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## Calibrating Children's Rights to Participate in a Family Setting 30 Years after the Adoption of the Convention on the Rights of the Child and the African Children's Charter

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### Abstract

*Efforts to ensure compliance with Article 12 of the United Nations Convention on the Rights of the Child (CRC) and Articles 4(2) and 7 of the African Charter on the Rights and Welfare of the Child (Children's Charter), permitting every child the right to participate in all matters affecting a child have reached boiling point in Africa. The reasons for this are plenty and range from the growing interests and development of children's rights to the increasing visibility of relaxed parental influence. For children, the relaxation of parental influence and the need to accentuate their right to participate in a family setting is essential because decisions that are taken within their families often have an immediate and sometimes lasting impact on their lives. Thirty years after the adoption of the CRC and the Children's Charter, this article aims to explore the existing cultured literature and models on child participation to propose a new way forward based on a child's evolving capacity. The article further aims to shine the light on the recognition of a child's right to participate in a family setting and suggest a model to enable better understanding and implementation of a child's right to participate in a family setting in Africa. This article is inspired by the CRC Committee's recognition of the family as one of the leading settings for promoting child participation.*

**Keywords:** Child participation; respect of the views of a child; children's right to be heard, child autonomy; evolving capacity; the balanced model

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## 1 INTRODUCTION

Across the globe and, increasingly, in Africa, there is a growing edge amongst children's rights actors to adopt progressive ways to comprehensively and meaningfully realise a child's right to participate in all matters concerning the child in the public and private setting. As discussed in section 4 of this article, over the years, many scholars have analysed and strengthened the scope, understanding and implementation of a child's right to participate in the public setting. On the contrary, as will be discussed further in sections 2 and 3, academic literature on a child's right to participate in the family setting is severely limited, especially in an African context. This article intends to contribute to this gap in cultured literature in an African academic context. The rationale is to promote and strengthen a child's right to participate within an African family. The analysis in the article specifically focuses on African children and their ability to meaningfully participate in a family decision-making process involving them.

For African children, the right to participate is settled in Articles 12, 4(2) and 7 of the CRC and the Children's Charter, respectively. Even though these articles do not explicitly mention the family as a child participation platform, the CRC Committee has approved the family as one of the leading settings to enable child participation.<sup>1</sup> States parties to the CRC, have promised "to develop and implement programmes to promote meaningful participation by children, including adolescents, in decision-making processes, including in families and schools and at the local and national levels."<sup>2</sup> Through the lens of the aforementioned articles, read together with the CRC Committee's general comment on a child's right to be heard,<sup>3</sup> parental responsibility includes the responsibility to promote and protect a child's right to participate meaningfully in family decision-making processes on all matters affecting the child.<sup>4</sup>

Practically, it is challenging to meaningfully involve children in *all* decision-making processes on matters affecting them. Some of the challenges are around a child's immaturity of judgement to participate in, for example, a medical decision-making process<sup>5</sup> and other reasons such as a disability which could limit a child's ability to freely form and express an opinion.

Further, the challenge to meaningfully involve a child in a participation process is exacerbated by the varied concepts of childhood and the intricate role of an African child which, in most cases, is not construed to allow a child to participate in *all* matters affecting the child, especially within the family setting.<sup>6</sup> Notwithstanding, child participation is not a new concept in Africa and surely, was not introduced after the adoption of the treaties. Indeed, most ancient traditions across the continent, allow children to participate in cultural, religious and leadership matters.<sup>7</sup> The aim, generally, is to transfer certain African practices to the next generation. For instance, in Ethiopia and Eritrea, children are taught from a very young age how to perform a coffee ceremony.<sup>8</sup> The coffee ceremony in these countries is an old and respected tradition which is often performed in every household during different time intervals and especially after a meal with guests.<sup>9</sup> Also, in Malawi, the Lomwe tribe/clan<sup>10</sup> allows children to participate in and to lead traditional songs and dances which includes adult participants.<sup>11</sup> These practices are inspiring and must be encouraged to continue. Nevertheless, the philosophical setting of child participation as conceptualised in the treaties requires far more than just including children in ceremonies. The key provisions of the CRC and the Children's Charter indicated above, present certain caveats which form the key ingredients required to ensure a child's meaningful participation. These include; age and maturity, due weight, and a child's ability to freely form and express an opinion.<sup>12</sup>

Against this background, the objective of this article is to argue the need to promote child participation in an African family setting, and to broaden the scope of the CRC Committee's position on the respect of the views of a child in a family.<sup>13</sup> To persuasively argue the need to broaden a child's right to participate in the family in domestic, African law. The method of this article is a reflective and comparative research approach with the aim to look back to suggest a new way forward. This objective and further analyses in this paper should be viewed from the perspective that the paper suggests that the African human rights system, specifically the Committee of Experts on the Rights and Welfare of the Child, should expand, through policy and or a general comment, the interpretation of the child participation standards and norms

11 This is a very common practice across several African traditions.

12 For details on these caveats, see Parkes *Children and International Human Rights Law: The Right of the Child to be Heard* (2013).

13 UN Committee on the CRC, General Comment No 12.

presented in the Children's Charter and by extension the CRC, to include parents obligation to implement meaningful child participation in an African, family setting.

The paper is divided into six sections, including the introduction and conclusion as follows: First, the attributes and underlying understanding of child participation will be discussed. Second, the article highlights some of the barriers that have frustrated the successful implementation of child participation in an African, family setting. Third, a catalogue of leading child participation models inspired by a children's rights approach is examined. Fourth, following from the review of previous models, the article proposes a balance model of child participation with the aim to promote and facilitate child participation in an African, family setting. The article concludes on a cautionary note calling on all parties concerned, for instance, the State, stakeholders and children's rights actors to fortify rather than weaken a parent-child relationship through the lens of a child's right to participate in all matters affecting a child.

