproductive Knowledge."

188 Nkateko *The silenced voice of initiated Venda Women* 37.

189 Milubi *South African Journal for Folklore Studies* 56-61; Nkateko *The silenced voice of initiated Venda Women* 36-27.

190 Milubi *South African Journal for Folklore Studies* 56-61.

191 Van de Walle, and Franklin *Sexual of Initiation and the Transmission*. *Reproductive Knowledge*. University Pennsylvania; Stayt *The Bavenda*. According to Stayt, "*musevhetho* has been introduced into Vha-Venda by the neighbouring Basotho, where it is called '*mula*." Nkateko *The silenced voice of initiated Venda Women* 27.

In other words, *Musevhetho* is believed to play an essential role not only in reducing early sexual engagement amongst young girls and boys, but also guards against unplanned teenage pregnancies. For example, girls' virginity status is checked by the older women (*vhomazwale),* and girls who have lost their virginity are ostracised at the '*musevhetho*' initiation school.[192] The practice is believed to encourage girls to abstain from sex and discourage girls to guard their virginity before their marriage.

It should be kept in mind, that the focal point of the proceedings of the initiation rite for girls is the genital cutting, which all the initiates must undergo.[193] The process leading to the cuttings of the genitalia are held in a small hut outside the village known as '*nonyana*' described by Stayt[194] as the spirit of the '*musevhetho'*. Nkateko clearly described the process and practices as follows:

> [T]he girls often attend at *nonyana'* shut for a day and a night. They will see the spirit and be returned to their homes until they are considered to be enough initiates to warrant the operation. On the appointed day, they are taken to a secluded place on the river bank, where an old woman performs the operation of cutting the clitoris.[195]

The initiation process does not end with the cutting of the clitoris as the girls are further branded with a mark on the outside of the thigh. The mark or brand, as described by Nkateko[196] is "two inverted U's joined together or sometimes, it may be two round dots". The essence of the brand is to certify that the initiate is qualified to participate in the ceremonies. In order words, the branding serves as

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192 Nkateko *The silenced voice of initiated Venda Women* 26.

193 It is narrated by Vha-Venda people that children of all ages must attend, and quite young children are brought to the ceremony by their mothers. The boys dance to perform antics for the entertainment of the crowds. The events are fascinating, because these boys never speak to any one, and only communicate with each other. They do not communicte with those who did not attend the ceremony. See Stayt *The Bavenda*; Nkateko *The silenced voice of initiated Venda Women* 26.

194 Stayt The Bavenda.

195 Nkateko *The silenced voice of initiated Venda Women* 26; Kitui date unknown https//africlaw.com

196 Nkateko *The silenced voice of initiated Venda Women*26; Kitui date unknown https//africlaw.com

a proof that the branded girl has undergone the cutting (that is, Female Genital Mutilation/Cutting).[197]

What should be clear from the discussion so far, is that the practice of FGM/C is an aspect of the cultural initiation rite or preparation for womanhood in the practising communities. More so, the girl child at puberty must participate in the initiation's ceremonies, and their participation is ignited by societal and cultural pressure. For instance, the calling of those who have not attended the initiation "names such as *shuvhuru*, master-mistress and the usage of derogatory names" are instances of pressure to comply.[198] Consequently, it follows that most girl-child who are victims of FGM/C are coerced, threatened and intimidated to undergo the initiation proceedings, which include such harmful practices as FGM/C. In this regard, the requisite consent to participate cannot be said to have been adequately sought. The issue of consent to participate in such cultural practices is further discussed later in this Chapter.

5.6.3 Female Genital Mutilation/Cutting in Australia: Theory and practices

The national level evidence of prevalence of the practice in Australia seem limited.[199] However, Australian Family Law Council has since as long as 1994 accepted, that it was likely that FGM/C is conducted in Australia.[200] In other words, there is an indication that the practice of FGM/C does exist in Australia. For example, doctors and hospitals in 2010 reported that FGM/C exists and that they have attended to female patients who underwent FGM/C. The Melbourne Royal

197 Nkateko *The silenced voice of initiated Venda Women* 26; Kitui date unknown https//africlaw.com.

198 Milubi *South African Journal for Folklore Studies* 56-61.

199 See AIHW (Australian Institute of Health and Welfare) 2019. It is notable that FGM/C is illegal and conducted in private in Australia, therefore, obtaining precisie data in terms of it prevalence is imposisible. However, a report by Family Planning Victoria/ Royal Melbourne Institute of Technology provided estimates of the number of people living in Australia who were born in countries where communities practise FGM/C. See Costello *et al* 2014 *A tradition in transition: female genital mutilation/cutting*.

200 Mathews *MJA* 139.

Women's Hospital alone reported seeing between 600 and 700 affected women annually.[201]

Gibson-Helm *et al*,[202] in a study of births conducted in 2014 at the Metropolitan Health Service, found that the prevalence of FGM/C among women born in selected African countries was 3.6 per cent. The author found that the majority of the practise is common among women from migrant refugee backgrounds than non-refugee migrants.[203]

A study by Varol *et al*[204] on the prevalence of FGM/C among women giving birth at particular hospitals also found that 2.2 per cent of women who gave birth over a six-year period had FGM/C. Furthermore, Zurynski *et al*[205] in their 2017 survey of paediatricians discovered that 23 clinicians (2.3 per cent) had seen 59 children with FGM/C in the previous 5 years in their practice in Australia. The majority (90 per cent) were identified through refugee screening, and were born abroad; however, three (10 per cent) were born in Australia, two of whom had had FGM/C done in Australia, and one in Indonesia.[206] Similar to Zurynski *et al*. study is that of Sureshkumar *et al*,[207] survey of paediatricians' knowledge, attitudes and clinical experiences. The authors discovered that 10 per cent of the 497 people who replied had encountered FGM/C in girls younger than 18 years at some point in their careers, and that 22 per cent of those who responded were aware of the WHO classification of FGM/C.[208]

A good example of FGM/C practice in Australia is the widely reported Australia's first FGM/C prosecuted case in the New South Wales Court in 2015, where two women (one of which is the mother) and a man was convicted of mutilating two

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201 See AIHW (Australian Institute of Health and Welfare) 2019; Costello *et al* 2014 *A tradition in transition: female genital mutilation/cutting.*

202 Gibson-Helm *et al BioMed Central Pregnancy Childbirth* 392.

203 Gibson-Helm *et al BioMed Central Pregnancy Childbirth* 392. See also See AIHW (Australian Institute of Health and Welfare) 2019 5.

204 Varo *et al BioMed Central Pregnancy Childbirth* 328.

205 Zurynski *et al* Archives of Disease in Childhood 509-515; Zurynski *et al* 2015 *BioMedCentral International Health and Human Rights* 32.

206 Zurynski *et al* Archives of Disease in Childhood 509-515.

207 Sureshkumar *et al Child Abuse and Neglect* 1-9; Dawson *et al* 2015 *Midwifery* 229-238.

208 Sureshkumar *et al* 2016 *Child Abuse and Neglect* 1-9.

young girl who are sisters age six and seven in separate cultural procedures.[209] The cultural procedure known as "*Khatna*", involves nicking or cutting a girl's clitoris in the presence of several females elders and is considered a rite of passage by some members of the Dawoodi Bohra Muslim community.[210] *Khatna* is a cultural practice passed down through generations to socialise girls into the community and it is symbolic of fertility and womanhood. It is meant to define women and her femininity and her identity as a Bohra woman.[211]

Analysing narratives of survivors of *Khatna* as a cultural practice, Kakal[212] clearly stated that:

> [K]hatna was seen as a religious and traditional practices and was considered to be a tool to control women's sexuality and maintain morality. Most of the survivors' experiences involved traditional cutting by a *dai* or midwife, in unhygienic conditions; where mothers and other women in the family played a vital role. It was a highly secretive and taboo practice but normalized and obligatory, and passed down through generations. Many women claimed to feel anger and shame, remembered it being painful and asserted it affected their sexual lives and crucially, being traumatic event in their lives.

The crown prosecutor in the Australian case on FGM/C described a similar procedure with that of kakal's above stating that the children subjected to the procedure experience pain as a result of the nick or cut they endured, and that the procedure was designed to inhibits sexual pleasure which has to do with sexual repression of women to make them more marriageable.[213] The practise of

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209 See Women convicted over repugnant genital mutilation of two girls shows no remorse 2015 http://www.abc.net.au/news/2016-02-05/women-convicted-over-genital-mutilation-show-no-remorse/7145556

210 See Women convicted over repugnant genital mutilation of two girls shows no remorse 2015 http://www.abc.net.au/news/2016-02-05/women-convicted-over-genital-mutilation-show-no-remorse/7145556

211 See Kakal 2020 Khatna within the Bohra community: A struggle of Tradition and Modernity. http://sahiyo.com/202/02/25/khatna-within-the-bohra-community-a-struggle-of-tradition-and-modernity/

212 See Kakal 2020 Khatna within the Bohra community: A struggle of Tradition and Modernity. http://sahiyo.com/202/02/25/khatna-within-the-bohra-community-a-struggle-of-tradition-and-modernity/

213 See Women convicted over repugnant genital mutilation of two girls shows no remorse. 2015 http://www.abc.net.au/news/2016-02-05/women-convicted-over-genital-mutilation-show-no-remorse/7145556 It must be stated, however that the New South Wales Court of Criminal Appeal 2018 later quashed the convictions of all the three accused in the case after reviewing new expert evidence, namely that the tip of the clitoris was still visible in each girl. The evidence at trial was that the examining doctor could not see the tip of the clitoris in each of the girl, leaving it to the jury to decide whether the pair had been

Khatna, thus, seem to be a tool employed by the practicing community not only to sustain traditions but also to control the children and women sexuality and sexual lives. The vital roles played by the family and the community in the practices of *Khatna* suggest that the children who are victims of the practices are obligated to undertake the harmful FGM/C procedure. Thus, consent as well as participation in decision-making concerning the victims of the practice cannot be said to have been voluntary.

In light of the foregoing, the main point is that FGM/C remains a relevant issue within Australian societies, particularly among the indigenous Australian and the migrant communities. However, there seems in recent time to be a change in attitudes towards FGM/C among migrant communities in Australia. According to Vaughan *et al*,[214] younger women and community members are now vehemently opposed to FGM/C for their daughters, which emphasised the vast generational change occurring in their communities.[215] According to Costello *et al*.[216] several factors are accountable for this change in attitude, that is, education regarding the physical and mental health consequences of FGM/C, increased awareness that FGM/C is illegal in Australia and the role male and female community leaders should play in opposing FGM/C.

5.6.4 Female Genital Mutilation/Cutting and the UNCRC children's participation rights

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removed. It was the defence case at trial that the "symbolic Khatna" had been performed without cutting involved, described by the mother of the girls as a ceremony whereby "skin sniffed the steel". The Appeal heard expert evidence that a possible explanation for being unable to previously visualise the glans was the girls being prepubescent prior to trial. See also See Genital mutilation conviction overturned. http://www.abc.net.au/news/2018-08-11/genital-mutilation-conviction-overturned/1010810 Furthermore, a later trial by the High Court of Australia held that even the symbolic khatna constitutes FGM/C and ordered a re-trial of the case.

214 Vaughan *et al* Listening to North Yarra communities about female genital cutting; Costello *et al* A tradition in transition: female genital mutilation/cutting. A study conducted by the authors in North Yarra, Melbourne reported that FGM/C had decreasing relevance in migrant communities, reducing over time after resettlement in Australia.

215 See AIHW (Australian Institute of Health and Welfare) 2019 7; Costello *et al* 2014 A tradition in transition: female genital mutilation/cutting.

