

UNIVERSITY OF KWAZULU-NATAL

**AN ANALYSIS OF THE IMPLEMENTATION OF THE CHILD'S RIGHT
TO BE HEARD WITHIN THE FAMILY ENVIRONMENT IN
ACCORDANCE WITH SECTION 31 OF THE SOUTH AFRICAN
CHILDREN'S ACT 38 OF 2005**

By

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the degree LLM (Child Care and Protection)**

**In the College of Law and Management Studies, Howard College
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DECLARATION

I, **Ceridwen Emily Rose Zhekov**, hereby declare that this dissertation is my original work, and other works cited or used are clearly acknowledged. This work has never been submitted to any University, College or other institution of learning for any academic or other award.

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ABBREVIATIONS AND ACRONYMS

Convention on the Rights of the Child

CRC

African Charter on the Rights and Welfare of the Child

ACRWC

ABSTRACT

The United Nations Convention on the Rights of a Child 1989 has endowed children with the right to express their views in all matters that affect them. According to the Committee on the Rights of a Child this right extends to decisions that are made within the family environment. In keeping with its obligation under the Convention on the Rights of a Child, South Africa enacted section 31(1)(a) and (b) of the Children's Act 38 of 2005 which deals exclusively with the child's right to be heard within the family environment. Research has shown the importance and benefit of implementing the child's right to be heard within the family environment. This dissertation provides an analysis of South Africa's implementation of the child's right to be heard within the family environment. The analysis is done in light of the relevant international and foreign law, and from this recommendations are drawn as to how South Africa can improve its implementation of the right.

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CHAPTER ONE

INTRODUCTION

1.1 Research background & motivation

“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.”¹

Historically children were viewed as passive individuals worthy of protection, whose views and wishes were not worthy of respect or consideration.² Children have been expected to be ‘seen and not heard.’³ The voices of children have been habitually ignored in our adult-centric society. However, this approach to childhood was radically challenged through the adoption of the United Nations Convention on the Rights of a Child 1989 (hereafter ‘CRC’), and in particular article 12 of the CRC. Article 12 of the CRC provides the child with the right to be heard in all matters affecting them. This right has been recognised as one of the four fundamental rights of the CRC, and it therefore has to be considered in the implementation of all other rights.⁴ Providing a child with the right to be heard gives recognition to their human dignity, enabling them to participate in decisions affecting their lives.⁵ The right furthermore enables children to enforce other rights, speak out against rights violation and abuse.⁶

¹ ‘Human rights for all – quotation’ available at <http://www.un.org/en/globalissues/briefingpapers/humanrights/quotes.shtml> accessed on 14 November 2015; ‘Teaching human rights – practical activities for primary and secondary school’ United Nations available at <http://www.ohchr.org/Documents/Publications/ABCChapter1en.pdf> accessed on 05 December 2015, 10.

² L Krappmann ‘The weight of the child’s view (Article 12 of the Convention on the Rights of the Child)’ (2010) 18 *International Journal of Children's Rights* 502.

³ G Lansdown ‘Every child has the right to be heard – a resource guide on the UN Committee on the Rights of the Child General Comment No.12’ (2011) *Save the Children UK – London* available at http://www.unicef.org/french/adolescence/files/Every_Childs_Right_to_be_Heard.pdf accessed on 14 November 2015, 81.

⁴ UN Committee on the Rights of the Child *General Comment No. 12 (2009): The right of the child to be heard* available at <http://www2.ohchr.org/english/bodies/crc/docs/AdvanceVersions/CRC-C-GC-12.pdf> accessed on 14 November 2015, para 2.

⁵ Note 3 above, vi; Note 2 above.

⁶ Note 3 above, 7 - 8.

Therefore, the incorporation of the child's right to be heard in the CRC was a significant step in securing the rights of the child and respecting the child's dignity. The right extends to all aspects of a child's life including decisions made within the family environment.⁷ This is significant as the realisation of all human rights should begin within the home.⁸ Furthermore it has been suggested that child participation within the home promotes the development of the child, improves family relations, develops the child's socialisation skills and protects the child from abuse.⁹ However many children do not experience a style of parenting which encourages their participation, and are instead expected to be quiet, obedient and accepting of parental authority.¹⁰

Despite tradition and conservative views, South Africa ratified the CRC on 16 June 1995.¹¹ The CRC has directed state parties to take "legislative and other measures"¹² to implement the rights contained in the CRC. In keeping with this, South Africa enacted section 10 of the South African Children's Act¹³, which is very similar to article 12 of the CRC.¹⁴ South Africa has also enacted section 31(1)(b) of the Children's Act 38 of 2005 which deals specifically with a child's right to be heard within the family environment.¹⁵

The adoption of the provision has triggered much research concerning the right to be heard or participate (as it is sometimes referred). Researchers have examined and analysed the benefits associated with the right to be heard.¹⁶ The right, being one that challenges traditional mind-sets has been met with scepticism and opposition.¹⁷ There have been a number of parental concerns regarding implementing the right of the child to be heard within the family environment. Firstly implementing the right may burden children with unnecessary responsibility or information.¹⁸ Further that listening to the views of a child is a time

⁷ Note 4 above, para 90 – 96.

⁸ Note 1 above.

⁹ Note 3 above.

¹⁰ Ibid.

¹¹ 'South Africa's periodic country report on the United Nations Convention on the Rights of the Child' available at http://www.unicef.org/southafrica/SAF_resources_uncrcreport16.pdf accessed on 07 December 2015, 8.

¹² United Nations Convention on the Rights of a Child 1989, article 4.

¹³ 38 of 2005.

¹⁴ This will be discussed in more detail in chapter 3 below – where is the reference? This is not a reference.

¹⁵ Children's Act 38 of 2005, section 31(1)(b).

¹⁶ Note 3 above, 5 – 10.

¹⁷ E Sutherland 'Listening to the child's voice in the family setting: from aspiration to reality' (2014) 26(2) *Child and family law quarterly* 157 – 162; Note 3 above, 12.

¹⁸ Note 2 above, 82.

consuming exercise for a parent.¹⁹ There is a concern that children may make the wrong decision, which could make them unhappy or expose them to danger.²⁰ Parents have expressed apprehension about the consequences of children challenging existing norms and practices.²¹ Lastly there has been a concern that children who have their say will expect to have their way.²² These concerns have been addressed in literature, and were discovered to be largely unfounded.²³ A fair amount of literature has evolved concerning the meaning and implementation of article 12 in a general sense.²⁴ There has also been particular focus on the child's right to be heard in any judicial and administrative proceedings,²⁵ public and intuitional settings.²⁶ However child participation in the family environment has received little consideration. Moses, in an article dealing with an overview of child participation within South Africa, mentioned child participation in the family in passing, while the rest of the article focused on child participation in public and institutional settings.²⁷ The research pertaining to a child's right to be heard within the family is minimal.²⁸ Furthermore very few nations have implemented the child's right to be heard within the family into their domestic law. ²⁹ In 2007, UNICEF Innocenti Research Centre expressed that it was 'rare' to find laws

¹⁹ Ibid.

²⁰ Ibid.

²¹ Ibid.

²² Ibid.

²³ Ibid.

²⁴ Note 2 above, 501-513; Note 3 above; ; 'Fact sheet on child participation' available at <http://www.unicef.org/crc/files/Right-to-Participation.pdf> accessed on 14 November 2015; P Ward 'Reinforcing child participation – the civil society forum on the African Charter on the Rights and Welfare of the Child' (2012) *Save the children Sweden* available at <http://www.mutengo.co.za/docs/Reinforcing%20Child%20Participation%20CSO%20FORUM.pdf> accessed on 14 November 2015,11.

²⁵ D O'Donnell 'The right of children to be heard: children's right to have their views taken into account and to participate in legal and administrative proceedings' (2009) *UNICEF Innocenti Research Centre* available at http://www.unicef-irc.org/publications/pdf/iwp_2009_04.pdf accessed on 14 November 2015; N Taylor...et al. 'Respecting children's participation in family law proceedings' (2005) 15 *International Journal on Children's Rights* 61 – 82; J Sloth-Nielson 'Realising children's rights to legal representation and to be heard in judicial proceedings: an update' (2008) 24 *South African Journal of Human Rights* 495 – 524; M Mahlobogwane 'Determining the best interest of the child in custody battles: should a child's voice be considered?' (2010) *Obiter* 232 – 246.

²⁶ M Couzens 'Exploring public participation as a vehicle for child participation in governance: A view from South Africa' (2012) 20 *International Journal of Children's Rights* 674 – 704; R Hinton...et al. 'Children and young people's participation in public decision making' (2008) 16 *International Journal of Children's Rights* 281 - 284; R Hinton 'Children's participation and good governance: limitations of theoretical literature' (2008) 16 *International Journal of Children's Rights* 285 – 300; S Moses 'Children and participation in South Africa: an overview' (2008) 16 *International Journal of Children's Rights* 327 – 342; E Tisdal...et al. 'Reflecting on children and young people's participation in the UK' (2008) 16 *International Journal of Children's Rights* 343 – 354.

²⁷ S Moses 'Children and participation in South Africa: an overview' (2008) 16 *International Journal of Children's Rights* 328.

²⁸ Note 17 above, 154.

²⁹ Ibid, 164.

that expressly provided for the child's right to be heard within the family.³⁰ According to Sutherland, the countries that have implemented this right into their domestic law include: Czech Republic, Romania, Scotland, China, Finland, Germany, Hungary, Norway, Portugal, Sweden, Russia and South Africa.³¹ Therefore there is a gap in the research relating to the implementation of the child's right to be heard within the family environment. It is important to ensure that the right is implemented effectively as decisions made within the family have a significant impact in the life of a child. In this light it is necessary to research how this right is being protected in South Africa, the effectiveness of this protection, and whether any improvements can be made to the implementation and monitoring of the right. Children's right to be heard in "judicial and administrative proceedings"³² will not form part of this study.

1.2 Theoretical framework

This research will consider and analyse the child's right to be heard within the family environment as implemented by section 31 of the Children's Act 38 of 2005. This right will be considered in light of the international legal framework of article 12 of the Convention on the Rights of a Child 1989. The meaning of article 12 being limited to a child's right to be heard within the family environment as provided for in General Comment No. 12.

1.3 Research goals

The aim of the research is to analyse critically the South African legal framework which protects the right of the child to be heard in decisions concerning the child within the family, in light of the relevant international and foreign comparative materials, with a view of providing recommendations for improving the implementation of that legal framework.

This will be achieved through assessing the protection of the right to be heard within the family environment in South African law, in light of relevant international instruments. The research will assess the challenges in the implementation of the existing legal frameworks, and make recommendations based on relevant international materials and the experiences with the implementation of this right in selected foreign jurisdictions.

³⁰ 'Law reform & implementation of the Convention on the Rights of Child' (2007) available at http://www.unicef-irc.org/publications/pdf/law_reform_crc_imp.pdf accessed on 20 September 2015, 30.

³¹ Note 23 above, 164.

³² Note 12 above, article 12(2).

1.4 Research questions:

The following research questions will be addressed in the research:

- 1.4.1 What does international law require in respect of children's right to be heard in decisions within the family environment?
- 1.4.2 What does the Children's Act 38 of 2005 require with regards to children's right to be heard in decisions within the family environment?
- 1.4.3 What are the implementation mechanisms contained in the Children's Act in terms of this right?
- 1.4.4 What are the potential weaknesses of these mechanisms?
- 1.4.5 What can South Africa learn from Scotland and Botswana in implementing the right of a child to be heard within the family environment?

1.5 Methodology

This is a literature based research. The primary sources of this research comprised of law (international; foreign and national legislation), international conventions and cases (international; foreign and national). The secondary sources comprised of books, journal articles and electronic sources.

1.6 Structure of research

This dissertation consists of five chapters. The current chapter is the introductory chapter, aimed at introducing the topic and placing the topic in its context. Chapter Two describes and analyses the benefits, concerns and challenges of implementing the child's right to be heard within the family environment. Thereafter the research moves onto a description and analysis of the international and national law pertaining to the child's right to be heard within the family. The fourth chapter consists of a comparative analysis of the child's right to be heard within the family as found in Botswana and Scotland. From the analysis lessons are drawn from these jurisdictions as to what South Africa can learn and improve on. The final chapter concludes with a summary of the topics discussed and draw conclusions on how South Africa can improve its implementation of the child's right to be heard within the family environment.

CHAPTER 2

UNDERSTANDING BENEFITS, CONCERNS AND CHALLENGES OF IMPLEMENTING THE CHILD'S RIGHT TO BE HEARD WITHIN THE FAMILY ENVIRONMENT

2.1 Introduction

The concept of the child's right to be heard is embodied in article 12 of the CRC and article 7 of the African Charter on the Rights and Welfare of the Child 1990 (hereafter ACRWC).³³ The Committee on the Rights of a Child "has identified article 12 as one of the four³⁴ general principles of the Convention".³⁵ The UN Committee on the Rights of the Child has expressed that article 12 should be considered in the "implementation of all other rights".³⁶ The application of the child's right to be heard is very broad, as it "is applicable to all areas of a child's life"³⁷ including both public and private spheres.³⁸ Decisions that are made within the family certainly have the potential to affect the child and therefore fall within the ambit of the child's right to be heard as provided for in the international instruments.³⁹ Extensive literature has been written on the child's right to be heard in other areas such as in judicial and administrative decisions or public forums.⁴⁰ However the child's right to be heard within the

³³ Both articles will be discussed in great detail in chapter 3 below.

³⁴ The other fundamental principles being the right to non-discrimination (article 2), the right to life and development (article 6), and the primary consideration of the child's best interests (article 3).

³⁵ Note 4 above, para 2.