## 2 A SUCCINCT COMPOSITION OF THE COMMON POSITION ON CHILD PARTICIPATION

According to the CRC and the Children's Charter, child participation<sup>14</sup> is both a right and a general principle. As a right, it obligates and strengthens the need for a child to participate decision-making process in all matters concerning the child. As a general principle, child participation governs the interpretation and implementation of all children's rights, including a child's right to participate.<sup>15</sup> Freeman, writing in 1996, classifies child participation as "the kingpin" of the children's rights protection framework.<sup>16</sup> In other words, a child's right to participate is an essential part of the treaties. In 2008, Sloth-Nielsen alludes that child participation gives the treaties a "soul" and significantly extricates "the rights based approach firmly from a welfarist or protectionist approach."<sup>17</sup> This means that a child's right to participate heightens a child's autonomy and ability to meaningfully participate in *all* decision-making processes on matters affecting the child. In 2010, Lynch, while examining the implementation of a child's right to participate through the lens of restorative justice and international standards for children's rights, regarded the right as a right which assigns children with "a daunting [task] to speak about personal issues in front of strangers."<sup>18</sup> In other words, Lynch seems to warn that the right, should not be unvaryingly applied through *all* aspects of children's rights. However, in 2013, Parkes, depicts child participation as a "perfect fit" in enabling children to share their views on *all* matters concerning the child.<sup>19</sup> Depending on the angle of appreciation, separately, these claims are accurate. This is because, legally, even though a child's right to participate empowers children to be active actors in claiming their rights, it also assigns a child with the demanding responsibility to meaningfully contribute to a decision concerning the child.<sup>20</sup>

Legally, credit is given to the CRC and the Children's Charter for providing the much-needed legal basis, standards and norms for child participation.<sup>21</sup> According to the treaties, the purview of child participation can be spilt into two apposite participation channels. These include the vertical and horizontal participation channels. The vertical channel constitutes participation in the public setting and denotes the relationship between the state (public officials and state agents) and children. For instance, the parliament and court sessions are some of the platforms which permits children to engage with policy and decision-makers to express their views on certain issues concerning them in the public setting.<sup>22</sup> The horizontal

14 Cornwall "Unpacking 'Participation': Models, Meanings and Practices" 2008 *Community Development Journal* 269–283.

15 The other three principles include: non-discrimination, best interests of the child, and right to life, survival and development.

16 Freeman "The Importance of a Children's Rights Perspective in Litigation" 1996 *Butterworths Family Law Journal* 84–90.

17 Sloth-Nielsen "Seen and Heard? New Frontiers in Child Participation in Family Law Proceedings in South Africa" 2009 *Speculum Juris* 1.

18 Lynch "Restorative Justice through a Children's Rights Lens" 2010 *International Journal on Children's Rights* 179.

19 Parkes (2013) *Children and International Human Rights Law: The Right of the Child to be Heard* 1.

20 Gardner "The Mark of Responsibility" 2003 *Oxford Journal of Legal Studies* 157–171.

21 All 54 African States have ratified the CRC and at the time of writing, 49 have ratified the Children's Charter. In most cases, both instruments have also been domesticated into domestic laws.

22 For a synopsis of what this entails, see UNICEF, *A Handbook on Child Participation in Parliament* available at <http://archive.ipu.org/PDF/publications/child-parl-e.pdf> (accessed 20-05- 2020).

channel constitutes participation in the private setting and speaks to child participation in family decision-making processes. For instance, processes such as deciding on a child's education,<sup>23</sup> clothing,<sup>24</sup> food<sup>25</sup> and health<sup>26</sup> are part of participatory opportunities in the family.<sup>27</sup> For African children, the protection of their right to participate in family decision-making processes is essential because any decisions taken in the family often have an immediate and sometimes lasting impact on their development.

In other words, a child's right to participate encourages unremitting, healthy and progressive collaboration between parents and children in protecting and claiming a child's right.<sup>28</sup> The mutuality of a parent-child relationship is apparent through Article 20 of the Children's Charter, which enjoins parents to ensure that a child's best interests is central in their parenting endeavour. Furthermore, through Article 4(2) and 7, parents are called to respect the views of a child in all matters concerning the child. The obligation to respect the views of a child, does not diminish parental authority. On the contrary, a child's right to participate grants more technical powers to parents than it does to the child. This is established in the requirement to give due weight to the views of a child based on the child's age and maturity.<sup>29</sup> The due weight process gives parents the power, guided by the principle of the best interests of the child discussed further in section 6, to discard or accept a child's opinion.

A child's right to participate, jointly with the best-interest principle of the child, prompts parents to be rational in the decisions they make for their children. For example, in an unreported case in South Africa, a child, 16 year of age at the time, approached the High Court in Cape Town to request for a court order to allow her to move out of her parents' home and to live a semi-independent life.<sup>30</sup> In her submission to the High Court, she complained that her parents circumscribed her from speaking to boys, speaking to friends through her phone, meeting friends after school, and reading books she likes. The court decided that the parenting approach was not rational. Consequently, the court granted the child's request to live semi-independently with a school friend's family who became her foster parents until she was 18 years old. Surely there comes a point in a child's development when parental responsibility and dominance over a child diminishes. At the age of 16, it is irrational for a parent to completely ignore a child's views. In *Pillay*, the Constitutional Court of South Africa heard an appeal from the KwaZulu-Natal High Court concerning the right of a learner to wear a nose stud to school. Langa CJ observed that "[t]he need for the child's voice to be heard is perhaps even more acute when it concerns children [of a certain age] who should be increasingly taking responsibility for their own actions and beliefs."<sup>31</sup> This decision is crucial to the analysis in this article in that it

23 See for example, Isokpan and Durojaye "The Child's Right to Basic Education in Nigeria: A Commentary on the Decision in *SERAP v. Nigeria*" 2018 *African Journal of International and Comparative Law* 639–648.

24 See, Levin-Epstein "Letting Kids Choose what they Wear" available at <https://www.parents.com/toddlers-preschoolers/development/social/letting-kids-choose-what-they-wear/> (accessed 4-05-2020).

25 See, Chirwa "Child Poverty and Children's Rights of Access to Food and Basic Nutrition in South Africa: A Contextual, Jurisprudential and Policy Analysis" 2009 available at <https://repository.uwc.ac.za/bitstream/handle/10566/203/ChirwaChildPoverty2009.pdf?sequence=3&isAllowed=y> (accessed 4-05-2020).

26 Oduwo and Edwards "A Systematic Review of Factors Affecting Children's Right to Health in Vluster Randomized Trials in Kenya" 2014 *Trials* 15:287 available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4223386/> (accessed 29-05-2020).