216 Costello *et al* A tradition in transition: female genital mutilation/cutting.

Flowing from the foregoing discussions on the custom of *ukuthwala*, male circumcision as well as the theory and practice of FGM/C in Nigeria, South Africa and Australia, it goes without saying that FGM/C absolutely infringes upon the right to life and the protection of children from all forms of violence, injury or abuse. More so, the UNCRC obliges states to do away with "traditional practices prejudicial to the health of children".[217]

Speaking in terms of Article 12(1) of the UNCRC children's participation rights, it is also clear that the practice of FGM/C in Nigeria are usually carried out without the victims' consent. The final decision whether or not to circumcise the female child is most often with the parents' consent in Nigeria.[218] Similarly, in South Africa, most adolescent females who participate in the cultural initiation rite ceremonies or preparation for womanhood in the practising communities, do so out of societal and cultural pressure.[219] In Australia, the decision to undertake the practice of FGM/C rest with the parents of the victims.[220] Consequently, most of the victims are coerced by threats and intimidations to undergo cultural initiation rites, which involved the harmful practice of FGM/C. Again, the requisite consent to participate cannot be said to have been adequately sought. Since FGM/C as a cultural practice is a matter that directly affects both infant and adolescent children, it goes that making the decision to or participating in the process of decision-making towards the practice should be paramount to the child while taking into consideration the child's age, maturity and stage of development as envisaged by the UNCRC.[221]

Regardless of the above, the question as to the legality of children's consent to the practice of FGM/C remains valid. So much so that it speaks volumes of the extent of a child's participation in the decision-making process in matters

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217 See Article 19 and 24(3) of the UNCRC.

218 See earlier discussion in par 5.6.1 above. See also EASO, 'Country Guidance: Nigeria' February 2019 62-63.

219 See earlier discussion in par 5.6.2 above. See also Nkateko *The silenced voice of initiated Venda Women* 38.

220 See earlier discussion in par 5.6.3 above.

221 See Article 12 (1) of the UNCRC. See also Chapter 4 of this thesis for a detailed discussion on what Article 12 (1) provisions entails and its various components.

concerning the child. The question of the legal context of children consent is considered in the following section. However, it important to keep in mind that the discussion is done within the general context of common law principles of consent and not individual countries jurisdictional context. The reason for adopting general common law principles as context for discussion is that the common law principles enjoin same application in terms of interpretation in the legal systems of each jurisdiction.[222] More so, a general discussion of the common law principles drawing specific examples where necessary, limits to an extent a repetitive discussion of what has earlier been address on each jurisdiction.

5.6.5 FGM/C and children's consent to the practices: Addressing its legality

The legal context of children's consent is governed by several well-established common law legal concepts. First, administering treatment or subjecting a child to practices without the child's consent or the approval of a person or a court of law authorised to give consent on the child's behalf, is generally unlawful.[223] This principle promotes the general legal right to bodily inviolability, which has long been recognised by the Nigerian, South African and Australian courts,[224] as well as the UNCRC.[225]

Second, parents generally have the authority to grant consent on behalf of their children.[226] Parents have a duty to care for and protect their children, and as a result, they have a right to consent to any practise or treatment on their children's behalf.[227] As indicated in the thesis,[228] this power can only be exercised in the child's best interests and the court has the authority to reject a parental decision

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222 Subsequent discussion in par 5.6.5 justify this assertion.
223 Pattison *Medical Law and Ethics* 97*;* Esiri "Medical Law and Ethics in Nigeria" 7.
224 See Mason and Call Smith Law and Medical Ethics 345; Cutan *Journal of Cutaneous and Aesthetic Surgery* 35. On the court application of this principle in Australia see the case of *Secretary, Department of Health and Community Services v JWB and SMB* (1992) 175 CLR 218. In South Africa see *Ncedani v R* 1908 EDC 245. In Nigeria see the case of *Medical and Dental Practitioner Disciplinary Tribunal v Okonkwo* 8 (2001) 7 NWLR (Part 711) 79.
225 See also Article 19 and 24(3) of the UNCRC.
226 See Esiri "Medical Law and Ethics in Nigeria" 304.
227 See Dada Legal Aspect of Medical Practice in Nigeria 223-225.
228 See paras 4.4.1, 4.6.1.1 and 4.8.1 of Chapter 4 on discussion on the best interest of the child in Nigeria, South Africa and Australia respectively. See also See Mathews, Children and consent to medical treatment 113-147 for a discussion on this common law principle.

either to consent or not to consent to any form of treatment if it deems the decision is not in the child's best interests.

Third, unless legislation establish an age at which the child is empowered to give her/his own consent – as is the case in Nigeria, where the age is 18 years, in South Africa and South Australia, where the age is 16 years and 18 years in the rest of Australia[229] – the parent's right to consent to the child's treatment or any practises exists only until the child possesses sufficient understanding and intelligence to enable him/her to fully understand what is proposed regarding the specific treatment or the practise.[230]

These above stated principles are settled common law principles – that is, law emanating from court decisions in these countries respectively – and will determine the legal position even in the absence of legislation. In terms of the custom of *ukuthwala* and male circumcision in South Africa earlier discussed, they are regulated by the law.[231] What is notable with regard to FGM/C, is that parliaments in Nigeria, South Africa and every Australian jurisdiction have perceived it as warranting legislative regulation.[232] In other words, these three countries have legislations prohibiting any person from executing any type of FGM/C on a child or adult, including excision of any other part of the genitalia, infibulation, and any other mutilation of the genitalia. Consequently, even if persons over the age of 18 or 16 in South Africa and in South Australia as prescribe by their law consent to such cultural practises, any practitioner or other

229 The Nigeria Constitution peg the age of majority to 18 years. In South Africa, section 12(9) of the Children's Act, 2005 provides for a general age of consent to circumcision at 16 years. In Australia the age to consent to treatment is 18 years or in South Australia, the age is 16 years.

230 See Mathews children and consent to medical treatment 113-147. See also earlier discussion on this issue in Chapter 4.

231 See earlier discussion in paras 5.4.1 and 5.5.3 above.

232 In Nigeria See s 6 (1), (2) and (3) of the Violence Against Persons (Prohibition) Act, 2015 (VAPP) prohibits female circumcision, making it a federal offence, with penalties. In South Africa, Female circumcision is completely proscribed by section 12(3) of the South African Children's Act, No 38 2005. In Australia, Crimes Act 1900 (ACT) s. 74; *Crimes Act 1900* (NSW) s. 45; Criminal Code Act (NT) s. 186B; Criminal Code Act 1899 (Qld) s. 323A; Criminal Law Consolidation Act 1935 (SA) s. 33A; Criminal Code Act 1924 (Tas) s. 178A; Crimes Act 1958 (Vic) s. 32; Criminal Code Act Compilation Act 1913 (WA) s. 306 all prohibits FGM/C respectively.

person administering FGM/C would commit an offence, regardless of whether the child or adult consents.

5.6.6 Legal prohibition of Female Genital Mutilation/Cutting: Further justification

As already stated in this Chapter,[233] the practices of FGM/C is mainly focused on social control of girls' and women's bodies and their capacity for sexual enjoyment and fulfilment. Some justifications offered for FGM/C, include that, it is a rite of passage into womanhood, it ensures virginity (promoting family honour), it helps attract a husband because uncircumcised women are seen as promiscuous and it prevents infidelity by controlling sexual desire and capacity.[234]

Furthermore, FGM/C also has a number of negative physical and psychological consequences. The procedure is frequently carried out in unsterile conditions without anaesthetics, antiseptics or antibiotics by people with no surgical training and using rudimentary instruments like stones, razors and glass. The risk of infection is significant and haemorrhage-related death is not uncommon. Painful intercourse, childbirth complications, chronic menstruation pain, recurring infections and prenatal death are all more likely when FGM/C is more invasive. Post-traumatic stress disorder, sadness, anxiety and fear of sexual relations are common psychological consequences of all types of FGM/C.[235]

In view of the aforementioned, a legal and policy prohibition on FGM/C appears to be justified, owing to the negative health consequences and violations of the autonomy and liberty rights. In passing, it is worthy of note that not sanctioning medically conducted FGM/C would leave the harmful assumptions that underpin the practice undisturbed, as well as endorsing the practice's unfair attitudes towards girls and women's rights.[236] Therefore, the lack of justification for FGM/C (including medicalised FGM/C)[237] is reflected in the growing acceptance of girls'

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233 See earlier discussion in this chapter on general overview of FGM/C and the theory and practice of FGM/C.

234 See earlier discussion in paras 5.6, 5.6.1, 5.6.2 and 5.6.3 of Chapter 5 on theory and practice of FGM/C in Nigeria, South Africa and Australia respectively.

235 See general discussion in par 5.6 of Chapter 5.

236 See Morris *Lancet* S64-S67.

237 See Morris *Lancet* S64-S67.

and women's rights as well as how scientific discrediting of the practice has influenced several African countries, including some where the practice is entrenched, to pass legislation prohibiting FGM/C.[238]

Furthermore, all forms of FGM/C (including medicalised FGM/C) are also prohibited by several regional and international human rights instruments. Some of these human rights instruments specifically mention FGM/C as a form of violence against women and girls and State Parties are required to prohibit the practice. The following are some examples:

5.6.6.1 International instruments

The Universal Declaration of Human Rights[239] established a wide framework for safeguarding against FGM/C. According to Article 3, "[E]veryone has the right to life, liberty and security of person." Under Article 5, "No one shall be subjected to torture or to cruel, inhumane or degrading treatment or punishment." Article 7 provides for the equality status of everyone before the law as well as equal protection before the law without any discrimination. Article 8 declares the right of everyone to an effective remedy by a competent national court of law against violation of the fundamental rights granted by the constitution or by law. Whereas Article 12 provide protections for an individual's privacy while Article 25 addresses motherhood and childhood. More broadly, Article 28 enshrines the rights of everyone to "a social and international order in which the rights and freedoms set forth in this Declaration can be fully realized."

Similarly, the International Covenant on Civil and Political Rights (ICCPR)[240] forbids gender discrimination and requires States Parties to guarantee that person whose rights or freedoms are "violated shall have an effective remedy."[241] The ICCPR also protects people from "torture or cruel, inhuman or degrading treatment" as well as arbitrary or unlawful invasion of their privacy.[242] Furthermore, the ICCPR

238 See Wakabi *Lancet* 1069-1070.
239 Universal Declaration of Human Rights, 1945.
240 International Covenant on Civil and Political Rights (ICCPR) (1966).
241 See Article 2 of the ICCPR (1966).
242 See Articles 7 and 17 of the ICCPR (1966).

stipulates for the rights of everyone to liberty and security of person as well as the rights of every child to "measures of protection as are required by his status as a minor, on the part of his family, society and the State."[243]

The preamble to the International Covenant on Economic, Social and Cultural Rights (ICESCR)[244] recognises that human rights are products of the inherent dignity of the human person. Thus, Article 3 establishes that the State Parties must guarantee "the equal right of men and women to the enjoyment of all economic, social and cultural rights" as provided in the ICESCR. Further, Article 12 safeguards the enjoyment of everyone right to "the highest attainable standard of physical and mental health."

Furthermore, the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW)[245] focuses on the rights of women and girls, laying the groundwork for the elimination of FGM/C as a human rights violation. Discrimination against women is defined under the CEDAW as follows:

> any distinction, exclusion or restriction made on the basis of sex which has the effect or purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field.[246]

FGM/C is under the definition of discrimination against women put forth in CEDAW, even though not being explicitly specified. It is a practice that is solely geared against women and girls which violates their fundamental rights. Article 2 obligates State Parties to CEDAW to eliminate discrimination against women. In addition to this obligations, Article 5, state that State Parties to CEDAW are required to modify the social and cultural patterns of conduct in order to eliminate prejudices as well as customary and all other practices which fostered the idea of the inferiority or the superiority of either sexes or on stereotyped roles for men and women.

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243 See Articles 9 and 24 of the ICCPR (1966).
244 International Covenant on Economic, Social and Cultural Rights (ICESCR) (1976).
245 Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) (1979).
246 See Article 1 of CEDAW (1979).

The General Recommendation Nos. 14, 19 and 24 from the Committee on the Elimination of Discrimination against Women (CEDAW) provides additional support for the idea that FGM/C is a form of gender discrimination under CEDAW.[247] These guidelines recognise the harmful health and other complications of FGM/C for women and girls, classify FGM/C as a form of violence against women and urge State Parties to take steps to eradicate the practice of FGM/C.

In terms of UN Declarations and Resolutions, Article 1 of the UN General Assembly Declaration on the Elimination of Violence Against Women, describe violence against women as "any act of gender-based violence that causes or likely to cause, physical, sexual or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or in private life."[248] Article 2 of the above declarations specifically mentions FGM/C as example of a form of violence against women.[249]

Furthermore, the United Nations General Assembly has frequently urged State Parties to pay more attention to the practice of FGM/C and to make greater efforts to eliminate it and protect women and girls from the practice.[250]

5.6.6.2 Regional instruments

247 See Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 14 (9th Session, 1990). Recommends that States parties "take appropriate and effective measures with a view to eradicating the practice of female circumcision" and provides various examples of such measures. Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 19 (11th Session, 1992); and Committee on the Elimination of Discrimination against Women (CEDAW), General Recommendation No. 24 (20th Session, 1999).