³⁶ Ibid; The reason that the right to be heard is so fundamental will be discussed in more detail under paragraph 2.2 of this chapter.

³⁷ A Parkes 'Making Space for Listening to Children in Ireland: State Obligations, Children's Voices, and Meaningful Opportunities in Education' (2015) 7 *Politics, Citizenship and Rights* 2.

³⁸ Note 22 above 328.

³⁹ Note 17 above, 155; E Sutherland 'Imperatives and challenges in child and family law' in E Sutherland's (ed) *The future of child and family law: international predictions* (2012) 27.

⁴⁰ See for example various articles written on these topics: D O'Donnell 'The right of children to be heard: children's right to have their views taken into account and to participate in legal and administrative proceedings' (2009) *UNICEF Innocenti Research Centre* available at http://www.unicef-irc.org/publications/pdf/iwp_2009_04.pdf accessed on 14 November 2015; 'Children's right to be heard in Canadian judicial and administrative proceedings – submission for the Committee on the Rights of the Child General Day of Discussion' *Justice for children and youth - Canadian Foundation for Children, Youth & The Law* at <http://jfcy.org/wp-content/uploads/2013/10/UNDiscussionPaper.pdf> accessed on 14 November 2015, 1; J Sloth-Nielson 'Realising children's rights to legal representation and to be heard in judicial proceedings: an update' (2008) 24 *South African Journal of Human Rights* 495 – 524; P Ward 'Reinforcing child participation – the civil society forum on the African Charter on the Rights and Welfare of the Child' (2012) *Save the children Sweden* available at <http://www.mutengo.co.za/docs/Reinforcing%20Child%20Participation%20CSO%20FORUM.pdf> accessed on 14 November 2015; E Sutherland 'Imperatives and challenges in child and family law' in E Sutherland's (ed) *The future of child and family law: international predictions* (2012) 27-28.

family environment has received little attention in academic literature and research.⁴¹ While this may be so the Committee on the Rights of a Child has addressed the implementation of the CRC in different settings, and one of these settings is the family.⁴² It is important that the Committee on the Rights of a Child has addressed the implementation of the right within the family as the family plays a significant role in the life of a child. Family has been recognised as the “natural environment for the growth and well-being” of a child, playing a fundamental role in the “full and harmonious development”⁴³ of a child. While there are many benefits to children participating within the family, this concept has received criticism.⁴⁴ Furthermore there are a number of challenges faced in implementing the right to be heard within the family setting. The chapter will go on to discuss and analyse the benefits, criticisms and challenges faced in implementing the child’s right to be heard within the family environment.⁴⁵

2.2 Importance and benefits of the child’s right to be heard within the family

There are countless benefits and reasons why listening to the child’s views within the family environment is so important, but perhaps the most significant benefits are that it gives recognition to the individual identity of the child, it enhances the protection of the child’s other rights, it develops the child’s social and participatory skills, it has the potential to improve the quality of the decision made and provides protection to the child from abuse⁴⁶. These benefits will be discussed in more detail below.

2.2.1 Children as individuals in their own right

The importance of listening to a child within the family environment needs to be foremost addressed in light of the overall importance of listening to the views of the child in any environment.⁴⁷ The importance stems from the fact that children are individuals in their own right.⁴⁸ Regardless of their age, maturity or dependency on parents children are foremost

⁴¹ Note 15 above, 155.

⁴² Note 3 above, 89.

⁴³ Note 12 above, preamble.

⁴⁴ Note 3 above, 12 – 18.

⁴⁵ Note 17 above, 157 – 162.

⁴⁶ Note 3 above, 5 – 11.

⁴⁷ Note 17 above, 154.

⁴⁸ Note 2 above, 502.

human beings, and this in itself attracts the right to be treated as an individual and have their views respected.⁴⁹ The perception of childhood has been summed up as follows:

“...children are and must be seen as active in the construction of their own lives, the lives of those around them and of societies in which they live. Children are not just passive subjects of social structures and processes.”⁵⁰

Viewing children as individual and independent right holders is a new phenomenon in law and family life.⁵¹ Traditionally the law only sought to protect children, they were viewed as passive individuals and so little regard was given to their views.⁵² The law has now extended the participation rights of children into the family environment, the family being the institution which is fundamental to the life of a child.⁵³ The decisions that are taken within the family can greatly impact the life of a child, and thus respecting their views as individuals is of great importance.⁵⁴

2.2.2 The interrelation with and enhancing of other rights

The right to participate is relevant to the exercise of all other rights, including those rights exercised within the family.⁵⁵ As mentioned above the right to be heard has been regarded by the Committee on the Rights of a Child as one of the fundamental rights of the Convention, being “one of the four general principles of the Convention”.⁵⁶ As a result of this, the right to be heard is not only a right in itself but has to be taken into “consideration in the interpretation and implementation of all other rights”.⁵⁷ Therefore it is important that parents’ have regard for the child’s right to be heard in their interpretation and implementation of the other rights of their child. An example of this is the right to be heard as it relates to the best interest of the child (article 3 of the CRC). The Committee on the Rights of the Child have expressed that in order for article 3 of the CRC to be correctly applied, the principles of article 12 of the CRC also have to be respected.⁵⁸ Article 18 of the CRC provides that the

⁴⁹ Ibid.

⁵⁰ J James A & Prout A *Constructing and reconstructing childhood* (1997) 4.

⁵¹ M Freeman (ed) *Law & Childhood Studies: Current Legal Issues* (2012) 1.

⁵² D G Kassin ‘How can the voice of the child be adequately heard in family law proceedings?’ (2004) *LLM Thesis, University of the Western Cape, South Africa* 1.

⁵³ Note 12 above.

⁵⁴ Note 17 above, 156.

⁵⁵ Note 19 above, 2.

⁵⁶ Note 4 above.

⁵⁷ Ibid.

⁵⁸ Note 4 above, para 74.

“child’s best interest” should be “their (*parents*) basic concern”.⁵⁹ In order for parents to comply with article 18 of the CRC and determine what is in the best interest of their child, the views of the child must therefore be considered.⁶⁰

Secondly a child’s voice is the primary mechanism by which they can attempt to enforce and secure their rights.⁶¹ Children are not in a position to enforce their other rights unless they have the right to be heard. This is because it is only when a child’s voice and views are taken seriously and given weight that the views of the child can actually have an impact on their situation.⁶² Thus the right to be heard allows the child to speak out against other rights violations. Within the family a child may for example want to exercise article 14 of the CRC, being the child’s “freedom of thought, conscience and religion”.⁶³ In securing their enjoyment of this right it may be necessary for the child to express their views to their parents, and the parents should in turn consider the child’s views and give effect to them where appropriate. In family conflict situations such as divorce or separation, it is increasingly common for the family members to engage in mediation.⁶⁴ Divorce proceedings can have long term consequences on the life of the child involved.⁶⁵ Involving the child in mediation enables the child to express their views and concerns over other rights concerned such as their right to a family environment and their right to parental care. Where there is litigious family conflict, the judicial officer has to determine what is in the best interest of the child.⁶⁶ The views of the child must be considered in determining the best interest of the child.⁶⁷ Mediation is an effective method in which the views of the child can be expressed on issues of family conflict.⁶⁸ It is therefore recommended that where there is litigious family conflict, that the family members engage in mediation and the child’s voice within the family be considered in tandem with the judicial proceedings.

⁵⁹ Note 12 above, 18.

⁶⁰ M De Jong ‘Giving children a voice in family separation issued: A case for mediation’ (2008) 4 *TSAR* 785; M Mahlobogwane ‘Determining the best interest of the child in custody battles: should a child’s voice be considered?’ (2010) *Obiter* 235.

⁶¹ Note 3 above, 31.

⁶² Note 4 above, para 68.

⁶³ Convention on the Rights of the Child, 1989, article 14(1).

⁶⁴ M De Jong ‘Giving children a voice in family separation issued: A case for mediation’ (2008) 4 *TSAR* 785 & 787.

⁶⁵ *Ibid.*

⁶⁶ M Mahlobogwane ‘Determining the best interest of the child in custody battles: should a child’s voice be considered?’ (2010) *Obiter* 233.

⁶⁷ *Ibid.*, 235.

⁶⁸ *Ibid.*, 789.

2.2.3 Developing the child's social and participation skills

Research has shown that encouraging child participation, by listening to their views, builds their self-esteem, social skills and cognitive ability.⁶⁹ This benefit along with the other benefits of listening to a child, support the idea that children should be participating in private and public spheres of life.⁷⁰ However knowing how to express views and having the confidence to do so may not be a skill that comes naturally to all children. Children can learn these skills within the family, as the family environment has been regarded as the ideal environment for children to learn how to express their views and participate meaningfully.⁷¹ In their home environment, children can develop their confidence in expressing their views, and in so doing they will learn important social skills associated with participating and expressing views.⁷² Children's increased confidence in participating within the home will provide them with confidence to participate publically.⁷³ If the child has a positive experience in expressing his or her views within the home, he or she is more likely to have the confidence to do so in public spheres.⁷⁴ Participation within the home is where a child can begin to learn and experience democratic principles.⁷⁵ Participation within the family therefore plays a key role in developing the child's ability to interact with others, including participation in public spheres.

2.2.4 Improving quality of family decisions

It has been suggested that permitting children to participate in family decisions enriches the decision making.⁷⁶ This is quite true, as a parent needs to be aware of all views and factors at hand in order to make a properly informed decision.⁷⁷ For the same reasons the judiciary is obliged to consider the views of children when making a major decision affecting the child.⁷⁸ Parents therefore should not exclude this very important step in the decision making process. Although a parent may be well acquainted with all information relating to their child, they do not have the same insight into the child's life as the child has.⁷⁹ Furthermore parents may

⁶⁹ Note 3 above, 5.

⁷⁰ Note 50 above, 2.

⁷¹ Note 4 above, para 90.

⁷² Note 3 above, at 81; Note 4 above, at para 90.

⁷³ Note 3 above, 81; Note 4 above, para 90.

⁷⁴ Note 17 above, 156.

⁷⁵ 'Role of the family in the promotion of the rights of the child' *UNICEF* (1994) available at [http://www.unicef.org/lac/Role_of_the_family\(1\).pdf](http://www.unicef.org/lac/Role_of_the_family(1).pdf) accessed on 14 November 2015,3.

⁷⁶ Note 50 above, 1.

⁷⁷ Note 17 above, 156.

⁷⁸ Note 4 above, article 12(2).

⁷⁹ Note 3 above, 5.

sometimes be in a position where it is difficult to distinguish between their own interests and that of their children.⁸⁰ By considering the views of their children parents are better able to fulfil their parenting role.⁸¹

2.2.5 Protection from abuse

Child participation within the family can play a role in preventing and protecting a child from abuse.⁸² There are numerous ways in which the implementation of the child's right to be heard within the family can aid in the prevention of abuse. The first is the link that has been associated with children participating within the home and the use of corporal punishment.⁸³ A number of children in South Africa have reported that their caretakers punish them without first consulting them.⁸⁴ When disciplining a child, the parent therefore has not given the child an opportunity to explain the reason for his or her behaviour. It is submitted that before disciplining a child unnecessarily a parent should allow the child the opportunity to be heard this will then allow better understanding and communication between the parent and child.

Other forms of abuse that children can be subjected to is verbal, emotional and bullying both inside and outside the family environment. Where a child is permitted to express views within the family the children can inform their parents of abuse which they may be subject to outside the family environment. An example of this would be bullying within the school environment, emotional or verbal abuse by a colleague or teacher. Where the child's views are listened to and taken seriously, the child will be able to alert the parents concerned to any such abuse and the parents will be able to take steps to prevent further abuse.

Another way that participation within the home can prevent abuse is by creating an environment of respect. A family environment where the members respect each other's views are unlikely to abuse one another.⁸⁵ Furthermore listening to the views of all members of the family helps to overcome disagreements and conflict in the home in a peaceful

⁸⁰ M De Jong 'Giving children a voice in family separation issued: A case for mediation' (2008) 4 *TSAR* 785.

⁸¹ Note 17 above, 156.

⁸² Note 4 above, para 90.

⁸³ CASE 'An assessment of child participation in the family in South Africa' *The Community Agency for Social Enquiry* (2006) available at <http://resourcecentre.savethechildren.se/sites/default/files/documents/1702.pdf> accessed on 14 November 2015,56.

⁸⁴ *Ibid*, 42.

⁸⁵ Note 17 above, 157.

manner.⁸⁶ Lastly, if children are accustomed to expressing their views at home they will be more likely to tell their parents of any abuse they have being subjected to that may occur both inside and outside the home.⁸⁷ This will enable the parent to provide the necessary protection to the child to prevent further abuse.⁸⁸

2.3 Concerns towards the child's right to be heard within the family

As with any new development, the right to be heard within the family has been met with both praise and criticism. The discussion above focused on the importance of listening to the views of children, the research will now go onto to consider common criticisms and concerns pertaining to listening to the views of children. What is most remarkable regarding these criticisms and concerns is that they are the same across different cultures.⁸⁹ The cultures may understand childhood differently, but nevertheless share the same reservations to child participation. These reservations are as follows:

“children lack competence; they lack knowledge and judgement; involving them in decisions is to place too heavy a burden on them; parents know what is best for their children; giving children a voice will lead to excessive demands, bad behaviour, disrespect for elders; participation will expose children to risk of harm.”⁹⁰

Over the last 20 years, organisations dealing with child participation have found that these reservations are unfounded and are not based on evidence.⁹¹ Quite the contrary the experience of these organisations' in allowing children to participate have been very positive.⁹² Permitting children to participate has revealed that children do have views, perspectives and experiences to express, and further that such expressions contribute positively to the decisions at hand.⁹³ Nevertheless, since parents play the most significant role in ensuring that a child's right to participate within the family is realised it is important that their concerns are considered and addressed within this research.

