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Children's Voice at Home. A Vitality or a Fairy-tale?

***Children's Right to Self-Expression at Home under International
Children's Rights Law.***

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examination of the Advanced L.L.M
in International Children's Rights



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Executive Summary

The present thesis aims to look at the position of children and their rights within the specific environment of the home. Most importantly, this thesis will take into consideration the importance of affording children the right to voice their opinion in the family home environment and in family decision-making from an early age. This research topic will especially be seen through by taking into account international human rights instruments such as the United Nations Convention on the Rights of the Child (hereinafter 'UNCRC'), along with regional legal instruments containing specific provisions in relation to children's rights. The family unit is rightly portrayed in the UNCRC as a vital part of children's upbringing from the Preamble and is also a running point throughout the various provisions it contains. This thesis thus endeavours to rebut the persistent idea that children should be seen but not heard by undertaking a multidisciplinary approach towards this topic – meaning that while the main focus will be on the legal aspect, other areas will be interwoven into the research as a way to emphasise the point being carried forward – that is, the importance of children's participatory rights to be applied in every setting, including the family environment. This thesis will undertake this task by looking into the positive and negative aspects of child participation in early childhood with the concluding remark being that the positive aspects outweigh the risks. The ultimate question that will form the backbone of this study will nonetheless relate to the applicability of an international legal instrument as is the UNCRC within the private sphere of the family.

The first Chapter of this thesis will commence by providing an analysis of what is meant by the phrase 'participation rights' since this cannot be explicitly identified in any of the UNCRC provisions. It will thus seek to identify a working definition of what is meant by 'participation rights' by looking into the colloquial definition of 'participation', alongside the more targeted definition offered by the UN Committee on the Rights of the Child (hereinafter 'CRC Committee') in its General Comment No. 12. The same Chapter will then proceed to look into what is meant by child participation in the family and why it shall be considered essential in children's day-to-day activities.

The second Chapter will then turn the focus to identifying the various provisions that may be found in the International and Regional (African and European) legal instruments that consist of the child's right to be heard, coupled with other rights relating to parental responsibilities and the extent to which parents are to take into consideration children's evolving capacities. While the first half of this Chapter will focus on the international perspective, the second half will focus on the African and European frameworks, undertaking a comparative analysis between the regional and the international realm and also between both regional systems in question.

The third Chapter will take a closer look into children's participation rights and the misconceptions that have been acting as an obstacle over the past thirty years for the effective implementation of these rights. This Chapter will also tackle and combat the disconcerted notion that the affordance of the right to be heard shall be especially based on the child's age, going against the recommendations of the CRC Committee that at a minimum consideration shall be had of children's age and maturity. Furthering on the element of misconceptions, this Chapter will delve into the often identified idea that child participation amounts to parental control being lost and parents' or caregivers' authority being undermined, where particular focus will be placed on bringing forward what is actually meant by children's right to be heard and what it entails. Conclusively, taking further cognisance of the regional perspective, this Chapter will conclude by focusing the lens on how cultural values and norms may be perceived as a hindrance to effective implementation and whether or not this may be effectively avoided.

The climax of the thesis will then be reached in the fourth Chapter which shall focus on why the right to self-expression is fundamental in the family environment. This will be done by initially taking into consideration the possible benefits likely to emanate from the effective implementation of children's participation rights in all settings and will likewise emphasise the fact that this shall not be solely beneficial for the individual, but also for the family unit as a whole and the public in general. The focus will then be shifted towards three specific UNCRC provisions – Articles 5, 12 and 18 and the notion of the tripartite relationship encompassed in the UNCRC between the State, parents and children. Lastly, this Chapter will close off by establishing the level of implementation possible of the UNCRC in the private sphere of the family and what this truly means for the family unit.

In the conclusion, in the fifth Chapter, tying up the discussion and findings identified in the previous Chapters, an attempt will be made to answer the main research question and the underlying sub-questions, where it will be shown that more certainly needs to be done in terms of practice and research in relation to children's right to participation in the home environment. Furthering this point, this Chapter will thus provide recommendations for State action to better ensure the implementation of children's participatory rights, while taking into account certain examples of good practice that have emerged over the years.

Keywords

Child – Participation – Right to be Heard – Family – UN Convention on the Rights of the Child – Regional Practice – Tripartite Relationship – Private Sphere – Self-expression.

Overview of Main Findings

This thesis aims to undertake the task of exploring the concept of children's right to be heard in the private sphere of the family unit. This is especially done by undertaking a rights-based approach which is interwoven with more practical elements that have been hindering the effective implementation of children's participatory rights thus far. The latter aim is tackled by looking at international legal instruments, especially the UNCRC, along with the development of regional frameworks that has taken place over the past thirty years in Africa and Europe. Overall, this thesis offers three main findings.

First, it takes the innovative approach of looking at the level of possible implementation of the UNCRC in the private sphere, while comparing it to the advances made in the regional sphere in recent years. Even though Article 12 UNCRC on children's right to be heard has been identified as a general principle by the CRC Committee, it transpires, following close analysis of both African and European frameworks, that there remains a high necessity for more targeted measures in ensuring that this right is available in all settings of a child's life, especially in the private sphere and everyday tasks. While the fundamental nature of this right is not disputed, it nonetheless emerges that additional focus shall be placed by the CRC Committee on what the application of this right in the private sphere actually entails and what positive outcomes may be expected, because unless this is convincingly established by the CRC Committee, it remains highly unlikely for States to work towards effectively ensuring its implementation.

Second, this thesis contributes to furthering the question of age limits and the notion of evolving capacities. While it is shown that the CRC Committee has over the years emphasised the idea that the availability of children's rights shall not be incumbent on age limits, it becomes especially evident from the present thesis that further clarity is necessary as to the balancing between children's age and maturity and the notion of evolving capacities, so as to ensure the full affordance of rights to children, with a specific focus on the child's right to be heard.

Third, this thesis has as its backbone the level of possible implementation of the UNCRC in the family home. While over the years this right has been the central theme of numerous academic texts and reports, the majority of studies looked at the implementation of this right in the public sphere, without much thought being placed on how to ensure the effective application of children's participation rights in the private sphere or even if this is at all expected. It becomes clear that this side of implementation has fallen behind drastically when compared to the public sphere and it is thus evident from this thesis that more practical and community-oriented steps are vital from the State's end. It is fundamental that parents are provided with the opportunity to learn more about their children's participatory rights, why they are necessary and how they can result to be beneficial for their children's betterment of future endeavours. Additionally, from the present study it results that this is not merely a question of introducing formal measures such as new laws, as these might further intimidate parents in their parental role, thus leading to parental fears escalating, leading to further hindrance of such rights. Rather, this shall be about working with specific communities, by understanding their parenting cultures and about creating safe spaces for parents to be able to share with each other their views and fears on children's participation and thus instigating the commencement of dialogue on the fundamental nature of children's participatory rights. It hence becomes a question of working hand-in-hand with both caregivers and children to ensure the necessary understanding and knowledge of children's participation rights, as well as about conveying the message that the UNCRC is not aimed at giving more way for State intervention but about strengthening the position of the family unit as the main bearer of responsibilities towards children.

List of Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child
CoE	Council of Europe
CRC Committee	United Nations Committee on the Rights of the Child
ECECR	European Convention on the Exercise of Children's Rights
ECHR	European Convention on Human Rights
ECtHR	European Court of Human Rights
EU	European Union
European Charter	Charter of Fundamental Rights of the European Union
GC	General Comment
UNCRC	United Nations Convention on the Rights of the Child

Chapter 1: Introduction

“Where, after all, do universal human rights begin? In small places, close to home – so close and so small they cannot be seen on any maps of the world. Yet they are the world of the individual person [...] Such are the places where every man, woman and child seeks equal justice, equal opportunity, equal dignity without discrimination. Unless these rights have meaning there, they have little meaning anywhere. Without concerned citizen action to uphold them close to home, we shall look in vain for progress in the larger world.”

- Eleanor Roosevelt¹

1.1. Background

The United Nations Convention on the Rights of the Child² (hereinafter ‘UNCRC’ or ‘Convention’) was the first of its nature. While not the first legal instrument relating to children’s rights,³ it was the first comprehensive and holistic binding legal instrument,⁴ with its main focus on the position of children in society and their rights. It quickly became one of the most widely ratified international human rights instruments,⁵ with only one country in the world not having ratified it.⁶ It introduced several innovative provisions protecting children’s rights, including the central provision to this study – Article 12 UNCRC, dealing with children’s right to express themselves in matters concerning them and for their views to be afforded due weight in accordance with their age and maturity.⁷

This study deals particularly with an under-researched area relating to children’s participation.⁸ While copious research has been undertaken since the introduction of the UNCRC on the public application of participation rights,⁹ limited focus has been placed on the application of these rights in the private sphere. However, prior to delving deeper into this sphere, it is essential to briefly discuss the nature of participation rights and what is meant by them.

¹ Eleanor Roosevelt, ‘In Our Hands’ (1958) Speech delivered on the tenth anniversary of the Universal Declaration of Human Rights; Annabelle Mooney, *Human Rights and the Body: Hidden in Plain Sight* (Routledge New York 2016) 199.

² United Nations Convention on the Rights of the Child 1989.

³ Geneva Declaration of the Rights of the Child 1924; Declaration of the Rights of the Child 1959.

⁴ Wouter Vandenhoe, Gamze Erdem Türkelli and Sara Lembrechts, *Children’s Rights: A Commentary on the Convention on the Rights of the Child and its Protocols* (Edward Elgar Publishing Limited 2019) 22.

⁵ Julia Sloth-Nielsen, ‘Monitoring and Implementation of Children’s Rights’ in Ursula Kilkelly and Ton Liefaard (eds.), *International Human Rights of Children* (Springer Nature Singapore Pte. Ltd. 2019) 34.

⁶ Ibid.

⁷ UNCRC [n 2] Article 12(1).

⁸ Ninoslava Pećnik, Jelena Matić and Ana Tokić Milaković, ‘Fulfillment of the Child’s Participation Rights in the Family and the Child’s Psychosocial Adjustment: Children’s and Parents’ Views’ (2016) 23(3) *Revija za socijalnu politiku* 399, 411.

⁹ Participation rights in the UNCRC include Articles 12-17.

1.2. What is 'Participation'?

The UNCRC consists of three categories of rights – Provision, Protection and Participation rights,¹⁰ with each group of rights consisting of a number of provisions. This study focuses on participation rights, where the main provision is Article 12 which identifies children as active agents in their own lives.¹¹ However, as informed by the United Nations Committee on the Rights of the Child (hereinafter 'CRC Committee') in its General Comment (hereinafter 'GC') No. 12, while the term 'participation' is utilised to identify a cluster of rights, nowhere in the Convention does the term appear.¹² So, what is meant by the phrase 'participation rights'? This question has been the centre of various debates over the years with differing opinions being formulated on what this term represents owing to its 'multifaceted nature'.¹³

It has been argued by some scholars that the definition of participation rights has been shifting and no specific meaning can be established.¹⁴ Commencing by looking at the colloquial definition of 'participation', the online Cambridge dictionary defines it as 'the fact that you take part or become involved in something'.¹⁵ However, from a more targeted angle, the CRC Committee, in an attempt to clear this debate proceeds to define participation as being 'widely used to describe the ongoing processes, which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes'.¹⁶

From the above two definitions, it becomes evident that the main aim of this broad term is to ensure that children are allowed to be active members in their own lives rather than constantly being on the passive receiving end of adult protection, with their adult counterparts making decisions for them. It is aimed at ensuring that children are trained to use their own judgement from a young age, where they are offered help rather than precedence from adults. Taking this a step further, does this right also extend to the family environment? As highlighted in the next sub-section, this question shall be answered in the affirmative.

1.3. Participation in the Family

The UNCRC does not at any point specifically establish that children shall be afforded the right to participation in family decision-making. However, this can be identified, as will be articulated later on in

¹⁰ Thomas Hammarberg, 'The UN Convention on the Rights of the Child – and How to Make it Work' (1990) 12(1) Human Rights Quarterly 97, 100.

¹¹ Gerison Lansdown, 'Every Child's Right to be Heard: A Resource Guide on the UN Committee on the Rights of the Child General Comment No.12' (Save the Children UK, 2011) 3.

¹² Committee on the Rights of the Child, 'General Comment No. 12 (2009) The right of the child to be heard' (CRC/C/GC/12) para. 3.

¹³ Aisling Parkes, *Children and International Human Rights Law: the Right of the Child to be Heard* (Routledge, 2013) 14.

¹⁴ Gerison Lansdown, 'Can you hear me? The right of young children to participate in decisions affecting them' (2005) Working Paper 36 (Bernard van Leer Foundation, Netherlands), xiv <<https://bibalex.org/baifa/Attachment/Documents/114976.pdf>> accessed 15 May 2020.

¹⁵ Cambridge Dictionary, <<https://dictionary.cambridge.org/dictionary/english/participation>> accessed on 1 June 2020.

¹⁶ GC12 [n 12] para 3.

this study, in a number of GCs by the CRC Committee. These GCs are compiled by the CRC Committee as a way to provide States Parties with further information on the UNCRC rights and what they encompass. While they are not binding on States Parties, they offer guidance for the proper implementation of the UNCRC provisions along with a definition of the broad meaning of such articles. It can thus be established that participation rights can be identified both in the private and the public sphere.¹⁷

As will be the primary focus of this thesis, it is essential that children's participation rights extend to all parts of children's lives, including day-to-day activities.¹⁸ Therefore, the present thesis will show that the concept of child participation shall no longer be viewed as the rarity, and the 'individual child is no longer to be viewed merely as an object of concern, care and protection, whose life and destiny are shaped and regulated by laws, institutions, parents and professionals'.¹⁹ Furthermore, the whole theme on children's participation shall not solely be based on what adults allow children to say and what adults consider to be within children's 'capacity' to act on, rather it shall also consist of instances of 'young people confronting adult authority, challenging adult assumptions about their competence to speak and make decisions about issues concerning them'.²⁰ We thus have to move beyond the perception of child participation being the one-off exception, and instead, this needs to become ingrained in children's everyday reality if they wish to exercise such right.²¹ Additionally, children's right to be heard shall not be frivolously afforded, but children's views shall be taken seriously.²² This paper thus aims to break down the ideology that children should be seen but not heard.²³

Moreover, in Chapter 4 this thesis will consider the connection between Articles 5, 12 and 18 UNCRC and the tripartite relationship that may be identified in the UNCRC between the State, parents and children. This Chapter furthers on the focus placed in Article 5 on children's evolving capacities in relation to the right to be heard in Article 12 UNCRC and correspondingly opens up on Article 18 and its articulation on the vitality of parents being offered the appropriate help from States in fulfilling their parental responsibilities.

1.3.1. Why is it important for children to participate in the family sphere?

Child participation in the family context means that children are afforded the possibility of giving their input to family members about matters affecting them and the family, and it is about assuming levels of responsibilities in accordance with their stage of development.²⁴ It is about teaching children the

¹⁷ Susan Moses, 'Children and Participation in South Africa: An Overview' (2008) 16 *International Journal of Children's Rights* 327, 328.

¹⁸ Lansdown [n 11] 81.

¹⁹ Martin Woodhead, 'Foreword' in Barry Percy-Smith and Nigel Thomas (eds.), *A Handbook of Children and Young People's Participation* (London; New York: Routledge, Taylor & Francis Group 2010) xx.