27 See Hein "Children's Competence in Medical Care Decision-making" in Dorscheidt and Doek (eds) *Children's Rights in Health Care* (2018) 150–172.

28 Fokala "The Impact of the Best Interests and the Respect for the Views of the Child Principles in Child Custody Cases" 2019 *Nordic Journal of International Law* 614–635.

29 Feinstein and O'Kane "'Children's and Adolescents' Participation and Protection from Sexual Abuse and Exploitation' 2009, UNICEF Inocentia Research Centre, *Inocentia Working Paper 1* available at [https://www.unicef-irc.org/publications/pdf/iwp\\_2009\\_09.pdf](https://www.unicef-irc.org/publications/pdf/iwp_2009_09.pdf) (accessed 20-5-2013). See also, UN Report *The State of the World's Children: A Fair Chance for Every Child* (2016) 41–51 available at [http://www.unicef.org/publications/files/UNICEF\\_SOWC\\_2016.pdf](http://www.unicef.org/publications/files/UNICEF_SOWC_2016.pdf) (accessed 8-05-2016).

30 For details, see Bekink "Child Divorce: A Break from Parental Responsibilities and Rights due to the Traditional Socio-cultural Practices and Beliefs of the Parents" 2012 *PELJ* 179. In her article, Bekink highlights the difficulty she faced in getting the official reference of the case when she states that "Despite attempts by the author hereof to obtain copies of the legal arguments presented in court and the order given, the author was unable to obtain such documentation from the learned judge or the attorneys representing the girl. The reasons given were the sensitivity of the matter and the client's instructions. Reliance is therefore made on the media reports of the matter." I have made further enquiries to obtain the official reference of the case on Monday, 7 September 2020 with no outcome.

31 *MEC for Education, KwaZulu Natal v Pillay* 2008 1 SA 474 (CC) para 56.

accentuates the importance to respect rational decisions made by children.

Placed in an ideal world, it is almost inconceivable to imagine a child going through childhood without some form of parental or adult influence to shape a child's cognitive development.<sup>32</sup> According to Article 12, 4(2) and 7 of the CRC and the Children's Charter, the first step is to allow a child to participate in matters affecting the child.<sup>33</sup> One of the first references in a court case which echoes the importance of the role parents play in Africa, is the South African Constitutional Court decision in *S v M* in which Sachs J, held that the significance of the role played by parents:

[I]s to [...] serve as the most immediate moral exemplars for their offspring. Their responsibility is not just to be with their children and look after their daily needs. It is certainly not simply to secure money to buy the accoutrements of the consumer society, such as cell phones and expensive shoes. It is to show their children how to look problems in the eye. It is to provide them with guidance on how to deal with setbacks and make difficult decisions. Children have a need and a right to learn from their primary caregivers that individuals make moral choices for which they can be held accountable.<sup>34</sup>

Generally, the role of parents in a child participation process is sensitive, requires compromise and must be taken seriously because the responsibility to ensure that the final decision is in the best interest of the child rest on the shoulders of parents and not the child. Related to this, the following section presents an analysis of apparent factors which fortify and justify the role of parents in an African family setting: culture, religion and parental authority.

### 3 APPARENT BARRIERS WITHIN THE FAMILY

From the outset, it is important to note that there are several barriers extant within the family that hinder children from meaningfully participating in a family. These include, parental authority and control,<sup>35</sup> power relations,<sup>36</sup> children's presumed immaturity,<sup>37</sup> and the legal protection of the family as a private unit.<sup>38</sup> For children, and specifically around protecting their rights, the family is not an absolute private space.<sup>39</sup> Article 5 of the CRC calls on parents to give direction and guidance to the child to enable the child to enjoy all the rights recognised in the CRC. Pursuant to Article 5, the CRC Committee calls on State Parties to "encourage, through legislation and policy, parents, guardians and childminders to listen to children and give due weight to their views in matters that concern them."<sup>40</sup> As envisaged by the CRC Committee, the family is indeed a crucial space to promote child participation. However, the reality is that it takes a tremendous amount of work to clear the way for children to meaningfully participate in the family. The barriers highlighted earlier are some of the aspects that must be cleared in the family to encourage child participation. These have been discussed extensively in several academic papers.<sup>41</sup> This article does not analyse all the barriers but proceeds to analyse three common barriers extant in most African families.

The first barrier examined in this article is a combination of two practices with similar effects on African family structures. These include culture and religion.<sup>42</sup> There is an insignificant difference

32 Wabwile "Rights Brought Home? Human Rights in Kenya's Children Act 2001" 2005 *International Survey of Family Law* 393–416.

33 Runeson et al "Children's Participation in the Decision-making Process during Hospitalization: An Observational Study" 2002 *Nursing Ethics* 584.

34 *S v M* (Centre for Child Law as Amicus Curiae) 2008 (3) SA 232 (CC) para 134. See also, *Minister for Welfare and Population Development v Fitzpatrick* [2000] ZACC 6; 2000 (3) SA 422 (CC).

35 Lansdown "The Realisation of Children's Participation Rights" in Percy-Smith and Thomas (eds) *A Handbook of Children and People's Participation: Perspectives from Theory and Practice* (2010) 11.

36 Parkinson and Cashmore *The Voice of a Child in Family Law Disputes* (2012) 62–89.

37 Lansdown *The Evolving Capacities of the Child* (2005) 3.

38 Human Rights Council reports, *Protection of the Family: Role of the Family in Supporting the Protection and Promotion of Human Rights of Persons with Disabilities* (2016) UN Doc A/HRC/32/L.35. See also, Woodhouse "The Dark Side of Family Privacy" 67 *The George Washington LR* 1247–1999.

39 See for example, Egede "Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria" 2007 *Journal of African Law* 249–284. See also, Olsen "The Myth of the State Intervention in the Family" 1985 *University of Michigan Journal of Law Reform* 839–840; Jonas "Gender Equality in Botswana: The Case of Mmusi and Others v Ramantele and Others" 2013 *African Human Rights Law Journal* 299–244.