⁸⁶ Note 2 above, 508.

⁸⁷ Note 4 above, para 90.

⁸⁸ Note 17 above, 157.

⁸⁹ Note 3 above, vi.

⁹⁰ Ibid.

⁹¹ Ibid.

⁹² Ibid.

⁹³ Ibid.

2.3.1 Children do not have sufficient competence or experience to participate

Many parents are of the view that their children do not have sufficient “competence” or experience to “participate in decision making”.⁹⁴ A child’s incompetence to participate has been attributed to their lack of intellectual and emotional maturity and their lack of experience.⁹⁵ However, even with limited capacity and competence children can still provide useful insights into situations.⁹⁶ Children of all ages have the competence to participate in decisions affecting them, provided that they are informed sufficiently of the decisions at hand and given an opportunity to communicate in a way that is appropriate to their age and capacity.⁹⁷

In the South African context there are many child-headed households.⁹⁸ Children are forced take on adult responsibilities in order to support their younger siblings.⁹⁹ In such a context the child displays a level of competence and maturity that should not be disregarded. This supports the idea that children have the competence to deal with, or at least be involved in decision making. If children are capable of running households, then they surely are capable of participating in household decisions that will affect them.

Despite the argument that adults hold more competence and experience than children, children have been seen to possess competence in areas that adults do not.¹⁰⁰ Children often act as mediators between conflicting parents, children have the ability to forgive easily, think creatively and act with enthusiasm.¹⁰¹ Furthermore many children show particular competence in their knowledge of technology, which knowledge often supersedes that of

⁹⁴ M Mahlobogwane ‘Determining the best interest of the child in custody battles: should a child’s voice be considered?’ (2010) *Obiter* 234.

⁹⁵ Ibid; Coyne I & Harder M ‘Children’s participation in decision-making: balancing protection with shared decision-making using a situational perspective’ (2011) 15(4) *Journal of Child Health Care* 314.

⁹⁶ Note 2 above 507.

⁹⁷ Note 3 above, 12.

⁹⁸ ‘Protection for orphans and vulnerable children – alternative care’ *Unicef South Africa* available at http://www.unicef.org/southafrica/protection_6633.html accessed on 12 November 2015.

⁹⁹ H Meintjes et...al ‘Child-headed households in South Africa: A statistical brief’ *Children Count* available at http://www.childrencount.ci.org.za/uploads/brief_child_headed_households.pdf accessed on 12 November 2015.

¹⁰⁰ P E Veerman ‘The ageing of the United Nations Convention on the Rights of a Child’ (2010) 18 *International Journal of Children’s Rights* 586.

¹⁰¹ Note 17 above, 156.

adults.¹⁰² This competency's should not be overlooked, but should be cherished and considered when making decisions affecting a child.

2.3.2 “Children must learn to take responsibility before they can be granted rights”¹⁰³

This notion is not in keeping with international and national human rights instruments which endow all human beings with fundamental rights.¹⁰⁴ Children are “human beings”¹⁰⁵ and are entitled to the same rights as adults irrespective of their age (excluding certain rights such as the right to vote which has an age requirement).¹⁰⁶ Babies are endowed with these rights and certainly could not be expected to show any responsibility.¹⁰⁷ In conclusion, the argument has no standing as the nature of human rights is that they are endowed freely on all human beings, of all ages.

2.3.3 “Giving children the right to be heard will take away their childhood”¹⁰⁸

It has been argued that permitting children to participate in family decisions that affect them will damage and destroy their childhood. The concept of “childhood’ and what it entails has changed drastically in recent years.¹⁰⁹ Within the human rights discourse there has been a move to abandon the idea that children are passive objects worthy of protection.¹¹⁰ But rather, children should be considered as individuals endowed with human rights and ought to be regarded as active participants within their own lives and the world around them.¹¹¹ The notion of a childhood has passed down from generation to generation in which many parents did not participate in family decisions, thereby developing the perception that children should not be included in family decision making.¹¹² The concept of childhood has never been static, children have been treated very differently within each historical period.¹¹³

¹⁰² Note 90 above.

¹⁰³ Note 3 above, 12.

¹⁰⁴ Note 3 above, 12.

¹⁰⁵ ‘Protecting children’s rights – Convention on the Rights of a Child’ available at http://www.unicef.org/crc/index_protecting.html accessed on 24 March 2015.

¹⁰⁶ Ibid.

¹⁰⁷ Note 3 above, 12.

¹⁰⁸ Note 3 above, 13.

¹⁰⁹ Note 47 above, 1.

¹¹⁰ Ibid, 6.

¹¹¹ Note 45 above, 8.

¹¹² Note 3 above, 13.

¹¹³ P E Veerman *The rights of the child and the changing image of childhood* (1992) 6.

Apart from this, the perception that during ‘childhood’ children do not make decisions or take responsibility is grossly unrealistic¹¹⁴. Children do make decisions and take responsibility from an early age.¹¹⁵ Children make decisions regarding play, friendship, coping with parents who are divorced and negotiate between conflicting parents to name a few.¹¹⁶ In some instance, due to circumstances children are forced to live and make decisions like adults. This is particularly true within South Africa in light of the dilemma of child headed households.¹¹⁷ Lastly article 12 of the CRC is a right and not an obligation, children are therefore not forced to participate they are simply given the opportunity to participate.¹¹⁸

2.3.4 Child participation will undermine parental authority and lead to lack of respect for parents

Parents have argued that permitting children to participate within the family will lead to a lack of respect for parents¹¹⁹ thereby undermining parental authority.¹²⁰ However article 12 of the CRC does not provide that children’s views are decisive, it is only a right to be heard, parents are still required to exercise their parental authority by making decisions that are in the child’s best interest.¹²¹ It has been argued that by respecting children through listening to their views encourages a culture of mutual respect.¹²² Furthermore it has been argued that listening to the views of family members promotes unity in the family environment as listening resolves conflict and promotes understanding.¹²³

A comprehensive understanding of the CRC reveals that it certainly does not promote disrespect for parents. Rather the CRC values the role of parents in the life of a child, this is most apparent in the preamble of the CRC, article 5 and article 29 of the CRC. Article 5

¹¹⁴ Note 3 above, 13.

¹¹⁵ P Alderson ‘Children’s consent and ‘assent’ to healthcare research’ in M Freeman (ed) *Law & childhood studies: current legal issues* Oxford: Oxford University Press (2012) 185.

¹¹⁶ Note 3 above, 13.

¹¹⁷ ‘Orphans and vulnerable children – child protection’ *UNICEF SOUTH AFRICA* available at http://www.unicef.org/southafrica/protection_6631.html accessed on 30 March 2015.

¹¹⁸ Note 3 above, 13.

¹¹⁹ Note 73 above, 5.

¹²⁰ B C Hafen & J O Hafen ‘Abandoning children to their own autonomy: the United Nations Convention on the Rights of a Child’ (1996) 37(2) *Harvard International Law Journal* 449 & 452.

¹²¹ Note 17 above, 160.

¹²² Note 3 above, 13.

¹²³ Note 2 above, 508.

requires “State Parties to respect the responsibilities, rights and duties of parents”.¹²⁴ The preamble of the CRC recognises that the family is the most “natural environment for the growth and wellbeing”¹²⁵ of the children and therefore should be protected. The role of a parent is fundamental in the make-up of a family. Article 29 in particular provides that education should be directed in a way that develops the child’s respect for their parents.¹²⁶ Through its provisions the CRC therefore promotes mutual respect between family members, and respect for the role of the parent in the life of a child.

2.3.5 Children’s rights as a Western concept that is not in accordance with African traditional and cultural values

Children’s right to participate within the family has been regarded as a Western concept as have many of the rights in the CRC.¹²⁷ African countries and societies are often wary of and opposed to western concepts being imposed on them.¹²⁸ Within African culture children are expected to remain silent around adults and are not allowed to question parents, therefore the idea of children participating in family decisions goes against traditional African culture.¹²⁹ It has been argued that although child participation within the home is not routed in traditional African culture neither is it routed in traditional Western culture.¹³⁰ Traditionally in almost all societies around the world children have held a subservient role to adults and have not been permitted to take part in family decisions.¹³¹ The ACRWC may have been influenced by the CRC,¹³² but it was drafted solely by the African nations. The African nations themselves have incorporated the right of the child to be heard into the ACRWC through article 4(1).¹³³ Tradition and culture develop, they are not static, and the African nations’ adoption of the child’s right to be heard into the ACRWC illustrates this.¹³⁴ The traditional African cultural value of *ubuntu* incorporates the concept of child participation. The concept of *Ubuntu* cannot

¹²⁴ Note 12 above, article 5.

¹²⁵ Note 17 above, preamble.

¹²⁶ Note 3 above, 13.

¹²⁷ A Skelton ‘The development of a fledgling child rights jurisprudence in Eastern and Southern Africa based on international and regional instruments’ (2009) 9 *African Human Rights Law Journal* 482.

¹²⁸ Supra note 8, 155; Sutherland E ‘Imperatives and challenges in child and family law’ in E Sutherland’s (ed) *The Future of Child and Family Law: International Predictions* (2012)158 - 159.

¹²⁹ J Sloth-Nielsen ‘Modern African childhoods: does law matter?’ in M Freeman (ed) *Law & Childhood Studies: Current Legal Issues* Oxford: Oxford University Press (2012) 127.

¹³⁰ P Stahl P M ‘Don’t forget about me: implementing article 12 of the United Nations on the Rights of a Child’ (2007) 24(3) *International Journal of Comparative Law* 803.

¹³¹ Note 8 above,155; Sutherland E “Imperatives and challenges in child and family law” in E Sutherland’s (ed) *The future of child and family law: international predictions* (2012) 159; Note 11 above, 16.

¹³² Note 3 above, 15.

¹³³ Note 118 above.

¹³⁴ Note 17 above, 159.

be easily explained in Western language.¹³⁵ However it has been described to envelop “the key values of group solidarity, compassion, respect, human dignity, conformity to basic norms and collective unity, in its fundamental sense it denotes humanity and morality.”¹³⁶ It could be argued that the value of respect incorporated in the concept of *Ubuntu* would involve permitting children to express their views on issues that affect them.¹³⁷

Traditional values are not necessarily always good values that deserve protection. An example of this is the subservient role that women have played in most cultures (Western as well as African).¹³⁸ Globally there has been a move to transform the role of women in society as the traditional values pertaining to women are not in accordance with human rights.¹³⁹ A child’s right to participate within the family should be viewed in the same light. Just as it has been necessary to change societies respect for women so too is it necessary to bring about change in the role of a child within the family.

2.3.6 Children should not be burdened with unnecessary responsibility or information¹⁴⁰

A concern of some parents has been that by allowing children to express views with regards to family decisions could burden them with unnecessary responsibility or information.¹⁴¹ However it is the responsibility of the parent who permits the child to participate to ensure that the child is protected from information that is potentially harmful.¹⁴² The parent also bears the responsibility to guard the child from negative consequences that can possibly arise from the participation.¹⁴³ The child’s parents will have the best understanding of their child’s level of competency and capacity.¹⁴⁴ Therefore by applying their discretion and knowledge of their child a parent can avoid overburdening their child or providing them with harmful information. It should be borne in mind that very often children do like to know what is

¹³⁵ Sloth-Nielsen & J Gallinetti “Just say Sorry?” *Ubuntu*, Africanisation and the Child Justice System in the Child Justice Act 75 of 2008 *P.E.R/ PELJ* 2011 14(4), 69.

¹³⁶ *S v Makwanyane and Another* 1995 (6) BCLR 665 (CC), 308.

¹³⁷ Note 35 above.

¹³⁸ Note 3 above, 16.

¹³⁹ *Ibid.*

¹⁴⁰ Note 3 above, 84.

¹⁴¹ Note 3 above, 84.

¹⁴² Note 2 above, 507.

¹⁴³ *Ibid.*

¹⁴⁴ Note 2 above, 508.

happening in their lives and why.¹⁴⁵ Withholding information from a child could result in them misunderstanding the situation and blaming themselves.¹⁴⁶

2.3.7 Child Participation takes more time

Another parental concern is the time consumption required in including children in family decisions.¹⁴⁷ This is true, as it does take longer to consult children's views.¹⁴⁸ However this right only pertains to major decisions involving a child and not every single household decision. Major decisions affecting a child should not be made hastily and therefore appropriate time must be given to listening to the views of the child concerned. Failing to listen to the views of the child will result in a badly informed decision and possibly a wrong decision.¹⁴⁹

2.3.8 Children might make a mistake

There has been a concern among parents that children involved in decision making may make wrong decisions.¹⁵⁰ Parents who have this concern disregard the fact that the children are merely participating in the decision, the final decision is the responsibility of the parent.¹⁵¹ The parent still has the "responsibility to protect their child from harm"¹⁵² and can say no to the child if necessary.¹⁵³ If the decision taken ends up being wrong, the adults involved bear the responsibility for any of consequences.¹⁵⁴ In certain circumstances a parent may be required to make a decision that is in the best interest of the child.

In facilitating their child's participation parents must bear in mind their child's evolving capacity.¹⁵⁵ The decision making power afforded to children should be in accordance with their capacity to handle and understand that decision. Very often parents undermine their

¹⁴⁵ Note 2 above, 84.

¹⁴⁶ Ibid.

¹⁴⁷ Note 2 above, 84.

¹⁴⁸ Ibid.

¹⁴⁹ Ibid.

¹⁵⁰ Note 73 above.

¹⁵¹ Y Lee 'Introduction celebrating important milestones for children's and their rights' (2010) 18 *International Journal of Children's Rights* 481; Sutherland E 'Listening to the child's voice in the family setting: from aspiration to reality' (2014) 26(2) *Child and family law quarterly* 155; Sutherland E "Imperatives and challenges in child and family law" in E Sutherland's (ed) *The future of child and family law: international predictions* (2012) 161.