²⁰ *Ibid.* xxii.

²¹ *Ibid.*

²² GC12 [n 12] 91.

²³ John Tobin, 'Understanding Children's Rights: A Vision beyond Vulnerability' (2015) 84 *Nordic Journal of International Law* 155, 179.

²⁴ Mònica González, Ma Eugènia Gras, Sara Malo, Dolors Navarro, Ferran Casas and Mireia Aligué, 'Adolescents' Perspective on Their Participation in the Family Context and its Relationship with Their Subjective Well-Being' (2015) 8 *Child Indicators Research* 93.

importance of expressing views and opinions from a young age and for them to grow up in an environment where they feel safe to express their feelings²⁵ since this is their 'first experience of social interaction'.²⁶

The importance of the family unit can be identified from various UNCRC provisions, as will be further elaborated in Chapter 2, however, it is initially given a level of priority in the preamble of the UNCRC where it declares that 'the family, as the fundamental group of society and the natural environment for the growth and well-being of all its members and particularly children, should be afforded the necessary protection and assistance so that it can fully assume its responsibilities within the community'.²⁷ Therefore, unlike the preoccupation of many parents, the UNCRC is not geared at undermining or breaking the family unit, but at ensuring that all members are afforded the necessary rights to further strengthen the family.²⁸

1.4. Aims and Research Question of this Study

This study aims to provide a legal analysis of the importance of children's right to be heard to be afforded in all areas of children's lives. Great focus will thus be placed on examining the applicability and level of possible implementation of the UNCRC principles, specifically children's right to self-expression in the private sphere when compared to the public sphere.

To achieve such goal, this thesis will have at its core the following research question: 'What degree of priority does the UNCRC convey in relation to the child's right to self-expression in the home?'. Furthermore, as an aim to reach the targeted conclusion, the following sub-questions will be addressed:

- i) How can a public international law framework such as the UNCRC be implemented in the private space of the family home?
- ii) How have regional systems embraced the UNCRC provisions and enforced them in their own systems?
- iii) To what extent should the implementation of Article 12 UNCRC in the home be dependent on cultural differences?
- iv) What are the specific advantages likely to result from allowing children to have a voice and be taken seriously in the home environment?
- v) To what extent can a balance be struck in relation to the application of Article 12 UNCRC and the relationship between the State, parents and children?

²⁵ Ferran Casas, Mònica González, Carme Montserrat, Dolors Navarro, Sara Malo, Cristina Figuer and Irma Bertran, 'Informe técnico sobre experiencias de participación social efectiva de niños, niñas y adolescentes (principalmente europeas)' (Madrid: Ministerio de Educación, Política Social y Deporte 2008). https://www.observatoriodelainfancia.es/ficherosoia/documentos/4807_d_Informe_participacion_infantil_social.pdf accessed 1 June 2020; UNICEF, 'The state of the world's children' (New York: UNICEF 2003).

²⁶ Alexandra Filipova, 'Child Participation in Family Decision-Making: The Contribution of the Russian Parent's Forum' (2019) 3(4) *Society Register* 157, 159.

²⁷ UNCRC [n 2] Preamble.

²⁸ Sibnath Deb, Aleena Maria Sunny and Bishakha Majumdar, *Disadvantaged Children in India: Empirical Evidence, Policies and Actions* (Springer Singapore 2020) 203.

1.5. Methodology

This paper endeavours a multidisciplinary approach to the above research question, meaning that while the main focus is placed on the legal element, other areas are interwoven into the research as a way to emphasise the point in question – that is, the importance of the right to be heard being applied in every setting, including the family environment. The study is mainly conducted through legal academic desk research to effectively consider the concept of participation and to convey the positive impacts that may result from properly instilling in children an element of participation from their earliest stages, and how such treatment leads to better future prospects.²⁹ Additionally, as a measure of enhancing the arguments within the study and as a bet to make it more tangible and relatable, this thesis uses a comparative methodology from a regional perspective. The two regions that will be included are Europe and Africa, which choice of regions is particularly incumbent on the cultural differences between the two, and because these regions have seen the strongest advancements in recent years when it comes to children's participation.³⁰

1.6. Outline

Following a general introduction to this paper, Chapter 2 commences by laying down the law and thus affords specific focus on the applicable UNCRC provisions to this study and the applicable GCs, while the second half discusses the regional advancements made through the years on the right to be heard specifically within the family context. Chapter 3 then proceeds to take a more practical approach towards the concept of Article 12 UNCRC and the obstacles that have been prevalent when it comes to the implementation of this right in the family sphere, with the discussion taking both an international and a regional stand. Chapter 4 elaborates more on the likely positive outcomes the effective implementation of Article 12 UNCRC in the family environment can have. It then proceeds by taking cognisance of the connection between Articles 5, 12 and 18 UNCRC and the tripartite relationship between the State, parents and children, along with a deep discussion on the applicability of an international human rights treaty such as the UNCRC in the private sphere of the family. Chapter 5 then makes concluding remarks on the study, along with recommendations on the future considerations for more effective implementation of Article 12 in the family sphere.

²⁹ Philip Treseder, *Empowering Children and Young People – Promoting Involvement in Decision-making* (London: Save the Children, Children's Rights Office, 1997) 38.

³⁰ Parkes [n 13] 8.

Chapter 2: Laying down the Law

2.1. Introduction

The present Chapter will place particular focus on the more technical and legal aspect and will thus commence by discussing the applicable provisions of the UNCRC and the applicable GCs when taking into consideration the research topic at hand. This Chapter will be split into two sections; Section 2.2 focusing on the International Framework and Section 2.3 is centred on the Regional Framework, with the latter section making parallel notions between the African and the European legal systems.

2.2. International Framework

2.2.1. United Nations Convention on the Rights of the Child (1989)

The introduction of the UNCRC in 1989, brought along with it a new perspective regarding children and their rights. The Convention's rather unique nature is especially evident through the fact that while children's rights were not an innovative thing in 1989, the UNCRC is the one international legal instrument tying up all children's rights into one framework, whereas prior to its introduction the rights pertaining to children were found sporadically placed in various instruments.³¹ Another particular aspect of this Convention is that it revolutionised the way children are seen - from being solely perceived as objects in need of protection to being afforded a more active role in their own lives. Children are now identified 'as human beings with a distinct set of rights instead of as passive objects of care and charity'.³²

The Convention consists of 54 provisions, 4 of which have been established by the CRC Committee as general principles;

- Article 2 – The Right to Non-discrimination;
- Article 3 – The Best Interests of the Child;
- Article 6 – The Right to Life, Survival and Development;
- Article 12 – The Right to Express Views Freely in All Matters Affecting the Child.

This study has, as its identifying factor, a primary focus on Article 12(1) UNCRC.³³ Further narrowing the crux of the paper, the discussion in this study is especially focused on the application of this right in the environment of the home, as discussed in Chapter 1. The introduction of the right established in Article 12 was a novel introduction in the realm of children's rights since 'no equivalent provision in the 1924 or 1959 Declarations on the Rights of the Child or the Covenants on Civil and Political Rights and Economic, Social and Cultural Rights'³⁴ may be identified. Since the introduction of the

³¹ Jaap E. Doek, 'The Human Rights of Children: An Introduction' in U. Kil Kelly, T. Lief aard (eds), *International Human Rights of Children* (Springer Nature Singapore Pte Ltd., 2018) 10.

³² Michelle O'Reilly and Nisha Dogra, *Interviewing Children and Young People for Research* (SAGE Publications Ltd 2016) 4.

³³ UNCRC [n 2] Article 12(1).

³⁴ John Tobin, *The UN Convention on the Rights of the Child: A Commentary* (Oxford University Press, Oxford Commentaries on International Law) 398.

Convention, the discourse around Article 12 has been ever-growing and this principle has thus 'emerged as one of the most influential of the Convention's provisions in both international and domestic law'.³⁵ In fact, in Freeman's view, Article 12 is considered to be the 'lynchpin' of the UNCRC since it 'recognises the child as a full human being with integrity and personality and with the ability to participate fully in society'.³⁶

Article 12(1) provides that:

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

This article conceptualises children as active citizens in a society in the exercise of their rights, by giving them a voice in matters that have a direct or indirect impact on them.³⁷ This exercise of rights is essential in varying contexts, ranging from the family home to more formal aspects like court proceedings, as can be identified in Article 12(2) UNCRC. Fundamentally, one cannot look at Article 12 as a stand-alone right, rather, it is connected to various other rights in the Convention and unless properly implemented, then it will affect the application of most, if not all, other rights in the Convention. As confirmed by Marta Santos Pais, 'Article 12 [is] an underlying value of the CRC which must guide the way [for] each and every right of the child [to be] ensured and respected'.³⁸

Whenever considering the applicability of Article 12, one also has to refer to another general principle, that identified in Article 3 UNCRC, for the best interests of the child to be a primary consideration in any action being taken. There is a tendency that these two articles are viewed as being in competition with each other, however, as established in GC 12, no such tension can be effectively identified. The relationship between these two provisions is rather complementary; while one lays down the vitality of considering children's best interests, the other highlights the importance of children being given a voice. As a matter of fact, it furthers that 'there can be no correct application of Article 3 if the components of Article 12 are not respected. Likewise, Article 3 reinforces the functionality of Article 12, facilitating the essential role of children in all decisions affecting their lives'.³⁹

Furthermore, throughout the study, reference will be made to Articles 5 and 18 UNCRC. Article 5, akin to Article 12, is a unique provision and no equivalent of it can be identified in any preceding human rights treaty.⁴⁰ This provision establishes two key elements; the prevention of unnecessary interference by States in the parents' fulfilment of duties, rights and responsibilities and for parents to take into consideration children's evolving capacities in the conduction of such rights, duties and responsibilities. Therefore, considering that this paper is geared towards children's participation in the family, then Article 5 is essential for the regulation of parental behaviour. It is thus on the same basis that Article 18 will likewise form a fundamental part of this study since it links parental rights and responsibilities to Article 3, establishing that '[t]he best interests of the child will be their basic

³⁵ Ibid.

³⁶ Michael Freeman, 'Whither Children: protection, participation, autonomy?' (1994) 22(3) *Manitoba Law Journal* 307, 319.

³⁷ GC12 [n 12] para. 73.

³⁸ Parkes [n13] 2.

³⁹ GC12 [n 12] para. 74.

⁴⁰ Geraldine Van Bueren, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1998) 45.

concern'.⁴¹ Relating to a notion which will be tackled later on in the study, Article 18 also establishes that States shall offer parents the necessary support to properly carry out their rights, duties and responsibilities.⁴²

Cognisance of the above-mentioned linking rights is essential in the consideration of children's right to have their voice heard in the home environment since a prevailing notion has dominated in previous decades that children should be seen but not heard.⁴³ An unfortunate reality, however, remains that even though '[c]hildren have good ideas [and] [t]hey can think of things that adults would not',⁴⁴ there remains a prevailing tendency that children's potential is underestimated, resulting in a grave breach of their rights. Therefore, further on in Chapter 4, the States' responsibilities and possible options to find the path forward will be highlighted, meaning that, reference shall also be made to Article 42 UNCRC⁴⁵ establishing the States' obligation to widely disseminate the provisions of the Convention, ensuring that they are known and understood by both parents and children.

2.2.2. General Comments

Aside from the Convention, one also has to take account of the GCs published by the CRC Committee aimed at providing States with a more elaborate explanation of the aims of the various rights established in the legal instrument. Article 12 UNCRC, being a general principle is touched upon in all GCs by the CRC Committee, but it was also afforded the importance of being the main theme of a specific GC. Throughout the study reference will thus be made to GC 12 on the child's right to be heard, GC 5 on the implementation of the Convention, GC 7 on the implementation of children's rights in early childhood and GC 20 on the implementation of children's rights during adolescence.

Most notably, as highlighted by the CRC Committee in its GC 12, Article 12 shall be available to children in all settings of their life.⁴⁶ This latter statement thus also applies to the private space of the family. It is as a result of the publication of these GCs that the CRC Committee has furthered its argument in favour of promoting children's right to be heard and to be taken seriously in their day-to-day lives wherein it notes that '[r]espect for the young child's agency – as a participant in family, community and society – is frequently overlooked, or rejected as inappropriate on the grounds of age and immaturity'.⁴⁷

2.3. Regional Frameworks

This section compares two regional frameworks and the measures that have been undertaken in the years since the introduction of the UNCRC to effectively implement children's right to be heard and to be taken seriously as identified in Article 12 UNCRC. The two regional systems that will be taken into

⁴¹ UNCRC [n 2] Article 18(1).

⁴² Ibid. Article 18(2).

⁴³ Parkes [n 13] 75.

⁴⁴ European Commission, 'Children's Rights as they see them' (Luxembourg: European Union, 2011) 3.

⁴⁵ Committee on the Rights of the Child, 'General Comment No. 5 (2003) General measures of implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para.6)' (CRC/GC/2003/5) para. 66.

⁴⁶ GC12 [n 12] para. 89.

⁴⁷ Committee on the Rights of the Child, 'General Comment No. 7 (2005) Implementing child rights in early childhood' (CRC/C/GC/7/Rev.1) para .14.

account for the purposes of this study are the African and the European Systems. In the most part, the approach taken in the international forum towards the recognition and effective implementation of children's right to be heard in matters affecting them has been 'reinforced to a large extent at the regional level, particularly in Africa and Europe'.⁴⁸ These two systems were chosen as a way to examine how such different cultural backgrounds have undertaken their responsibility to ensure that children's participation rights are effectively applied.

2.3.1. African Framework

Reference here shall be made to the African Charter on the Rights and Welfare of the Child (1990) (hereinafter 'ACRWC' or 'Charter'). More specifically, Article 4.2 ACRWC provides 'for the views of the child to be heard [...] as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law'.⁴⁹ This can be identified as being almost identical to Article 12(2) UNCRC, and similarly makes specific reference to judicial or administrative proceedings. This provision was also deemed a general principle by the African Committee of Experts on the Rights and Welfare of the Child. Thus, a fundamental question arises as to whether or not this latter provision shall be considered applicable to the private space of the home. The consideration seems to point towards an answer in the affirmative. Like the UNCRC, the ACRWC follows a periodic reporting process by States Parties, and as highlighted in a guidance report compiled by Save the Children, under the right to participation in the Charter, a specific element is that there shall be consideration as to 'what legislative or other measures are in place to ensure the right of the child to express his or her views in family life'.⁵⁰ Moreover, even if this was not implied through the ACRWC, African States are nevertheless bound by such expectations as a result of their ratification of the UNCRC.

Additionally, with regard to the ACRWC and child participation rights, reference shall also be made to Article 7 which encapsulates that '[e]very child who is capable of communicating his or her own views shall be assured the rights to express his opinions freely in all matters and to disseminate his opinions subject to such restrictions as are prescribed by laws'.⁵¹ It thus becomes evident that the fundamental nature of children's participation rights can be found mirrored under the African regional framework.

However, to date, on the African regional plane, not enough focus has been placed on considering the application of children's right to be heard in the private sphere, however, studies have been carried out in the Southern African region⁵² and more specifically in South Africa.⁵³ Further focusing on legislative instruments, apart from the ratification of the UNCRC and the ACRWC, in South Africa there was also

⁴⁸ Parkes [n 13] 8.