248 Article 1 of the UN General Assembly Declaration on the Elimination of Violence Against Women.

249 See Article 2(a) of the UN General Assembly Declaration on the Elimination of Violence Against Women.

250 See United Nations, General Assembly Resolutions and Secretary-General Reports on Traditional or Customary Practices Affecting the Health of Women and Girls; Report of the Secretary-General Fifty-third Session, 10 September 1998 A/RES/53/354 paras 17-18; United Nations, General Assembly Resolution on Traditional or Customary Practices Affecting the Health of Women and Girls; Report of the Third Committee 30 January 2002 A/RES/56/128; United Nations, General Assembly Resolution on Traditional or Customary Practices Affecting the Health of Women and Girls, Report of the Third Committee 7 February 2000 A/RES/54/133

The African Charter on Human and People's Rights (the Banjul Charter)[251] focuses on the protection and preservation of women's and girls' fundamental human rights. For example, Articles 4 and 5 recognise the value of human life, personal integrity, and the "right to the respect of the dignity inherent in" each person. Furthermore, Article 16 ensures the right of each person "to enjoy the best attainable state of physical and mental health." According to Article 18(3) the government must guarantee the elimination of all forms discrimination against women as well as safeguarding woman and the children's rights as set forth in international declarations and conventions. In addition, Article 28 recognises the duty to treat others with respect and considerations.

The African Charter on the Rights and Welfare of the Child (African Charter)[252] is another regional instrument that protect children against violence and discrimination. The African Charter upholds the UNCRC's principle that the "best interests of the child shall be the primary consideration" when dealing with situations concerning children.[253] The Charter also safeguards against discrimination and children's rights to survival, protection, privacy, and physical, mental, and spiritual health.[254] In addition, the African Charter urges member states of the Organization of African Unity to:

> [T]ake all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:
> (a) those customs prejudicial to the health or life of the child; and
> (b) those customs and practices discriminatory to the child on the grounds of sex or other status.[255]

The Maputo Protocol, an addition to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[256] requires States Parties to put in place "other legislative, administrative, social and economic measures as may be necessary to ensure the prevention, punishment and eradication of all forms of

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251 African Charter on Human and People's Rights (the Banjul Charter) (1981).
252 African Charter on the Rights and Welfare of the Child (African Charter) (1990).
253 See Article 4(1) of the African Charter (1990).
254 See Articles 3, 5(2), 10, 14(1) of the African Charter respectively.
255 See Article 21(1) of the African Charter.
256 Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003) (The Maputo Protocol).

violence against women."[257] State Parties are also required to prohibit and eliminate harmful practices, explicitly including FGM/C under this protocol.

According to Article 5 on the Elimination of Harmful Practices, States Parties must take all necessary legislative and non-legislative measures to end these practices including:

- creation of public awareness in all sectors of society regarding harmful practices through information, formal and informal education and outreach programmes;
- prohibition, through legislative measures backed by sanctions, of all forms of female genital mutilation, scarification, medicalisation and para medicalisation of female genital mutilation and all other practices in order to eradicate them;
- provision of necessary support to victims of harmful practices through basic services such as health services, legal and judicial support, emotional and psychological counselling as well as vocational training to make them self-supporting;
- protection of women who are at risk of being subjected to harmful practices or all other forms of violence, abuse and intolerance.

Another regional instruments against FGM/C is the 1998 Banjul Declaration on Violence against Women – Inter-African Committee on Traditional Practices and the Gambia Committee on Traditional Practices Affecting the Health of Women and Children (GAMCOTRAP). GAMCOTRAP strongly condemns the practice of FGM/C and the misuse of religious arguments to promote it. Apart from legislative measures for the prohibition of the practice of FGM/C, the Declaration recommends setting up networks of religious and scholarly leaders to campaign against harmful traditional practices, establishing family tribunals to settle disputes, and reviewing family laws "in light of Christian and Islamic principles and human rights."[258]

The 1999 Ouagadougou Declaration of the Regional Workshop on the fight against Female Genital Mutilation is another declaration which call for an end to FGM/C. The declaration mandated members of the West African Economic and Monetary Union region to serve as a "network for dialogue, harmonization, implementation

257 See Article 4 of the Maputo Protocol (2003).
258 See the 1998 Banjul Declaration on Violence against Women – Inter-African Committee on Traditional Practices and the Gambia Committee on Traditional Practices Affecting the Health of Women and Children (GAMCOTRAP).

and follow-up of joint activities to combat FGM." The Declaration recommends among others for:

- The effective implementation of the Addis Ababa Declaration through the adoption of national legislation condemning the practice of FGM;
- The ratification of all United Nations and International Labour Organization conventions and recommendations pertaining to women's rights, particularly the United Nations Convention on the Elimination of All Forms of Discrimination Against Women;
- The creation of national networks of religious and customary leaders as well as networks of traditional and modern communicators with a view of setting up sub regional networks; …

Finally, the Cairo Declaration for the Elimination of FGM, 2003, is a regional instrument which specifically calls on governments to recognise and protect the human rights of women and girls in accordance with the aforementioned human rights documents as well as to pass legislation criminalising and prohibiting FGM/C. The Declaration states that "the prevention and the abandonment of FGM can be achieved only through a comprehensive approach promoting behaviour change, and using legislative measures as a pivotal tool."[259] FGM/C laws should therefore be "integrated into broader legislation" such as "gender equality, protection from all forms of violence against women and children, women's reproductive health and rights, and children's rights."[260] The declaration also acknowledges that the "use of law should be one component of a multi-disciplinary approach to stopping the practice of FGM."[261]

The foregoing accounts of both international and regional instruments on the protection of children's rights against FGM/C demonstrate the continuing relevance of the debate on FGM/C practices and the urgent need for specific and comprehensive measures to prohibit the practices in the State Parties' domestic legal systems.

As majority of the foregoing human rights instruments observed, a comprehensive approach towards the prohibition of FGM/C is required. A comprehensive approach implies that other measures aside legislative initiatives are equally vital in the fight

259 See the preamble to the Cairo Declaration for the Elimination of FGM, 2003.
260 See par 1 of the Cairo Declaration for the Elimination of FGM, 2003.
261 See par 2 of the Cairo Declaration for the Elimination of FGM, 2003.

against FGM/C. The foregoing acknowledgment serves as one of the foundations for the strategy proposed as suggestions in the conclusion of the thesis for eradicating the harmful cultural practices of FGM/C within the family and the community in Nigeria, South Africa and Australia.[262]

In terms of using legislative measures as a critical instrument,[263] specific children's rights must be integrated into children's rights legislations to protect them against cultural values or practices that may encourage FGM/C. As a result, children's participation rights within the context of the family must be protected at the domestic level. Apart from giving children with the required mental capacity and sufficient maturity the opportunity to participate in family decision-making, this protection will also give them the power to consent or decline consent in any matters concerning them – including cultural practices. The following discussion further canvass for an approach in favour of Article 12(1) of the UNCRC participation rights in the specific domestic children's rights legislation of State Parties to the UNCRC.

5.7 Cultural values and practices and Article 12(1) children's participation rights: Canvassing an approach in favour of Article 12 (1) children's participation rights

In the discussion in the thesis, it is established that the cultural values of rights and duties are intricate measures of implementation of Article 12(1) of the UNCRC in the domestic children legislation in Nigeria, South Africa and Australia.[264] More so, specific cultural practices, which may be used in line with the values of rights and duties infringed on the UNCRC children's participation rights.[265]

What also became clear on the issue of cultural values and practice within the family and the children's participation rights as contained in the UNCRC is the inevitable conflict between the exercise of parental rights to cultural values and children's right to participation. Several theoretical debates considered in the

262 See par 5.5.1 on recommendations for suggested approach towards eradicating FGM/C.
263 See the preamble and par 1 to the Cairo Declaration for the Elimination of FGM, 2003.
264 See generally earlier discussion on this issue in Chapter 3.
265 See earlier discussion in this Chapter in paras 5.4.2, 5.5.2 and 5.6.4 above.

thesis affirm to this assertion.[266] Therefore, considering that the Article 12(1) right to participation enjoys eminence among the rights entrenched in the UNCRC over cultural values, the question should not be on the egoistical superiority of these rights, but rather on what best serves the interests and development of the child within the family and the society.

Furthermore, considering that most of the criticism against Article 12(1) of the UNCRC on children's participation within the family revolves around the disruption of family relationship, the question, once again, should be on how the conflict between parental rights in line with the values of rights and duties within the family and children's participation rights could be resolved.

As indicated in the thesis,[267] one need not go further than the provisions of the UNCRC to find the answer. Aside that Article 12(1) of the UNCRC recognise autonomous children's participation rights within the family, the UNCRC provision as a whole enjoins holistic interpretation of its principles.[268] Article 5 of the UNCRC takes family relationships into account.[269] In other words, the concerns of children's individual ability to assert and to hold an opinion had been taken care of by Article 5 of the UNCRC, which refers to the evolving capacity of the child, as well as Article 12(1) which act as a limitation to children's choices and decision-making.[270]

As further indicated earlier, the component part of Article 12(1) which holds that the views of the child shall be accorded due weight is to the effect that children do not only have the right to express their views, but also to have those views considered seriously.[271] The requirement that attention is given to both age and maturity when considering the views of the child, show that Article 12(1) makes clear that age on its own should not be used to limit the significance accorded to

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266 See earlier theoretical debates on this issue in par 3.5 of Chapter 3.
267 See generally the discussion in Chapters 3 and 5 of this thesis.
268 See par 3.3.1 of Chapter 3 for the discussion on main perspective and principles of the UNCRC.
269 Otlowski and Tsamenyi 1992 *Australian Journal of Family Law* 150.
270 Otlowski and Tsamenyi 1992 *Australian Journal of Family Law* 151.
271 Lansdown "The realisation of children's participation rights; Critical reflections"12.

children's views.[272] Put differently, age alone is not a sufficient criterion and indicator of an individual's capability and capacity to seek and analyse information and to understand the consequences of decisions made.[273] Individual experiences and abilities, accessible 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.[274] It goes, therefore, that 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.[275] The UNCRC sees children primarily as having needs and wishes that have to be met and fulfilled by adults or parents, who must take such needs and wishes into consideration. Hence, it is for the adult or parents to decide whether the views of the child are relevant, and are to be considered in relation to any decision finally made on behalf of the child.

To give due weight to children's views does not necessarily mean that the child's preference should be given systematic pre-eminence, but that such views should be considered in the light of the nature of the problem and the child's development and maturity.[276] According to Lansdown, "consideration has to be given to their level of understanding of the issues involved while also protecting their best interests".[277] In other words, the extent to which the child's views should be respected needs to "reflect the risks associated with the decision involved."[278] For instance, a 3 to 5 year old child cannot be left to decide on male circumcision. However, the child can, with information about the harmful nature of the practice and the anticipated pain and awful consequence of it, take part in deciding whether to partake in it or not. It goes therefore, that the decision as to whether to subject the child to such or any cultural practices, for example, will be

272 Lansdown "The realisation of children's participation rights; Critical reflections"12.
273 Lansdown "Participation and young Children" 3-5.
274 Lansdown Promoting Children's Participation in Democratic Decision-making 3.
275 Stern 2006 *The Child's Right to Participation – Reality or Rhetoric?* 164. She is of the view that these factors can somewhat limit the extent to which children's voices are appreciated.
276 Moyo 2015 *SAJHR* 176.
277 Lansdown "Participation and young Children" 5.
278 Lansdown; "Participation and young Children" 5.

based on a calculation of the harm to be caused by compelling the child to participate in the practice, which is harmful, and the choice of the child not to participate in the practice.[279]

Apart from the identified limitations in Article 12(1) and 5 of the UNCRC, the goal of the UNCRC is to ensure that the world's 2.2 billion children enjoy the same opportunities as adults to exercise their rights according to the Universal Declaration.[280] The UNCRC preamble specifically refers to the Universal Declaration in which it is stated that everyone is entitled to all the rights and freedoms set forth therein, without distinction of any kind. In other words, some human beings should simply not be more equal than others. This assertion is attested to by the guiding principles of the UNCRC, namely, non-discrimination (Article 2), the best interests of the child (Article 3), the right to life (Article 6), survival and development (Article 6), and the right to participate (Article 12).