¹⁵² Note 2 above, 84.

¹⁵³ Note 2 above, 507.

¹⁵⁴ Ibid.

¹⁵⁵ Note 17 above, 161.

child's capacity, and competence in decision making.¹⁵⁶ Children should be given the opportunity to make minor decisions, and learn from their mistakes if it is a wrong decision.¹⁵⁷

2.4 Challenges encountered in the implementation of the child's right to be heard within the family environment

There are various challenges encountered in the implementation of the child's right to be heard within the family environment. It is important to identify and consider these challenges before analysing the effectiveness of the international and national law. The following general challenges have been identified, the tension between the role of the parent and child; individual attitudes of family members towards the right of a child to be heard within the family environment; tradition and culture and private nature of the family environment. These challenges will be explored further in the preceding paragraphs.

2.4.1 Tension between the role of the parent and child

The right of a child to be heard within the family environment can create tension between the parent and child. This tension exists through the role and desire of the parent to be able to lead and guide the life of the child on the one hand and on the other hand the increasing desire and capacity of a child to reason and decide independently from their parents.¹⁵⁸ While article 12 of the CRC contains the child's right to be heard, article 5 of the CRC provides parents the right to give their child direction and guidance.

The CRC and General Comment 12 address this tension by recognising the "rights and responsibilities of parents to provide appropriate direction and guidance to their children" in order to allow and enable the "child to exercise their other rights."¹⁵⁹ Such guidance must be given "in a manner consistent with the child's evolving capacities".¹⁶⁰ The two articles work hand in hand, as children's views are to be given more weight as their capacity develops.¹⁶¹ There are two rights that work hand in hand. The parents right to exercise their parental rights and responsibilities, and the child's right to autonomy.

¹⁵⁶ Note 73 above.

¹⁵⁷ Note 3 above, 84.

¹⁵⁸ Note 4 above, para 84.

¹⁵⁹ Note 4 above, para 91.

¹⁶⁰ Note 4 above, para 91.

¹⁶¹ Ibid.

Providing children with the right to increasingly participate in decisions that affect them, goes against longstanding culture and tradition on family hierarchy.¹⁶² In order to implement the right, the attitude of society needs to adjust to include children's opinions in the arena of family decision making.¹⁶³ There has been doubt as to whether enacting legislation dealing with children's rights to be heard within the family will result in society implementing the right in their homes.¹⁶⁴ However in a similar context, passing a law prohibiting corporal punishment against children was found to have a significant impact on the public's attitude towards corporal punishment.¹⁶⁵ So long as parents are aware in this development in the law, it may have an impact on changing societal mind-sets.¹⁶⁶ The purpose of implementing the right of a child to participate in national law is not to prosecute the parents who fail to do so, but rather to create a culture where the views of children are respected.¹⁶⁷

2.4.2 Individual attitudes of family members towards the right of a child to be heard within the family environment

The view of family members on child participation is a factor that can determine how effectively this right is implemented within that family. These views can be formed from traditional, cultural, religious beliefs or some other way.

A study was conducted that highlights the views of different family members towards children's rights.¹⁶⁸ The study was designed to examine the development of autonomy in adolescents.¹⁶⁹ The participants (mothers, fathers and adolescents) were interviewed about their views on children's rights.¹⁷⁰ A comparison was done between what girls and boys felt towards obtaining self-determination rights. The results did not show that either male or

¹⁶² Note 5 above, 333.

¹⁶³ Lenzer G 'The human rights agenda & the rights of children: towards a unified approach' (1999) 21(1) *Whittier Law Review* 109.

¹⁶⁴ Note 17 above, 164.

¹⁶⁵ A Nolan 'Litigating the Child's right to life free from violence: seeking the prohibition of parental physical punishment of children through the courts' in M Freemans (ed) *Law & childhood studies: current legal issues* Oxford: Oxford University Press (2012) 536.

¹⁶⁶ Note 17 above, 161.

¹⁶⁷ Note 3 above, 85.

¹⁶⁸ I Cherney 'Mothers', Fathers', and their Children's Perceptions and Reasoning about Nurturance and Self-Determination Rights' 2010 (18) *International Journal of Children's Rights* 83.

¹⁶⁹ *Ibid.*

¹⁷⁰ *Ibid.*

female children were more supported of self-determination rights.¹⁷¹ It was however found in the study that mothers and fathers generally had different views on children's rights. The parents were questioned about their thoughts on their child's view on self-determination rights. A greater percentage of mothers than fathers believed that their child would support the concept of children having self-determination rights.¹⁷² The views parents also differed between those who would grant their children autonomy and those that would not.¹⁷³

This dissertation does not deal with the autonomy of a child but with child participation, which in this case deals with a child being able to voice his/her opinion or feelings towards a major decision affecting him/her. However the aforementioned study is relevant and important to this research in that it illustrates that each person within a particular family can have a different view towards children's rights. This could make the implementation of children's right to be heard within the family over major decisions affecting him/her rather difficult. It can thus be said that individual family members beliefs regarding child participation could affect the proper implementation of the right.

2.4.3 Tradition and culture

Tradition and culture are still very prominent in the lives of many South Africans. To a great degree tradition and culture still dictate how communities, families and individuals interact with one another. South Africa is a diverse nation, although situated in Africa, the African culture is not the only culture represented within the country.¹⁷⁴ The dominant cultures found within South Africa are African, Indian, English and Afrikaans and within each of these groups are different religious sectors.¹⁷⁵ Parents within South Africa hold different views regarding the role of children within the home.¹⁷⁶ However it is generally found across cultures there is a great difference in power between adults and children.¹⁷⁷

A study was conducted on child participation within the family in South Africa.¹⁷⁸ Although this study did not have participants from the English culture, there were participants

¹⁷¹ Ibid, 97.

¹⁷² Ibid, 90.

¹⁷³ Ibid, 91.

¹⁷⁴ Note 22 above, 332.

¹⁷⁵ Note 42 above, 8–9.

¹⁷⁶ Note 22, 332.

¹⁷⁷ Note 22, 333.

¹⁷⁸ Note 42, 8–9.

represented from the other main cultural groups.¹⁷⁹ The cultural groups involved in the study were descendants from Malaysia, India, Indonesia and elsewhere in Asia; individuals from Afrikaans communities; and various traditional African cultural groups namely, Zulu, Xhosa, Sesotho and SePedi.¹⁸⁰ The different areas representing the different cultural groups were questioned whether their culture encourage child participation within the family. It was found that a significantly greater number of participants from the individuals from the Asian, Indian and Afrikaans cultural areas indicated that their cultures encourage participation within the family.¹⁸¹ Within the traditional African culture (Zulu, Xhosa, Sesotho and SePedi) the majority of participants indicated that child participation in the family was not encouraged.¹⁸²

The African culture at a general level has particularly conservative views on the role of the family. Children are expected to obey adults and not question what they are told to do.¹⁸³ Children who express views can be seen as disrespectful and are often insulted.¹⁸⁴ Such values may be very important to the culture, but are clearly in conflict with the CRC's right of a child to be heard within the family environment. The value of obedience and respect towards adults often prevents children from talking to adults when they have a problem as children are afraid to confront traditional norms.¹⁸⁵

The African culture also contains different hierarchal structures within the family. The biological parents are often not solely responsible for raising the child.¹⁸⁶ Extended family members are involved in raising and disciplining of the child. The head of the household generally makes final decisions regarding the child. The biological parent may not be the head of the household in an extended family home.¹⁸⁷ This can result in the biological parent having little authority over their child, and therefore they may have limited ability to make

¹⁷⁹ Ibid.

¹⁸⁰ Note 42, 8 - 9.

¹⁸¹ Note 42, 34.

¹⁸² Ibid.

¹⁸³ Note 2, 420.

¹⁸⁴ Note 2, 421.

¹⁸⁵ Note 2, 422.

¹⁸⁶ A Twum-Danso 'Reciprocity, respect and responsibility: the 3rs underlying parent-child relationships in Ghana and the implications for children's rights' *International Journal of Children's Rights* 17 (2009) 419.

¹⁸⁷ Note 2, 419; P M Stahl 'Don't forget about me: implementing article 12 of the United Nations on the Rights of a Child' (2007) 24(3) *International Journal of Comparative Law* 829

decisions concerning the child.¹⁸⁸ The parents would therefore have limited authority in deciding the degree to which children participated in the home.¹⁸⁹

Although cultural norms seem to impact on the level of a child's communication within the home, children from a variety of South African cultural backgrounds have expressed that they do not feel they are listened to, respected or taken seriously by adults within the home.¹⁹⁰ Thus even though there may be some households or cultures that appear to be more supportive of child participation within the home, the general feeling from South African children is that their views are not taken seriously.¹⁹¹

Advocacy and awareness-raising with traditional authorities, local and national political actors is needed in order to create respect for this right amongst traditional leaders and families.¹⁹² In order to implement the right to be heard within the family the mind-sets and attitudes of society has to change.¹⁹³

2.4.4 The private nature of the family environment

Family life is a very private environment, involving complex relationships and interdependency.¹⁹⁴ It has been considered a sacrosanct, an institution not subject to state intervention.¹⁹⁵ Government and non-governmental organisations have been reluctant to promote child participation within the home as the home environment is considered very private.¹⁹⁶ It is thus difficult to ensure that the right is exercised within families in day to day life. Critics of children's rights question the suitability of rights rhetoric in the child-parent relationship.¹⁹⁷ This is an interesting point to note, in that the right to be heard can be more easily enforced in the public domain than in the private. Rights groups have been set up to voice children's views on certain public issues. But it is much harder to ensure that children's

¹⁸⁸ Ibid.

¹⁸⁹ Ibid.

¹⁹⁰ Note 22, 332.

¹⁹¹ Note 17, 157

¹⁹² 'Children's participation' *PAN Children* available at <http://children.pan.org.za/sites/default/files/publicationdocuments/Children's%20participation%20Topical%20guide.pdf> accessed on 14 November 2015, 3.

¹⁹³ Note 150 above, 109.

¹⁹⁴ Note 217 above, 157.

¹⁹⁵ M Couzens 'Autonomy Rights versus Parental Autonomy family' in Alen A...et al. (ed) *The UN children's rights convention: theory meets practice* (2007) 427.

¹⁹⁶ Note 73 above.

¹⁹⁷ N Taefi 'The synthesis of age and gender: intersectionality, international human rights law and the marginalisation of the girl-child' *International Journal of Children's Rights* 17 (2009) 352.

voices are being heard in the private sphere of a family. Sutherland has suggested that the “manifold reasons for listening to children in the family provide the justification and the challenge is to overcome the practical barriers.”¹⁹⁸

2.5 Summary

This chapter laid the foundation for the preceding chapters. From a reading of this chapter the reader will be aware of the benefits, concerns and challenges associated with the child’s right to be heard within the family. Child participation within the family is highly beneficial to the child. Child participation within the family gives respect and recognition to the individual identity and human dignity of the child. Furthermore the right is important in the role it plays in enhancing other rights. The right is also beneficial as it plays a role in developing a child’s social and participation skills; improves the quality of family decisions; and aids in protecting children from abuse. Upon a closer analysis it appears that the concerns regarding child participation within the family are largely unfounded. Therefore parents cannot use these concerns to justify their non-compliance with the relevant sections of the Children’s Act. The challenges associated with implementing the child’s right to be heard within the family environment were identified. Understanding these challenges is important when drawing conclusions regarding the implementation of the child’s right to be heard within South Africa.

¹⁹⁸ Note 17 above, 157.

CHAPTER THREE

INTERNATIONAL AND NATIONAL LAW PERTAINING TO THE CHILD'S RIGHT TO BE HEARD WITHIN THE FAMILY

3.1 Introduction

The right of the child to be heard has been incorporated into both the international and regional children's rights instruments, namely, the CRC and the ACRWC respectively. While neither of these instruments makes specific reference to the child's right to be heard within the family, this is addressed more extensively in General Comment No 12 to the CRC. Nevertheless both instruments have greatly influenced the drafting of the Children's Act,¹⁹⁹ including the provisions pertaining to the child's right to be heard. This chapter will therefore provide an analysis of the child's right to be heard as contained in both the CRC and the ACRWC. On this basis the research will thereafter discuss and analyse the child's right to be heard within the family, as implemented in South African domestic law.

3.2 The international legal framework for the protection of the right to be heard within the family environment

The international legal instruments that will be considered in this research are the CRC and the ACRWC. The CRC has been chosen as it deals exclusively with children's rights, and is the most widely ratified Convention in the world,²⁰⁰ and was the first legally binding human rights instrument for children.²⁰¹ The ACRWC has been chosen as it is the African regional children's rights instrument. Both treaties have greatly impacted on Africa by creating an awareness of children's rights.²⁰² More specifically the CRC and the ACRWC have impacted on the way that children are viewed in South African law currently.²⁰³ These treaties both contain a clause dealing with the right of children to be heard. Therefore the treaties have been specifically chosen based on the relevance they have to this particular topic and the

¹⁹⁹ 38 of 2005.

²⁰⁰ 'Ratification Status for CRC - Convention on the Rights of the Child' *United Nations Human Rights – Office of the High Commissioner of Human Rights* available at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en accessed on 31 May 2015.

²⁰¹ L Yanghee 'Introduction: Celebrating Important Milestones for Children and Their Rights' (2010) 18(4) *International Journal of Children's Rights* 479.

²⁰² Note 117 above, 483.

²⁰³ J Heaton 'South Africa: Changing contours' in E Sutherland's (ed) *The future of child and family law: international predictions* (2012) 403.

impact that they have had on the child's right to be heard. An analysis of the relevant sections of these treaties reveals what international law requires in respect of children's right to be heard in decisions within the family environment.