40 UN Committee on the CRC, General Comment No 12.

41 See for example, Egede 2007 *Journal of African Law*, Olsen 1985 *University of Michigan Journal of Law Reform*; Jonas 2013 *African Human Rights Law Journal*

42 For details on how these practices influence family structures, see, Van der Vyver and Green "Law, Religion and

between these practices.<sup>43</sup> This is generally because in most cases, cultural expressions are motivated by religion.<sup>44</sup> Under both practices, a child is conceived as a presumably competent person who lacks the proper ability to articulate an opinion in a decision-making process.<sup>45</sup> What is more, it is inconsequential whether a family is religious, conservative or not. In reality, every household functions around certain beliefs that influence the way members of that family are treated. For those who are overly religious, as was established in *Christian Education South Africa* by Sachs J, discussed further under section 5.1.2, "their relationship with God or creation is central to all their activities."<sup>46</sup> Furthermore, in *Talibé*, which is another example of the domination of religion in the decisions parents make for their children, the children concerned were not consulted at the family level to canvass their opinion whether they would prefer to attend a religious or secular school.<sup>47</sup> Even though the Committee of Experts did not pronounce on the violation of the children's right to participate, the *Talibé* is a vivid example of a decision made in the family which failed to consult the views of the children concerned because of the influence of religion. But, as was established in *Nkosi*, religion has limitations.<sup>48</sup>

The second common barrier within the family, is technically related to the previous barrier. That is, absolute parental control and authority. It is common knowledge that the CRC and the Children's Charter are inundated with parental responsibilities around the proper development of their child.<sup>49</sup> Indeed, there is hardly any provision in these instruments that does not accentuate parental guidance and authority, including the provisions that protect child participation. Two reasons could account for this. First, either the drafters of the treaties did not completely consider a child as competent enough to articulate an opinion or second, it was strategic to consider parental authority since they (parents) are at the frontline of protecting a child's welfare and rights. According to the CRC Committee, parents have four roles to meaningfully enable child participation. These include involving a child (admission), listening to the child (include taking the child's opinion seriously), giving due weight to a child's opinion and to implement the decision made.<sup>50</sup> However, when parents as was the case in *Esanubor*, *Talibé* and *Pillay* for example, ignore child participation or roughshod over a decision-making process, it becomes problematic because that would be excessive and in violation of Articles 4(2), 7 and 12 of the Children's Charter and the CRC respectively.

#### 4 MODELLING PREVIOUS MODELS OF CHILD PARTICIPATION

Generally, children's right to participate, is the most, if not the only of the four general principles of children's rights that has an impressive list of models aimed at facilitating its implementation. Indeed, more than a dozen of these models exists.<sup>51</sup> For this reason, during this time, it is difficult to introduce a new model which is completely unrelated to one or more of the previous models. Accordingly, based on existing cultured publications, this sub-section, builds on the analysis provided under section 2 of this article, to chronologically flag five of the most popular models on child participation according to the year they were published. Because these models have been discussed extensively in several cultured literature, the objective of the discussion in this section, is sincerely to present and reflect on the models to enable the author propose a model for child participation in the family setting in Africa. Related to section 5, the discussions below provide a bridge to the analyses provided under the balanced model

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Human Rights in Africa: Introduction" 2008 *African Human Rights Law Journal* 337–356.

43 For details on the similarities of these practices, see Raday "Culture, Religion, and Gender" 2003 *International Journal of Constitutional Law* 663–715.

44 For example, the cultural discriminatory reactions to people in the LGBTI+ community are often motivated by religion. See Quansah "Same-sex Relationships in Botswana: Current Perspectives and Future Prospects" 2004 *AHRLJ* 201–217.

45 This is prevalent across the continent albeit Article 1(3) of the Children's Charter's call on states to discourage any custom, tradition, cultural or religious practice that is inconsistent with the rights of a child.

46 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757.

47 *Centre for Human Rights (University of Pretoria) and La Recontre Africaine Pour la defense de Droit de L'homme v Senegal Decision*: No 003/com/001/2012.

48 *Bührmann v Nkosi* 2000 1 SA 1145 (T); *Nkosi v Bührmann* 2002 1 SA 372 (SCA). This case raised a contentious legal issue involving, on the one hand, the right to religious freedom, and particularly the right to practise one's religion, and, on the other hand, the right not to be deprived of one's land except by law.

49 See for example Arts 19 of the Children's Charter and 18 of the CRC.

50 UN Committee on the CRC, General Comment No 12 paras 25 and 91.

51 Allcock "Frameworks for Child Participation in Social Care" 2018, available at <https://www.iriss.org.uk/resources/esss-outlines/frameworks-child-participation-social-care> (accessed 22-01-2021).

of child participation in a family setting.

The first model examined is Hart's ladder of participation. Hart's ladder consists of eight steps divided into two parts. From the bottom of the ladder, the three lowest steps are grouped as "non-participation", and the upper five steps are grouped as "degree of participation".<sup>52</sup> The two parts of the model flagged instances of tokenistic and meaningful participation. However, as children's rights actors and researchers continue to investigate how best to promote child participation, Hart's model has been critiqued for promoting a hierarchical model of participation. For instance, Comeau, is concerned that Hart's model of participation is rigid and not flexible to suit different contexts of child participation.<sup>53</sup> Notwithstanding, most scholars agree that Hart's model contributes significantly to future models as it helped identify instances of non-participation.<sup>54</sup> The second model examined is Treseder's circles of participation.<sup>55</sup> Treseder's model is basically an adaptation of the first five steps of Hart's model. Accordingly, Treseder tweaks Hart's model to introduce a circle of participation which underscores children as able, resourceful and ambitious. Treseder's model, introduces a child as capable to articulate an opinion, until proven otherwise. This aspect of the model is included in the balanced model because it advocates for the involvement of children, which is the first step promoted in the balanced model.