As also indicated in the thesis,[281] these above provisions form the backdrop against which all actions of the States' Parties to the UNCRC are to be assessed. Against this background, the thesis adopts the argument that the internal limitation of Article 12 and 5 coupled with the guiding principles of the UNCRC should and continue to serve as counterarguments against oppositions to Article 12(1) of the UNCRC rights for the children.

Furthermore, and as earlier indicated,[282] at the core of the Article 12(1) of the UNCRC participation rights for children is a close connection between rights and dignity as well as between rights and respect, a connection which according to Freeman[283] is "important not least in relation to children in their often-vulnerable position *vis-à-vis* adults." As Stern[284] puts it, "a person not accorded dignity and respect is very easily reduced to an object of intervention, a commodity or

279 Lansdown; "Participation and young Children" 5-6.
280 See the preamble to the UNCRC.
281 See earlier discussion in paras 3.3.1, 3.3.2 and 3.3.3 of Chapters 3 on the UNCRC, its scope, applicability and measure of implementation.
282 See earlier discussion in par 3.4.4 of Chapter 4.
283 Freeman *International Journal of Law and the Family* 52-71.
284 Stern 2006 *The Child's Right to Participation – Reality or Rhetoric*? 81.

someone's property." Therefore, Article 12(1) of the UNCRC rights is tied to the respect and dignity, as well as the development of children.

In light of the above, it cannot be overemphasised that human dignity and respect is fundamental in the legal systems of States' Parties to the UNCRC, thus, the value of human dignity and respect should always prevail in situations where cultural values, beliefs, customs and practices collide with human freedoms and rights. States' Parties must therefore, prioritise respect, dignity and the development of the child in their implementation of Article 12(1) of the UNCRC children's participation rights within the context of the family in their domestic children's legislations.

It is submitted that the Nigerian Children's Rights Act 2003, should therefore, look toward the fundamental values of equality, human dignity and freedom in evaluating children's participation rights within the context of the family, in the same way as the examples of the South African and Australian Children's laws analysed in the thesis.[285] In other words, Nigeria's Children's Rights Act should reflect an integration approach of implementation by protecting parental *bona fide* exercise of their cultural values of rights and duties within the family and the protection of Article 12(1) children's participation rights in all matters affecting them as an individual or as a community.

By adopting an integration approach as ascribed above, it is the author's submission that Nigeria as a States' Parties to the UNCRC should develop and recognise a separate or distinct provision in her Children's Rights Act that will reflect components of Article 12(1) of the UNCRC rights provision as it is the case in South Africa and Australia. This recognition will proactively aid the interpretation and application of children's participation rights in decision-making within the context of the family in the Nigerian legal systems. Suggested recommendation on the replica of Article 12(1) of the UNCRC participations rights – to be included in the Nigerian Children's Act – is made in the concluding part of the thesis.

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285 See earlier discussion in Chapter 4, particularly paras 4.6.1.2 to 4.6.31 and 4.8.1 on the South African and Australian implementation approach of Article 12 of the UNCRC respectively.

5.8 Conclusion

Cultural values of duty and rights, namely, respect, responsibility and reciprocity in terms of children's participation within the family poses a particular challenge to children, because what is considered to be an indigenous custom or cultural practice, may inadvertently constitute a harmful practice. This is particularly so, where a family has to deal with situations where indigenous practices and culture play a role in the upbringing and rearing of the child. In South Africa, such a situation can present itself when an individual act in pursuance of the indigenous belief in the custom of *ukuthwala,* male circumcision and FGM/C. In Nigeria and Australia, such situations can also present itself in terms of FGM/C. In all of these instances, the duty to respect parents could easily be relied upon to curtail children's rights to participation in decision-making on matters affecting the child in particular.[286]

It is shown in this Chapter that the term 'prejudicial to the health of the child' as stipulated by Article 23(3) UNCRC in terms of "harmful cultural practices" encompasses those practices that cause direct bodily harm to the child, as well as any other practices that affect the participation right of the child.[287] The custom of *ukuthwala,* male circumcision and Female Genital Mutilation/Cutting (FGM/C) are specific examples of such cultural practices that not only result in direct bodily harm to children, but also curtail their rights to participation in decision-making on matters that affect them.[288]

A perusal of the custom of *ukuthwala,* male circumcision and FGM/C in South Africa[289] and FGM/C in Nigeria[290] and Australia[291] reveal that the practices hinge mostly on cultural considerations, among other factors. Furthermore, the affected children are always not consulted and are often coerced by societal pressure and

286 Chirwa "The Merits and Demerits of the ACRWC" 157-177.
287 See discussion in paras 5.2 and 5.3 above.
288 See discussion in par 5.4 and 5.6.
289 See discussion paras 5.4, 5.4.1, 5.5 and 5.6.2 respectively.
290 See par 5.6.1 above.
291 See par 5.6.3 above.

cultural intimidation into participating in this harmful cultural practice.[292] In terms of FGM/C, the prevalence rates for the three culturally diverse countries varies. Factors such as the region of birth within a country, ethnicity, religion, educational and socioeconomic status can be said to be accountable for the variations in the prevalence of the practice in some of these culturally diverse countries.[293] It is therefore important to appreciate the fact that FGM/C is an issue affecting individual families within specific communities and ethnic groups rather than all female children and women in these countries.

In light of the discussion in Chapter 2, and this chapter, it is further submitted that within the indigenous family of culturally diverse countries like South Africa, Nigeria and Australia, the custom of *ukuthwala,* male circumcision and FGM/C practices may and will present itself when a family acts in pursuance of their communal or indigenous values of "right and duty" on raising responsible children. Keep in mind that in the thesis, the discussion on custom of *ukuthwala* and male circumcision are in accordance with South Africa's legal systems only.

Furthermore, there are strong arguments in favour of Article 12(1) of the UNCRC in the implementation of children's participation right at the States' Parties level. It is also evident that, cultural values are important, but specific practises may be used under the pretext of proper cultural upbringing of children within the family under the values of rights and duties to violate the children's rights. Such harmful cultural practices as discussed in the thesis, cannot be allowed or should not be practised at the expense or in violation of the participation rights of children. More so, the regulation of cultural practices by way of the law suggest that positive aspect of cultural values cannot be relinquished, *per se*. Considering the importance of the heritage attached to the values of duties and rights within the family as indicated by their inclusion in children's rights legislation, such cultural values cannot be relinquished, but instead, encourages the proper application thereof. Therefore, the preferred position adopted in this thesis is that the use of

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292 See paras 5.6.1 and 5.6.2 on theory and practice of FGM/C in Nigeria and South respectively. The discussion under this paragraph supports this conclusion.

293 See discussion in paras 5.6.1, 5.6.2 and 5.6.3.

reciprocal duties and responsibilities of the child towards the family should be delineated within the context of the limitation of the UNCRC, and in the Constitution and the domestic children's rights legislation of States Parties respectively. Such delineation would ensure that cultural value of duties within the family has the same power as accorded the Article 12(1) children's autonomous rights. What is more, the delineation would ensure that cultural values of duties within the family would be brought in line with the values of the UNCRC children's participation rights and the constitution of the respective States Parties. Still, it would also fall within the scope of the courts' duty to promote children's enjoyment of participation rights of the UNCRC through transformative Judicial decisions.

Ultimately, it is submitted that there is a need to further explore other means of promoting the child's right to participation within the family under Article 12(1) of the UNCRC in Nigeria whose implementation approach tilted towards cultural inclination. Perhaps prioritising Article 12(1) children's rights to participation by considering an integrative approach of the cultural values and Article 12(1) provisions of the UNCRC in its implementation as shown by both the South African and Australian examples discussed in the thesis

The final chapter of the thesis draws conclusions from the research carried out regarding the theoretical understanding of culture, cultural values and children's participation rights within the context of the family, and cultural practices and children's participation right, what Article 12(1) of the UNCRC entails, and the implementation of Article 12(1) *vis-a-vis* the relevant cultural values in the domestic children's law in Nigeria, South Africa and Australia respectively. Furthermore, recommendations are proposed on suggested approach and response towards further curtailing the harmful cultural practice, specifically FGM/C, and how Article 12(1) of the UNCRC may be included in the implementation of children's participation rights in Nigeria as a State Party who is yet to properly implement the provisions of Article 12(1) of the UNCRC.

CHAPTER 6

CONCLUSION AND RECOMMENDATIONS

6.1 Background

In human rights discourse, discussions have progressed from the sole standpoint of protecting and preserving communal rights to that of protecting and preserving other rights such as individual rights, and in this instance, children's participation rights within the context of the family. The recognition of children's participation rights within the family has been made possible by the provision of Article 12(1) of the UNCRC.

The recognition of children's participation rights within this context has not been without complications or conflicts. Although, the UNCRC sets out clear autonomous rights for children, the legitimacy of the autonomy-based provisions in the UNCRC may be tenuous under the domestic laws of the state. The provision of autonomous individual rights without the corresponding provisions of the cultural values of rights and duties within the family will undermine the effective implementation of Article 12(1) provision. Conversely, the non-recognition of the provision of autonomous individual rights undermines the significance of children's participation.

The Article 12(1) of the UNCRC children participation rights, as well as specific cultural values are well established and recognised in the children's laws of specific States Parties considered as examples in the thesis. On the other hand, specific States Parties example reveals a resistance to the provisions of the UNCRC on autonomy rights at the level of children's rights legislation implementation. This have demonstrated that we cannot ignore the importance of autonomous participation rights, as well as the complex demands of social and cultural context that invariably prevents the individual child from being able to exercise these rights within the context of the family. Therefore, the balancing of the competing interests they represent ought to be the essence of its implementation pursuit.

Article 12(1) children's participation as an enabler for the development of the child is the interpretation emphasised at the international level. It goes, thus, that Article 12 as well as the UNCRC, promotes autonomous rights participation and the contribution of participation to children's development within the family and the society. The role of autonomous children participation as a positive contributor to the goal of children, family and society development has been the theme of the thesis.

6.2 Revisiting the Research Question and Objectives

The research question that underpins this study has to do with the extent to which and the manner in which specific cultural values and practices influence the implementation of the rights of the child to be heard within the family under Article 12(1) of the UNCRC in the legal systems of Nigeria, South Africa and Australia.

To explore the research question, and to test the stated hypothesis,[1] the following aims/objectives were formulated:

a) To contextualise the meaning of culture and provide an overview of specific indigenous cultural values in terms of children's participation within the context of the family;

b) To distil the scope, nature and applicability of Article 12(1) of the UNCRC.

c) To investigate the influence of specific cultural values on the implementation of Article 12(1) of the UNCRC in the legal systems of culturally diverse State Parties such as Nigeria, South Africa and Australia.

d) To elucidate the specific cultural and traditional practices that may be used under the guise of the values of rights and duties within the family in the context of culturally diverse societies such as Nigeria, South Africa and Australia.

1 See par 1.4.1.3 of Chapter 1 for the hypothesis in the thesis.

e) To consider the approach to implementing Article 12(1) of the UNCRC in the legal systems of State Parties with cultural diversities such as Nigeria, South Africa and Australia.

f) To make recommendations and suggest an approach for the effective implementation of Article 12(1) of the UNCRC in the legal systems of State Parties with cultural diversities, specifically in Nigeria.

To deliver on the above objectives, the thesis is structured into chapters, the purpose of which is described below.