3.2.1 United Nations Convention on the Right of the Child 1989 (CRC)

The CRC was ratified by South Africa in 1995. As a result of this the Children's Act 38 of 2005 was enacted in accordance with article 4 of the Convention.²⁰⁴ Therefore the CRC greatly influenced the drafting of the new Children's Act 38 of 2005.²⁰⁵ Article 12 of the CRC contains the child's right to be heard, and has in many ways inspired sections 10 and 31 of the Children's Act dealing with child participation. It is therefore necessary to consider Article 12 of the CRC and its General Comment in so far as they relate to a child's right to be heard within the family environment. Article 12(1) of the CRC states 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.”²⁰⁶

Article 12 does not make specific reference to the family environment. According to Article 12 the child has a “right to express... views ... in all matters affecting the child.”²⁰⁷ Article 12 will therefore apply to decisions that are made within the family where the decision at hand will affect the child.²⁰⁸ Although article 12 does not refer specifically to the family environment, it is discussed in General Comment No. 12. Paragraphs 90- 96 of the General Comment provide guidance on how the right to be heard should be implemented within the family environment. The discussion below will therefore focus on the child's right to be heard in the family as set out in the General Comment and not on a child's general right to be heard as contained in article 12.

²⁰⁴ Article 4, United Nations Convention on the Rights of a Child 1989

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

²⁰⁵ ‘Review of the Child Care Act: Discussion Paper 103/2002, Project 110’ *South African Law Reform Commission* available at <http://www.justice.gov.za/salrc/dpapers/dp103.pdf> accessed on 15 November 2015, 1; C J Davel & A Skelton *Commentary on the Children's Act* ed 5 Cape Town: Juta, (2012) 9 - 10.

²⁰⁶ Note 12 above, article 12(1).

²⁰⁷ Note 12 above, article 12(1).

²⁰⁸ Note 47 above, 9.

3.2.2 General Comment No. 12 on the Convention on the Rights of a Child

Part C of the CRC deals with the implementation of the CRC in different settings.²⁰⁹ This part of the General Comment addresses the fact that “the right to be heard” has to be implemented in the “diverse settings and situations in which the child grows up.”²¹⁰ Each setting will have its own dynamics which may place children in a particular role or in some way limit their participation in everyday matters and crucial decisions.²¹¹ One of the settings that is provided for is the family environment, which is the focus of this study. What follows therefore is an analysis of the paragraphs relating to the implementation of the right to be heard within the family environment.

Paragraph 90 starts off by broadly explaining the importance and benefits of child participation within the family.²¹² Paragraph 90 states as follows:

“A family where children can freely express views and be taken seriously from the earliest ages provides an important model, and is a preparation for the child to exercise the right to be heard in the wider society. Such an approach to parenting serves to promote individual development, enhance family relations and support children’s socialization and plays a preventive role against all forms of violence in the home and family.”

These benefits described in this paragraph are discussed in more detail in Chapter Two. However, it is of importance to note that the Committee on the Rights of a Child recognises the benefits of child participation within the family.²¹³ These benefits have the potential to encourage parents who read the General Comment to listen to their child’s views within the family. There is however a concern among parents that child participation within the family is potentially harmful in that it encourages disrespect for parents, places undue burden on children; children may make a wrong decision etc.²¹⁴ However, despite negative responses to the idea of child participation within the family, cases and studies have found that in most instances these fears are unfounded, and the practice of child participation within the family

²⁰⁹ Note 4 above, para 89.

²¹⁰ Ibid.

²¹¹ Ibid.

²¹² UN Committee on the Rights of the Child, General Comment No. 12 (2009): Paragraph 90: “A family where children can freely express views and be taken seriously from the earliest ages provides an important model, and is a preparation for the child to exercise the right to be heard in the wider society. Such an approach to parenting serves to promote individual development, enhance family relations and support children’s socialization and plays a preventive role against all forms of violence in the home and family.”

²¹³ Note 2 above, 510.

²¹⁴ Note 3 above, 84.

attracts positive results for the child, family and community.²¹⁵ This supports the idea that child participation within the family does result in the benefits described in paragraph 90 of the UN Committee on the Rights of the Child, General Comment No. 12 (2009).

After addressing the benefits of child participation within the family, the General Comment No 12 goes on to discuss two matters deeply related to a child's right to be heard within the family, namely the parental right to provide direction and guidance and the evolving capacity of the child.²¹⁶ Paragraph 91 states as follows:

“The Convention recognizes the rights and responsibilities of parents, or other legal guardians, to provide appropriate direction and guidance to their children (see para. 84 above), but underlines that this is to enable the child to exercise his or her rights and requires that direction and guidance are undertaken in a manner consistent with the evolving capacities of the child.”

According to paragraph 91, a parent has the right to provide “appropriate direction and guidance to their child.”²¹⁷ This direction and guidance is to compensate for the child's lack of knowledge, experience and understanding.²¹⁸ However, this parental right has two qualifications. Firstly the purpose of the parents providing direction and guidance is to enable the child to exercise his or her other rights.²¹⁹ The second qualification is that the direction and guidance of the parent has to be undertaken in a “manner consistent with the child's evolving capacities”.²²⁰ This paragraph of the General Comment essentially addresses what is contained in article 5 of the CRC. Article 5 of the CRC provides parents and guardians with a right to provide their child guidance on how to exercise their rights in the Convention. This direction and guidance is to be given in a manner that respects the child's evolving capacities.²²¹ The concept of “evolving capacity” referred to above denotes the continual growth of a child's competence in different areas and to undertake and complete different tasks.²²² This growth in competence is not solely because of the child's increase in age but is

²¹⁵ Ibid.

²¹⁶ Note 12 above, article 5.

²¹⁷ Note 4 above, 91.

²¹⁸ Note 17 above.

²¹⁹ G Lansdown ‘The Evolving Capacities of the Child’ *UNICEF* available at <http://www.unicef-irc.org/publications/pdf/evolving-eng.pdf> accessed on 15 November 2015, 82.

²²⁰ Ibid.

²²¹ Note 2 above.

²²² Note 46 above, x.

also attributed to the experiences the child has.²²³ The manner of direction and guidance provided by the parent has to continually adapt to accommodate the child's increasing level of knowledge, understanding and experience.²²⁴ It may be necessary for a parent or guardian of a very young and inexperienced child to make the decision for the child, while a parent of a more mature and experienced child may provide guidance to the child through advice and reminders.²²⁵ In the context of the right to be heard, once a child has expressed a view pertaining to a decision, a parent may be required to provide direction and guidance to their child as to what the right decision will be. The way the parent provides this direction and guidance will differ according to the child's understanding, knowledge and experience in the situation.

There are different views pertaining to parental direction and guidance and the child's decision making "powers". Child liberalists advocate that children should have complete self-determination rights, and should be able to make their own decisions.²²⁶ It has however been argued that this is unrealistic.²²⁷ It is firstly regarded as unrealistic as children who are very young and inexperienced could make decisions that are harmful to themselves, and which are not in their best interest.²²⁸ Furthermore children form part of a family unit, it is impractical for each family member to have their way all the time. Family dynamics are such that they sometimes require compromise.²²⁹ By addressing the rights and responsibilities of the parents, the General Comment provides a holistic approach to child participation within the family.²³⁰ As it recognises the role parents' play in the life of the child, and gives effect to the new child-centred approach to law.

Paragraph 92 of the General Comment requires state parties to take "legislative and other measures to ensure the implementation of the right"²³¹. Paragraph 92 reads as follows:

"States parties should encourage, through legislation and policy, parents, guardians and childminders to listen to children and give due weight to their views in matters that concern them. Parents should also

²²³ Ibid.

²²⁴ Note 17 above, 84.

²²⁵ Ibid.

²²⁶ A Jones & K Frank 'Convergence and Divergence between the UN Convention on the Rights of Children, and the African Charter on the Rights and Welfare of the Child' (2013) 3(1) *Sacha Journal of Human Rights* 48.

²²⁷ T Boezaart *Child Law in South Africa* (2009) 259.

²²⁸ Note 4 above.

²²⁹ Note 3 above.

²³⁰ Note 2 above, 505.

²³¹ Note 4 above, 92.

be advised to support children in realizing the right to express their views freely and to have children's views duly taken into account at all levels of society."²³²

South Africa has satisfied this requirement in that it enacted sections 10 and 31 of the Children's Act 38 of 2005. However legislative change in itself is not sufficient to ensure the implementation of this right in the lives of individuals. This participatory style of parenting is a relatively new concept. Many parents', who are expected to parent their children in this manner, would have never experienced it themselves. They therefore will be unaware of how it is to be implemented practically, and the possible struggles and hurdles experienced in implementing this participatory style of parenting. Further, it is likely to go against many cultural and religious beliefs. The General Comment addresses these issues by requiring educational programmes to be created to support the development of child participation within the family.²³³

The Committee has urged "states parties to avoid tokenistic approaches, which limit children's expression of views, or which allow children to be heard, but fail to give their views due weight."²³⁴ The Committee has provided certain guidelines that should be followed for the effective, ethical and meaningful implementation of article 12.²³⁵

3.2.3 Summary

The General Comment No.12 addresses the concept of child participation within the family from a number of aspects. It highlights the importance of child participation within the family, this is significant as child participation within the family is a fairly novel concept, thus many people are unaware of its importance and benefits. The General Comment then goes on to address issues closely related to a child's right to be heard within the family, namely, parental right to provide "direction and guidance" to their child and "the evolving capacity"²³⁶ of the child. The General Comment thereafter places a requirement on state parties to take legislative and policy measures to ensure the implementation of the right.²³⁷ Foreseeing that legislative initiative itself would not be sufficient the General Comment addresses the need for parenting programmes, where this issue of child participation within

²³² Note 4 above, para 92.

²³³ Note 2 above; Note 04 above, paras 93 - 94.

²³⁴ Note 4 above, para132.

²³⁵ Note 4 above, para 134

²³⁶ Note 4above, para 91.

²³⁷ Note 4above, para 92.

the family is addressed, and parents are provided with skills for incorporating participation within the home. The General Comment therefore provides a very broad and holistic approach to the implementation of child participation within the family. Further on, under the discussion of South African national law, we will observe the extent South Africa has drawn from this General Comment in its implementation of child participation within the family. The study will now go on to analyse African regional children's rights instrument, the ACRWC, and how its incorporation of the child's right to be heard within the family.

3.3 African Charter on the Rights and Welfare of a Child (1990) (ACRWC)

The CRC was criticised for not adequately addressing children's rights issues that were unique to Africa.²³⁸ Such issues were apartheid, social-economic issues, the discrimination of female children, and the role and position of the child within the African family.²³⁹ The ACRWC was therefore adopted to address the issues that were unique to Africa and implement children's rights within an African context.²⁴⁰ South Africa ratified the ACRWC on 21 January 2000.²⁴¹ Below is an analysis of whether the ACRWC has provided protection to the child's right to be heard within the family environment.

3.3.1 Protection of the child's right to be heard within the family environment

The right of the child to be heard is found under article 4(2) of the ACRWC which deals with the best interest of the child. Article 4(2) reads as follows:

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

²³⁸ Note 4 above, 483 - 484.

²³⁹ Note 4 above, 483; The African Charter on the Rights & Welfare of the Child 1990, the preamble.

²⁴⁰ Note 4 above, 483 - 484.

²⁴¹ 'ACRWC ratification table' *The African Union* available at <http://pages.au.int/acerwc/pages/acerwc-ratifications-table> accessed on 31 May 2015.

Article 4(2) provides explicitly for children’s participation in “judicial and administrative proceedings”²⁴² and does not address the right to be heard in other matters concerning the child. The ACRWC recognises children as active participants in the family/community,²⁴³ there is a duty on children to respect parents, superiors and elders²⁴⁴ which could indicate that children’s views are only welcomed in a very narrow context.²⁴⁵ Further the duty to “work for the cohesion of family”²⁴⁶ and the “preservation of African cultural values”²⁴⁷ could necessitate children submitting and consenting to adults rather than expressing their own views.²⁴⁸ The Charter does not contain a provision that specifically relates to children’s right to be heard within the family environment. It has been argued that children are not afforded a right to be heard in other environments as this is not in accordance with traditional African culture.²⁴⁹ As mentioned above, the right of children to be heard is uncommon within the African culture.²⁵⁰ Some authors have argued that this assumption is false, and that the African culture does in fact welcome the views of children.²⁵¹ There is said to be a number of African cultural traditions which respect the rights of children.²⁵²

3.3.2 Comparison of the CRC and the ACRWC

The child’s right to be heard is incorporated differently in both the CRC and the ACRWC. Firstly the CRC applies to children who are capable of forming their view while the ACRWC requires that the child be capable of communicating their view. It has been argued that this wording of the ACRWC is more restrictive than the CRC in that children who are disabled and unable to communicate through verbal or written means are unprotected by the right.²⁵³ However it has been argued that the word “communicate” is not limited to verbal

²⁴² The African Charter on the Rights & Welfare of the Child 1990, article 4(2).

²⁴³ Ibid, the preamble.

²⁴⁴ Ibid, article 31.

²⁴⁵ Note 2 above, 110.

²⁴⁶ Note 228 above, article 31(a).

²⁴⁷ Note 228 above, article 31(d)

²⁴⁸ Note 2 above, 510.

²⁴⁹ Note 3 above, 81.

²⁵⁰ Note 3 above, 81.

²⁵¹ Note 212 above.

²⁵² B Mezmur B ‘The African Children’s Charter versus the UN Convention on the Rights of the Child: A zero-sum game?’ (2008) 1 *SA Public Law* 23.