⁴⁹ African Charter on the Rights and Welfare of the Child 1990, Article 4.2.

⁵⁰ Julia Sloth-Nielsen, 'Advancing Children's Rights: A civil society guide on how to engage with the African Committee of Experts on the Rights and Welfare of the Child' (Third Edition, Save the Children and Plan International 2018) 59.

⁵¹ ACRWC [n 49] Article 7.

⁵² Save the Children Sweden, 'Regional study of children's participation in Southern Africa: South Africa, Swaziland and Zambia' (March 2010).

⁵³ Save the Children Sweden, 'An Assessment of Child Participation in the Family in South Africa' (The Community Agency for Social Enquiry (C A S E), October 2006).

the introduction of the Constitution of the Republic of South Africa⁵⁴ (1996) and the Children's Act 38 of 2005⁵⁵ amongst others. However, notwithstanding such legislative frameworks in the South African national legal system for the effective participation of children, 'a range of policy and implementation gaps and barriers to child participation persist. These include cultural barriers, adult resistance, and lack of adult capacities to facilitate child friendly participatory processes'.⁵⁶

Following a close examination of a study conducted in 2006 on the application of children's right to participation in the home environment in South Africa, it transpired that when considering the level of enforcement of child participation, it is fundamental to consider 'the wide range of cultural and religious practices'.⁵⁷ Additionally, this study also linked the question of participation in the family and the disciplinary measures employed by parents,⁵⁸ meaning that in families where the use of corporal punishment was a common occurrence, participation was even lower.⁵⁹ The main part of the 2006 study was based on a South African Child Rights Survey commissioned by Save the Children Sweden in 2002,⁶⁰ wherein the children involved in the study were requested to rank the rights which they felt were being violated in their everyday lives, resulting in the right to participation as being the 'third most violated right'.⁶¹

Consequently, it emerged that not all issues were approached in the same manner by caregivers. One such example being that parents were more eager to discuss with their children their performance at school than more taboo topics such as relationships and sex.⁶² Additionally, it became clear that 'more than half of the caregivers across the sites felt that children should not question their parents' decisions, suggesting that an authoritarian approach to child rearing is relatively common'.⁶³ Furthermore, the majority of caregivers acquiesced that in the past children had a higher level of respect towards their elders, one such example being identified in the site of Cofimvaba wherein parents feared they were losing control of their children, thus not being in a position to relate to them.⁶⁴ Yet, despite these hindrances to the proper implementation of this right to be heard, the majority of caregivers nonetheless agreed that parents ought to listen to their children.⁶⁵

⁵⁴ Constitution of the Republic of South Africa 1996.

⁵⁵ Children's Act 38 of 2005.

⁵⁶ Save the Children South Africa, 'National Child Participation Framework' (Department of Social Development Republic of South Africa, 2018) 8.

⁵⁷ Save the Children Sweden [n 53] 1.

⁵⁸ Ibid.

⁵⁹ Ibid. 61. As can be identified through statistics, till May 2020, only eight African States had prohibited all forms of corporal punishment⁵⁹, with the latest to join the movement being South Africa in 2019. (Global Initiative to End All Corporal Punishment of Children, 'Global Report 2019: Progress towards ending corporal punishment of children' (February 2020).)

⁶⁰ The study was conducted in six sites in South Africa, coming from different economic backgrounds and all having different religious beliefs – Bo Kaap, Chatsworth, Cofimvaba, Diepsloot, Mphahlele and Umlazi.

⁶¹ Save the Children Sweden [n 53] 4.

⁶² Ibid. 58.

⁶³ Ibid.

⁶⁴ Ibid.

⁶⁵ Ibid.

In furtherance of the above, another study conducted in 2010, looked at the situation in Zambia, South Africa and Eswatini (previously known as Swaziland). This report highlights the fact that if the necessary awareness is raised with parents about their children's rights and why they are fundamental, this is likely to result in a change of behaviour.⁶⁶ It was in this latter study and in a National Child Participation Framework compiled in June 2018,⁶⁷ wherein it was confirmed that a strong barrier to meaningful participation relates to culture, religion and traditional beliefs, as will be later furthered upon in Chapter 3.

Furthermore, another study was conducted in Ghana (2005) in relation to children's participation. It shall initially be noted that 'Ghana was the first country to ratify the [UNCRC] in February 1990, [...] with no reservations, but also proceeded to incorporate the principles of Article 12 into the country's Children's Act'.⁶⁸ However, almost 10 years on, the State nonetheless reported extreme difficulties in the effective implementation of children's participation rights and this was primarily because the Ghanaian society did not perceive participation rights as essential.⁶⁹ As a matter of fact, from this study, it resulted that, as will be discussed in Chapter 3, children who are more vocal 'are seen as bringing shame on their parents, as their behaviour shows that they have not been raised properly' and they are viewed as being unaware of 'key cultural values such as respect and obedience' in the parent-child dynamic.⁷⁰ This was a shared feeling among adults and children, where according to a child in Nima, 'it was not important for children to be involved in decision making or to express their views because 'some parents will spoil their children''.⁷¹

The above-mentioned studies thus show that even though the African states have ratified the UNCRC and have also introduced their own version of it, the ACRWC, and even though the studies were conducted a while ago, it will become evident in the coming chapters that most problems nonetheless persist. The general perception in relation to children's participation rights has been that 'if you do not express your opinions you will not die',⁷² thus disputing the fundamental nature of these rights in early childhood. It emanated from this study that the general perception is that all parents have their children's best interests as their main priority, which was 'at odds with the [...] literature on parent-child relations in Ghana, which [showed] that parents [were] retreating from the responsibilities of parenthood'.⁷³

2.3.2. European Framework

In the years since the introduction of the UNCRC, the European Union ('EU') and the Council of Europe (hereinafter 'CoE') have taken various steps to ensure the proper enforcement of children's rights. Reference here shall be made to Article 24 of the Charter of Fundamental Rights of the

⁶⁶ Save the Children Sweden [n 52] 19.

⁶⁷ Save the Children South Africa [n 56].

⁶⁸ Afua Twum-Danso, 'The construction of childhood and the socialisation of children in Ghana – Implications for the Implementation of Article 12 of the CRC' in Barry Percy-Smith and Nigel Thomas (eds.), *A Handbook of Children and Young People's Participation* (London; New York: Routledge, Taylor & Francis Group 2010) 134.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Ibid. 135.

⁷³ Ibid.

European Union⁷⁴ (hereinafter 'European Charter') which establishes that children 'may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.' Unlike Article 4.2 ACRWC, the European Charter does not stipulate that this right shall be available in 'judicial or administrative proceedings', rather it widens its scope. Further commitment by the EU can be identified in the EC Communication 'Towards an EU Strategy on the Rights of the Child'⁷⁵ and the 'EU Agenda on the Rights of the Child'.⁷⁶

Moving on to the CoE, on a more general note, in 2010, it introduced the Child-Friendly Justice Guidelines⁷⁷ which mainly focus on the right to participation in family law proceedings. This latter communication was further enhanced through the introduction of the 'Strategy on the Rights of the Child 2012-15'⁷⁸ and the 'Council of Europe Strategy for the Rights of the Child (2016-2021)'.⁷⁹ Additionally, in relation to the CoE, reference shall also be made to the European Convention on the Exercise of Children's Rights (ECECR) (1996) which once again provides for the right of any child under 18 years to express his or her view 'in the case of proceedings before a judicial authority'.⁸⁰ However, it shall be noted that the ECECR has only had 20 ratifications.

The above-mentioned European legal instruments do not take much cognisance of the application of child participation in the private sphere of the family, but this is not to say that it has not been undertaken in other instruments. Particularly, in 1991, the CoE took on a project to understand the concept of 'Child participation in family and social life', for which a working group was formed.⁸¹ This latter project was then followed by a conference in Madrid on 'Evolution of the role of children in family life: participation and negotiation'⁸² which examined child participation within the family⁸³ and eventually culminated in the 1998 CoE Recommendation No. R(98)8 on Child Participation in family and social life being adopted. This latter instrument highlights that 'participation of children is crucial in influencing the conditions of their own lives'⁸⁴ with specific emphasis being placed on the importance of ensuring these rights in family and social life by adding that 'participation in family life in various

⁷⁴ Charter of Fundamental Rights of the European Union (2000/C 364/01).

⁷⁵ Commission of the European Communities, 'Towards an EU Strategy on the Rights of the Child' COM(2006) 367 final.

⁷⁶ European Commission, 'An EU Agenda for the Rights of the Child' COM(2011) 60 final.

⁷⁷ Council of Europe, 'Guidelines of the Committee of Ministers of the Council of Europe on child-friendly justice adopted by the Committee of Ministers of the Council of Europe on 17 November 2010 and explanatory memorandum' (Council of Europe Publishing, 2010).

⁷⁸ Council of Europe, 'Council of Europe Strategy for the rights of the Child 2012-2015' COM(2011) 171 final (15 February 2012).

⁷⁹ Council of Europe, 'Council of Europe Strategy for the Rights of the Child (2016-2021)' (Council of Europe Publishing, March 2016).

⁸⁰ European Convention on the Exercise of Children's Rights, 1996 Article 3.

⁸¹ González, Eugènia, Malo, Navarro, Casas and Aliqué [n 24] 94.

⁸² Ferran Casas, Children's participation in European society, Proceedings of the Conference on Evolution of the Role of Children in Family Life: Participation and Negotiation. (Madrid: Council of Europe & Ministerio de Asuntos Sociales 1-3 December 1994); Ferran Casas, 'Políticas y Servicios para la Infancia en Europ' in Ferran Casas and Carme Gómez-Granell eEds.), *Infancia, familia y calidad de Vida* (Barcelona: Instituto de Infancia y mundo Urbano (CIIMU) 2002).

⁸³ González, Eugènia, Malo, Navarro, Casas and Aliqué [n 24] 94.

⁸⁴ Recommendation No. R(98)8 on Children's Participation in Family and Social Life, 1998, Principle 5.

forms and degrees is possible and desirable in all stages of childhood'.⁸⁵ This was then followed by CoE Recommendation Rec(2006)19 on policy to support positive parenting as a way to encourage States to effectively recognise the need for providing parents and caregivers with the necessary support in raising their children, while ensuring that children's rights remain at the forefront.⁸⁶ It nevertheless highlights that States shall focus on 'how the child is to be respected as a person and how his/her participation should be promoted, and that parents have rights as well as responsibilities'.⁸⁷ This recommendation was nonetheless followed by a follow-up report⁸⁸ which reported on a number of good practice initiatives undertaken by the Member States. One such example relates to Cyprus where there was introduced '[a]n in-depth training for parents on matters of communication within the family'. The Programme was composed of thirteen workshops wherein 'groups of approximately 20 parents meet in weekly sessions for two hours', undergoing training aimed at improving the means of communication within the family.⁸⁹

Following the above recommendations, in 2009, the Parliamentary Assembly also introduced Recommendation 1864 (2009) on "Promoting the participation by children in decisions affecting them" which likewise makes specific reference to the importance of ensuring that children are 'allowed to participate in decisions in all fields, especially in family life'.⁹⁰ Through the years, the measures introduced by the CoE have been further building on the notion of family policy with the main goal being, to ensure the effective exercise of children's right to be heard, not only in serious judicial matters, but especially in their everyday lives. Thus, in 2012, there was the introduction of Recommendation CM/Rec(2012) 2 by the Committee of Ministers with specific focus on 'the Participation of Children and young people under the age of 18'.⁹¹ Lastly, the CoE also undertook a mission to examine the implementation of the right to participation in its various respects in several Member States, while also making recommendations on what action should be considered by Governments.⁹² Therefore, following this brief compilation of legal instruments by the EU and the CoE it is clear that the aim is not to move beyond the UNCRC completely, but rather to continue pushing Member States to ensure the effective enforcement of the rights established in the UNCRC for better security of children's future.

⁸⁵ Ibid. Principle 7.

⁸⁶ Recommendation Rec(2006)19 on policy to support positive parenting, 2006.

⁸⁷ Ibid. Rule 11.

⁸⁸ Council of Europe, 'Council of Europe' Conference of Ministers Responsible for Family Affairs – Positive Parenting – Report on the follow-up to the 28th Conference of European Ministers responsible for Family Affairs (Lisbon 2006)' (June 2009).

⁸⁹ Ibid. 8.

⁹⁰ Parliamentary Assembly Recommendation 1864 (2009) on "Promoting the participation by children in decisions affecting them" (2009) para. 7.

⁹¹ Recommendation CM/Rec(2012)2 on the Participation of Children and young people under the age of 18, 2012.

⁹² Council of Europe, 'Child and Youth Participation in Finland – A Council of Europe policy review' (Council of Europe 2011); Council of Europe, 'Child and Youth Participation in the Slovak Republic – A Council of Europe policy review' (Council of Europe 2012); Council of Europe, 'Child and Youth Participation in the Republic of Moldova – A Council of Europe policy review' (Council of Europe, 2013).

2.4. Conclusion

Conclusively, this Chapter has thus highlighted the key legal instruments that will be utilised in the coming Chapters, both from the international and regional perspectives. This Chapter has moreover undertaken the task of painting a picture to portray the way children's participation rights have been approached thus far, by looking comparatively at different aspects and it has thus placed the setting for the forthcoming discussion in Chapters 3 and 4 on implementing child participation rights in the private sphere, while taking into consideration what has hindered such effective implementation. The next Chapter will take a closer look into the obstacles that have been in the way of children's participation in the family environment, undertaking the discussion from both the international and the regional sphere.

Chapter 3: Identifying the Obstacles to Self-Expression from Early Childhood

3.1. Introduction

Following up on the previous Chapter, this thesis will now take a closer look at the right to be heard as enshrined in the UNCRC, while also combining the legal aspect of the discussion with the sociological element relating to the misconceptions that may be identified as obstacles to the proper implementation of the right of the child to have a voice in the family environment. Therefore, Section 3.2 will commence by providing a brief discussion on the components of Article 12 and will further focus on the application of such right in the context of the family environment. Section 3.3 will then delve into the general misconceptions that have surrounded the effective enforcement of Article 12 UNCRC. Furthermore, Section 3.4 will take a closer look into the importance of not employing the close-minded approach of strict age-based determinations, but rather building on UNCRC Article 12 and on GC 12, meaning that, at a minimum, cognisance of age and maturity shall be taken together. Additionally, Section 3.5 will further elaborate on the widely perceived misconception relating to parental authority being under duress. Conclusively, Section 3.6 will place particular focus on the regional situation by analysing whether, and if so, to what extent cultural elements have had an impact on the full implementation of children's participation rights in the family home.

3.2. What is the relevance of Participation?

A specific arena wherein children's right to participation is essential, as highlighted particularly in GC 12,⁹³ is within the family. The application of this right in the private environment of the home faces a tendency of being highly underestimated and is often considered invisible,⁹⁴ but the truth remains that the 'family environment is the first democratic reality a child experiences and, as the child grows, his or her capacity for informed participation in the decision-making process is strengthened'.⁹⁵

Consideration of child participation rights in the family setting go even further back than GC 12 or GC 7. This latter notion was primarily emphasised in the CRC Committee's Day of General Discussion (1994) on the Role of the Family. These Days of General Discussion are designed 'to foster a deeper understanding of the contents and implications of the convention as they relate to specific articles or topics'.⁹⁶ It was in this latter-mentioned Day of General Discussion that the CRC Committee further pointed out the change in perception towards children since the introduction of the UNCRC, from being 'dependent, invisible and passive family member[s]', to now becoming "seen".⁹⁷ In 1994, the CRC Committee also went as far as to note that 'the movement [was] growing to give him or her the space to be heard and respected [...] The family becomes in turn the ideal framework for the first stage of the democratic experience for each and all of its individual members, including children'.⁹⁸ Prior to the publication of GC 12, the CRC Committee also tackled the subject of children's right to be heard and to be taken seriously in family matters in its Day of General Discussion on the Right to be

⁹³ GC12 [n 12] paras. 89-96.