6.3 Structure and Purpose of the Analysis

Chapter 1 provide the context for the research question of the study, which is to investigate the influence of cultural values and practices on the implementation of the rights of the child to be heard within the family under Article 12 of the UNCRC in the legal systems of Nigeria, South Africa and Australia.[2] This question emanates from the fact that culture and traditional values are an important legitimacy tools in the implementation of child participation right in decision-making within the family.[3] In Chapter 4, a perusal of specific culturally diverse countries such as the Nigerian, South African and Australian legal systems revealed that culture and tradition influenced the various ways these States Parties implemented Article 12(1) of the UNCRC in their children's domestic legislation.[4]

Also, in Chapter 1, the focus of the thesis hinged on the child's rights to participate under Article 12(1) of the UNCRC within the specific context of the family.[5] Chapter 2 contextualised the meaning of culture, family and specific cultural values and children participation within the context of the family.[6] Chapter 3 focuses on what Article 12(1) of the UNCRC rights to participation entail *vis-à-vis* the various arguments favour for and against the autonomous participation right

2 See par 1.2.1.
3 See par 2.5.2.
4 See par 4.4.1.3 to 4.4.1.4, 4.6.3, 4.6.3.1 and 4.8.1 of chapter 4.
5 See par 1.2
6 See generally the discussion in Chapter 2.

of the child.[7] Chapter 5 focuses on specific cultural practices that can, and may be use within the family under cultural values of rights and juxtaposed this cultural practices with children's participation rights under the UNCRC and the specific domestic children's rights laws.[8] As shown in Chapter 3, 4, and 5, it is clear that the discussion in the thesis, is not to indicate or show that the provisions on the autonomy rights of the child under Article 12(1) of the UNCRC are of no value or unnecessary.[9] Indeed, they are quite significant in that they recognise the child as an individual with a voice and who should be guaranteed protection rights against all forms of harmful cultural practices.[10] However, discussions in Chapter 4 on the implementation approach of Article 12(1) of the UNCRC show that Nigeria, a States Parties to the UNCRC, ignore the provisions of Article 12(1) of the UNCRC.[11] The reason cannot be delinked from the fact that cultural contexts and values largely influenced the implementations of Article 12(1) of the UNCRC in her domestic children's rights legislation.[12]

Flowing from the above investigations, the following central findings did elicit specific recommendations, as discussed in the following paragraphs:

6.4 Central Findings

The following findings formed the basis for drawing conclusions, widening the knowledge base of the subject matter, and further enriching the discourse on the implementation of Article 12(1) of the UNCRC children's participation right within the context of the family:

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7 See paras 3.4 to 3.4.5 and 3.5.
8 See generally the discussion in Chapter 5 and 6 respectively.
9 The discussion in this Chapter supports the theme of the thesis which sees the role of autonomous children participation as a positive contributor to the goal of children, family and society development.
10 See for instance the discussion on what Article 12(1) of the UNCRC entails in paras 3.4 to 3.4.5 of Chapter 3.
11 See paras 4.4.1.4 and 4.4.1.5.
12 See discussion in par 4.4.1.5 on the implication of the Nigerian implementation of Article 12(1) UNCRC in the domestic Children's Rights Act.

6.4.1 Conceptualising culture as the values, attitudes, beliefs, orientations and underlying assumptions prevalent among people in the society

"Culture" as a concept is subject to a deluge of meanings as much as there are many scholars in the field.[13] However, considering the interest of the thesis, which is on how culture affects and relates with legal development, culture is defined and used in purely subjective terms as the values, altitudes, beliefs, orientations and underlying assumptions prevalent among people in the society.[14] This clearly resonates with the UNESCO definitions of culture in its preamble to the 2001 Universal Declaration of Cultural Diversity, which supplied an elaborate definition of culture.[15]

Whose and which culture and traditional practices – within the context of a group or the society – is superior, does not lie within the purview of this study.[16] However, the dominant elites within the groups or the society, which comprises those individuals or groups have the power to claim the preferential right of interpretation of what is to be considered a "fundamental cultural tradition" in a specific socio-cultural context.[17] Furthermore, culture or custom forms an important part of both Nigeria and South Africa's legal systems respectively and as such are binding norms in these countries. However, the extent to which customary law values are regarded and accepted as valid are subject to the constitutions and other laws operating in these countries.[18]

In terms of what ascribes a legal character to customary values, a sense of obligation differentiates customs that are mere social habits from those customs that are regarded as law. Therefore, non-adherence to a social habit, attracts no legal weight unless a sense of obligation is involved. The internal aspects of customs give clues to customary law's legal character, since they explain why

13 See par 2.2.1.
14 See par 2.2.1.
15 Universal Declaration of Cultural Diversity (UNESCO Doc. 31C/Res 25, Annex 1 (2001)) adopted unanimously by the organisation's General Conference at its 31st session, 2 November 2001. See also analysis on this in par 2.2.1 of the thesis.
16 See par 2.2.2.
17 See par 2.2.1.
18 See par 2.3.1.

members of a community behave in one way rather than another way. It is this "sense of obligation" that gives customary law its legal character.[19]

Furthermore, since there are numerous provisions and principles of the UNCRC, which interplay with culture, tradition and the family.[20] The UNCRC, thus, acknowledge the interplay between family, cultural and traditional practices and the realisation of children's rights under Article 12(1) of the UNCRC in the domestic legal systems of the various States Parties. This interplay and realisation are key aspects to children's rights and legal pluralism in human rights discourse.[21]

6.4.2 Indigenous cultural values and children's participation within the context of the family

In terms of value systems and traditions and beliefs, it is clear that cultural values derived from indigenous practice influence children's participation rights within African societies in general.[22] These cultural values as identified are the key African cultural values of rights and duties, namely, respect,[23] responsibility (obligation)[24] and reciprocity.[25] In terms of children's participation in decision-making within the family in culturally diverse societies such as Nigeria, South Africa and Australia, the norms of respect, responsibility (obligation) and reciprocity are dominant cultural values of fundamental principles of their recognised customary law.[26] However, the right to culture or customary values are subject to constitutional and other requisite legislations in terms of children's rights in these countries.[27] These cultural values does not only reflect in the ACRWC, which is a regional children's document, but also, influences specific

19 See par 2.3.1.
20 See par 2.4.
21 See par 2.4.
22 See discussion in paras 2.5.1 to 2.5.5.
23 See par 2.5.3
24 See par 2.5.4.
25 See par 2.5.5.
26 See earlier discussion in par 2.2.2 on the conflict between dominant and minority culture within a legal system.
27 See paras 2.3.2, 2.3.3 and 2.3.4.

domestic children' rights in terms of the implementation of Article 12(1) of the UNCRC in Nigeria and South Africa, and to an extent in Australia.[28]

Upon the premise that cultural values of rights and duties influence the specific domestic children' rights in terms of the implementation of Article 12(1) of the UNCRC in the States Parties, the question which then arose was, what and which cultural practice may be used under the pretext of proper cultural upbringing, through the values of duties and rights within the family in Nigeria, South Africa and Australia respectively, and if such cultural practices are harmful to children's participation rights?

6.4.3 Cultural practices: Identifying the issues

6.4.3.1 Harmful cultural practices

The UNCRC did not explicitly mention any "practices" as harmful. However, Article 24(3) of the UNCRC obliges States Parties to take all effective and appropriate measures to abolish traditional practices that are prejudicial to the health of children.[29] The phrase "prejudicial to the health of children", presupposes both legitimate and other cultural or traditional practices that are harmful to children.[30] A legitimate cultural practice are those practices that are allowed and accepted according to the law or which the law regulates. Male circumcision, which is common in South Africa, is an example of such legitimate cultural practice. Also, the custom of *ukuthwala* in South Africa is another example of practices that could be considered as legitimate with distorted aspects of the practice.[31] They are considered legitimate cultural practices because the law did not entirely prohibit such practices, but they are largely regulated.[32] Other practices are those cultural or traditional practices that are incompatible with the UNCRC four anchoring

28 See discussion in Chapter 4.
29 See discussion in para 5.3, 5.4. Though these provisions did not specifically mention children's rights to participation, however, it is argued that denying children rights to participate in matters affecting them can be regarded as traditional practices harmful to them. See Kiame 2005 *African Journal of Human Rights* 227.
30 See discussion in par 5.3 of Chapter 5.
31 See earlier discussion on this issue in paras 5.4, 5.4.1 and 5.5 of Chapter 5.
32 See par 5.4 of Chapter 5.

principles, namely, non-discrimination, participation, survival and development and the best interests of the child.[33] A specific example is FGM/C in Nigeria, South Africa and Australia.[34] Thus, a cultural or traditional practice that offends/violates any or all of these principles are considered to be harmful to a child's rights under the UNCRC. In other words, cultural practices that are incompatible with principles of participation rights of the child, that is, which denies a child's right to express his/her views and to have those views respected are also regarded as harmful practices.[35]

6.4.3.2 *Ukuthwala* and UNCRC children's participation rights

The custom of *ukuthwala* is indigenous to South Africa, and comes under the canopy of value of rights and duties. With reference to this custom, a female is carried off by her prospective husband, his friends or family to the residence of the husband's father or guardian.[36] Regardless of whichever form of *ukuthwala,* the custom of *ukuthwala* infringes on the legal interests protected in the stated Article 12(1) UNCRC component. The protected legal interests referred to, is the young girl's actual exercise of making and forming views and holding opinions over matters that affects them. These interests also refer to the two most important requirements for holding views and forming an opinion, namely, to ensure that a young girl who wishes to participate, have a right to express her views and opinions without any limitations and must enjoy the right to be provided with access to appropriate information to enable her make an informed decision. A decision cannot be considered freely made if it is not an informed decision.[37]

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33 Although, the UNCRC did not specifically states what amount to harmful practices. However, it is argued that the holistic approach of interpretation of its articles and what maybe considered as its four anchoring principles such as non-discrimination, participation, survival and development and the best interests of the child, pontificates practices not compatible with such principles as harmful.

34 See discussion on FGM/C in paras 5.6, 5.6.1, 5.6.2 and 5.6.3 of Chapter 5.

35 See par 5.3.

36 See par 5.4 of Chapter 5.

37 See the discussion in par 5.4.1.

6.4.3.3 Male circumcision and the UNCRC children's participation rights

Male circumcision is widely practised in South Africa for both religious or cultural and medical reasons. In the indigenous communities where male circumcision is practised, traditional circumcision is seen as a rite of passage into adulthood. Boys are sent away or secludes for several weeks whilst the ceremonies of transition to manhood are performed. As a result of the adverse effects occasioned primarily from botched cultural circumcision, male circumcision has been recognised and regulated, with the aim of achieving minimal infringement of the rights of children while ensuring their protection.[38] In terms of male circumcision and the UNCRC children's participation rights, it is clear that children are protected both by rights that apply to all persons and by rights pertaining specifically to them – as a result of their vulnerability.

Therefore, the UNCRC, to which South Africa have acceded to, affords children protection against all forms of violence, injury or abuse, and obliges states to do away with "traditional practices prejudicial to the health of children".[39] Since circumcision as a cultural practice directly affects the male child, it goes that making the decision or participating in the process of decision-making towards their circumcision is paramount – taking into consideration the child's age, maturity and stage of development.

6.4.3.4 FGM/C and the UNCRC children's participation rights

In light of the discussion on the theory and practice discussed in the thesis, it is clear that FGM/C absolutely infringes upon the right to life and children's protection against all forms of violence, injury or abuse. More so, the UNCRC obliges states to do away with "traditional practices prejudicial to the health of children".[40] Aside from the foregoing, the practice of FGM/C in Nigeria is usually carried out without the victims' consent. The final decision as to whether or not to

38 Seethe discussion in par 5.5.3.
39 See the discussion in par 5.5.2.
40 See Article 19 and 24(3) of the UNCRC.

circumcise their daughter most often lies with the parents.[41] In South Africa, for instance, most adolescent females at puberty who participate in the cultural initiation rites ceremonies or preparation for womanhood in the practising communities, do so based upon societal and cultural pressure.[42] Consequently, most of the victims are coerced by threats and intimidations to undergo the initiation rites, which include the harmful practice of FGM/C. Therefore, the requisite consent to participate cannot be said to have been adequately sought and gotten.