The third model considered in this article is Shier's pathway to participation.<sup>56</sup> Similar to Treseder's, it identifies five levels of participation. These include listening to a child; supporting the child to express their views; giving due weight to the views of the child; involving a child in the decision-making process and sharing responsibilities for decision-making. According to Shier, these levels are mainly intended to guide an adult through a series of questions to determine which level of the model they are operating on to support children's participation. Critically, Shier introduces child participation as a process which could start at any point depending on the maturity of the child. Though this model highlights some of the key components of Article 12 of the CRC and recognises the challenges that parents could face in involving children, the model is technically lacking in that it does not seem to envisage a situation where a child could act on his or her own without adult support.<sup>57</sup>

The fourth model examined in this article, is Kirby *et al's* model of participation.<sup>58</sup> This model takes from Shier's model and supports the fact that meaningful child participation is a process and "not simply the application of isolated cases of participation activities or events."<sup>59</sup> However, it parts from the general scenario in Hart's and Shier's model to highlight an inclusive, persuasive and appealing culture of meaningful child participation. Importantly, the model posits a participation process which is fit for purpose. To this end, the authors hold that "the appropriate activities and level of participation are dependent on a number of factors: including the type and content of decisions, the context and children."<sup>60</sup>

The fifth model examined in this article is Lundy's model of participation.<sup>61</sup> This model, advocates for a rights-based approach of child participation through the lens of Article 12 of the CRC. Importantly, it recognises a child as a right bearer. Lundy's model deals with the question of how to meaningfully involve a child in decision-making processes and how to give due weight to the views of a child. Lundy's model just like Treseder's and Shier's models, also has a strong presence in the balance model discussed further in section 5.

Related to the next section, it is important to understand section 4 as the foundational phase of the balanced model of the child participation discussed further in section 5. The balanced model is the result of a combination of the thorough examination of the gaps in

52 Hart "Children's Participation: From Tokenism to Citizenship" 1992 *UNICEF Innocenti Essays* 5.

53 Comeau "Involving Children in Decision Making. A Model for Developing Children's Participation" 2005 *Surrey, Children's Fund*.

54 See for example, Cahill and Dadvand "Re-conceptualising Youth Participation: A Framework to Inform Action" 2018 *Children and Youth Services Review* 243–253.

55 Treseder "Empowering Children & Young People Training Manual: Promoting Involvement in Decision Making" 1997 *Save the Children*.

56 Shier "Pathways to Participation: Openings, Opportunities and Obligations. A New Model for Enhancing Children's Participation in Decision-making" 2001 *Children & Society* 107–117.

57 Lansdown "The Realisation of Children's Participation Rights" 11–23.

58 Kirby *et al.* "Building a Culture of Participation: Research Report" 2003 *Department for Education and Skills*.

59 *Ibid* 7.

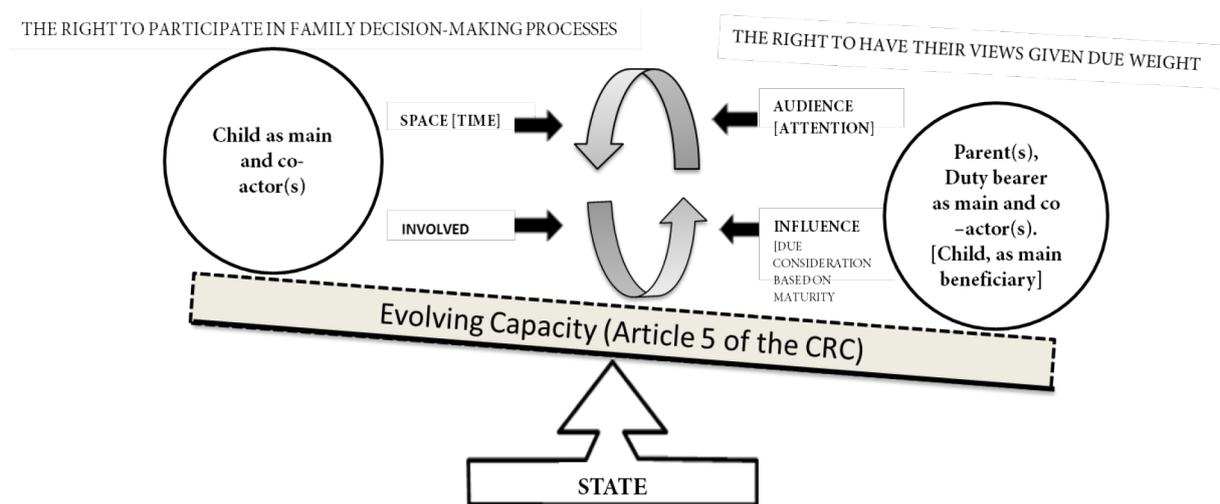
60 *Ibid* 8.

61 Lundy "'Voice' is not Enough: Conceptualising Article 12 of the United National Convention on the Rights of the Child" 2007 *British Educational Research Journal* 933.

these models of child participation, the context of Articles 4(2), 7 and 12 of the Children's Charter and the CRC and the analysis of the CRC Committee in its general comment on a child's right to be heard.

## 5 THE BALANCE MODEL OF CHILD PARTICIPATION

Methodically, this model is based on a user perspective of rights.<sup>62</sup> The user perspective of rights approach is inspired by the necessity to connect a child as a right bearer to a child's mental development and ability to claim rights. Accordingly, the model presupposes a child who is deemed competent and a child who is presumed competent. Generally, a child who is unable to articulate their opinion must be supported by parents. The model also, introduces the State as a waiting partner in the decision-making process. The role of the State is pronounced through interventions to protect a child's best interests where parental opinion and decision fails to do so. This is best displayed in the diagram below:



The balance model of children's participation in the family setting.

### 5.1 Unpacking the Balance Model

As indicated earlier in section 4, this model is not crafted on a new canvass. Accordingly, certain features of previous models discussed in section 4, are apparent in the balance model. But the model highlights two critical features which are not clearly highlighted in the previous models. These include the three-cornered relationship between children, parents and the state and a child's evolving capacity. The role parents play in any decision that concerns a child is eminent however, in the balance model this role is skirted to provide support and not to ride roughshod over the wishes of a child.<sup>63</sup> Similarly, the model introduces the State, with a very limited but fundamental role to intervene in a decision-making process only when the best interests of the child is threatened.<sup>64</sup> Related to this section, the following sub-section highlights the salient features that play out in the balance model and how they could facilitate child participation in the family.

<sup>62</sup> Baumärtel "Perspective on the 'User': Unpacking a Concept for Human Rights Research" 2014 *Human Rights and International Legal Discourse* 142–159.