²⁵³ Gose M ‘The Charter on the Rights and Welfare of the Child’ *Community Law Centre* 2002, accessed on 20 March 2016 at <http://dullahomarininstitute.org.za/our-focus/childrens-rights-project/Publications/Other%20publications/The%20African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf>, 125; Jones A & Frank K ‘Convergence and divergence between the UN Convention on the Rights of Children, and the African Charter on the Rights and Welfare of the Child’ (2013) 3(1) *Sacha Journal of Human Rights* 52.

communication.²⁵⁴ The ACRWC requires the child's views be heard and taken into consideration. While the CRC gives the child the right to express their views and there is an obligation to give the child's views due weight. A drawback of ACRWC is that the child's views will be taken into consideration 'in accordance with the provisions of appropriate law'.²⁵⁵ The impact of the child's voice is therefore limited by the provisions of the appropriate law, the State therefore has a wide discretion to limit the right.²⁵⁶ There is an obligation to give due weight in accordance with the age and maturity. Therefore the views of children who are mature and older should have more impact on a final decision than those of a very young and immature child.²⁵⁷ Lastly the right in the CRC is applicable to all matters concerning the child while the ACRWC is only applicable to judicial proceedings.

3.4 The national legal framework for the protection of the right to be heard within the family environment

The international instruments, particularly the CRC has played a significant role in the drafting of the new Children's Act 38 of 2005.²⁵⁸ Section 10 of the Children's Act deals specifically with the child's right to be heard. Section 10 is in many respects a restatement of article 12 of the CRC.²⁵⁹ Section 31 of the Children's Act was in many ways inspired by article 12 of the CRC. An interpretation of the CRC above²⁶⁰ indicated how state parties are obliged to ensure that mechanisms are established to guarantee that the child's views are heard, and further that these views are given weight. The research will now go onto analyse the relevant sections of the Children's Act in order to determine whether the right to be heard within the family environment has been implemented effectively.

3.4.1 The Constitution of the Republic of South Africa, 1996

The South African Constitution does not contain an explicit provision on child participation. It does entrench, however, the 'best interest' principle, by stating that "[a] child's best

²⁵⁴ Jones A & Frank K 'Convergence and divergence between the UN Convention on the Rights of Children, and the African Charter on the Rights and Welfare of the Child' (2013) 3(1) *Sacha Journal of Human Rights* 52.

²⁵⁵ Gose M 'The Charter on the Rights and Welfare of the Child' *Community Law Centre* 2002, accessed on 20 March 2016 at <http://dullahomarinstitute.org.za/our-focus/childrens-rights-project/Publications/Other%20publications/The%20African%20Charter%20on%20the%20Rights%20and%20Welfare%20of%20the%20Child.pdf>, 125.

²⁵⁶ Ibid.

²⁵⁷ Note 2, 507 – 508.

²⁵⁸ Note 191 above.

²⁵⁹ C J Davel & A Skelton *Commentary on the Children's Act* ed 5 Cape Town: Juta, (2012) 10.

²⁶⁰ Heading 2.2.1. (i) above.

interests are of paramount importance in every matter concerning the child.”²⁶¹ Listening to the views of children in matters that affect the child has been regarded as forming part of the child’s best interest.²⁶² The Constitution does however provide a child with the right to have a “legal practitioner assigned by the state, and at the state expense, in civil proceedings affecting the child if substantial injustice would otherwise result”.²⁶³ Furthermore section 12(2)(a) of the Constitution provides that everyone has the “right to make decisions concerning their reproduction.” However, despite this the Constitution does not contain a general right to be heard, nor a right to be heard within the family. In light of the fact that the child’s right to be heard is “one of the four general principles”²⁶⁴

3.4.2 Children’s Act 38 of 2005

The Children’s Act was enacted to give effect to the provisions in section 28 of the Constitution as well as the international human rights instruments relating to children.²⁶⁵ In keeping with the provision of Article 12 of the CRC the South African Law Reform Commission (SALRC) incorporated the child participation process into its drafting of the Children’s Act.²⁶⁶ Furthermore the SALRC identified that one of the underlying principles to be incorporated into the Children’s Act was the child’s right to participate in decisions regarding his or her life.²⁶⁷ The SALRC identified the provision as one of the fundamental principles of modern children’s rights approach, in keeping with the CRC.²⁶⁸ Clause 2(4) of the Discussion Paper reads as follows:

“Whenever a child is in a position to participate meaningfully in any decision-making affecting him or her, he or she must be given the opportunity so to participate and proper consideration must be given to the child’s opinion, views and preferences, bearing in mind the child’s age and maturity.”²⁶⁹

On this basis section 10 was incorporated into the Children’s Act, which provides children with the right to be heard in all matters that affect them.

²⁶¹ The 1996 Constitution, section 28(2).

²⁶² Note 3 above, 32.

²⁶³ Note 73 above, section 28(1)(h).

²⁶⁴ Note 4 above, para 2.

²⁶⁵ Note 15 above, the preamble.

²⁶⁶ ‘Discussion Paper 103, Project 110 - Review of the Child Care Act’ South African Law Commission available at <http://www.justice.gov.za/salrc/dpapers/dp103.pdf>, accessed on 20 March 2016 ,8.

²⁶⁷ Ibid, 77.

²⁶⁸ Ibid, 74.

²⁶⁹ Ibid, 8.

Section 10 relates to children’s right to be heard in any decision affecting them. Section 31 focuses specifically on decisions that are made within the family environment. Section 10 of the Children’s Act reads as follows:

“Every child that is of such an age, maturity and stage of development as to be able to participate in any matter concerning that child has the right to participate in an appropriate way and views expressed by the child must be given due consideration.”

A comparison between section 10 of the Children’s Act and Article 12 of the CRC reveals a slight difference in wording. This difference in wording impacts on the extent to which the right is protected. In both the CRC and the Children’s Act the child has the right to participate in any matter concerning them. However the Children’s Act is more restrictive as it requires that the child be of such an “age, maturity and stage of development”²⁷⁰ so as to participate, while the CRC only requires that the child be capable of forming their own views. In this way the Children’s Act creates a heavier restriction on permitting children to participate. However there is a danger that the CRC could be misinterpreted as children with disabilities could be thought to be incapable of forming their own views.

According to the CRC the child is given the right to ‘express’ their views, while the Children’s Act allows the child the right to ‘participate in an appropriate way’. The term “express” refers solely to the child’s communication of their view.²⁷¹ However the term participation involves expressing views and having their views taken seriously.²⁷² Participation involves expression, information sharing and the consideration of the child’s views.²⁷³ The child’s views are to be attributed weight in accordance with their age and maturity.²⁷⁴ However although the CRC does not use the term “participation”, the requirement to consider the child’s views in accordance with their age and maturity ensures proper participation.

²⁷⁰ Note 15 above, section 10.

²⁷¹ Note 3 above, 3.

²⁷² Ibid.

²⁷³ Ibid.

²⁷⁴ Ibid.

The other distinguishing difference between article 12 of the CRC and section 10 of the Children’s Act is that the Children’s Act provides that the views must be given “due consideration”²⁷⁵, this is different from the CRC which says that their views must be given “due weight in accordance with the age and maturity”²⁷⁶ of the child. This analysis reveals that with the CRC the child’s age, maturity and stage of development affect how much weight is given to their views. While in the Children’s Act the child’s participation is dependent on the child’s age, maturity and stage of development. This wording has been phrased slightly differently in section 31 of the Children’s Act.

According to section 31(1)(a) of the Children’s Act a person holding parental responsibilities and rights²⁷⁷ in respect of a child must give “due consideration to any views and wishes expressed by the child, bearing in mind the child’s age, maturity and stage of development, before taking a major decision involving a child”.²⁷⁸

The type of decisions referred to in section 31(1)(a) are those typically made within a family setting, and which will have an effect on the life of the child. The decisions referred to in section 31(1)(a) are provided for in section 31(1)(b) as follows:

“A decision referred to in paragraph (a) is any decision –

- i. in connection with a matter listed in section 18(3) (c);²⁷⁹
- ii. affecting contact between the child and the co-holder of the parental responsibilities and rights;
- iii. regarding the assignment of guardianship or care in respect of the child to another person in terms of section 27; or

²⁷⁵ Note 15 above, section 10.

²⁷⁶ Note 12 above, article 12.

²⁷⁷ From here after where the research refers to the word ‘parent’, it includes all those who fall under the scope of ‘holders of parental rights and responsibilities’.

²⁷⁸ Note 15, section 31(1)(b).

²⁷⁹ The Children’s Act 38 of 2005, section 18(3)(c) states the following:

- (3) Subject to subsections (4) and (5), a parent or other person who acts as guardian of a child must –
- (c) give or refuse any consent required by law in respect of the child, including –
 - i. consent to marriage.
 - ii. consent to the child’s adoption;
 - iii. consent to the child’s departure or removal from the Republic;
 - iv. consent to the child’s application for a passport; and
 - v. consent to the alienation or encumbrance of any immovable property of the child.

- iv. which is likely to significantly change, or to have an adverse effect in, the child's living conditions, education, health, personal relations with a parent or family member or, generally, the child's well-being.²⁸⁰

It is important to understand when the section is applicable. Firstly it is only applicable to children who express their views and wishes.²⁸¹ However this does not mean that the child has to be fully developed, from a very young age children can express their views through non-verbal communication such as “play, body language, facial expressions, drawing and other non-verbal means.”²⁸² Secondly those wishes “are given weight in accordance with the child's age, maturity and stage of development”.²⁸³ This means that the parents have to seriously consider their child's views, and consider the factors of “age, maturity and stage of development” when determining how much weight to attribute to the child's views.²⁸⁴ Furthermore, the child's right to have their views considered in decisions made within the family environment has been limited to a list of major decisions.²⁸⁵ A closer examination of each subsection contained in section 31(1)(b) helps one to understand when the right can be implemented, and whether the requirements can be readily implemented.

3.4.2.1 Marriage

Section 31(1)(b)(i) of the Children's Act refers to decisions in connection with matters listed in section 18(3)(c). The first of these matters is “marriage.”²⁸⁶ One of the requirements of a valid marriage is that both spouses must consent to the marriage.²⁸⁷ When one of the spouses to the marriage is a minor, the consent of the child's parent or guardian is necessary for the marriage to be valid.²⁸⁸ Section 18(3)(c)(i) endows parents with the authority to consent to the marriage of their minor child. However in considering whether or not to consent to the marriage, section 31(1)(b)(i) requires that the parent must give “due consideration to any views and wishes of the child, bearing in mind the child's age, maturity and stage of development”.²⁸⁹ Therefore in considering whether to consent to the marriage of their child,

²⁸⁰ Note 15 above, section 31(1)(b).

²⁸¹ Note 47 above, 9.

²⁸² Note 3 above, 21; Note 13 above, 20.

²⁸³ Note 15 above, section 31(1)(a)

²⁸⁴ Note 2 above, 508. Note 2 above, 23; Note 4 above, para 28.

²⁸⁵ Note 17 above, 166 - 168.

²⁸⁶ Note 15 above, section 18(3)(c)(i).

²⁸⁷ Marriage Act 25 of 1961, section 30(1) of the; Recognition of Customary Marriages Act 120 of 1998, section 3(1)(a)(ii) of the; Civil Union Act 17 of 2006, section 11(2) .

²⁸⁸ Marriage Act 25 of 1961, section 24(1) and 24(A).

²⁸⁹ Note 15 above, section 31(1)(b).

the parents must consider the views and wishes of their child. This is important in the context of South Africa where there is a fair amount of child marriage.²⁹⁰ Children have been known to express their consent to marriage as a result of the undue influence of family members.²⁹¹ It is important that the parents take into account the actual views of their child before consenting to the proposed marriage of their child. In South Africa there is a cultural practice known as *ukuthwala*. *Ukuthwala* is an unconventional form of engagement, where the bridegroom forcibly abducts the woman, with the intention of forcing the parents of the girl to consent to the marriage and accept the proposal.²⁹² There is sometimes collusion between the bridegroom and the girl if they are desire to get married but are unable to obtain the consent of their parents.²⁹³ This practice does not adhere to the requirement that the parents and children must consent to a proposed marriage. Although in many cases the girl may consent, this is not always the case. This cultural practice therefore disregards section 31(1)(b)(i) of the Children's Act. Furthermore the practice is in violation of best interest of the child principle as provided for in section 28 of the Constitution.

3.4.2.2 Adoption

Another decision listed in section 18(3)(c) is a parent or guardians' consent to their child's adoption. Before a parent or guardian may give or refuse consent to the adoption of the child, they are required to consider the views and wishes of the child concerned.²⁹⁴ A decision regarding the adoption of a child is certainly a 'major decision', as it significantly impacts on the child's life. Thus, a child who is considered for adoption certainly has an interest in expressing their views regarding their proposed adoption. This section will not be applicable where a decision is made regarding the child's adoption before the child is born, or when the child is a very young baby, as the sections is only applicable to children who can express a view.

²⁹⁰ V Mtshali 'Forced child marriage practiced under the pretext of customary marriage in South Africa' (2014) 15 (2) *Child Abuse Research in South Africa* 51.

²⁹¹ Ibid.

²⁹² 'Revised Discussion Paper 138 - The Practice of *Ukuthwala*' *South African Law Reform Commission* available at <http://www.justice.gov.za/salrc/dpapers/dp132-UkuthwalaRevised.pdf>, accessed on 20 March 2016, 6-7.

²⁹³ Ibid. '

²⁹⁴ Note 15 above, section 31(1)(b)(i) & section 18(3)(c); Note 25 above, 99.