⁹⁴ Committee on the Rights of the Child, 'Report on the seventh session' (1994) (CRC/C/34) para. 192.

⁹⁵ Parkes [n 13] 71.

⁹⁶ Committee on the Rights of the Child, 'Report on the Forty-Third Session' (2006) (CRC/C/43/3) 218 para. 2.

⁹⁷ CRC Committee (1994) [n 94].

⁹⁸ CRC Committee (1994) [n 94] para. 192-193.

Heard (2006)⁹⁹ wherein the CRC Committee particularly focused on 'child participation in the home and at school'.¹⁰⁰

Consequently, it is thus evident that the CRC Committee did not aim for children's participation rights to be solely a matter of concern in bigger and more serious issues. '[T]he fact that the effect of a matter on a child may be remote, incidental, indirect, or minimal does not diminish the right of that child to express his or her views on that matter'.¹⁰¹ As has been a running theme so far in this study, through the years a prevailing idea with respect to children has been especially geared towards their vulnerable nature,¹⁰² their lack of competence and their constant need of protection.¹⁰³ This latter perception, thus, grossly fails to take children's true potential into account. As noted by Parkes, 'this paternalistic approach is linked to a concern on the part of parents that their children should not be burdened with unnecessary responsibility or information'.¹⁰⁴

Over the years, the implementation of the right of children to be involved in decisions relating to the family and themselves has been surrounded by various misconceptions regarding its effects and repercussions. The next section will thus focus on this view relating to children's participation rights and aim to exhibit the fact that parents are predominantly concerned with the negative aspects rather than the overwhelming number of positive results that may emanate from such practice.

3.3. Misconceptions attached to Children's Participation Rights

As highlighted in the latter section, the introduction of children's right to express their views in various environments has not come without problems or hindrances, and, 'it would appear that there are more obstacles to respecting the views of children in the family than elsewhere'.¹⁰⁵ As the CRC Committee notes, there are a number of persistent and 'long-standing practices and attitudes' that hinder the effective implementation of such right¹⁰⁶ as will be further elaborated in this section.

Children Lack Competence

A recurring justification relates to children's competence or, more so, the lack thereof to effectively participate and the risks that may result from such participation.¹⁰⁷ This is one of the most common justifications brought forward for the non-participation of children and it is highly damaging to children's position since it generalises and places all children in one category, that characterised by incompetence. This perception shall be considered as a premature conclusion since 'children have

⁹⁹ CRC Committee (2006) [n 96].

¹⁰⁰ Ibid. paras. 986 and 999-1002.

¹⁰¹ Tobin [n 34] 403.

¹⁰² Wouter Vandenhoele, Ellen Desmet, Didier Reynaert, Sara Lembrechts (eds), *Routledge International Handbook of Children's Rights Studies* (London; New York: Routledge, Taylor & Francis Group, 2015) 3.

¹⁰³ Lansdown [n 11] 12.

¹⁰⁴ Parkes [n 13] 76.

¹⁰⁵ Ibid. 74.

¹⁰⁶ GC12 [n 12] para. 4.

¹⁰⁷ Lansdown [n 11] 12; Save the Children South Africa [n 56] 12.

different levels of competence in respect of different aspects of their lives'¹⁰⁸ and competence is highly influenced by one's 'social context and culture',¹⁰⁹ along with their lived experiences. As a matter of fact, this reasoning can be considered directly contradictory to the wording of Article 12(1) UNCRC wherein it is said that every child shall be afforded the right to express views and to have those views afforded 'due weight in accordance with the age and maturity of the child'.¹¹⁰

Therefore, it is not the possibility to speak out that shall be dependent on one's age or maturity, but as will be emphasised in Section 3.4, such criteria shall only come into consideration when taking cognisance of such views and affording them the necessary weight in reaching final decisions. As has been a running point in various studies conducted through the years, as well as in GC 12, 'the child is able to form views from the youngest age, even when she is unable to express them verbally'.¹¹¹ Moreover, it does not remain a question of competence and capacity, but it becomes more about 'the willingness of adults to listen to what [children] are saying'.¹¹²

Children are vulnerable and will not have a positive Childhood

Another misconception relates to children's inherent vulnerable nature, and that granting such right impedes children from having a good childhood¹¹³ and results in over-burdening young children.¹¹⁴ The concept of childhood being affected can once again be established as a premature argument. Simply because children are not given the possibility to express their views about something, does not mean that they are receiving a blanket immunity from being directly or indirectly affected by a third party's decisions. As a matter of fact, this is a romanticised belief that if you are not part of something then you will not be affected. Placing this in a more concrete example, can it effectively be argued that if X and Y did not tell Z that they knew that X will die in three weeks then Z will not be affected by X's imminent death? No, because the effects are still there and there would be a higher chance of such loss being less traumatising if in the remaining time Z could have made the most of the time that was left. The truth is that protection is not always the most beneficial answer.

Similarly, if for example, a child was asked his or her opinion on moving to the other side of the country, and no future contact with friends would be possible, while the child's views shall not be deemed determinative, it will nonetheless allow the child the possibility to speak with his or her caregivers and understand why this is happening. While there is no plausible way for the repercussions to be avoided, this "burden" of information on the child also helps provide a level of clarity which would otherwise be missing if decisions are made without consulting the child. As a matter of fact, the 'right to be heard [...] is critical to improving the nature and quality of the childhood [children] experience'.¹¹⁵

¹⁰⁸ Lansdown [n 11] 12.

¹⁰⁹ Save the Children South Africa [n 56] 12.

¹¹⁰ UNCRC [n 2] Article 12(1).

¹¹¹ GC12 [n 12] para. 21.

¹¹² Lansdown [n 11] 12.

¹¹³ Lansdown [n 11] 13; Save the Children South Africa [n 56] 13.

¹¹⁴ Lansdown [n 11] 84; Save the Children South Africa [n 56] 29-30; Lansdown [n 14] 18.

¹¹⁵ Lansdown [n 11] 13.

Furthermore, Article 12(1) UNCRC speaks of the right to express views 'freely', meaning that children will only speak out if they desire. It is not an obligatory task. Allowing children the possibility to speak 'is not imposing any further responsibilities on them. Rather, it is providing an opportunity to improve the quality of their lives and promote greater respect for their rights'.¹¹⁶ When employing the perception that children's participation results in over-burdening children, what tends to be set aside is that exclusion from family matters 'leads to greater, rather than less, anxiety and stress'. One such example here being the child's lack of knowledge about their parents' marital breakdown.¹¹⁷ The longer children are kept in the dark about such important matters, the more likely their imagination will take over and make themselves believe that the separation is their fault.¹¹⁸

Participation places children at risk

Another parental fear is that participation might place children at risk and outside of parental protection.¹¹⁹ There needs to be a balancing of children's protection and participation rights, no set of rights can exist without the other. As Boyden and Levison established, '[s]upporting children's best interests requires the perspective not just that children need special protections, but that they have valid insights into their well-being, valid solutions to their problems and a valid role in implementing those solutions'.¹²⁰ Therefore, if both sets of rights work hand-in-hand and if parents apply them in such a manner, and take account of their children's evolving capacities, in accordance with Article 5 UNCRC, it will become clear that while some decisions require 'consultations', others are too serious in nature for children to be involved. An example here is that a 2-year-old cannot be given the power to decide to run into a busy road as she or he would lack the necessary capacity to foresee the possible risks, however, it would be a wholly different matter if the same child, upon receiving necessary information chooses his or her outfit for the day.¹²¹

Other Misconceptions

Other prominent misconceptions that have dominated the argument against children's participation, with particular effect in the family environment, are that participation by children would lead to a lack of respect for parents by children,¹²² while the second justification relates to the question of cultural

¹¹⁶ Save the Children South Africa [n 56] 13.

¹¹⁷ Lansdown [n 14] 18.

¹¹⁸ Mervyn Murch, *Supporting children when parents separate: Embedding a crisis intervention approach within family justice, education and mental health policy* (Bristol University Press & Policy Press 2018) 56.

¹¹⁹ Lansdown [n 14] 8, 18.

¹²⁰ Jo Boyden and Deborah Levison, 'Children as Economic and Social Actors in the Development Process' (2000) Expert Group on Development Issues Working Paper 2000:1, 52
<<https://www.semanticscholar.org/paper/WORKING-PAPER-2000-%3A-1-CHILDREN-AS-ECONOMIC-AND-IN-Boyden-Levison/d3973ee98dea48cbc16fb619d0575e7d02662a83>> accessed 23 June 2020.

¹²¹ Lansdown [n 14] 18.

¹²² Lansdown [n 11] 13; Save the Children South Africa [n 56] 13, 29-30; Parkes [n 13] 74; John Tobin, 'Fixed Concepts but Changing Conceptions: Understanding the Relationship Between Children and Parents under the CRC' in Martin D. Ruck, Michele Peterson-Badali and Michael Freeman (eds.), *Handbook of Children's Rights: Global and Multidisciplinary Perspectives* (London; New York: Routledge, Taylor & Francis Group 2017) 53, 65; Vandenhoe, Türkelli and Lembrechts [n 4] 157; Laura Lundy, 'Voice' is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child (2007) 33(6) *British Educational Research Journal* 927, 928.

values¹²³ and how such child participation results in the challenge to existing norms and values. The following fears will be furthered upon in Sections 3.5 and 3.6.

Apart from the above misconceptions, more frivolous justifications have nonetheless been raised over the years, including that child participation is time-consuming;¹²⁴ that before being granted rights children should learn how to take responsibility;¹²⁵ and also, that unless the adult's right to be heard is respected, then there cannot be respect for children's right to be heard.¹²⁶

From the above-listed misconceptions, it becomes evident that parents or caregivers tend to look at children's participation rights from a protectionist lens. Therefore, more needs to be done to break down these barriers of implementation. The discourse around children's rights within the family, thirty years on from the introduction of the UNCRC, remains prevalently tainted by excessive attention being focused on the possible negative impacts that may result, yet much less consideration is afforded to the abundant degree of benefits that may ensue. 'These barriers, which deny young children control over aspects of their everyday lives, are products of adults' conceptualisations of children as incomplete people and "moral incompetents" who do not have the capacity to decide what is true or not, what is right and wrong and what is appropriate or inappropriate'.¹²⁷

3.4. Age-based Determination. Why so harmful?

A supplementary persistent obstacle to the effective implementation of the right to be heard in the private sphere is related to the child's age. While this was already partially raised in the previous section, further elaboration on this obstacle is fundamental. Article 12(1) UNCRC speaks of both age and maturity and it does not refer to these indicia as the basis to decide whether or not a child shall be afforded the right to participate, but rather it shall only be employed when it comes to affording "due weight" to children's views.¹²⁸ '[T]he realisation of children's rights is not contingent on the ability to exercise agency, or on the acquisition of any age. All the rights embodied in the [UNCRC] extend to all children'.¹²⁹ Thus, the right to speak out is not incumbent on a mature view being expressed, 'it is dependent only on [one's] ability to form a view, mature or not'.¹³⁰ Moreover, it is also essential that the right to be heard does not become a tokenistic practice wherein children are simply afforded a voice just for the sake of it, without any proper consideration being given to such views, as this can become more harmful.¹³¹

¹²³ Lansdown [n 11] 84; Save the Children South Africa [n 56] 29-30; Parkes [n 13] 74-75 and 260-261; GC12 [n 12] para. 76; Vandenhoe, Türkelli and Lembrechts [n 4] 157.

¹²⁴ Lansdown [n 11] 84; Parkes [n 13] 76; Save the Children South Africa [n 56] 29-30; Lansdown [n 14] 18.

¹²⁵ Lansdown [n 11] 12; Save the Children South Africa [n 56] 13.

¹²⁶ Lansdown [n 11] 13.

¹²⁷ Sally Hester and Allison Moore, 'Understanding Children's Participation through an Eliasian Lens: Habitus as a Barrier to Children's Everyday Participation Rights' (2018) 26 *International Journal of Children's Rights* 446, 451.

¹²⁸ Laura Lundy, "Voice" is not enough: conceptualising Article 12 of the United Nations Convention on the Rights of the Child (2007) 33(6) *British Educational Research Journal* 927, 935.

¹²⁹ Gerison Lansdown, 'The Evolving Capacities of the Child' (Save the Children and Innocenti Centre 2005) 5.

¹³⁰ *ibid.*

¹³¹ *Ibid.* 938.

Due to the prevailing idea that children are vulnerable objects in need of special protection, they are rarely viewed from the perspective of being active agents in their own lives and therefore, there is a tendency that the concept of children's right to express themselves is made dependent on the attainment of a specific age, rather than taking cognisance of both criteria (age and maturity). While it is a fact that '[c]hildren's level of maturity will generally increase with age'¹³² this shall not be applied as a limitation to the general rights especially when considering that this study particularly focuses on the implementation of this right in children's everyday activities. As the CRC Committee confirmed in GC 12, '[c]hildren's levels of understanding are not uniformly linked to their biological age. Research has shown that information, experience, environment, social and cultural expectations, and levels of support all contribute to the development of a child's capacities to form a view'.¹³³

There is a tendency for adults to consider the progress of cognitive development on the same plane as that of physical growth. While it can be said that bones more or less follow a specific cycle of development, cognitive development is highly affected by experience and cultural background, amongst other things.¹³⁴ The assumption thus is that the fact that parents have before them a small person means that their brain and emotive functions are not developed enough to formulate separate opinions. However, since this thesis is especially focused on participation in the family environment, it is fundamental to break down the brick walls in the way of enforcing children's participation rights because hindering participation rights early on is likely to result in future developmental problems.¹³⁵ The reality is that if children start stumbling in the exercise of their rights from the 'safe' home environment, then application will only get tougher in other spheres. As will thus be elaborated in Chapters 4 and 5, it is vital to teach caregivers why participation rights shall be afforded from early childhood by elaborating on the pros and cons of such practice.

Most importantly, it is fundamental to bring to light the idea that there shall be a steady process to affording children their participation rights; for example, anything children say shall not be taken as instantly determinative but shall be balanced against their evolving capacities. However, while the limiting criterion of age is many times utilised as a tool to ensure protection for children in case they make mistakes, this shall nonetheless be combined with the question of maturity as per Article 12(1) UNCRC and shall not be solely determined by age since these criteria do not necessarily progress at the same pace.¹³⁶ Additionally, the concept of competence shall thus not be understood in a vacuum. 'Children, as well as adults, will demonstrate differing levels of competence in different contexts'¹³⁷ and this is especially contingent on the personal experiences a child has had.¹³⁸

Conclusively, the age-based determinations mentioned in this section have led to a lack of focus on participation in early childhood.¹³⁹ Therefore, there is a crucial need for those children under the age of

¹³² Tobin [n 34] 411.