<sup>63</sup> Thompson "Africa's Charter on Children's Rights: A Normative Break with Cultural Traditionalism" 1992 *International Comparative Law Quarterly* 432; 438–439; Arts "The International Protection of Children's Rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child" 1993 *African Journal of International and Comparative Law* 139, 158: where it was observed that "[t]he doctrine of parental authority over children is strongly present in contemporary Africa and children are often regarded as the property of their parents or legal guardians" and Kamchedzera "The Rights of the Child in Malawi: An Agenda for Research on the Impact of the United Nations Convention in a Poor Country" 1991 *International Journal of Law, Policy and the Family* 241.

<sup>64</sup> See for example, Human Rights Council Reports, "Protection of the Family: Role of the Family in Supporting the Protection and Promotion of Human Rights of Persons with Disabilities" (2016) UN Doc A/HRC/32/L.35. See also, Woodhouse *The George Washington LR* 1247–1999 and Baskin "State Intrusion into Family Affairs: Justifications and Limitations" 1974 *Stanford LR* 1383–1409.

### 5 1 1 *The Major Features of the Balance Model*

The components highlighted in the balance model, draw inspiration, mostly on Lundy's Model of participation with some additions. The additions are deliberate to enable the balance model to posit an appealing approach towards meaningful child participation in the family setting with an African perspective. These components are explained as follows: The first component of the model discussed is "[s]pace [time]". It is imperative to note that it is extremely critical for parents to make time to listen to their children and to also create a child-friendly space for a child to express an opinion on a matter concerning the child. According to UNICEF, a child friendly space is a space "designed and operated in a participatory manner."<sup>65</sup> In an African, rural setting, the balanced model posits a space which, psychologically, gives the child confidence, security and trust. What is more, granting children the space and time to express themselves also gives parents a better opportunity to appreciate a child's views. The second component of the balance model is "[i]nvolved". This component draws inspiration on Kirby et al's model of participation. This model mandates a child's involvement in all decision-making processes on *all* matters concerning the child. Technically, seeking a child's opinion in a family decision-making process is the first step towards activating meaningful child participation in the family. Without this first step, the other components of the balance model are practically irrelevant.

The third component of the balanced model examined in the model is "[a]udience". It is vital that after involving a child and allowing the child the space and time to express an opinion, an audience, in this case, attentive parent(s), becomes a must. Parents must pay undivided attention when a child is expressing an opinion. This is important as it is a strong indication that parents are taking the process and the opinion of the child seriously. It is only in doing so that parents will be able to give due consideration to a child's views. The fourth component of the balanced model examined in this article is "[i]nfluence". Akin to any decision-making process, the involvement of all the parties concerned to the decision-making process is crucial and children are no exception.

It is important to understand these features of the balanced model as proposed practical steps to facilitate the attainment of child participation in the family. Related to these practical steps, the next section discusses the CRC and Children's Charter based components of the balanced model, the role of the state to assist a child to attain participation and the intricate presence of African ethical and cultural aspect in the family.

### 5 1 2 *The CRC and Children's Charter Inspired Aspects of the Balance Model*

#### *The evolving capacities of a child*

A child's evolving capacity is, legally presented as a binding element of the child participation in Article 5 of the CRC. As established by the CRC Committee, and discussed in this article, it is linked to the direction and guidance from parents.<sup>66</sup> Through the lens of the model, the perceived level of a child's capacity has a strong bearing on the level of participation a child enjoys in a decision-making process. Within the family, it is the responsibility of parents to scale the level of a child's evolving capacity. As it was established in *Re W*, a child's evolving capacity is dynamic and changes frequently based on the child's development and exposure.<sup>67</sup> Currently, there is no certified assessment tool to assist in the recognition of a child's capacity in Africa. However, according to Dixon and Nussbaum, a child's capacity should be assessed from the start of a variety of undeveloped capacities.<sup>68</sup> Meaning, because a child is born virtually with no iota of competence, the onus is on parents to strengthen a child's cognitive development to enable the child to meaningfully engage in a participation process. The rationality of recognising parental responsibility to support the development of a child's ability to properly participate in a decision-making process is two-fold. According to Eekelaar, these include "a factual recognition of the state of affairs, and also a normative granting of approval

65 See UNICEF, *A Practical Guide for Developing Child Friendly Spaces* available at [https://www.unicef.org/protection/A\\_Practical\\_Guide\\_to\\_Developing\\_Child\\_Friendly\\_Spaces\\_-\\_UNICEF\\_\(2\).pdf](https://www.unicef.org/protection/A_Practical_Guide_to_Developing_Child_Friendly_Spaces_-_UNICEF_(2).pdf) (accessed 30-05-2020).

66 UN Committee on the CRC, General Comment No 12 para 84.

67 *Re W (a minor)* 1992 4 All ER 627.

68 Dixon and Nussbaum, "Children's Rights and a Capabilities Approach: The Question of Special Priority" 2012 *Cornell LR* 549.

by the state to a given situation."<sup>69</sup> The first aspect highlighted by Eekelaar is supported by the fact that parents as frontline caregivers to a child have the advantage of knowing the basic needs of a child more than anyone else. The second aspect is related to the first in that in decision-making processes around a severe health concern which may hinder a child from participating, parental opinion becomes dominant. However, as was established in *Esanubor*, parental opinion will be set aside if it is not in the best interests of the child.<sup>70</sup>

Parents also require a constant personal and cognitive development of necessary parenting skills to enable them to properly give due weight to a child's opinion.<sup>71</sup> The consideration of parental evolving capacity in the balance model is based on the high threshold of parenting required to activate a meaningful child participation process at the family level. According to Article 12 of the CRC and 7 of the Children's Charter, parents have a responsibility to activate a child's right to participate in two related ways. The first is to involve a child in decision-making processes and the second, to give due weight to the views of a child. Therefore, parents have the astute responsibility to continuously learn how to understand and properly implement meaningfully child participation in the family. However, as was established in *Pillay*, discussed in section 2, as the child's capacity evolves and becomes stronger, persuasive and balanced, parental responsibility wanes.<sup>72</sup>