6.4.3.5 FGM/C and children's consent to the practices: Addressing its legality

The well settled legal principles of common law that govern the legal context in terms of children's consent is that it is generally not lawful to administer treatment or subject a child to practises without the child's consent, or the consent of the child's parents or a person empowered by the court to give consent on behalf of the child.[43] Second, parents generally have the power to give consent on behalf of their infant or young children.[44] This power, however, can only be exercised in the child's best interests.[45] Third, unless legislation provides an age at which the child is empowered to give her/his own consent,[46] the parent's right to consent to the child's treatment or any practises exists only until the child possesses sufficient understanding and intelligence to enable him/her to understand fully what is proposed regarding the specific treatment or the practise.[47]

The foregoing principles are settled in common law and are applicable in the domestic legal systems of Nigeria, South Africa and Australia. It is notable in the context of the custom of *ukuthwala* and male circumcision in South Africa that

41 See the discussion in par 5.6.1. See also EASO, 'Country Guidance: Nigeria' February 2019 62-63.
42 See the discussion in par 5.6.2. See also Nkateko *The silenced voice of initiated Venda Women* 38.
43 See the discussion in par 5.6.5 of Chapter 5. See also Pattison, *Medical Law and Ethics 97;* Esiri 'Medical Law and Ethics in Nigeria' 7; Mason and Call Smith *Law and Medical Ethics* 345; Cutan *Journal of Cutaneous and Aesthetic Surgery* 35.
44 See the discussion in par 5.6.5. See also Esiri "Medical Law and Ethics in Nigeria" 304.
45 See the discussion in par 5.6.5 on this issue in Nigeria, South Africa and Australia respectively. See Mathews children and Consent to Medical Treatment 113-147.
46 See the discussion in par 5.6.5.
47 See the discussion on this issue in par 5.6.5 of Chapter 5.

they are largely regulated by law. With regard to FGM/C, it is also notable that parliaments in Nigeria, South Africa and every Australian jurisdiction have perceived it as warranting legislative regulation.[48] The legislations prohibit a person from performing any type of FGM/C, including excision of any part of the genitalia, infibulation, and any other mutilation of the genitalia on a child or an adult. Consequently, consent to FGM/C practices does not matter. Hence, any practitioner or anyone else who administers FGM/C in Nigeria, South Africa and Australia commit an offence, regardless of whether the child or adult consents.

6.4.4 Article 12(1) of the UNCRC and the ACRWC within the context of children's right to participation in the family: Identifying the issues

6.4.4.1 Article 12(1) UNCRC entails that children are autonomous individuals who are capable of making and participating in decision-making within the family

The fundamental objective of the UNCRC established the status of children as rights-bearers and considered their rights as equally important as those of adults when it comes to respect and fulfilment.[49] Thus, the UNCRC comprises two main perspectives, namely, the right to protection and the right to participation. The guiding principles of the UNCRC includes, non-discrimination (Article 2), the best interests of the child (Article 3), survival and development (Article 6), and the right to participate (Article 12).[50] Together, these provisions form the backdrop against which all actions of the States Parties to the UNCRC are to measured. More so, they also shape the UNCRC interpretation and execution and reflects the articulation of specific rights throughout the treaty.[51]

Furthermore, aside from the other substantive Articles in the UNCRC that are linked to children participation, Article 12(1) clearly elaborates the participatory right of the child.[52] In the context of Article 12(1) of the UNCRC, the reference to

48 See the discussion in par 5.6.5.
49 See par 3.4 to 3.4.5.
50 See the discussion in par 3.3.1.
51 See the discussion in paras 3.3.1 and 3.3.2.
52 See the discussion in par 3.4 to 3.4.5.

"in all matters" indicates that the participatory rights in Article 12(1) of the UNCRC are not limited to matters that are specifically dealt with in the UNCRC. It applies to both the private and public spheres of society and established responsibilities for the state in connection to matters that are generally left to the private sphere, such as the family decision-making.[53] Therefore, the right to participate under Article 12(1) refers to every child's right to be heard and to participate in all matters that affect their lives, including decision-making within the family.[54] This presupposes that children are autonomous individuals capable of making and participating in decision-making within the family.[55] Article 12(1) rights provisions in the UNCRC are widely viewed as central to the children's rights agenda set by the drafters of the UNCRC.[56] Therefore, these rights are the most important of the rights established by the instrument because they recognise children as independent subjects of the law.[57]

6.4.4.2 The views of child participation based on individual or autonomous rights of Article 12(1) as a matter of concern

The contentions of the views of child participation based on individual or autonomous rights as Article 12(1) of the UNCRC is not on the desirability of the rights of the child *per se*.[58] As earlier indicated, children are entitled to specific rights because of their vulnerability.[59] However, the individuation of the child by the UNCRC, without adequate recognition of the inherent interdependence and reciprocity within the family will not only affect the realisation of these rights, but also the important role that this nature of relationship plays in children's development.[60] Therefore, lack of provisions for the duties of the child under the UNCRC, seemingly, implies that the main goal of the family is to benefit the child alone, instead of supporting the reciprocal duties and responsibilities of the child

53 See the discussion in par 3.4.3.
54 See the discussion in paras 3.4 to 3.4.5 respectively.
55 See the discussion in paras 3.4.3.
56 See the discussion in par 3.4. to 3.4.5.
57 See the discussion in par 3.4.5.
58 See the discussion in par 3.5
59 See the discussion in par 3.5
60 See the discussion in par 3.5

towards the family.[61] For instance, such duties as signified by African societies recognises norms of respect,[62] responsibility[63] and reciprocal relationships[64] in the ACRWC.[65] Although, the ACRWC in many ways closely resemble the UNCRC within the context of the children's right to participation within the family.[66] The ACRWC, a regional children's rights instruments encourage the preservation of tradition and culture more than the UNCRC.[67] Therefore, the UNCRC seem not to have adequately accounted for the complex relationships between the child, his/her parents, and other members of the family, especially in regions that place value on right and duties as well as loyalty within the context of the family.[68]

However, considering the interpretation principles of the UNCRC, these concerns of a child's ability to assert her/his opinion within the family, seem to have been taken care of by Article 5 of the UNCRC, which refers to the evolving capacity of the child and Article 12, which places limitations on a child's choices and decision-making.[69] Furthermore, in terms of the scope of participation rights between the UNCRC and ACRCW, the UNCRC offer a more unrestricted and "extensive" rights than the ACRWC, which seem to offer a more "restricted" participation rights within the family.[70] Therefore, the argument and criticism against Article 12(1) of the UNCRC autonomous children's rights cannot be totally accepted as a valid excuse for denying children participation in decision-making within the family.

6.4.5 Legal comparison and implication of implementation of Article 12(1) of the UNCRC in the laws of Nigeria, South Africa and Australia

The approach adopted in examining the implementation of Article 12 of the UNCRC in the domestic laws of Nigeria, South Africa and Australia focuses on the

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61 See the discussion in par 2.5.2.
62 See the discussion in par 2.5.3
63 See the discussion in par 2.5.4
64 See the discussion in par 2.5.5
65 See the discussion in paras 3.6.1 and 3.6.2.
66 See the discussion in par 3.7.
67 See the discussion in paras 3.6.2.
68 See the discussion in par 3.7 and 3.8.
69 See the discussion in paras 3.4.1 to 3.4.4 of chapter 3 and par 6.5 of Chapter 6. See also Otlowski and Tsamenyi 1992 *Australian Journal of Family Law* 151.
70 See the discussion in par 3.7 on the relationship between UNCRC and ACRWC within the context of children's participation rights within the family.

constitution and specific children's rights legislation which domesticated the provisions of the UNCRC.[71]

6.4.5.1 Constitutionalism: Nigerian, South African and Australian Perspectives

Nigeria, South Africa and Australia are multi-ethnic societies, encompassing a wide variety of cultures, languages and religion.[72] With respect to South Africa, her pluralistic nature is expressed by the constitutional recognition of many distinct languages.[73] Similar to Nigeria and Australia, South Africa operates a constitutional democracy with three tiers of Government – National, Provincial and Local Government – each with its distinct executive authority.[74] However, unlike Nigeria[75] and Australia,[76] the Constitution of South Africa stipulate specific rights for children and affords them protection of other rights in the bill pertaining to them.[77] This, however, does not preclude children from having access to other human rights provisions in the Nigerian and Australian constitutions respectively.[78] Also, unlike in the Constitution of Nigeria and Australia, which has no specific provisions on the best interests of the child,[79] the South African Constitution specifically makes the best interests of the child in all matters affecting them to be paramount.[80] However, like all the other specific rights enjoyed under the Nigerian and Australian Constitutions,[81] the best interests right of the child under the South African Constitution are subject to applications and limitations the same way as other rights endorsed in the Bill of Rights.[82]

Despite the constitution of these three countries according a range of human rights to their citizens, it is noticeable that it does not specifically refer to the

71 See the discussion in paras 4.3, 4.5 and 4.7.
72 See the discussion in paras 4.2.1.1, 4.2.1.2 and 4.2.1.3.
73 See the discussion in par 4.2.1.2.
74 See the discussion in paras 4.3.1.2 and 4.3.2.1.
75 See the discussion in par 4.3.1.1.
76 See the discussion in par 4.7.1.
77 See the discussion in par 4.3.2.2.
78 See the discussion in paras 4.3.1.1 and 4.3.3.1.
79 See the discussion in paras 4.3.1.1 and 4.7.1.
80 See the discussion in par 4.5.3.
81 See the discussion in paras 4.3.1.1 and 4.7.1.
82 See the discussion in par 4.5.3.

rights of children to participate in decision-making within the family.[83] Their obligations in terms of children's right to participate in decision-making, reside in their government's ratification of international children's rights instruments.[84] Nigeria, South Africa and Australia in fulfilling their legal and administrative obligation under the UNCRC enacted children's rights law respectively in their countries.[85]

6.4.5.2 Children's Laws

Although, the preamble to the Nigerian Child's Rights Act and South African Children's Act specifically reinforce and endorse the rights provided in Chapter IV of the Nigerian Constitution (Fundamental Human Rights provisions), and section 28 of the South Africa Constitution respectively (children's rights under the Bills of Rights).[86] The Nigerian, South African and Australian children's rights laws embraced a notion of childhood premised on the idea that, for a child to fully assume his/her responsibility in the community, and for a full and harmonious development of his/her personality, a child should ideally grow up in a family environment and in an atmosphere of happiness, love and understanding.[87] To a certain extent, this notion of childhood as embraced by these countries children's rights law, recognise the cultural value of respect, responsibility and reciprocity that are predicated on the rights and duties within the family.[88]

Similarly, the South African and Australian Children's Act also recognised that some children are capable of acting autonomously – in their own best interest – in all matters affecting them including decision-making within the family.[89] Of importance in these respect, is the provision of section 10 of the South African Children's Act and section 68F (3) of the Australian Family Law – unlike the

83 See the discussion in paras 4.3.1.1, 4.5.2 and 4.7.1.
84 See the discussion in paras 4.3.1.1, 4.6 and 4.7.1
85 See the discussion in paras 4.5, 4.6 and 4.7.1
86 See the discussion in paras 4.3.1.1 and 4.5.3.
87 See the discussion in paras 4.5.1.5, 4.5.1, 4.5.2 and 4.7.1.
88 See the discussion in paras 3.4, to 3.4.5.
89 See the discussion in paras 4.6.1.1 to 4.6.1.5, 4.6.2 and 4.7.1.