¹³³ GC12 [n 12] para. 29.

¹³⁴ Lansdown [n 129] 23.

¹³⁵ Pećnik, Matić and Tokić Milaković [n 8] 404.

¹³⁶ Ibid. 401

¹³⁷ Lansdown [n 129] 24.

¹³⁸ Lansdown [n 129] 25; Priscilla Alderson, *Children's consent to surgery* (Buckingham: Open University Press 1993).

¹³⁹ Lansdown [n 14] v.

8 years to be afforded their participation rights in their day-to-day tasks.¹⁴⁰ The reason for specific emphasis being placed here on children below the age of 8 years is because to date ‘the vast majority of [...] work has focused on older children. Relatively little emphasis has been given to children under 8 years of age’.¹⁴¹ Additionally, children under the age of 8 are especially directed in their everyday lives by caregivers and other adults who have been less forthcoming in participating in the evolution of children’s participatory rights,¹⁴² thus further confirming the need for emphasising the importance of rights of this age group since they are the ones mostly considered as lacking competence.

3.5. Loss of Power or Gaining Insight?

A common belief among parents and caregivers when it comes to affording their children a voice in the family environment is that this practice would result in the undermining of parental authority and the excessive ‘legitimate’ intervention by the State in the private sphere.¹⁴³ As a matter of fact, it is the insertion of Article 12 in the UNCRC and its potential to undermine parental authority which acted as a primary reason for the USA not to ratify the UNCRC.¹⁴⁴ The UNCRC has thus been described as ‘the most dangerous attack on parent’ rights in the history of the United States’¹⁴⁵ and a ‘blank cheque for government intervention in the home’.¹⁴⁶ While these comments may be viewed as being excessive, these are actual parental concerns, and it thus prevails that children’s rights are approached hesitantly and are nonetheless perceived as a threat to the family resulting in issues within various communities.¹⁴⁷

This justification is one of the main reasons for the approach towards children in previous decades, that is, that children should be seen but not heard.¹⁴⁸ This latter concept is mostly incumbent on the notion that many of today’s parents were not afforded the possibility of being heard within their family unit and hence ‘this may further fuel their reluctance to recognise the legitimacy of allowing this for their own children’,¹⁴⁹ consequently creating a vicious cycle. Even though parents want what is best for their children, parents nevertheless would not want to lose ‘control’ over their children. This thus essentially means that they misunderstand what the right to express views particularly entails.

A common belief is that children might feel they have the upper hand, but what remains underestimated here is that simply offering the child the possibility to voice opinions on matters

¹⁴⁰ Ibid.

¹⁴¹ Ibid.

¹⁴² Ibid.

¹⁴³ John Tobin, ‘Fixed Concepts but Changing Conceptions: Understanding the Relationship Between Children and Parents under the CRC’ in Martin D. Ruck, Michele Peterson-Badali and Michael Freeman (eds.), *Handbook of Children’s Rights: Global and Multidisciplinary Perspectives* (London; New York: Routledge, Taylor & Francis Group 2017) 53.

¹⁴⁴ Susan Kilbourne, ‘The wayward Americans – why the USA has not ratified the United Nations Convention on the rights of the Child’ (1998) 10 *Child and Family Law Quarterly* 243.

¹⁴⁵ John Rosemond, *A Family of Value* (Kansas City MO: Andrews McMeel Publishing 1995) 116; Tobin [n 143] 53.

¹⁴⁶ Ingrid J. Guzman, *Parent Police: the UN wants your children* (Lafayette, LA: Huntington House 1995) 3.

¹⁴⁷ Tobin [n 143] 53.

¹⁴⁸ Parkes [n 13] 251.

¹⁴⁹ Ibid. 75.

concerning the family or simple daily tasks, does not necessarily mean that their views will be conclusive. However, on the other hand, this is not to say that their opinions should not be seriously considered. The main goal here is to provide children with the possibility of becoming accustomed to forming their opinions and thinking with their own head from early childhood, rather than being shocked at a later stage of their life. Parents 'will continue to make some decisions for children – in their best interests. They will let children make some decisions for themselves. And there will be some decisions that parents will negotiate with their children'.¹⁵⁰

Additional concerns that have been raised in association with this misconception relate to the fear that children might make mistakes in the decisions they make or make 'wasteful' decisions, or even want something they cannot have.¹⁵¹ These concerns, however, fail to consider the earlier mentioned point that 'this does not mean that whatever children say must be complied with',¹⁵² as long as the necessary consideration of children's views is taken when reaching decisions so as not to make this a tokenistic exercise.¹⁵³ Furthermore, relating to the element of 'mistakes', it is only through mistakes and fumbles that one can truly progress in life and it cannot be expected that one will get his way no matter what. It is therefore essential for children to learn from a young age that the expression of one's opinion is not a definitive 'win' but rather a way to work on reaching learned compromises.

Consequently, from a more positive lens, effective enforcement of participation within the safe environment of the home will teach children the importance of listening to others, taking others' views into consideration and thus, understanding other people's perspective and reasoning.¹⁵⁴

A final, yet strong, concern attached to this misconception is that the UNCRC is promoting that children should resultantly show less respect towards their elders by exercising their participation rights. However, as will be later highlighted in Chapter 4, this is rather the contrary. In fact, 'Article 29 of the CRC clearly states that one of the aims of education is to teach children to respect their parents'.¹⁵⁵ Therefore, the aim here is to promote a stronger equilibrium between parents and children. It is thus evident from the arguments raised in this section in relation to the right to be heard that the UNCRC, thirty years on, is still approached hesitantly and is often seen in a bad light. It is nonetheless under the 'perception that recognising human rights for children will undermine the family unit by promoting a conception of childhood that is severed from, and potentially antithetical to, the idea of the family'.¹⁵⁶ This therefore further confirms that more awareness needs to be raised about the true potential and necessity for the effective implementation of the UNCRC in all aspects of children's lives and further non-technical and user-friendly awareness needs to be raised on the notion that 'the concept of the family and the role of parents are exalted and supported under the CRC',¹⁵⁷ rather than threatened.

¹⁵⁰ Lansdown [n 11] 84.

¹⁵¹ *Ibid.*

¹⁵² Lansdown [n 14] 3.

¹⁵³ Louise Forde, Ursula Kilkelly, Deirdre Kelleher and Laura Lundy, 'The Right of Children to Participate in Public Decision-Making Processes' (Save the Children International 2020) 2.

¹⁵⁴ Lansdown [n 14] 17, 18.

¹⁵⁵ Save the Child South Africa [n 56] 13.

¹⁵⁶ Tobin [n 143] 65.

¹⁵⁷ *Ibid.*

3.6. The notion of Culture in applying Article 12 UNCRC

Since its conception, the UNCRC, and most notably the right to participation, has been labelled as a 'western concept'¹⁵⁸ 'which promotes the visibility and individual rights of a child [and] which conflicts with the cultural commitment to the primacy of the family in many other cultures'.¹⁵⁹ However, as Lansdown rightly articulates, 'there was no interference by 'Western' powers in the independent process of debate and ratification of the UNCRC by sovereign governments of north, south, east and west'.¹⁶⁰ This can nevertheless be further identified through the fact that the African region even introduced its own version, the ACRWC, which likewise incorporates children's right to be heard, among other UNCRC rights.

The goal of this section is to analyse to what extent cultural elements have influenced the effective implementation of children's right to express their views. As Vandenhoe et al. note, there are a number of States that have expressed that certain traditional practices, beliefs and attitudes, also in relation to the exercise of parental responsibility take priority over Article 12 UNCRC. Thus, even though none of the 196 States that have ratified the UNCRC has inserted an express reservation to this latter right, some have nonetheless limited its scope of application.¹⁶¹ One such example can be identified in Brunei Darussalam and Iran wherein reservations were entered 'on the primacy of traditional beliefs and practices, and the declarations of Poland, Singapore and Kiribati on the understanding of [Article] 12 in the light of their culture's respect for parental authority'.¹⁶² Hence, this highlights what the CRC Committee established in its GC 7, that in certain countries, cultural values lead to children being viewed as 'undeveloped, lacking even basic capacities for understanding, communicating and making choices. They have been powerless within their families, and often voiceless and invisible within society'.¹⁶³

The hindrance of cultural practices to the implementation of Article 12 UNCRC can be highly felt when it comes to the application of such right in the family environment, where it is expected that parents have the power and where Article 12 UNCRC is perceived as a 'threat to adult authority'.¹⁶⁴ Consequently, it is often raised that children's participation is not part of one's traditional culture,¹⁶⁵ however, the reality is that this is not really woven into many cultures. Taking cognisance of women's and children's rights together, up until a few years ago, the general perception was that women were inferior to their male counterparts, and were denied various rights, 'but it is now widely recognized that attitudes towards women must change and must be backed up by legal protections to promote women's equality with men. The same applies to children'.¹⁶⁶ This, however, cannot be generalised as in certain parts of the world the first step concerning women's equality has not been accepted due to

¹⁵⁸ Martin D. Ruck, Daniel P. Keating, Elizabeth M. Saewyc, Felton Earls and Asher Ben-Arieh, 'The United Nations Convention on the Rights of the Child: Its Relevance for Adolescents' (2014) 26(1) *Journal of Research on Adolescence* 16, 24.

¹⁵⁹ Lansdown [n 11] 14.

¹⁶⁰ *Ibid.*

¹⁶¹ Vandenhoe, Türkelli and Lembrechts, [n 4] 157.

¹⁶² *Ibid.*

¹⁶³ GC7 [n 47] para 14.

¹⁶⁴ Parkes [n 13] 260, 261.

¹⁶⁵ Save the Children South Africa [n 56] 12.

¹⁶⁶ *Ibid.*

cultural norms and values, thus resulting in the similar treatment of children's rights. The UNCRC's aim is not to accommodate States, but to challenge them and their practices towards children and to help States bring their policies in line with such expectations.

Placing particular focus on South Africa, as highlighted in the National Child Participation Framework, in 2018, particularly when dealing with the family environment, '[l]egislation alone is not sufficient to secure participation within the family [...] Advocacy, awareness-raising, parenting support and participatory processes at traditional, local and national political levels'¹⁶⁷ are essential to appreciate children's position. It is about breaking down walls and changing the perception of children as being 'less-than' when compared to their adult counterparts, even by children themselves.

Following a study conducted in Ghana (2005-2006), Article 12 was not ranked as an essential right by child participants. As a matter of fact, children themselves expressed that children 'are not equal to adults' and thus 'do not know anything'.¹⁶⁸ This means that children themselves underestimated their own potential as they themselves view other children who are afforded the possibility to speak as being 'spoilt and thus not trained properly in the values of society';¹⁶⁹ they are perceived as 'social deviants, disrespectful, and are thus punished or insulted (as witches or devils)'.¹⁷⁰ In this latter-mentioned study, it emanated that child-participants do not regard the right to participation as necessary for survival, but perceive it more as a frivolous right because even if not allowed the possibility to participate, 'they could still develop into well-rounded, responsible citizens'.¹⁷¹

Furthermore, an evaluation study was also undertaken in Western Kenya¹⁷² (2014) which related to the introduction of the Skilful Parenting programme. This study commenced by highlighting the various cultural backgrounds that may be identified in Kenya, where at the time of the study 'a total of 42 ethnic communities [...] characterised by (partly) distinguished cultural practices' were identified.¹⁷³ As van Esch and de Haan noted, a great contrast can be identified between the 'Western' concept of childhood and the perception of childhood in Kenya, particularly based on the fact that in Kenya children are not viewed as active agents in their own lives and are not perceived as holding the ability to form personal thoughts and emotions.¹⁷⁴ Rather, in this part of the world, children are viewed based on what they can offer, 'contributing by doing labour and chores'.¹⁷⁵

¹⁶⁷ Ibid. 19.

¹⁶⁸ Twum-Danso [n 68] 134.

¹⁶⁹ Ibid.

¹⁷⁰ Ibid.

¹⁷¹ Ibid. 135 – 'if you do not express your opinions you will not die'.

¹⁷² Ruben Peter Van Esch and Mariëtte de Haan 'Learning under the Tree: An Evaluation of the Skillful Parenting Program in West Kenya ICS' (University of Utrecht 2016) < <https://www.icsafrica-sp.org/media-upload/DOWNLOADS/Learning%20under%20the%20Tree%20Evaluation%20of%20SkillfulParentingWestKenya.pdf>> accessed 10 June 2020.

¹⁷³ Ibid. 9; Edward K. Mburugu and Bert N. Adams, 'Families in Kenya' in Bert N. Adams and Jan Trost (eds.), *Handbook of World Families* (SAGE Publications 2005).

¹⁷⁴ Van Esch and de Haan [n 172] 11.

¹⁷⁵ Ibid.

This study consisted of five areas 'dealing with topics of family relationship, parental roles and responsibilities, self-care [and] self-esteem, values [and] discipline and communication'.¹⁷⁶ In setting up this study, culturally sensitive approaches were undertaken, such as tailoring the idea of family to a more collective and inclusive unit including grandparents, and siblings; or amongst others, employing the use of biblical teachings.¹⁷⁷ This study amalgamated two perspectives – by respecting local customs and 'at the same time [sharing] Western-oriented knowledge and skills'.¹⁷⁸ Prior to initiating the Programme, participants were asked a number of questions, which were then repeated after the Programme was finalised; including what they perceive good parenting to be,¹⁷⁹ how they view the role of the family and its construct, parents were asked if they had been "taught" how to be parents¹⁸⁰ and if so by whom, and what they think the role of the child in the family is. Prior to the Programme, 'parents reported that children contribute to working in and around the house, as well as on the farm'¹⁸¹ and various references were made to the use of violence in case of disobedience.¹⁸²

Following the completion of the Programme, the participants were asked whether they had experienced a difference in their parenting methods, and they were also asked to answer the same questions they had been posed prior to the initiation of the Programme. The results from this study showed that most of the perceptions remained constant to what had been reported before the Programme, however, there did emanate progress and some answers had evolved. In defining what a good parent is, one participant said that 'a good parent is a parent who is an example to the children and also she is a parent who hears what the children say and also get to tell them the things that they are supposed to be doing'.¹⁸³ This latter excerpt was a common expression among many parents and thus shows that now some parents consider that hearing children forms part of parental responsibility. As a matter of fact, after being asked how the use of communication has bettered their parent-child relationship, one mother stated 'that now that she has been taught she's able to know how to treat the children, how to hear what the children want and in that way when she's able to hear what the children want from her. The children hear what she wants from them. The relationship between her and the children is good'.¹⁸⁴

In furtherance to the latter, following the Programme, there was also recognition by parents of children's ability to express opinions and interests. Another mother also expressed that 'talking to the children is good because when you talk to them you are able to tell them when they have done a mistake and they improve'.¹⁸⁵ Following the Programme parents felt more aware of the positive effects

¹⁷⁶ Ruben van Esch and Prof. Mariëtte de Haan, 'Implementing Parenting Programmes Across Cultural Contexts: A Perspective on the Deficit Narrative' (2017) 29(5) *European Journal of Development Research* 983, 988.

¹⁷⁷ *Ibid.*

¹⁷⁸ *Ibid.*

¹⁷⁹ *Ibid.* 989.

¹⁸⁰ *Ibid.*

¹⁸¹ *Ibid.* 991.