### *The best interests of a child*

The second aspect of the treaties included in the balanced model is the best interests of the child principle. Under Articles 3(1) of the CRC and 4(1) of the Children's Charter, State Parties have a duty to ensure that the best interests of the child remain the paramount consideration in all decisions concerning a child. Attaining the best interests of the child must guide the rational why a child participatory process is initiated and why the decision arrived at is made. This critical at the family level because as instated in the introduction, decisions that are taken in the family, related to a child, often have an immediate and sometimes lasting impact on the child's life.<sup>73</sup>

Importantly, as was established in *S v M*, the principle of the best interests of a child is not one-dimensional.<sup>74</sup> Consequently, even though it is in the best interest of the child to be involved in a participation process at the family level, the same principle could motivate the exclusion of a child from the process. As Eekelaar, rightly observes, "if the best solution to the issue in question is considered to have a detrimental effect on a child's interest, [and the child's development] it may need to be modified or abandoned ... [however] the focus remains finding what is best for the child."<sup>75</sup> According to Articles 3(1) and 4(1) of the CRC and the Children's Charter respectively, parents have an obligation to respect and implement decisions that are in the best interests of the child. According to the CRC Committee, "[t]here is no tension between articles 3 and 12, only a complementary role of the two general principles: one establishes the objective of achieving the best interests of the child and the other provides the methodology for reaching the goal of hearing either the child or the children."<sup>76</sup>

69 Eekelaar "Parental Responsibility: State of Nature or Nature of the State?" 1991 *Journal of Social Welfare and Family Law* 37.

70 *Esanubor v Faweya* 2009 All FWLR (Pt 478) 380 (CA).

71 Details on some parenting skills, visit, <https://www.parents.com/parenting/better-parenting/> (accessed 24-05-2020).

72 *MEC for Education, KwaZulu Natal v Pillay* 2008 1 SA 474 (CC).

73 Fokala "The Impact of the Best Interests and the Respect for the Views of the Child Principles in Child Custody Cases" 2019 *Nordic Journal of International Law* 614–635. See also, Rwezaura "The Concept of the Child's Best Interests in the Changing Economic and Social Context of sub-Saharan Africa" 1994 *International Journal of Law and the Family* 82.

74 *S v M* para 26. See also, *De Reuck v Director of Public Prosecutions* (Witwatersrand Local Division) 2003 3 SA 389 (W).

75 Eekelaar 1991 *Journal of Social Welfare and Family Law*. See also, *C.K. (a child) (through Ripples International as her Guardian and Next Friend) and Others v Commissioner of Police / Inspector General of the National Police Service and Others* Petition 8 of 2012 2013 eKLR, in which it was held amongst others that it was in the best interests of the child for the state to conduct a comprehensive and thorough investigation into complaints of statutory rape.

76 UN Committee on the CRC, General Comment No 12 para 74.

### *African ethical, cultural, religious and social family practices*

A plethora of provisions in the Children's Charter accentuate the importance of strengthening and promoting positive African ethical, cultural, religious and social practices in the family. These practices are profound in the lives, upbringing and development of an African child relating to a child's right to participate. Article 12 read together with 31 of the Children's Charter requires children to participate, respect and protect positive African values. In *Minister of Home Affairs and Lesbian and Gay Equality Project* Sachs J stated that religion, for example, "is part of the people's temper and culture, and for many believers a significant part of their way of life."<sup>77</sup> Further, in *Christian Education South Africa* Sach J expands this decision to add that

[t]he right to believe or not to believe, and to act or not to act according to his or her beliefs or non-beliefs, is one of the key ingredients of any person's dignity ... For many believers, their relationship with God or creation is central to all their activities. It concerns their capacity to relate in an intensely meaningful fashion to their sense of themselves, their community and their universe. For millions in all walks of life, religion provides support and nurture and a framework for individual and social stability and growth. Religious belief has the capacity to awake concepts of self-worth and human dignity which form the cornerstone of human rights. It affects the believer's view of society and founds the distinction between right and wrong.<sup>78</sup>

Over the years, legalists,<sup>79</sup> sociologists<sup>80</sup> and anthropologists<sup>81</sup> with interests in the relationship between children's rights and their social and cultural upbringing have persuasively argued for African cultural practices to be tuned to constantly support and sustain the wellbeing of the African child. This has been strongly supported by the fact that, to ascertain the salient characteristics of parenting attitudes and practices, it is essential to constantly reset and refresh the notion that parenting is usually underpinned by parental beliefs and practices.<sup>82</sup> With the assistance of the evolving capacity, the balance model introduces a child whose upbringing and ability to meaningfully participate depends on a mixture of these practices and other practices garnered based on the child's exposure. The visible respect for parents is an undeniable game changer to facilitate child participation in the family in Africa. According to Article 31 of the Children's Charter, an African child, has the responsibility to "preserve and strengthen African cultural values in [the child's] relations with other members [of the family], in the spirit of tolerance, dialogue and consultation." This is crucial because child participation is a consultative process.<sup>83</sup>

77 *Minister of Home Affairs v Fourie; Lesbian and Gay Equality Project v Minister of Home Affairs* 2006 (1) SA 524 (CC); 2006 (3) BCLR 355 (CC) para 90.

78 *Christian Education South Africa v Minister of Education* 2000 (4) SA 757; 2000 10 BCLR 1051 (CC) para 36.

79 Kaime "The Convention on the Rights of the Child and the Cultural Legitimacy of Children's Rights in Africa: Some Reflections" 2005 *African Human Rights Law Journal* 221–238; Kaime *The African Charter on the Rights and Welfare of the Child: A Socio-legal Perspective* (2009); Kaime "'Vernacularising' the Convention on the Rights of the Child: Rights and Cultures as Analytic Tools" 2010 *International Journal of Children's Rights* 637–653; An-na'im 2005 *Common Knowledge Winter* 56–80.

80 Nukunya (2003) *Tradition and Change in Ghana: An Introduction to Sociology*; Twum-Danso "Reciprocity, Respect and Responsibility: The 3Rs Underlying Parent-child Relationships in Ghana and the Implications for Children's Rights" 2009 *International Journal of Children's Rights* 415–43. See other but similar examples further afield; Richter and Zartler "Children Participating in Family Decisions" 2011 *Revista de Cercetare si Interventie Sociala* 7–24.