Nigerian Children's Rights Act,[90] incorporated Article 12(1) of the UNCRC into their domestic legal systems.[91] These specific recognitions of the rights of child to participate in decision-making affecting him/her in the South African and Australian children's laws, explicitly comply with the obligation to protect and fulfil the rights of child under the UNCRC through administrative and legal means necessary.[92] It also challenges the cultural and traditional notions that affect the participatory right of the child.[93]

6.4.5.3 Implication of the implementation approach

Nigeria's implementation approach is solely within the acceptable local norms and culture, which dictates the role and nature of the relationship between the child and his/her parents within the Nigerian context.[94] The South African and Australian children's laws on the one hand, embedded to an extent the cultural value of connectedness, interdependence, and loyalty of children within the family.[95] On the other hand, the South African and Australian children's laws, embedded the UNCRC autonomous child's rights approach of children capable of making and participating in decision-making within the family.[96] Therefore, the Nigerian adopted implementation approach is solely within the acceptable local norms and culture, and does not reflect the intent and the actual implementation of the child's right to participation within the family in terms of Article 12(1) of the UNCRC. The unfortunate inevitable consequence of Nigeria's implementation approach is that the basis for actualising Article 12(1) rights to express views freely within the family by children does not exist. In contrast, the integration approach of Article 12(1) of the UNCRC children's participation rights and cultural values adopted in the South Africa's Children's Act, reflects an approach to

90 See the discussion in par 4.4.1.4 on analysis of the resistance to child's right provision of Article 12 UNCRC in the Nigerian Child's Rights Act. The Nigerian Children's Act, clearly omit Article 12 UNCRC provisions in the Child's Rights Act.
91 See the discussion in paras 4.6.1.2 to 4.6.1.5 and 4.7.1.
92 See the discussion in paras 3.3.3 and 3.3 3 on implementation and measure of implementation. See also Article 4 of the UNCRC.
93 See the discussion in para 4.3 and 4.4.
94 See the discussion in par 4.4.1.4.
95 See the discussion in paras 4.6.3, 4.6.3.1. and 4.8.1.
96 See the discussion in paras 4.6.1.2 to 4.6.1.5 and 4.7.1.

children's rights that aid a progressive interpretation and application of the law relating to children's participation rights in South Africa.[97] For example, section 7 provisions of the Children's Act on the best interests of the child and the constitutional value of tolerance and respect for diversity and pluralism in South Africa and section 68F(3) of the Australian Family Law Act, may allow for an approach that takes the cultural, traditional and religious circumstance of an individual child into account when considering the individual best interests of the child in terms decision-making within the family.[98] However, under the South African and Australian integration approaches, these cultural, traditional and religious considerations are subject to their Children's Act and their constitutional requirements.[99] Since human dignity and respect is fundamental and tied to participation rights of the child in the UNCRC, the value of human dignity and respect should always prevail in situations where cultural values, beliefs, customs and practices conflict with human freedoms and rights. States Parties should therefore, always prioritise respect, dignity and the development of the child in their implementation of Article 12(1) of the UNCRC children's participation rights within the context of the family in their domestic children's legislations.

6.5 Recommendations

The findings discussed above prompts a general proposal directed at the Nigerian, South African and Australian law and policymakers, as well as their national governments in terms of harmful cultural practices – specifically FGM/C. Also, specific proposals are directed at the Nigerian policy makers and national government with regards to her implementation of Article 12(1) of the UNCRC children's participation rights. Furthermore, there is a specific proposal for the UNCRC.

97 See the discussion in par 4.6.3.2.
98 See the discussion in par 4.6.3.2.
99 See the discussion in par 2.3.1.

6.5.1 Suggested approach and response towards curtailing the harmful cultural practice, specifically FGM/C

As indicated in the thesis, the law – which includes domestic legislations, international and regional instruments relating to FGM/C are sound and settled.[100] But, the prevalence of the practice of FGM/C in Nigeria, South Africa and Australia[101] is suggestive of the need for a consistent measures to compliments the extant laws in addressing the FGM/C.

However, there is no one approach towards eradicating the harmful practices of FGM/C because of diverse reasons for, and the methods of the practice around the world. The most common identified approaches towards eradication of FGM/C are: health risk approaches, conversion of excusers, training of health professionals as change agents, alternative rituals, community-led approaches, public statements, and legal measures.[102] All the above-mentioned approaches has enjoyed a greater level of analysis in literature on FGM/C and are found to be of tremendous advantage towards eradicating the scourge of FGM/C.[103] However, it does not mean that the approaches are not fraught with their own major challenges. Some of the notable challenges is that most interventions associated with these approaches do not have the total abandonment of all forms of FGM/C as the objective, which in an ultimate goal.[104] Other challenges are that most of the intervention only aim at increasing knowledge and awareness of its association with health complications and its violation of human rights which at best is to break the silence and to initiate critical reflection upon FGM/C.[105]

In lights of the foregoing, most of the identified approaches to eradicates FGM/C are secondary and considered as a first step towards total abandonment. In fact, studies shows that "the translation of these secondary goals into actual

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100 See earlier discussion in paras 5.6.6, 5.6.6.1 and 5.6.6.2 of Chapter 5.
101 See earlier discussion on this in paras 5.6.1, 5.6.2 and 5.6.3 of Chapter 5.
102 For a detailed analysis on these approaches see Johansen *et al Obstetrics and Gynecology International* 1-10.
103 See Johansen *et al Obstetrics and Gynecology International* 2,3.
104 See Johansen *et al Obstetrics and Gynecology International* 2,3.
105 See Johansen *et al Obstetrics and Gynecology International* 2,3.

abandonment of FGM/C is far from automatic."[106] There are, for example, surveys that find parents "who express a negative attitude to the continuation of FGM/C, while they still intend to let their daughters undergo the practice."[107]

A major reason for this apparent contradiction between attitude and behaviour is not far from social and cultural pressure to uphold the tradition within the family and the community.[108] Therefore, the importance of a community-wide change interventions to enable individual families to abandon FGM/C cannot be overemphasised.[109] More so, studies shows that large-scale abandonment can only be expected when FGM/C is no longer an all-dominant social norm and families can abandon the practice without the risk of stigmatisation and exclusion.[110]

The question therefore, is how can interventions such as community-wide change enables individual family and community to abandon FGM/C?

In sociological studies, several model of interventions are developed by expert that may be used to answer the above question.[111] A particular striking model which is considered as best fit into our discussion and which the thesis is suggesting as community-wide interventions – with a practical model – to enable individual families to abandon FGM/C is that of "Intergenerational Dialogue".[112] The reason for adopting this model as shown by subsequent discussion is the fact that it encourages participation of children through interaction among the social

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106 See Berg and Denison *Studies in Family Planning* 135-146.

107 See Berg and Denison *Studies in Family Planning* 135-146; Johansen *et al Obstetrics and Gynecology International* 3.

108 See earlier discussion in paras 5.6.1, 5.6.2 and 5.6.3 of chapter 5. See also Mackie "Female genital cutting: the beginning of the end" 253-282; Berg and Denison *Studies in Family Planning* 135-146; World Health Organisation, "Eliminating Female genital mutilation. An interagency statement," 2008.

109 See World Health Organisation, "Eliminating Female genital mutilation. An interagency statement," 2008; Mackie "Female genital cutting: the beginning of the end" 253-282.

110 See Mackie "Female genital cutting: the beginning of the end" 253-282; See Berg and Denison *Studies in Family Planning* 135-146; World Health Organisation, "Eliminating Female genital mutilation. An interagency statement," 2008.

111 See Lee "Female genital mutilation: multiple-case studies of communication strategies against a taboo practice" 50-98 for detail discussion on the various model and approaches to the eradication of FGM/C.

112 For a detail analysis of Intergenerational Dialogue See Lee "Female genital mutilation: multiple-case studies of communication strategies against a taboo practice" 92-99.

players within the family and the community as well as expand their knowledge about cultural activities concerning them.

The intergenerational dialogue in sociological studies, is a reflection of social interactionism.[113] Symbolic interactionism is a sociological theory that attempts to explain how people interact in other to build meaning and social reality. The theory was invented and developed by Blumer[114] who points out three basic premises of social interactionism as follows:

- Human beings act toward things on the basis of the meanings they ascribe to those things.
- The meaning of such things is derived from, or arises out of, the social interaction that one has with others and the society.
- These meanings are handled in, and modified through, an interpretive process used by the person in dealing with the things he/she encounters.

Blumer[115] refers to social reality as the reality that people form through interaction as active and creative social participants, and that social reality is generated by employing language to embed meanings into symbols that would otherwise be meaningless. Charon,[116] who support Blumer's theory, believes that symbolic interactionism is produced by interaction among its component, just as social reality is and that social change is similarly brought about through the interaction process and interpretation of each other's acts. In other words, people's behaviour is continually changing as a result of communication that allows them to understand one another. Taking someone else perspective and observing how others characterised their situation is one approach to do this. Knowing how others communicate and collaborate is the first step toward effective communication and collaboration.[117]

According to Charon, most intervention programs have failed to recognise FGM/C as a social symbol.[118] Sensitisation initiatives centred on impacting the "objective

113 Blumer Symbolic interactionism: Perspective and method 2.
114 See Blumer Symbolic interactionism: Perspective and method 2.
115 See Blumer Symbolic interactionism: Perspective and method 2-4.
116 See Charon Symbolic interactionism: An introduction, an interpretation, an integration 146.
117 See Charon Symbolic interactionism: An introduction, an interpretation, an integration 146.
118 See Charon Symbolic interactionism: An introduction, an interpretation, an integration 42-43.

reality" that is "independent of the social definition" have resulted into focusing solely on the physical act of FGM/C centred around the act of scarring.[119] As previously stated, the majority of government and stakeholders sensitisation activities have taken place through education, informing the people about the health consequences and human rights violations associated with the practice of FGM/C. Such approaches hardly suggest the questions of how the practice of FGM/C can fulfil the worldviews of the social members of the practicing communities. They also fail to notice how social actors' interactions have shaped the meaning of the practice.[120]

In light of the foregoing, it is suggested that the concept of social reality through interaction among social constituents are theoretical ideas that can easily be applied into the practice of FGM/C among numerous ethnic and religious groups. Therefore, rather than to instruct and persuade the individual families and community members to change their behaviours, the model will foster interaction among generation groups within the family and the community.

In order to facilitate the needed interaction among generation groups. The author of the thesis is suggesting the following practical model and accompanying considerations on how interaction among generation groups within family and the community may be implemented towards eradicating FGM/C.

STEP 1	**IMPLEMENTATION**	**OBJECTIVE**
Within the Family	The interaction within the family should be planned in line with local tradition and should include elements that allows family members to connect, such as parents and children or older	The goal of family interactions and connection is for each generation, particularly the children to be heard, taken

119 See Charon Symbolic interactionism: An introduction, an interpretation, an integration 43.
120 See Lee "Female genital mutilation: multiple-case studies of communication strategies against a taboo practice" 83.

	and younger generations. The goal of the engagement should not only be to have the two generations identify with one other, but also for them to discover things about each other that they would not have learned otherwise. Each generation should come up with a list of questions they have always wondered about but never dared to ask during the curiosity exercise. For example, within the family, questions about their different realms of rights, duties, and responsibilities, as well as cultural beliefs and custom. The two generation should discuss the question and answers.	seriously, respected and appreciated. The engagement is also a technique for each generation to become aware of and break stereotypes and prejudices about the other.
STEP 2	**IMPLEMENTATION**	**OBJECTIVE**
Within the community	The family generational dialogue should be carried out throughout the community. Intergenerational dialogue should be initiated by the interacting participants with other community members, beginning with their relatives	The goal of this phase will be to involve ever more members of the community in generation conversations, to adapt the dialogue

	and friends. The participants should share their experiences, listen to testimonies from members who have benefited from the conversations, and arrange future talks with other members of the community with similar personalities.	to the circumstances of a community, and to help the dialogue's spirit become ingrained in all participants' daily lives.

The above suggested practical model examine two distinct efforts to mobilise toward FGM/C abandonment. First interactions are from within the family and, second within the community. Therefore, the intergenerational discourse model will enable various generations to reflect on and share their unique worldviews and expectations of one another. By doing so, the generation constituents will be encouraged to see themselves in the shoes of others and imagine how other generation see the family and the community. This interaction process will be a step towards defining problems in the family and community and negotiating how and under what conditions to bring about certain societal changes towards the practice of FGM/C.

Furthermore, this suggested model, if and when follow to a logical end will not only grant the greatest freedom of participation to the individual family and community members, but also bridge generation gaps, power relationships, and the role of the elders in maintaining tradition. More so, since the approach of interactions segmented its participants by family and later by community, it will stimulate negotiated behavioural change. Eventually, the dialogue will be able to come to a community-based decision toward the cultural practice of FGM/C.

The assumption of the above model and approach is that whereas interaction shapes social reality, problems within social reality may be still ignored for a variety of reasons. They may be taken for granted, people may not believe they

can be remedied, or some may simply avoid addressing the apparent problem to others. Therefore, the suggested strategy/model may only function to provide a secure framework for discovering and discussing relevant issues and difficulties, as well as finding solutions that are acceptable to all parties.

Regardless, the generation dialogue model is designed to play central roles in cultural maintenance and change towards abandoning the harmful cultural practices of FGM/C.

The role of government and all relevant stakeholders including the family is therefore, to encourage and ensure that generational dialogue ensued within the family and the community where FGM/C are prevalent in Nigeria, South Africa and Australia. This can be done by providing enabling and conducive environment for the generational dialogue, and if and where necessary serves as moderators or observers in the process of the conversation. The government, through the instrumentality of executives' order, may draft the suggested intergenerational dialogue model into policy statement to be enforced by administrators of the local governments or communities in the affected communities.