¹⁸² *Ibid.* 992 – Further tying to the African proverb referred to in Chapter 4 that it takes a village to raise a child in Africa, one participant also stated, 'Like I find a kid playing on the road or a kid has hit another kid [...] traditionally, I just had the right of taking a stick and caning the kid. You see?'

¹⁸³ *Ibid.* 993.

¹⁸⁴ *Ibid.* 994.

¹⁸⁵ *Ibid.*

participation can have on children's behaviour.¹⁸⁶ Lastly, while prior to the Programme various parents raised the point that in case of misbehaviour 'they would *kiboko* (cane) the children', based on the parents' testimonies, this seemed to decrease following the Programme; one such example coming from an older mother who stated that '[o]ne thing that has made me happy, in the past when my child makes a mistake, I would beat them with anger but after the training I was advised not to beat my children when I am bitter because I can end up killing the child. Instead, I should talk to the child, which I see is working very well'.¹⁸⁷ It thus, resulted that a common theme among parents was that following the Programme, the use of such alternative methods in the household 'resulted in a more 'peaceful' household with less conflict'.¹⁸⁸ This study thus proves that such methods, while not fool proof, are likely to result in progress within communities if tailored to the specific cultural behaviour of a particular community.

3.7. Conclusion

The primary focus of this Chapter has thus been to evaluate what is meant by participation as a bet to afford better clarity to the subject, first by looking at the concept more generally and then furthering the discussion as to how its effective implementation has been hindered over the years. As is highlighted in Section 3.3, the effective application of Article 12(1) UNCRC has been surrounded by various fears and misconceptions from caregivers' end, with most fears particularly emanating from the protectionist nature of parents. Section 3.4 then opened up the discussion and analysis onto the notion of age-based determination, with particular importance being given to the fact that age alone cannot be considered as a sufficient justification for the hindrance of children's participation rights. Conclusively, Sections 3.5 and 3.6 placed particular focus on two prominent misconceptions that have impacted the application of participation rights. These particular misconceptions, unlike those listed in Section 3.3, are not as a result of the protectionist approach; rather the misconception discussed in Section 3.5 relates to the belief that the exercise of such rights by children will lead to the loss of parental 'control' over their children. Additionally, the other threat to the effective implementation to child participation rights encompassed in Section 3.6 focused on the part played by cultural values and norms in the hindrance of the proper application of these rights in children's everyday life and family decision-making, with additional emphasis being added through the analysis of various studies that have been undertaken over the years in this regard.

¹⁸⁶ Ibid.

¹⁸⁷ Ibid.

¹⁸⁸ Ibid. 995.

Chapter 4: Applying the UNCRC to the Private Sphere

4.1. Introduction

A recurring question in the background of this study relates to a fundamental point; 'Why is the right to self-expression in the family fundamental?'. It shall be noted that children's right to be heard shall be prevalent in all areas of children's rights,¹⁸⁹ but the 'family is the ideal framework for the first participatory experiences for children. It can provide the opportunity for children to learn to express their views in a safe and supportive environment where they feel valued and respected'.¹⁹⁰ This, therefore, emphasises that if children grow up in a safe environment where they are afforded the possibility of voicing their opinion, while also being aware that expressing their views is not a free pass to definitely getting their way, leads to the better promotion of children's right to development, in line with Article 6 UNCRC. It would be much more difficult for young children to be expected to have a voice later on in life if their participation rights are stifled from their earliest stages.¹⁹¹

As previously discussed, the notion of participation shall be an evolving concept in children's lives and shall not be considered a token or a prize that will only be 'awarded' upon the attainment of a specific age. The concept of participation shall be an ever-present and ever-growing element in one's life. 'Supporting children to express themselves starts from birth. [...] Even at this young age babies will discover whether their parents and carers are responsive to their expressions'.¹⁹² As has been previously expressed, '[i]n many societies children are expected to be quiet in the presence of adults'¹⁹³ as the voice of a child is seen as a defiance to elder authority. However, with the prevalence of this reasoning, what tends to go unnoticed are the benefits that are likely to emanate from the effective enforcement of the right to be heard. 'Embracing the child-centred, child-enabling and child-empowering values underlying participation is one thing. Putting these values into practice is quite another'¹⁹⁴ as will be further proved later on.

This Chapter will thus commence in Section 4.2 by focusing on the particular benefits of child participation and the areas where such benefits may be effectively felt. Section 4.3 will then proceed to discuss the interlinking nature of Article 5, 12 and 18 UNCRC and how this affects the tripartite relationship between the State, parents and children. Conclusively, Section 4.4 will tackle the all-important question on the applicability of the UNCRC on the doorstep of the home.

¹⁸⁹ Gerison Lansdown, 'The realisation of children's participation rights: Critical Reflections' in Barry Percy-Smith and Nigel Thomas (eds.), *A Handbook of Children and Young People's Participation* (London; New York: Routledge, Taylor & Francis Group 2010) 11.

¹⁹⁰ Lansdown [n 11] 81

¹⁹¹ Lansdown [n 14] 19.

¹⁹² Inter-Agency Working Group on Children's Participation, 'Children as Active Citizens: A Policy Programme Guide. Commitments and Obligations for Children's Civil Rights and Civic Engagements in East Asia and the Pacific' (Inter-Agency Working Group on Children's Participation: Bangkok 2008) 21.

¹⁹³ *Ibid.* 21.

¹⁹⁴ Woodhead [n 19] xxi.

4.2. Benefits of Child Participation in the Family Environment

After examining studies that have been undertaken over the years it results that ensuring the right under Article 12 UNCRC leads to the effective implementation of another right, which also happens to be a general principle - Article 6 UNCRC. As Lansdown rightly confirms, '[t]he expression of views and the experience of being taken seriously is an important means of strengthening children's development'.¹⁹⁵ Placing the concept of participation into perspective, competence is further achieved through effective participation from an early age, which thus results in the quality of one's participation to be further amplified.¹⁹⁶ Hence, this proves that unless children are afforded the possibility of expressing their views from early childhood, then this amounts to a hindrance of the effective enforcement of the right to development as per Article 6 UNCRC.

With the effective enforcement of the right to be heard in the home, one can also identify greater growth in the children's sense of agency in their life and results in a more active role in their own life. As much as it is essential for participation to be afforded to children in big and serious matters affecting them, such participation is unlikely to be effective and flowing unless one had already experienced the exercise of agency in day-to-day activities at an earlier stage. '[O]pportunities to participate in everyday activity afford young children social and non-social experiences that enhance their learning and development, which in turn promotes increased participation in other activities which further shape children's developmental courses'.¹⁹⁷ It is this path of development which in turn enables children 'to take an active part in the construction of their own identity and sense of personal autonomy'.¹⁹⁸

Joint enforcement of Articles 6 and 12 UNCRC results in various other benefits. One such benefit being the increase in 'confidence, knowledge, skills and motivation',¹⁹⁹ it helps boost children's self-esteem,²⁰⁰ it increases their 'autonomy, personal and social development, as well as social integration'²⁰¹ and provides them with 'a sense of efficacy and empowerment'.²⁰² Thus, enforcement of children's right to express their views from an early age allows children 'access to wider opportunities'²⁰³ and more concrete future prospects. The possible benefits are plenty, therefore caregivers 'need to acquire a greater humility in recognising that they have a great deal to learn from children'.²⁰⁴

¹⁹⁵ Lansdown [n 11] 34.

¹⁹⁶ Rakesh R. Rajani, 'Discussion paper for partners on Promoting Strategic Adolescent Participation' (UNICEF, New York, 2000) 17.

¹⁹⁷ Carl J. Dunst, Deborah Hamby, Carol M. Trivette, Melinda Raab and May Beth Bruder, 'Young Children's Participation in Everyday Family and Community Activity' (2002) 91 *Psychological Reports* 875.

¹⁹⁸ Tobin [n 34] 399.

¹⁹⁹ Kate O'Malley, 'Children and Young People Participating in PRSP Processes: Lessons from Save the Children's Experiences' (Save the Children, 2004) 9, 10.

²⁰⁰ Lansdown [n 14] 40.

²⁰¹ Wendy Cousins, Sharon Milner and Eithne McLaughlin, 'Listening to Children, Speaking for Children: Health and Social Services Complaints and Child Advocacy' (2003) 9(2) *Child Care in Practice* 109, 115.

²⁰² Lansdown [n 14] 32.

²⁰³ *Ibid.*

²⁰⁴ *Ibid.* 40.

The true nature of this right is that allowing children to make trivial mistakes and giving them the opportunity to follow their own thought process from early childhood will positively 'impact the development of their decision-making abilities'.²⁰⁵ It is only through adults allowing children to express their views that young people will be able to prove their true worth, and thus, in turn, promote 'the capacities of children'.²⁰⁶ Most notably, the joint enforcement of Articles 6 and 12 UNCRC serves to protect children. 'The self-esteem and confidence acquired through participation also empower children to challenge abuses of their rights'.²⁰⁷ As Lansdown furthers, silencing of children has a much higher probability of leading to the protection of abusers rather than their victims. Whereas if children feel that speaking out is an option, this has a higher likelihood of resulting in adults being more informed on what is happening in their children's lives as it is only the children themselves that can reveal such personal experiences. As Tobin highlights, the implementation of Article 12 UNCRC also aids the effective implementation of Article 29 UNCRC on the realisation of the child's full potential, especially since the continuous exercise of the right to be heard from a young age improves 'children's capacity for critical thinking'.²⁰⁸

Notwithstanding, the benefits of participation are not solely in relation to the individual, but it also helps improve the family dynamic by increasing the potential for communication²⁰⁹ and also benefits society in general. The more empowered citizens are and the higher potential to effectively offer their level of knowledge to the public encourages 'more efficient and effective policy making in matters concerning children and [enables] them to assume more active and effective roles as members of their communities'.²¹⁰ Therefore, they would help in breaking the cycle of silence. It is only if children are raised in an environment where speaking out is encouraged that 'they may acquire the confidence to contribute to decisions involving them outside the home in society'.²¹¹ Most notably, considering child participation in the home, this argument does not solely pertain to parents but also relates to 'siblings, relatives and friends of the family, who may all be in daily contact with children within the family sphere'.²¹²

Conclusively, allowing children the possibility of being part of family decision-making processes 'respects their right and dignity'.²¹³ As a result of the above, following a study conducted with adolescents, it resulted that those adolescents who believe that they are afforded the opportunity to participate more in decisions made within the family 'display higher scores on well-being'.²¹⁴

²⁰⁵ Amanda Sibley, Raymond Fitzpatrick, Elizabeth Davis, Mark Sheehan and Andrew J. Pollard, 'The Family Context of Assent: Comparison of Child and Parent Perspectives on Familial Decision-Making' (2018) 32 *Children & Society* 266.

²⁰⁶ Lansdown [n 11] 5.

²⁰⁷ *Ibid.* 7.

²⁰⁸ Tobin [n 34] 400.

²⁰⁹ GC12[n 12] para .90.

²¹⁰ Tobin [n 34] 400.

²¹¹ Parkes [n 13] 78.

²¹² *Ibid.*

²¹³ Danielle Kennan, Bernadine Brady and Cormac Forkan, 'Supporting Children's Participation in Decision Making: A Systematic Literature Review Exploring the Effectiveness of Participatory Processes' (2018) 48 *British Journal of Social Work* 1985, 1986.

²¹⁴ González, Gras, Malo, Navarro, Casas and Aligué [n 24] 93.

Therefore, while there are risks tied to the exercise of participation rights, the positive elements reign over the risks. Thus, the family home shall be a place that represents freedom, security, 'warmth, comfort, refuge and freer emotional expression',²¹⁵ while nonetheless properly taking into account one's evolving capacities, as per Article 5 UNCRC.

4.3. Linking UNCRC Provisions and the Concept of the Tripartite Relationship

Thus far, the present study has cross-referenced to various UNCRC articles connected to the pinnacle Article 12 UNCRC. However, the three most recurring provisions remain Article 5 on the concept of evolving capacities, Article 12 on the right to be heard, which is the lynchpin of this study, and Article 18 relating to parent and state responsibilities. Upon a quick review of the latter three articles, an additional element may be identified, which will be the focus of the second half of this section, and this relates to the tripartite relationship between the State, parents and children.

While much focus has been placed on Article 12 UNCRC and its wording so far, further attention will be given to Articles 5 and 18 UNCRC and what they mean in the next sub-sections.

4.3.1. Article 5: Evolving Capacities and Parental Guidance

As has already been established in Chapter 2, akin to Article 12, Article 5 UNCRC was an innovative insertion in the Convention as no other version of its kind can be identified in previous international human rights instruments pertaining to children's rights.²¹⁶ As a matter of fact, even the ACRWC 'which mirrors so many of the provisions in the Convention, has no equivalent to article 5'.²¹⁷ However, while this latter element may be viewed as a considerable step forward by the UNCRC, this also means that there is much less guidance for the CRC Committee, thus increasing the pressure to clarify the main elements of this provision.²¹⁸

Prior to the introduction of Article 5 UNCRC, parents were conferred wide-ranging powers and authority of their children and '[c]hildhood was viewed as a singular, fixed and universal stage of life, for which 'the child's only remedy was to grow up'.²¹⁹ However, this concept of *patria potestas* was departed from²²⁰ upon the introduction of Article 5. Furthermore, upon a close look at the language of the provision, it can be established that the main element of this principle is its goal to balance the caregivers' responsibility to provide 'appropriate direction and guidance' to the child in the exercise of his or her rights, with the child's 'evolving capacities'.²²¹

²¹⁵ Marianne Notko and Eija Sevón, 'Conflicts in Family Relations, Children's Emotions and Agency' (2018) 32 *Children & Society* 61, 62.

²¹⁶ Tobin [n 34] 159.

²¹⁷ *Ibid.*

²¹⁸ *Ibid.* 162.

²¹⁹ Sheila Varadan, 'The Principle of Evolving Capacities under the UN Convention on the Rights of the Child' (2019) 27 *International Journal of Children's Rights* 306, 307.

²²⁰ Tobin [n 34] 161.

²²¹ UNCRC [n 2] Article 5.

Furthermore, Article 5 UNCRC establishes the all-important feature of the Convention, that children are not merely objects in need of protection²²² but they are active agents in their own lives. As encompassed by the CRC Committee, when employing the concept of evolving capacities, it is fundamental to consider the individual circumstances of a child because, as established in Section 3.4, maturity does not progress hand-in-hand with one's age.²²³ The CRC Committee thus considers '[e]volving capacities as an enabling principle that addresses the process of maturation and learning through which children progressively acquire competencies, understanding and increasing levels of agency to take responsibility and exercise their rights'.²²⁴ Cognisance, thus, has to be taken of the fact that '[t]he healthy development of children relies on parents and other adults for necessary guidance and direction, in line with children's evolving capacities, to assist their growth towards responsible life in society'.²²⁵

Conclusively, over the years there have been various discussions as to whether Article 5 should have been elevated to the status of a general principle. This argument was highly elaborated upon by Hanson and Lundy²²⁶ wherein they discuss the Convention's drafting history. Tobin also furthers this question where he stipulates that even though the Committee did not go as far as to establish Article 5 as a general principle, 'its jurisprudence suggests that this is precisely how the Committee views this concept'²²⁷ and, as a matter of fact, the concept of evolving capacities has been referenced in the majority of its GCs.²²⁸

4.3.2. Article 18: Parents have the Primary Responsibility for the Upbringing of their Children

Similar to the notion of evolving capacities, Article 18 UNCRC has been surrounded by several misinterpretations. This provision is highly concerned with the relationship between the family and the state, and while a similar role may be identified in Article 10(1) of the International Covenant on Economic Social and Cultural Rights,²²⁹ which provides for 'the widest possible protection and assistance [...] to the family' and in the International Covenant on Civil and Political Rights²³⁰ in Article 17 on the prevention of unlawful interference in the family, neither of the latter instruments presents a specific focus on the role of parents and the state in relation to childhood.²³¹ Article 18(1) UNCRC

²²² Tobin [n 34] 161.