81 Hitchcock "Indigenous Children's Rights and Well-Being: Perspectives from Central and Southern Africa" in Johnson et al. (eds) *Vulnerable Children: Global Challenges in Education, Health, Well-being, and Child Rights* (2013) 219–223 and 225–232; Ame "Traditional Religion, Social Structure, and Children's Rights in Ghana: The Making of a *Trokosi* Child" in Johnson et al. (eds) *Vulnerable Children: Global Challenges in Education, Health, Well-being, and Child Rights* (2013) 240–252.

82 See, *Reflections on Africa's Indigenous Knowledge on Parenting: Indigenous Parenting Practices of Different Communities in Africa* available at [https://bettercarenetwork.org/sites/default/files/attachments/reflections\\_on\\_africas\\_indigenous\\_knowledge\\_on\\_parenting-\\_indigenous\\_parenting\\_practices\\_of\\_different\\_communities\\_in\\_africa\\_-\\_2014\\_.pdf](https://bettercarenetwork.org/sites/default/files/attachments/reflections_on_africas_indigenous_knowledge_on_parenting-_indigenous_parenting_practices_of_different_communities_in_africa_-_2014_.pdf) (accessed 12-09-2020).

83 Lansdown *Promoting Children's Participation in Democratic Decision-making* (2001) 16.

### *The role of the State*

The legal obligation of the State to assist parents and support effective child participation is presented in, for example, Article 12(1) of the CRC which obliges State Parties to "assure" the right of the child to participate. According to the CRC Committee the obligation to "assure" is a "legal mandate which leaves no leeway for State parties' discretion" to fulfil their mandate under Article 12.<sup>84</sup> The role of the State in the balanced model is inspired by this legal obligation. In *Esanubor*<sup>85</sup> the mother of a critically sick child rejected blood transfusion to be administered to the child based on religious reasons.<sup>86</sup> The physician attending to the child, objected to the mother's rejection of the medical procedure of blood transfusion. The physician then proceeded to approach the court and submitted an urgent application to validate the medical procedure of blood transfusion to save the child's life. The court, based on medical advice and the obligation to protect the best interests of the child, discarded the mother's decision, and approved the medical procedure.<sup>87</sup> The absence of child participation in this case exacerbates the abuse of parental authority and control in *Esanubor*. Another example is in *YG*.<sup>88</sup> In this case, the Gauteng High Court (South Africa) handed down a judgment which denounced the defence of reasonable or moderate chastisement by parents unconstitutional.<sup>89</sup> The case was brought to court after a parent appealed conviction on charges of assault of his thirteen-year-old son whom he caught watching pornography. According to the parent, this was against the doctrines of their religion. Similar to *Esanubor*, child participation was ignored in the family in *YG*. The balanced model posits a State able and willing to act on the suggestions made by the CRC Committee in its general comment on a child's right to be heard.<sup>90</sup>

## 6 CONCLUSIONS

The calibration of child participation in all matters affecting the child at the family level, tampers excessive parental authority to the extent that it encourages collaboration and consultation in decision-making processes. Both processes, require the opinion of the child to be freely expressed in a child decision-making process before the final decision is made. Collaborative decision-making processes is not a very common practice across most African families. Usually, like in *Talibé* and *Esanubor* parents dominate and speculate what is best for their child. But, as Ngwena posits, the introduction of children, as partners in a decision-making process, is debunking parental domination and restructuring parent-child relationships.<sup>91</sup> In fact, the fear of relinquishing some of the powers that parents enjoy over their children is a deep-rooted factor which continuously hinder child participation in decision-making processes at the family level. As discussed in section 5 which introduced the balanced model of child participation in the family setting, there is no need to be apprehensive.

It is important to note that there are no blueprints to effective child participation in the family. The balanced model hypothesises a situation where children are meaningfully involved in a family decision-making process on all matters that concern the child. For the reasons indicated in section 3, a meaningful child participation process is not an easy process to manage in the

84 UN Committee on the CRC, General Comment No 12 para 19.

85 *Esanubor v Faweya* 2009 All FWLR (Pt 478) 380 (CA).

86 Nwauche "You May not Refuse a Blood Transfusion if you are a Nigerian Child: A Comment on *Esanubor v Faweya*" 2010 *African Human Rights Law Journal* 309–313.

87 Here, the court relied on the decision in *Medical and Dental Practitioners Disciplinary Tribunal v Okonkwo* (2002) AHRLR 159 (NgSC 2001) which provides as follows:

"The right of freedom of thought, conscience or religion implies a right not to be prevented, without lawful justification, from choosing the course of one's life, fashioned on what one believes in, and a right not to be coerced into acting contrary to one's religious belief. The limits of these freedoms in all cases are where they impinge on the right of others or where they put the welfare of society or public health in jeopardy. The sum total of the right to privacy and of the freedom of thought, conscience or religion which an individual has, put in a nutshell, is that an individual should be left alone to choose a course of life, unless a clear and compelling overriding state interest justifies the contrary if a decision to override the decision of a patient not to submit to blood transfusion or medical treatment on medical grounds, is to be taken on grounds of public interest or recognised interest of others, such as dependent minor children, it is to be taken by the courts. para 245"

88 *YG v The State, High Court of Gauteng Local Division, Case No. A263/2016*.

89 For details on this judgment, see, Mezmur "Don't Try this at Home?": Reasonable or Moderate Chastisement, and the Rights of the Child in South Africa with *YG v S* in Perspective" 2018 *Speculum Juris* 76–92.

90 UN Committee on the CRC, General Comment No 12 paras 48–67.

91 Ngwena 1996 *Acta Juridica*.

family as it involves parties (parents and the child) who share an emotive relation. As a result, it requires far more skills and techniques beyond just being a parent who cares and provides for a child. It is a valuable and essential process to have for three main reasons. First, a meaningful child participation process follows a gradual release of responsibilities and empowers a child to be a responsible, cogent thinker, and a decision-maker; second, it improves a parent-child relationship as a meaningful child participation process has the proclivity to improve communication and trust between a child and parents; and third, an effective child participation process will inevitably enable parents to give a balanced and rational due weight to the views of a child. Thirty years after the CRC and the Children's Charter were adopted, Africa should not merely celebrate this milestone but must take the opportunity to make a firm commitment to develop and adopt a robust strategy that will, in a persuasive manner, promote and protect child participation in the family setting.