6.5.2 Suggested approach to the implementation of Article 12(1) of the UNCRC in Nigeria

As indicated in the thesis, the integration approach of Article 12(1) of the UNCRC children's participation rights and cultural values in South Africa's Children's Act and Australia's Family Law Act reflects an approach to children's rights that aid in the progressive interpretation and application of the law relating to children participation rights in South Africa and Australia.[121] This is because the cultural, traditional and religious circumstances of an individual child may be taken into account when considering the best interest for the child on rights to participate in decision-making within the family.[122] When compared with an implementation approach confined solely within the acceptable local norms and culture, which outlines the role and nature of the relationship between the child and his parents

121 See the discussion in par 4.6.3.2 and 4.8.1.
122 See the discussion in par 4.6.3.2.

such as the Nigerian approach,[123] the South African and Australian adopted implementation approaches is commendable, as it takes into consideration both the rights of the child under the UNCRC and customary values. The question therefore, arises as to how culturally diverse societies like Nigeria who is yet to effectively implement provisions of Article 12(1) can further comply with her obligations on Article 12(1) of the UNCRC.

It would be nearly impossible to formulate a perfect or flawless approach in terms of how multi-ethnic societies as Nigeria may fulfil her obligations on the implementation of Article 12(1) of the UNCRC. More so, it is already established that culture and tradition are intricate values that influenced the implementation of children's rights. Nonetheless, the author suggests the following practical approach and accompanying considerations as some guidance on how Nigeria can comply with their obligations on Article 12(1) of the UNCRC.

Nigeria can adopt the integration approach of Article 12(1) of the UNCRC and cultural values as done in South Africa's Children's Act and Australia's Family Law Act examples pointed out in this study. This can be done by amending her extant Children's rights Act to include Article 12(1) provisions of the UNCRC. Such amendment will specifically allow for the legal basis in addressing participation rights of Nigerian children in decision-making within the family under the *Nigerian Children's Rights Act,* 2003. To effect such an amendment, a Bill by a member of the National Assembly in terms of an amendment to include a replica of Article 12(1) of the UNCRC should be presented before the National Assembly. As a result of the perceived "controversial nature" of Article 12(1) of the UNCRC rights, it is expected that such a proposal will be vehemently opposed by those members who are inclined towards upholding absolute cultural values in terms of parental rights within the family. In fact, one of the reasons for the exclusion of the participation rights in the first instance in the Children' Rights Act was the antagonist by traditional and religious leaders who claims that the inclusion of such rights will creates a disharmony within the existing family structures in Nigeria. With clear

123 See the discussion in par 4.4.1.4.

and logical explanations of what autonomous participation rights of children entails as well as other jurisdictions examples in terms of the implementation of these rights as espoused in this thesis, it should be clear enough that the claim and fear of antagonist of participation rights of children are unfounded. So, therefore the sponsors of the proposed amendment Bill should engage in legislative lobbying with other members of the Assembly with a view of persuading them with logical reasons of the urgent need to include such important provisions as the participation rights of children in the extant Children's Rights Act. The essence of the lobbying is to garnered the necessary support in favour of when the proposed Bill for the amendment is called up for debates at the floor of the National Assembly.

Below is the suggested replica of Article 12(1) of the UNCRC provision on children's participation rights to be included in the Nigerian Child's Rights Act, if and when amended:

> 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 and express views freely and views expressed by the child must be given due consideration

Furthermore, the federal government of Nigeria should ensure a nationwide applicability of the Nigerian Children's Rights Act*,* 2003. This can be done by amending the Constitution to include a Bill of Rights specifically on the rights of children or to make the rights of children to be expressly included in the exclusive legislative list for the National Assembly – which till date is not the case.[124] The author of the thesis is of the view that the Nigeria Government, NGO's, and all other relevant stakeholders should take the advantage of the ongoing Constitutional amendment by the Nigerian National Assembly to push for a Bill of Rights specifically on the rights of children in the constitution as a matter of urgency.[125] The role of the NGO's, civil societies as well as all relevant stakeholder in the field of children's rights protection is to ensure through advocacy, campaign

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124 See discussion in par 4.3.1.1 on the Nigerian Constitution and the Children.

125 As at the time of reviewing the recommendations in this Thesis, there is an on-going Constitutional review and amendment by the Nigerian National Assembly.

and sensitisation that the deficiency as identified in the thesis in terms of the low visibility to children's rights protection in the Nigerian Constitution are redressed through the Constitutional amendment. The inclusion of specific children rights in the highest law in Nigeria will not only serve as a tool for advocacy but also as a beacon guiding implementation and for developing policies and addressing challenges in terms of application and interpretation of children's rights in Nigeria.[126] However, the author of the thesis is not unmindful of the cumbersome and rigid nature in terms of the processes involved in Constitutional amendment.

Therefore, as an alternative to the foregoing, NGO's, and all other stakeholders in the field of children's rights should as a matter of necessity challenge the Nigerian Federal Government through the Office of the Attorney General of the Federation to seek a judicial intervention to determine the actual interpretation of the combined provisions of Item 67 and 68 of part I, 2nd schedule to the 1999 Constitution of Nigeria*,* which empowers the National Assembly to make laws on any matter incidental and supplementary to any matter mentioned elsewhere in the list. The Judicial intervention will be in the form of a legal actions by the office of the Attorney General of the Federation invoking the Supreme court of Nigeria original jurisdiction under section 232(1) of the constitution on the actual interpretation of the above-mentioned Constitutional provisions. It is the author's candid view that since citizenship is an item listed as number 10 on the exclusive legislative list, logically children's rights are matters incidental or supplementary to their rights as citizen of Nigeria. Therefore, children's rights may be argued to be within the exclusive legislative power of the National Assembly. This view as it were remains academic, it requires further and thorough judicial interpretation to determine its actual validity.

The need for a judicial intervention through the Office of the Attorney General of the Federation arises not only because the Attorney Generals is the legal adviser to the Government, but also advise the Government on constitutional and legal issues, including whether proposed legislation complies with the provisions of the

126 As indicated by earlier discussion in paras 4.3.1.1 on Constitution and the children in Nigeria.

Constitution. More importantly, Attorney General represents the State in all legal proceedings – including cases on the interpretation of constitutional provisions.

In pursue of the above judicial endeavour, the following are suggested questions for determination to assist the court in the process:

a. Whether the combined provisions of Item 67 and 68 of part I, 2nd schedule to the 1999 Constitution of Nigeria, empowers the National Assembly to make laws on any matter incidental and supplementary to any matter mentioned elsewhere in the exclusive legislative list.

b. Whether children's rights are within the contemplation and competence of the powers conferred on the National Assembly in item number 10 – citizenship – in the exclusive legislative list.

c. If the answer to questions a) and b) is in the affirmative, whether the combined provisions of item 67 and 68 of part I, 2nd schedule to the 1999 Constitution of Nigeria empowers the National Assembly to make laws exclusively on children's rights.

d. If the answer to questions c) is in the affirmative, whether the Nigerian Child's Rights Act, 2003, an Act of the National Assembly is applicable throughout and within other States of the Federation.

If and when, the suggested questions are found in the affirmative, the following declarations should be sought from the court:

a. A declaration that the combined provisions of item 67 and 68 of part I, 2nd schedule to the 1999 Constitution of Nigeria empowers the National Assembly to make laws exclusively on children's rights.

b. A declaration that the Nigerian Child's Rights Act, 2003 is applicable throughout and within other States of the federation.

On the part of the UNCRC, the Committee on the Rights of Child has on many occasion clamours for the need for State Parties to comply with the provision of

Article 12(1) of the UNCRC. However, as indicated by the thesis, particularly discussion in Chapter 4,[127] these persistent clamours by the Committee on the Rights of Child have not significantly translated to improvements, at least in one of the State Parties as the Nigerian example shown. Therefore, there is a need for further and concerted efforts towards ensuring a robust and effective implementation of Article 12(1) of the UNCRC in culturally diverse societies like Nigeria.

As part of the way forward in this regard, since the UNCRC as an international rights instrument cannot be amended, it is suggested that the United Nations may adopt an Optional Protocol specifically on Article 12(1) of the UNCRC that will reflect more on the role of parents and relationships of the child within the family as required within societies that favour communalism and collective solidarity as rights. This will expressly ensure a balance between the competing interests of the child's individual rights and the child's communal or collective rights. More so, it will further allay the recurring fear by critics and some State Parties that under the UNCRC the main goal of the family is to benefit from the child alone instead of supporting the reciprocal duties and responsibilities of the child towards the family.[128] The Optional Protocol, if and when considered, may adopt the integration model such as the South African and Australian implementation examples shown in this thesis or any other approach, in so far, as it adequately acknowledge and reasonably within the law, accommodate the other divide of the competing interests.

The above suggested view, however, must not be misconstrued to mean that the autonomous individual rights of the child as entrenched by Article 12(1) of the UNCRC are not valid. As earlier argued, the autonomous individual rights of the child provision are indeed, quite significant in that they give credence to the child as an individual with a voice which is critical to the child's development. But a

127 See generally Chapter 4 discussion which is on the implementation of Article 12 in the domestic legal system of specific multicultural states parties such as Nigeria, South Africa and Australia.

128 See discussion in par 3.5 in Chapter 3 on several debates and controversy concerning the legitimacy and authenticity of Child autonomy rights to participate in decision-making within the family as stipulated by Article 12 of the UNCRC.

specific multi-ethnic and developing countries – Nigeria who is a States' Parties to the UNCRC, largely ignore Article 12(1) provisions of the UNCRC[129] in her domestic children's legislation due to cultural legitimation such as reciprocal duties and responsibilities of the child towards the family which may foster "harmful practices" that violates children's rights.[130] There is therefore, the need to engage more, perhaps from within on these aspects of cultural and traditional values *vis-à-vis* Article 12(1) children's participation rights in the UNCRC. By so doing, it will further strengthen the application, implementation and realisation of children's rights in the domestic legal systems of culturally diverse countries who are State Parties to the UNCRC.

6.5.3 Suggested inclusion of the recommended Optional Protocol to the Convention on the Rights of Child on Article 12(1)

An example of what may be included in the above recommended Optional Protocol on Article 12(1) of the UNCRC are suggested in tabular forms below:

S/N	**OPTIONAL PROTOCOL TO THE CONVENTION ON THE RIGHTS OF CHILD ON ARTICLE 12(1) ON THE RIGHTS OF CHILDREN TO PARTICIPATE IN DECISION MAKING IN ALL MATTERS AFFECTING THEM AND THE OBLIGATIONS OF STATES' PARTIES.**
1.	This Optional protocol maintains and affirm the provision of Article 12(1) on the participatory rights of the child.
2.	In addition to Article 12(1) construction of autonomous individual child's rights to participation, the protocol acknowledged customary construction of the participatory rights of the child in the recognised legal system of States Parties.
3.	This Optional protocol, specifically recognised the roles of parents, as well as the duties and responsibilities of the child within the family in the cultural

129 See paras 4.4.1.4 and 4.4.1.5.

130 See discussion in par 4.4.1.5 on the implication of the Nigerian implementation of Article 12 of the UNCRC in the domestic Children's Rights Act.

	context of collective solidarity for the overall development of the child.
4.	Therefore, States Parties are obligated in every instance in No. 2 and 3 as above to ensure that the best interests of the child as stipulated in Article 3 of the UNCRC shall continue to attract paramount considerations in all matters concerning children.

It should, however, be re-emphasised that the essence of the above suggested Optional Protocol approach, if and when ratified by multi-ethnic States Parties, will at least, categorically foreclose the recurring cultural arguments by some State Parties as reasons for the abysmal/non-implementation of Article 12(1) of the UNCRC in their domestic legal systems, because the Optional protocol would have addressed and taken into consideration these cultural values with regards to children's participation rights. More so, as States Parties are re-obligated by Number 4 of the above suggestions to consistently ensure that the best interests of the child are of topmost priority in their application of cultural values to children's rights within their legal systems. This will not only ensure that the cultural values specificity in culturally diverse societies, that is, Nigeria are considered in relation to children's best interests, but also that children are beneficiary of the best of both worlds in terms of their rights to participation in decision-making within the context of the family.

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