²²³ GC7 [n 47] para. 17.

²²⁴ Committee on the Rights of the Child, 'General Comment No. 20 (2016) on the implementation of the rights of the child during adolescence' (CRC/C/GC/20) para. 18.

²²⁵ Committee on the Rights of the Child, 'General Comment No. 8 The Right of the Child to Protection from Corporal Punishment and other Cruel or Degrading Forms of Punishment'(2006) (CRC/C/GC/8) para. 13.

²²⁶ Karl Hanson and Laura Lundy, 'Does Exactly What it Says on the Tin? A Critical Analysis and Alternative Conceptualisation of the So-called "General Principles" of the Convention on the Rights of the Child' (2017) 25 *International Journal of Children's Rights* 285.

²²⁷ Tobin [n 34] 185.

²²⁸ Specific reference to Article 5 UNCRC can be identified in GCs 1, 4, 7, 8, 11, 12, 13, 14, 20, 21 and 23, and additionally, reference to the concept of evolving capacities without specific reference to Article 5 UNCRC can be found in GCs 3, 5, 9, 10, 15, 16, 17, 18 and 22.

²²⁹ International Covenant on Economic Social and Cultural Rights, 1966.

²³⁰ International Covenant on Civil and Political Rights, 1966.

²³¹ *Ibid.* 647.

starts off by affirming that States 'shall use their best efforts' to ensure that parents and caregivers 'have the primary responsibility for the upbringing and development of the child'.²³² However, the UNCRC does not place this "burden" solely on the shoulders of caregivers²³³ and thus continues in Article 18(2) that 'States Parties shall render appropriate assistance to parents and legal guardians in the performance of their child-rearing responsibilities'.²³⁴ It is the joining of these two elements in the same article that further enhances the importance of the relationship between the State, parents and children, as will be further discussed later on in this section.

Even though there is a common fear among parents that the UNCRC is aimed at undermining parental authority and at increasing the State's potential intervention in the family sphere,²³⁵ the truth is to the contrary.²³⁶ '[A]rticle 18 affirms in unequivocal terms that it is parents, rather than the state, who have primary responsibility to the care of children',²³⁷ whereas states hold a secondary role. Moreover, the provision further opens up on the significance of providing the necessary assistance to parents, for them to be able to effectively carry out their responsibilities towards their children. It thus requires 'states to create a social and regulatory environment that has the aim of assisting parents in their child-rearing responsibilities and persuading them of the virtues of parenting based on the principle of common responsibilities'.²³⁸

This exercise, however, does not come without its own challenges since there is a strong requirement of 'resources and political will to challenge and transform long held assumptions regarding [...] the role and responsibilities of parents'.²³⁹ It thus becomes fundamental for States to provide parenting education programmes²⁴⁰ as will be further elaborated in Chapter 5.

The next sub-section will hence focus on the relationship between Articles 5, 12 and 18 UNCRC now that a brief overview of all three articles separately has been undertaken throughout the study.

4.3.3. The Connection between Articles 5, 12 and 18 UNCRC

Keeping in mind the main research question and that the strongest barrier to the effective enforcement of Article 12 relates to the fear of undermining parental authority, it is crucial to discuss the connection between Article 5, 12 and 18 UNCRC. Upon reading these provisions together and following the discussion encompassed in Chapter 2, it emanates that parents have a duty 'to ensure that their children are positively guided towards exercising the right to express their views in order to promote their development in society' and that States shall aid parents in achieving this goal.²⁴¹ In fact, the

²³² UNCRC [n 2] Article 18(1).

²³³ Tobin [n 143] 58.

²³⁴ UNCRC [n 2] Article 18(2).

²³⁵ Tobin [n 143] 53.

²³⁶ Martin Guggenheim, *What's Wrong with Children's Rights* (Harvard University Press 2005) 247.

²³⁷ Tobin [n 34] 662.

²³⁸ *Ibid.* 685.

²³⁹ *Ibid.*

²⁴⁰ Committee on the Rights of the Child, 'Report on the Fortieth Session' (2005) (CRC/C/153) para. 646; GC12 [n 12] para 93.

²⁴¹ Parkes [n 13] 74.

CRC Committee even proceeded to note that children should be 'recognised as active members of families [...] with their own concerns, interests and points of view'.²⁴²

The interconnected nature of these provisions can be identified through their language. Starting off with the main argument of this paper, Article 12 sets down children's right to express their views in all matters affecting them and for such views to be weighed against one's age and maturity. It is thus at this point that cognisance of Article 5 shall be taken since the element of 'age and maturity' shall be applied in connection with the child's evolving capacities,²⁴³ and there will accordingly be a point where such parental direction and guidance will have to be foregone.²⁴⁴ This thus 'creates an expectation of a family environment in which the views of children must be taken into account and respected by their parents in a way that does not always align with traditional family structures in which power and control is vested exclusively with parents'.²⁴⁵ However, the latter expectations may not be effectively fulfilled unless the necessary awareness has been raised by States while working with parents on the fundamental nature of encouraging children to express their views from early childhood, which is thus where Article 18 comes into play. This trio of articles taken jointly 'emphasise a need for styles of parenting, caring and teaching that respect the child as an individual person and a rights holder'.²⁴⁶

Therefore, Article 18 speaks of the State's obligation to aid parents in ensuring that their children's rights are effectively secured and one such parental responsibility ties to Article 5 UNCRG to ensure that special attention is paid to children's evolving capacities. In its GC 14, the CRC Committee not only requires children to be given appropriate information in an accessible and child-friendly manner, rather, it takes into account the fact that families and caregivers also need to be informed about their children's best interests and on the importance of 'creating the necessary conditions for children to express their point of view and ensuring that their opinions are given due weight'.²⁴⁷ Notwithstanding the level of rights being afforded to children in these three articles, 'respecting children's views does not mean that children can do or say whatever they want'.²⁴⁸ The Convention does not pride itself on challenging the right of caregivers to 'provide direction and guidance to children but it does require that they listen to [children], take account of their views and recognise children's right to take responsibility for decisions and the exercise of their own rights in accordance with their evolving capacities'.²⁴⁹

The Tripartite Relationship

Another reason these three articles shall be deemed to be interconnected and interdependent is because they mirror the dynamic tripartite relationship between the State, parents and children which emanates from the UNCRG. 'Article 18 [...] requires that states parties support the family so that it

²⁴² GC7 [n 47] para. 5.

²⁴³ Lansdown [n 11] 36, 37; GC12 [n 12] para. 69.

²⁴⁴ Lundy [n 128] 939.

²⁴⁵ Tobin [n 34] 656.

²⁴⁶ *Ibid.* 181.

²⁴⁷ Committee on the Rights of the Child, 'General Comment No. 14 (2013) on The Right of the Child to have His or Her Best Interests Taken as Primary Consideration (Art. 3, para. 1)' (CRC/C/GC/14) para 15(g).

²⁴⁸ Lansdown [n 11] 82.

²⁴⁹ *Ibid.*

may undertake its responsibilities towards its children'.²⁵⁰ The link between these stakeholders in the enforcement of children's rights is especially evident from the phraseology of the three articles. While Article 12 is highly concerned with the affordance of child participation rights in all environments, in the context of this study, it nonetheless requires that parents respect this right and apply it as appropriate, and while taking consideration of their children's evolving capacities, as per Article 5. It is then Article 18 which ties all three articles into a neat bow since it requires States to provide the necessary assistance to parents and caregivers to ensure the effective implementation of children's rights. '[A]rticle 18 treats the relationship between children, their parents and the state in a way that affirms and extends upon the treatment of this relationship in other international instruments'.²⁵¹

Tobin notes that Article 18 can be considered to follow a 'collaborative or cooperative conception of the relationship between the state and the family when it comes to the upbringing of children'.²⁵² This means that while the State is under the obligation to provide parents with the necessary assistance, parents are nonetheless still the bearers of primary responsibility towards their children's upbringing.²⁵³ This consequently brings to light the fact that under this concept, the upbringing of children is perceived as a 'societal responsibility',²⁵⁴ aligning with the African proverb that 'it takes a village to raise a child'²⁵⁵ since the responsibility for the upbringing of children shall not only be undertaken by parents, rather, as can be identified clearly in Article 18, it is a shared responsibility between the family and the State. This thus brings the breaking down of the notion that the family has a 'sovereign' position that is completely external from the function of the State.²⁵⁶

As Tobin further depicts, Article 5 UNCRC is considered to present a different notion of the parent-child relationship which is 'best characterised as a trustee or fiduciary type relationship' since it identifies that the power is not equally split. Moreover, it is compared to such trustee or fiduciary relationship since 'Article 5 mandates that the power of parents must be exercised not for their own benefit but for the benefit of their child and the enjoyment of his or her rights',²⁵⁷ which is further confirmed in Article 18 which requires parents to make the 'best interests of the child [...] their basic concern'.²⁵⁸

4.4. Is the UNCRC enforceable in the private sphere of the family?

Having established the fundamental nature of children's participatory rights and the level of priority that shall be afforded to these rights by the family, the next step shall be giving due regard to the possible modes of implementation for such principle. However, this may only be achieved after looking into the level of potential enforceability of an international instrument, like the UNCRC, in the private

²⁵⁰ Parkes [n 13] 77.

²⁵¹ Tobin [n 34] 647.

²⁵² Tobin [n 143] 59.

²⁵³ Mary Lerner, Richard E. Behrman, Marie Young and Kathleen Reich, 'Caring for Infants and Toddlers: Analysis and Recommendations' (2001) 11 *The Future of Children* 7, 17.

²⁵⁴ Bruce Fuller, Sharon L. Kagan, Gretchen L. Caspary and Christiane A. Gauthier, 'Welfare Reform and Child Care Options for Low Income Families' (2002) 12 *The Future of Children* 97, 98.

²⁵⁵ Tobin [n 34] 648.

²⁵⁶ *Ibid.*

²⁵⁷ Tobin [n 4] 161.

²⁵⁸ UNCRC [n 2] Article 18(1).

sphere. The answer to this latter question is not as straight-forward since the majority of studies that have been undertaken so far have especially considered implementation in the public²⁵⁹ or the semi-private sphere, such as in educational institutions,²⁶⁰ but how does this work in the family environment?

It is essential to start off by highlighting that States Parties are under the obligation to ensure the effective implementation of the UNCRC rights in all spheres, be it public or private.²⁶¹ However, what differs here is the way this is done. An additional and notable difference relates to the fact that 'the family is an area which is not subject to the same level of regulation as the other spheres of a child's life such as school or the community'.²⁶² Yet, this does not mean that it can be done away with; to the contrary, this requires better-targeted measures.

As highlighted in Chapter 3, Article 12 UNCRC has had an especially hard time in being effectively implemented in the home environment²⁶³ and it has been mainly judged based on the possible risks that may result rather than the benefits. Thus, considering the risks, as encompassed in Chapter 3, the application of the right to be heard in the home has been faced with various obstacles and fears as presented by parents, and while certain fears are excessive, others are quite reasonable. Allowing children the right to participate in family decision-making shall, nonetheless, take account of children's capacity,²⁶⁴ however, this shall be done in a manner that respects children as individuals and thus, shall not be in the form of a generalised limiting practice.²⁶⁵ Additionally, such capacity shall not be questioned in the case of whether or not participation is possible, but only as to the weight that shall be afforded to the child's views.²⁶⁶ Moreover, another common fear is that allowing children to be more vocal in the home might result in their childhood being negatively impacted.²⁶⁷ This fear is not particularly far-fetched since the effective implementation of Article 12 UNCRC shall be accompanied by the necessary consideration being afforded to one's age and maturity, and therefore children shall not be pushed or forced²⁶⁸ into expressing opinions in matters beyond their concern, but at the same time, children need to be informed about matters that affect them, either directly or indirectly.²⁶⁹ Therefore, this element necessitates striking a balance between being laid back and being over-protective and hindering children's development to their full potential.

However, the dominant fear among caregivers remains that such practice results in the undermining of parental authority. As encompassed in Section 3.5, one of the key changes necessary in understanding the effective implementation of Article 12 UNCRC in the family environment relates to a portion of authority being relinquished by parents, though, this shall not be perceived negatively. It

²⁵⁹ Forde, Kilkelly, Kelleher and Lundy [n 153].

²⁶⁰ Lundy [n 128].

²⁶¹ Parkes [n 13] 76.

²⁶² *Ibid.* 86.

²⁶³ *Ibid.* 74.

²⁶⁴ Lansdown [n 11] 12; Save the Children South Africa [n 56] 12.

²⁶⁵ Lansdown [n 11] 12.

²⁶⁶ UNCRC [n 2] Article 12(1).

²⁶⁷ Lansdown [n 11] 13; Save the Children South Africa [n 56] 13.

²⁶⁸ Save the Children South Africa [n 56] 13.

²⁶⁹ GC12 [n 12] para. 73.

shall not be seen that parents will be “controlled” by their children, rather, this shall be understood as parents accepting that children can also teach adults concepts they might not consider essential.

Following up on Section 4.3, it is crucial that States Parties aid parents in fulfilling their obligations towards their children by ensuring that parents are aware of the beneficial factors of encouraging children's grasp on their rights and to apply them in their everyday life as spelt out in Articles 5 and 18 UNCRC. This latter element may also be found embedded in Article 42 UNCRC, which requires States Parties to undertake the necessary measures to ensure that both parents and children are aware of the UNCRC and its rights, along with the innovative approach it takes towards children's rights.

As encapsulated in GC 5, it is vital that children are aware and knowledgeable about their rights, however, it is also fundamental that those caring for children also understand the Convention and ‘its confirmation of the equal status of children as subjects of rights, [as otherwise] it is unlikely that the rights set out in the Convention will be realised for many children’.²⁷⁰ What remains an unfortunate shortcoming on the CRC Committee's end is that even though in its GC 12 paragraphs 90 to 96 specifically focus on the importance of the right to be heard to be fully implemented in the family environment, it nonetheless fell short from fully encompassing how such practice may be efficiently undertaken in children's day-to-day life.²⁷¹ This is a substantive shortcoming because the balance between the right to family life and the state's possibility to intervene in the family is separated by an extremely fine line, as can be especially evidenced through the European Court of Human Rights (hereinafter ‘ECtHR’) case law over the years.