3.4.2.3 Departure or removal from the Republic; application for a passport; alienation/encumbrance of immovable property of a minor

Section 18(3)(c) provides for the “departure or removal from the republic”. Therefore when a parent is considering “consenting to the departure or removal of their child from the republic,”²⁹⁵ they are required to consider the views of the child concerned, before reaching their final decision.²⁹⁶ A decision to relocate to another country is considered to be one that will significantly affect the life of the child.²⁹⁷ Similarly in terms of section 18(3)(c) when a parent is considering consenting to the application for their minor passport, they must first consider the views of the child concerned, before making their final decision.²⁹⁸ The final category contained in section 18(3)(c) is the “alienation/encumbrance of immovable property of the minor”.²⁹⁹ Therefore where a parent is considering consenting to the alienation/encumbrance of immovable property of the minor child, they must first consider the views of the child concerned, before reaching their final decision.

3.4.2.4 Affecting contact between the child and a co-holder of parental responsibilities and rights

More than one person may hold parental rights and responsibilities (hereafter PRR) in respect of a child.³⁰⁰ Married or unmarried biological mothers hold PRR’s in respect of their child,³⁰¹ married or unmarried biological fathers hold PRR’s in respect of their child,³⁰² and the guardians of a child may also hold PRR’s in respect of the child.³⁰³ The parent has a duty to listen to the child’s views when making a decision concerning the child’s contact with another parent.³⁰⁴ Difficulties can sometimes arise in determining the level of contact that the child has with each holder of PRR’s. The Act provides that holders of PRR’s may “agree on a parenting plan to determine the exercise of their respective responsibilities and rights in respect of the child.”³⁰⁵ The parenting plan can *inter alia* deal with the contact between child

²⁹⁵ Section 18(1)(c)

²⁹⁶ Note 15 above, section 18(3)(c)(iii); HG v CG 2010 (3) SA 352 (ECP) para 19 – 24.

²⁹⁷ Note 213 above, 98.

²⁹⁸ Note 15 above, section 18(3)(c)(iv)

²⁹⁹ Note 15 above, section 18(3)(c)(v).

³⁰⁰ Note 15 above, section 30(1).

³⁰¹ Note 15 above, section 19(1).

³⁰² Note 15 above, section 20 and 21(1)(a) & (b).

³⁰³ Note 15 above, section 23.

³⁰⁴ Note 47 above, 9.

³⁰⁵ Note 15 above, section 33(1).

and the respective holders of PRR's.³⁰⁶ Where holders of PRR's are having difficulties exercising their rights, they may not approach a court for intervention until they have concluded a parenting plan which deals with *inter alia* the contact between the child and any of the parents.³⁰⁷ The parenting plan may be either made an order of court or to be registered with the family advocate.³⁰⁸ The Children's Act obliges the parents to consider the views of their child when concluding the parenting plan.³⁰⁹

The Children's Act Regulation: General Regulations Regarding Children³¹⁰ provides the following regarding the participation of children in preparing parenting plans:³¹¹

1. "Bearing in mind the child's age, maturity and stage of development, such child must be consulted during the development of a parenting plan, and granted an opportunity to express his or her views, which must be accorded due consideration.
2. When a parenting plan has been agreed the child must, bearing in mind the child's age, maturity and stage of development, be informed of the contents of the parenting plan by the family advocate, a social worker, social service professional, psychologist, suitably qualified person or the child's legal representative."

The parenting plan may either be created through the assistance of a "family advocate, social worker or psychologist."³¹² The other way that a parenting plan can be prepared is after mediation by a "social worker or other suitably qualified person"³¹³ as contemplated in section 33(5)(b) of the Act.³¹⁴ The parenting plan that is submitted to the court or the family advocate has to be accompanied by a form 9 or form 10.³¹⁵ The family advocate, social worker or psychologist or other suitably qualified person has to indicate on the form whether they have complied with the requirements of the regulation 11, namely, to inform the child of the contents of the parenting plan and to grant the child an opportunity to express his or her views.³¹⁶ Thus the regulation ensures that the child has had an opportunity to express his/her views regarding contact with a co-holder of parental rights and responsibilities. The parent's

³⁰⁶ Note 15 above, section 33(3)(c).

³⁰⁷ Note 15 above, section 33(2).

³⁰⁸ Note 15 above, section 34(1)(b).

³⁰⁹ Note 15 above, section 98.

³¹⁰ No. R261 2010.

³¹¹ General Regulations Regarding Children No. R261 2010, section 11.

³¹² Note 283 above, section 10(2)(a), accompanied by form 9.

³¹³ Note 15 above, section 33(5)(b) Children's Act.

³¹⁴ Note 283 above, section 10(2)(b), accompanied by form 10.

³¹⁵ Note 283 above, section 10(2)(a) & (b) of the Regulation respectively.

³¹⁶ Note 283 above, form 9 & 10.

duty to listen to the views of their child is therefore enforced by an outside entity (the family advocate).

3.4.2.5 Assignment of guardianship in terms of section 27

Section 31(1)(b)(iii) requires that parents consider the views of the child affected before a decision is made in terms of section 27. A parent therefore has to give the child an opportunity to express their view regarding the assigned care/guardianship. The parent is required to consider these views and give “due consideration in accordance with the child’s age and maturity.”³¹⁷ This nomination in a will is a decision that has the potential to adversely affect the life of the child, and therefore the child has a strong interest in expressing his or her views regarding the nomination.

3.4.2.6 Living conditions

Section 31(1)(b) refers to decisions which “is likely to significantly change, or to have an adverse effect on”³¹⁸ a number of listed circumstances. The first of these is the child’s “living conditions.” The section therefore does not pertain to any decision that is made regarding the child’s “living conditions” but only those decisions that are likely to “*significantly change or to have an adverse effect* on the child’s living conditions.”³¹⁹ The term “living conditions” has a very wide meaning. “Living conditions” has been known to refer to “the circumstances of a person’s life – shelter, food, clothing, safety, access to clean water.”³²⁰ Therefore when making such a decision a parent has to permit the child affected to express their views, but only in instances where the decision is “to *significantly change or to have an adverse effect* on the child’s living conditions.”³²¹ Examples include, moving homes, decisions relating to after school care, parental residency arrangements (in the case of children with divorced/separated parents), placement in children’s home (in the case of children who are under the guardianship of a children’s home) and children’s transport arrangements to and from school (as a safety factor).³²²

³¹⁷ Note 15 above, section 31(1)(a).

³¹⁸ Note 15 above, section 31(1)(b)(iv).

³¹⁹ Note 15 above, section 31(1)(b).

³²⁰ ‘English language and usage’ available at <http://english.stackexchange.com/questions/139021/whats-the-difference-between-life-conditions-and-living-conditions> access on 16 November 2015.

³²¹ Note 15 above, section 31(1)(b).

³²² Note 218 above, 98 & 99; Note 23 above, 156; Note 47 above, 9; Note 2 above, 22.

3.4.2.7 Education

The next circumstance referred to in this section is where the parents decision will “significantly change or have an adverse effect on”³²³ the child’s ‘education.’ It has been said in this regard that children have an interest in expressing which school they would like to attend.³²⁴ Further, children have an interest in the type of sports they play, the cultural activities they participate in and the subjects they will study at school.³²⁵ These types of educational decisions are said to affect the life of the child both short and long term.³²⁶ These types of decisions may seem trivial to the parent but it is important that the parent listens to the child’s views and takes them into consideration. In the case of *MEC for Education: Kwazulu-Natal and Others v Pillay*³²⁷ O’ Reagan J was dissatisfied that the views of the mother has only been communicated. The Judge requested that the child provide reasons as to why the school should in transgression of the school rules, permit her to wear a nose-stud.³²⁸ The Judge made mention of the fact that the pupil concerned was a teenager, her views would accordingly hold much weight. In this way the Courts are giving recognition to the need to implement and incorporate child participation in all aspects of the child’s life.

3.4.2.8 Health

In terms of section 31 of the Children’s Act a child’s views must be considered before a parent may make a decision that is likely to “significantly change, or to have an adverse effect on”³²⁹ the child’s health.³³⁰ The Act does not provide a definition of the word ‘health.’ Health has been regarded as referring to both physical and mental wellbeing.³³¹ Physical health is said to encompass nutrition and diet; physical activity; use of alcohol and drugs; medical care; rest and sleep.³³² Mental health is regarded as a “state of well-being where an individual understands his or her own potential and is able to cope with the normal stresses of

³²³ Note 15 above, section 31(1)(b).

³²⁴ Note 17 above, 156.

³²⁵ Note 2 above, 508.

³²⁶ Note 17 above, 156.

³²⁷ 2008 (1) SA 474 (CC).

³²⁸ *Ibid*, 177 – 178.

³²⁹ Note 15 above, section 31(1)(b).

³³⁰ Note 15 above, section 31(1)(b)(i) & section 18(3)(c)(iv).

³³¹ Hornby AS *Oxford Advanced Learner’s Dictionary of Current English* 6 ed (2000) 55; ‘WHO definition of health’ *World health organisation* available at <http://www.who.int/about/definition/en/print.html> accessed on 22 November 2014.

³³² What Is Physical Health? - Definition, Components & Examples *Education Portal* available at <http://education-portal.com/academy/lesson/what-is-physical-health-definition-components-examples.html#lesson> accessed on 19 October 2014.

life, and is able to work productively and fruitfully.”³³³ The concept of health is therefore very broad, covering many different areas of a child’s life. Decisions relating to the “medical treatment and surgical operation”³³⁴ of a child have to be implemented in light of section 129 of the Children’s Act.

Section 129(1) of the Children’s Act states that the subsections contained in section 129 do not apply to Section 5(2) of the Choice and Termination of Pregnancy Act 92 of 1996 (hereafter CTPA). Section 5(2) of the CTPA permits women of any age (including children) to consent to the termination of their pregnancy. The termination of one’s pregnancy is certainly a decision that will “*significantly change or to have an adverse effect on*”³³⁵ the child’s ‘health,’ however a girl child has authority to consent to the procedure herself and thus section 31(1)(b)(iv) is not applicable in this instance, as the final decision is not with the parent but with the child.

Section 129 (2) provides that a child “may consent to his or her own medical treatment if, the child is over the age of 12 years; and the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the treatment.”³³⁶ Therefore even though “medical treatment” would appear to be a ‘major decision’, section 31(1)(b)(iv) is not applicable if the requirements of section 129(2) are met. A decision that would appear to result in greater change to or have an even greater “*adverse effect*” on the child’s health is ‘surgical operations.’ Nevertheless section 129(3) provides that:

“A child may consent to the performance of a surgical operation on him or her if-

- a) the child is over the age of 12 years; and
- b) the child is of sufficient maturity and has the mental capacity to understand the benefits, risks, social and other implications of the surgical operation; and
- c) the child is duly assisted by his or her parent or guardian”.³³⁷

In terms of regulation 48, the consent by the child or parent/guardian must be in writing.³³⁸ Although the child has to be duly assisted by the guardian, the decision making authority lies

³³³ ‘Mental health: a state of well-being’ *World health organisation* available at http://www.who.int/features/factfiles/mental_health/en/ accessed on 22 November 2014.

³³⁴ Note 15 above, section 129.

³³⁵ Note 15 above, section 31(1)(b).

³³⁶ Note 15 above, section 129(2).

³³⁷ Note 15 above, section 129(3).

with the child, and the provisions of section 31(1)(b)(iv) do not apply. For both medical treatment and surgical operations the provisions of section 31(1)(b)(iv) only apply where “the child is under the age of 12 years; or over that age but is of insufficient maturity or is unable to understand the benefits, risks and social implications of the medical treatment/operation.”³³⁹

Therefore is sub-section 31(1)(b)(iv) implementable when it comes to the issue of ‘health’? The analysis of the section as it relates to section 129 reveals that it can only be implemented when section 129(4) & (5) are applicable. Holders of PRR may not be aware of the provisions of section 129, section 31(1)(b)(iv) should make reference to section 129 to ensure that holders of PRR are aware of how the section is to be implemented.

3.4.2.9 Personal relations with a parent or family member

The next circumstance listed is section 31(1)(b)(iv) is “personal relations with a parent or family member”.³⁴⁰ The parents ought to give “consideration to any views and wishes expressed by the child”³⁴¹ where their decision will “*significantly change or have an adverse effect* on the child’s personal relations with a parent or family member.”³⁴² The courts have recognised that the children’s views ought to be considered and given weight when making a decision regarding relocation and a change in primary residence.³⁴³ Such decisions would certainly affect the child’s personal relation with a parent. It has been found that children of different ages and stages of life feel differently about how their contact with another parent is structured, and it is therefore important to consider the child’s views in each case.³⁴⁴

3.4.2.10 The child's well-being

The parent ought to give consideration to the views and wishes expressed by the child where their decision will “*significantly change or to have an adverse effect* on the child’s ‘well-being.’”³⁴⁵ The term ‘well-being’ refers to a person’s general health and happiness, including

³³⁸ The General Regulations of the Children’s Act, No 261.

³³⁹ Note 15 above, section 129(4) &(5).

³⁴⁰ Note 15 above, section 31(1)(b)(iv)

³⁴¹ Note 15 above, section 31(1)(a)

³⁴² Note 15 above, section 31(1)(b).

³⁴³ HG v CG 2010 (3) SA 352 (ECP).

³⁴⁴ B Neal & J Flowerdew ‘New structures, new agency: the dynamics of child-parent relationships after divorce’ (2007)15 *International Journal of Children’s Rights* 26.

³⁴⁵ Note 15 above, section 31(1)(b)(i) & section 18(3)(c)(iv).

their emotional, physical and psychological well-being.³⁴⁶ It is thus a very broad term that encompasses a broad spectrum of the life of a child. In this way the section ensures that important aspects of a child's life are provided for. It is very broad, and the term is fairly vague which potentially could make it difficult for parents to understand exactly what is required of them.