Furthering on this latter sensitive balance between family life and the possibility of State intervention before the ECtHR, reference here shall be made to the European Convention on Human Rights (hereinafter ‘ECHR’), more specifically Article 8 ECHR. As confirmed in *Libert v. France*,²⁷² ‘[t]he primary purpose of Article 8 is to protect against arbitrary interferences with private and family life, and correspondence by a public authority’.²⁷³ However, this shall not be done by prohibiting all State interference, rather it is about setting the necessary boundaries, as established in Article 8(2) ECHR which enumerates instances where such interference may be legitimate in a democratic society.²⁷⁴ The fine line between the possibility of State interference and family rights is further highlighted by the ECtHR when it observed that ‘[t]he Court's practice is to be quite succinct when it verifies the existence of a legitimate aim within the meaning’ of Article 8(2) ECHR.²⁷⁵ Additionally, such action by the State shall, in accordance with Article 8(2) ECHR be ‘necessary in a democratic society’, in which case ‘the Court balances the interests of the member State against the right of the applicant’²⁷⁶ and where the term ‘necessary’ shall be afforded a limited interpretation pointing at a “pressing social

²⁷⁰ GC5 [n 45] para. 66.

²⁷¹ Parkes [n 13] 86.

²⁷² *Libert v France* App no 588/13 (ECtHR, 22 February 2018) para. 40-42.

²⁷³ Council of Europe, ‘Guide on Article 8 of the European Convention on Human Rights: Right to respect for private and family life, home and correspondence’ (Council of Europe/European Court of Human Rights 2019) 8.

²⁷⁴ European Convention on Human Rights 1950, Article 8(2).

²⁷⁵ *S.A.S. v France* App no 43835/11 (ECtHR, 1 July 2014) para. 114.

²⁷⁶ Council of Europe [n 273] 12.

need"²⁷⁷ for the State's intervention. It is this latter ECtHR case law which further amplifies the primary role of parents in their child-rearing responsibility when compared to the State.

Moreover, in applying UNCRC provisions on the doorstep of the home, there needs to be a clearer articulation of what the right to be heard in the family environment essentially entails, while also providing States with concrete examples on how a child may be involved in family decisions. These practical examples would have to range from more trivial decisions relating to daily activities, to more serious matters, such as in connection with medical decisions.²⁷⁸ In this regard, Chapter 5 encompasses possible steps which may be considered appropriate for States to undertake in the future.

Most notably, an unfortunate veracity remains that regardless of the methods States undertake to ensure the effective promotion of the concept of common responsibility, this cannot be taken as a certainty that parents will suddenly change their perception towards children. 'States simply do not have the capacity to compel parents to accept that they have common responsibilities with respect to every aspect of the day to day upbringing and development of their child'.²⁷⁹ However, this may not be used to justify a lack of action by States towards putting their best foot forward to improve their measures towards the participation of children in the home environment. While it is inevitable to note that it is not possible to change all parents' behaviour, most behavioural changes evolve through practise and experience. As identified in Chapter 3, the majority of parents want what is best for their children, and in their mind's eye children's participation brings about only risks and dangers. The reason for such approach is highly based on the parents' own upbringing when they were children,²⁸⁰ which results in their failure to effectively consider the other side of the coin – 'what if children's participation is not all bad?'.

As has been a running theme throughout this thesis, one shall nonetheless question whether or not the key points being brought forward in the present study may be effectively implemented in all corners of the world without giving importance to cultural differences. As has become clear following the evolution of the argument through the various Chapters, particularly in Section 3.6, States shall look closely into how parenting is impacted by the communities' cultural practices and thus aim to work around such values and beliefs. This is not to say that cultural practices in breach of UNCRC provisions shall be accepted, however, it is about adapting approaches to fit the parenting styles, and thus striking a balance between what the UNCRC provisions establish and the innate behaviour and norms followed in a specific community.

4.5. Conclusion

Conclusively, as becomes evident through this Chapter, the application of Article 12 UNCRC, among other provisions, shall fundamentally be applied in all spheres and, even though the methods of implementation vary, this does not justify lack of action. Certainly, more consideration shall be taken of the likely benefits as encompassed in Section 4.2. Additionally, Section 4.3 further elaborates on the fear that implementation of the UNCRC in the private sphere amounts to parents being put in second place to the State when it comes to their child-rearing responsibilities. However, as furthered in

²⁷⁷ *Dudgeon v the United Kingdom* App no 7525/76 (ECtHR, 22 October 1981) para. 51.

²⁷⁸ Parkes [n 13] 86.

²⁷⁹ Tobin [n 34] 652.

²⁸⁰ Parkes [n 13] 75.

Section 4.4, while it is true that the implementation of the right to be heard does come with both positive and negative aspects, this thesis posits that the benefits shall be deemed to outweigh the risks, and what remains is that certain actions shall be taken with the necessary caution.

Chapter 5: Conclusion

5.1. Children's Right to be Heard in All Environments

As encompassed in the central research question to this thesis, the above chapters have undertaken to explore the meaning behind children's right to be heard, with a specific focus on its applicability to the private sphere of the family. The manner this study has approached this question is by first laying down in Chapter 2 the relevant international legal instruments, while also intertwining the regional perspective, more specifically the legal evolution experienced in the African and European regions. This section endeavoured to seek how these regional systems have undertaken their obligations to ensure that children in their society are afforded the necessary participation rights in their day-to-day lives. What resulted was that while measures have been put in place, certainly more needs to be done to work hand-in-hand with caregivers and with children, as will be confirmed later on.

Throughout this study, it further transpired that children's participation rights have been met with various obstacles and debates over the past three decades, as can be identified in Chapter 3. This latter chapter highlights the most prominent parental fears when approaching these rights. The main intention of this study is not to push children's participation to the forefront blindly, rather it is aimed at strengthening the dialogue on this notion. It is not about presenting the discussion in an authoritarian voice, but it is about raising the necessary questions relating to the stifling of children's voices and it is intended to instigate one's thought process when taking cognisance of children's participatory rights and why they are necessary. It resulted that there persists a lack of will to acknowledge children as active agents in their own lives, with the primary view being from the protectionist lens, where justifications for non-participation are expressed based on children's young and tender age. This section also took a closer look at two key fears caregivers have - that of losing parental control over their children and concluded by analysing whether cultural values and norms have had a role to play in preventing the proper application of such rights. It resulted that while culture certainly does play a part in such hindrance, lack of enforcement may especially be attributed to the absence of societal awareness and education about the benefits likely to result from such practice, both to the individual child and to society in general.

It is thus in Chapter 4 where the climax of the present thesis is reached. This chapter commences by highlighting the benefits that are likely to emanate from the proper implementation of such practice, before proceeding to discuss the development of the tripartite relationship encompassed within the UNCRC, between the State, parents and children. Section 4.3, therefore, highlights the interconnected, rather than the hierarchical relationship that is brought forward by the UNCRC, especially as evidenced through Articles 5, 12 and 18 UNCRC. This latter section thus confirms the progress made by the UNCRC in relation to the family, with a specific focus on the link between Articles 5, 12 and 18 which provisions are used to combat the idea that the UNCRC is aimed at increasing State interference in the private sphere. As Chapter 4 progresses, the answer to the main research question, 'What degree of priority does the UNCRC convey in relation to the child's right to self-expression in the home?', becomes clearer and more muddled at the same time. It becomes evident that while States Parties shall ensure the effective implementation of all UNCRC rights in all spheres,²⁸¹ implementation in the private sphere is not as straight-forward, and thus requires more targeted measures, as will be highlighted in the next section.

²⁸¹ Parkes [n 13] 76.

5.2. Recommendations for the Implementation of Article 12 in the Private Sphere

5.2.1. Parenting Education Programmes

Considering that States shall ensure that all UNCRC provisions are effectively implemented in the private sphere, as much as in the public sphere, this section will undertake the task of making recommendations that could ease the burden on States in the long-run and which are intended to strengthen the tripartite relationship highlighted in Chapter 4. Considering that Articles 5, 12 and 18 UNCRC require States Parties to afford caregivers the necessary assistance, this thus also speaks for the provision of parental education.²⁸² The CRC Committee has through its GCs²⁸³ provided practical guidance as to what such programmes shall aim to achieve and that these programmes shall not be limited to 'existing positive practices and attitudes within the family environment, but are also aimed at educating parents about the rights enshrined in the CRC'.²⁸⁴

Taking account of the benefits likely to result from the effective implementation of Article 12 UNCRC in children's day-to-day lives, it becomes clear that further progress is vital. It is thus fundamental to ensure that parents move away from the predominant protectionist approach, which sees children as vulnerable beings. This "evolution" may, however, only be possible if the necessary awareness is raised on looking at children through a new lens and rather than giving priority to their lacking features, placing more weight on what they have to offer because even young children might have something to teach adults.²⁸⁵ As Treseder reiterates, the final goal shall be to 'radically change the status and visibility of children within our society'.²⁸⁶

How can Parenting Programmes be effectively introduced?

Following the reasoning brought forward above, the prevailing question remains, 'How?'. An example may be to introduce Parental Education Programmes in a similar fashion as birthing classes which most parents already attend because of the benefits they are likely to reap and also because it has become customary practice in various corners of the world.²⁸⁷ These programmes should aim to provide new parents with accessible information on why it is essential to allow children the possibility to participate in family decision-making, its potential benefits, and most of all, the likely negative effects that may result if such right is hindered throughout childhood. A promising feature behind the introduction of these programmes is that on many occasions children are not silenced out of spite or lack of love but as a result of lack of awareness and knowledge. It is therefore fundamental that such programmes are physically, linguistically and socio-economically accessible; they need to be promoted through the appropriate mediums and the use of media as this 'can play a crucial role in the dissemination of the Convention and knowledge and understanding of it'.²⁸⁸ The media holds a

²⁸² CRC Committee [n 240] para. 646; GC12 [n 12] para 93.

²⁸³ GC12 [n 12] para. 93.

²⁸⁴ Parkes [n 13] 72.

²⁸⁵ European Commission [n 44].

²⁸⁶ Treseder [n 29] 3.

²⁸⁷ Robab Hassanzadeh, Fatemeh Abbas-Alizadeh, Shahla Meedy, Sakineh Mohammad-Alizadeh-Charandabi and Mojgan Mirghafourvand, 'Assessment of childbirth preparation classes: a parallel convergent mixed study' (2019) 16 Reproductive Health 1.

²⁸⁸ GC5 [n 45] para. 70.

fundamental position in bringing the message across in a more relatable tone to the general public and is an 'important means both of promoting awareness of the right of children to express their views, and of providing opportunities for the public expression of such views'.²⁸⁹

Furthermore, the aim is not to simply inform caregivers of the positive outcomes of participation, but it is about presenting the true colours of the matter, meaning the positive elements and the riskier side as encompassed in Chapter 4, and to ensure that a balance is created in a bid to help break down the misconceptions encapsulated in Chapter 3.

Who shall these Programmes be aimed at?

These programmes shall be 'spaces where parents can go to exchange experiences and learn from one another'²⁹⁰ and they shall be aimed at pregnant parents and also at parents of children at other stages of development. Furthermore, such programmes shall also have a child-friendly counterpart, meaning that the aim shall not solely be to reach parents, but it is essential to also reach children. The intention of this latter concept shall be founded on Article 42 UNCRC, and States shall ensure that children are aware and knowledgeable on their own rights and they should not act as barriers to their own potential. The reasoning here is to work towards the goal of ending what is highlighted in Chapter 3, that children in certain cultures view the exercise of their own rights as leading to children being 'spoiled and thus not trained properly in the values of society'²⁹¹ and also leading to children perceiving such other outspoken children as being ill-mannered and insubordinate.²⁹² This, therefore, brings into the picture another stakeholder apart from parents, children and the State, and this refers to educators, who have a key role to play in children's development journey. It shall thus be essential to ensure that effective human rights education is afforded to children at school.²⁹³

How does the cultural element fit in?

In relation to the recurring question of culture throughout this paper, a prominent matter furthering the debate on how effective such programmes can be relates to the cultural element, and how feasible it is to introduce such programmes in differing cultural backgrounds. As was confirmed in the study conducted in Western Kenya on child participation in the home environment,²⁹⁴ it is fundamental that parenting programmes are tailored to the specific parenting culture prevalent in a given country as '[i]deas about parenting, identity and personhood differ across place and time and are by no means culturally and historically universal, even within our own cultures'.²⁹⁵ However, as confirmed in Chapters 2 and 3, this shall not be used as a measure to condone parental behaviour that threatens

²⁸⁹ GC12 [n 12] para. 83. See also GC12 para. 94: "Such programmes need to address: The relationship of mutual respect between parents and children; The involvement of children in decision-making; The implication of giving due weight to the views of every family member; The understanding, promotion and respect for children's evolving capacities; Ways of dealing with conflicting views within the family.'

²⁹⁰ Council of Europe, 'Policy to Support Positive Parenting' 3 <<https://rm.coe.int/168046d340>> accessed on 29 May 2020.

²⁹¹ Twum-Danso [n 68] 134.

²⁹² Ibid.

²⁹³ GC12 [n 12] para. 108; Katherine Covell, R. Brian Howe and Justin K. McNeil, 'Implementing children's human rights education in schools' (2010) 13(2) *Improving Schools* 117.

²⁹⁴ Van Esch and de Haan [n 172].

²⁹⁵ Van Esch and de Haan [n 176] 985.

children's participatory rights, well-being and safety. Rather, it shall be about initially understanding what the citizens in a specific country perceive parenting to be and tailoring the Parenting Education Programmes based on such specifications while keeping in mind all UNCRC provisions.

The Western Kenya study²⁹⁶ thus confirmed that while a general setup for such parenting programmes is not viable in all corners of the world, this does not mean that such programmes cannot be tailored to fit such varying cultural backgrounds. This is not about condoning all cultural beliefs even if they go against UNCRC provisions, rather it is about understanding the people in the specific country and their parenting methods and working with that community to further the promotion of children's participation rights.

5.2.2. Family Policy Measures

Additionally, more akin to the measures required to promote child participation in the public sphere, States shall also consider the introduction of family policy measures. Their aim shall be to 'secure appropriate living standards for families and children; prevent child poverty and social exclusion of families with children; enable parents to reconcile family and professional life; provide high quality care services for all children'.²⁹⁷ They shall aspire to provide families with the necessary resources and services, by offering them the needed support.²⁹⁸ This ties back to the CoE recommendation referred to in Chapter 2 which also establishes the importance of introducing Parenting Education Programmes.²⁹⁹ Therefore, if such policies and the Parenting Education Programmes are employed together and are implemented to work in harmony, there could be a higher likelihood for parents to take an interest in children's rights and what they ultimately stand for.

5.3. The Way Forward

As it has become evident from the present thesis, while numerous studies and academic papers in the past three decades have undertaken to further examine the implementation of Article 12 UNCRC in the public sphere, additional research is necessary in relation to implementation in the private environment. Overall, further elaboration is needed from various aspects. It is vital that States Parties are held more accountable by the CRC Committee in their periodic reports on the advancements being undertaken to ensure the effective implementation of the UNCRC provisions on the doorstep of the home. There is also a great need for more targeted studies in relation to this research topic which aim at making this practice more tangible and accessible in various cultural backgrounds.

²⁹⁶ Van Esch and de Haan [n 12].

²⁹⁷ Council of Europe [n 290].

²⁹⁸ María José Rodrigo, Ana Almeida, Christiane Spiel and Willem Koops, 'Introduction: Evidence-based parent education programmes to promote positive parenting' (2012) 9(1) *European Journal of Developmental Psychology* 2, 4.

²⁹⁹ Recommendation Rec(2006)19 on policy to support positive parenting [n 86].

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