3.5 Shortfalls falls in South African Law

The Constitution is the supreme law of the nation,³⁴⁷ and is innovative in including a section which deals exclusively with children's rights.³⁴⁸ The Committee on the Rights of the Child has referred to the child's right to be heard as one of the fundamental rights of the Convention, to be considered in the implementation of all the other rights in the CRC.³⁴⁹ It is therefore a shortfall in the South African law that our Constitution has not included the child's right to participate, as this is so important to the child's enjoyment of other rights. Nevertheless this has been incorporated through the Children's Act.³⁵⁰ The child's right to be heard has been incorporated through section 10. The wording of this section is very similar to the wording of article 12 of the CRC, however the slight difference in the wording makes the application of the right as contained in the Children's Act more restrictive than that in the CRC. The Children's Act has also addressed the child's right to be heard within the family environment through section 31(1)(a) and (b), which is the focus of this research. The section has provided for a list of major decisions to which the right is applicable. This section is a good effort in covering all the important decisions and *aspects* of a child's life, and has been regarded as a "workable definition."³⁵¹ However, the privacy of the family environment makes it undesirable and difficult to monitor the implementation of section 31(1)(a) and (b).³⁵² It is suggested that an effective form of implementation for such decisions would be creating greater awareness amongst holders of parental rights and responsibilities through parenting programmes.³⁵³ General Comment No. 12 makes reference to the need for parenting programmes in implementing the right. The Children's Act has provided for skills

³⁴⁶ Note 301 above, 1456.

³⁴⁷ The Constitution of South Africa 1996, section 2.

³⁴⁸ *Ibid*, section 28.

³⁴⁹ Note 3 above, vi.

³⁵⁰ 38 of 2005.

³⁵¹ Note 17 above, 167 & 169.

³⁵² Note 181 above, 427; Note 58 above, 157; CASE 'An assessment of child participation in the family in South Africa' *The Community Agency for Social Enquiry* (2006) available at <http://resourcecentre.savethechildren.se/sites/default/files/documents/1702.pdf> accessed on 14 November 2015,56.

³⁵³ Note 3 above, 81 – 82.

programmes such as parenting programmes in the norms and standards regulations.³⁵⁴ A number of parenting programmes have been implemented in South Africa but there is a need for more,³⁵⁵ and with an emphasis on child participation within the home

3.6 Summary

Children's right to be heard within the family environment is new and innovative to both traditional Western and African cultures alike. The CRC and the ACRWC have both addressed the right of the child to be heard, it would seem that the wording of the CRC is clearer and easier to implement. Nevertheless both treaties leave open-ended questions as to how the right is to be properly implemented and make no specific reference to the right to be heard within the family environment. The General Comment No. 12 however provides good direction on how the right is to be implemented within the family environment, and these should be considered in implementing the relevant section of the Children's Act. In implementing this right, section 31(1)(b) of the Children's Act has listed a number of key decisions where holders of parents are obliged to listen to the views of their children. Thereby encouraging a style of parenting which is child centred, instead of adult dominated. Lastly, in its efforts to implement the right within the family, the Children's Act has failed to introduce parenting programmes which have proved an effective way of aiding the implementation of the right to be heard within the family. Overall the effort in both international and national law, even with its shortfalls, has had a positive effect on challenging and changing traditional mind-sets which sort to entrench the subservient role of children within the family.

³⁵⁴ Annexure B, Part IV Norms and Standards for Prevention and Early Intervention Programmes.

³⁵⁵ Ward C & I Wessels "Rising to the Challenge: Towards Effective Parenting Programmes" in L Berry, L Biersteker, A Dawes, L Lake, L Smith & C Smith *Child Gauge* (2013) *Children's Institute: Cape Town* <<http://www.ci.org.za/depts/ci/pubs/pdf/general/gauge2013/South AfricanChildGauge2013.pdf>, 64.

CHAPTER FOUR

A COMPARATIVE ANALYSIS OF THE CHILD'S RIGHT TO BE HEARD WITHIN THE FAMILY

4.1 Introduction

South Africa is one of many nations that have been influenced by the international children's rights instruments to the extent that it has incorporated the rights contained in these instruments into its national law. Nations that incorporate international law into their domestic law do so in different ways, and some nations manage to implement the rights in a way that is more effective than others. Therefore an analysis of the implementation of a right within different jurisdictions can render useful insights on how the right is best implemented. This part of the study focuses on a comparison and an analysis of the right of a child to be heard within the family as implemented in the South African, Botswanan and Scottish Children's Acts. Based on the comparative analysis, recommendations will be made on how South Africa can improve its implementation of the child's right to be heard within the family environment.

Botswana is a neighbouring country of South Africa.³⁵⁶ Both Botswana and South Africa share a history of colonialism, consequently their current legal systems have been influenced by Roman-Dutch Law and English Common Law.³⁵⁷ Furthermore both Botswana and South Africa have incorporated the child's right to be heard within the family into their domestic law.³⁵⁸ Very few countries have done this.³⁵⁹ Botswana's incorporation of this right into its domestic law is therefore a progressive feature of the Botswana Children's Act 8 of 2009. In addition to these two similarities, Botswana and South Africa hold similarities in the context of their African customary law and culture. In Botswana the role of the child within the family is very similar to that of South Africa.³⁶⁰ Respect and submission to adults is very much a part of family culture, and children are not encouraged to participate in family

³⁵⁶ 'Towards a common future' *Southern African development community* available at <http://www.sadc.int/member-states> accessed on 10 February 2015.

³⁵⁷ C Pörsel 'Unity, diversity or separation? The Bakgatla-ba-Kgafela in the borderlands of Southern Africa' (2014) 59(2) *Historia* 253.

³⁵⁸ Note 15 above, section 35(1)(b); Botswana Children's Act 8 of 2009, section 27(4)(e).

³⁵⁹ Note 17 above, 164.

³⁶⁰ 'Children's rights' *Ditshwanelo – Botswana centre for Human Rights* available at http://www.ditshwanelo.org.bw/child_rights.html accessed on 06 February 2015; S Moses 'Children and participation in South Africa: an overview' (2008) 16 *International Journal of Children's Rights* 331-332.

matters.³⁶¹ The Constitutions of both Botswana and South Africa have given recognition to traditional African customary law³⁶², resulting in a pluralist legal system.³⁶³ Therefore due to the geographical, legal and cultural similarities that the countries share, the context in which the right has been implemented in Botswana and South Africa is comparatively similar. On this basis it is submitted that a comparative analysis with the Botswana Children's Act is desirable and will be insightful.

Scotland has been chosen as a country of comparison due to the similarities it holds with South Africa in both its legal system and its incorporation of child participation within the family into its domestic law. The Scottish legal system, like South Africa comprises of a mixture of mainly English common law and Roman Civil law, or Roman-Dutch law in the case of South Africa.³⁶⁴ More particularly, the Scottish family law system like South Africa has its origins in English Common Law.³⁶⁵ Section 31 of the South African Children's Act, which implements the right of a child to be heard within the family, was to large extent inspired by the Children (Scotland) Act.³⁶⁶ Scotland and South Africa are one of the few countries that have incorporated children's right to be heard within the family into domestic law.³⁶⁷ On this basis it is submitted that analysing the right as it appears in the Children (Scotland) Act may provide insight on how to improve the implementation of the right in South African law.

Below is an analysis of the right as it appears in the Botswana Children's Act and the Children Act (Scotland). In analysing these Acts the research will only focus on sub-sections where the right is phrased significantly differently to the comparative section of the South African Children's Act as well as any relevant provisions which South Africa has not included.

³⁶¹ 'Children's rights' *Ditshwanelo – Botswana centre for Human Rights* available at http://www.ditshwanelo.org/bw/child_rights.html accessed on 06 February 2015; S Moses 'Children and participation in South Africa: an overview' (2008) 16 *International Journal of Children's Rights* 331-332.

³⁶² Note 342 above, 255.

³⁶³ Note 324 above, 253.

³⁶⁴ C Van der Merwe 'The origin and characteristics of the mixed legal systems of South Africa and Scotland and the importance in globalisation' (2012) 18(1) *Fundamina* 101-102; P M Stahl 'Don't forget about me: implementing article 12 of the United Nations on the Rights of a Child' (2007) 24(3) *International Journal of Comparative Law* 829.

³⁶⁵ D W De Bruin 'Child Participation and representation in legal matters' (2010) PHD thesis, University of Pretoria (2010) 442.

³⁶⁶ Note 17 above, 169.

³⁶⁷ Note 17 above.

4.2 Botswana

The following analysis of the Botswanan Children's Act is aimed at determining how effective the relevant sections are in implementing the child's right to be heard within the family environment, and whether any mechanisms can be adopted by South Africa to improve its implementation of the right.

4.2.1 Children's Act 8 of 2009

The Botswana Children's Act was promulgated 2009.³⁶⁸ The Children's Act was largely influenced by the CRC and the ACRWC.³⁶⁹ Botswana ratified the CRC in 1995³⁷⁰ and the ACRWC in 2001.³⁷¹ The Act incorporates the child's right to participate in section 8³⁷² and section 27(4)(e).³⁷³ Although section 8 is a more general section, section 8(2) provides valuable guidelines on the implementation of children's right to participate. South Africa can particularly learn from section 8(2) in its implementation of the child's right to be heard.

4.2.1.1 Section 8 of the Children's Act 8 of 2009

Section 8 can be regarded as one of the "guiding principles of the Act"³⁷⁴. It plays a role in informing the application and interpretation of the Botswana Children's Act.³⁷⁵ Section 8 of the Botswana Children's Act reads as follows:

"Section 8 – Child Participation

- 1) Every child who is of such age, maturity and level of understanding as to be able to participate in decisions which have a significant impact on that child's life shall have a right to do so.

³⁶⁸ 'Harmonisation of children's laws in Botswana' *The African Child Policy Forum* available at <http://www.acerwc.org/wp-content/uploads/2012/05/English-ACERWC-Botswana-Harmonisation-of-Laws-on-Children.pdf> accessed on 10 February 2015, 3.

³⁶⁹ Ibid.

³⁷⁰ Ratification Status for CRC - Convention on the Rights of the Child' *United Nations Human Rights – Office of the High Commissioner of Human Rights* available at http://tbinternet.ohchr.org/_layouts/TreatyBodyExternal/Treaty.aspx?Treaty=CRC&Lang=en accessed on 31 May 2015.

³⁷¹ 'ACRWC ratification table' *The African Union* available at <http://pages.au.int/acerwc/pages/acerwc-ratifications-table> accessed on 31 May 2015.

³⁷² Which deals with the child's right to participate more generally.

³⁷³ Which deals with child participation within the family.

³⁷⁴ Botswana Children's Act 8 of 2009, part II.

³⁷⁵ The wording of section 8(1) of the Botswana Children's Act is similar to the comparative section of the South African Children's Act 38 of 2005, which provides the categories of age, maturity and stage of development pre-requisites to participating.

- 2) For the purpose of ensuring that the child is able to participate in the decision-making process, the child shall be given —
 - a. adequate information, in a manner and language that the child understands, about
 - i. the decision to be made,
 - ii. the reasons for the involvement of persons or institutions other than his or her parents, other relatives or guardian,
 - iii. the ways in which the child can participate in the decision-making process, and
 - iv. any relevant complaint or review procedures;
 - b. the opportunity to express the child's wishes and views freely, according to the child's age, maturity and level of understanding;
 - c. any assistance that is necessary for the child to express those wishes and views;
 - d. adequate information regarding how the child's wishes and views will be taken into account;
 - e. adequate information about the decision made and a full explanation of the reasons for the decision; and
 - f. an opportunity to respond to the decision made.
- 3) Decisions under this Act that are likely to have a significant impact on a child's life include but are not limited to —
 - a. decisions about the alternative care of the child;
 - b. decisions in the course of preparing, modifying or reviewing care or alternative care agreements or plans for the child;
 - c. decisions about the provision of social services to the child; and
 - d. decisions about contact with the child's parents, other relatives, guardian or other persons who are significant in the child's life.”

The guidelines provided for in section 8(2) are a unique feature of the Botswana Children's Act,³⁷⁶ which can be used in the implementation of the child's right to be heard within the family as well in other situations requiring child participation.

Subsection 8(2) of the Children's Act greatly improves the protection of the child's right to participate. The South African Children's Act would improve its implementation of the child's right to be heard by including a subsection similar to subsection 8(2) of the Botswana Children's Act. Section 8(2) contains a list of requirements that needs to be met in order to

³⁷⁶ 8 of 2009.

ensure that children are able to participate in the decision making process³⁷⁷. Ensuring that these requirements are met is important as child participation involves more than merely permitting the child to be heard.³⁷⁸ These requirements cover four important aspects of participation namely, providing the child with the appropriate information;³⁷⁹ providing the child with an opportunity to participate;³⁸⁰ providing the child with assistance in participation³⁸¹ and giving the child an “opportunity to respond to the decision made”.³⁸² A more comprehensive analysis of section 8(2) under these four aspects of participation follows below.

Section 8(2) (a), (d) & (e) address the type of information the child ought to receive in order to be able to effectively participate. According to this section the child ought to receive information on the decision to be made, involvement of certain persons in the decision, ways to participate in the decision, complaint or review procedures, how their views will be taken into account and the decision made and reasons for the decision.³⁸³ Section 8(2)(a) also addresses the issue of language, children must be provided the “information in a manner and language that the child understands”³⁸⁴. This however, is not re-iterated in section 8 (2)(d) & (e).

An analysis of section 8(2) (a), (d) & (e) have many strengths and shortfalls. Firstly providing children with the information referred to in section 8(2) (a), (d) & (e) is a crucial part of ensuring that the child is able to participate properly. This has been endorsed by the Committee on the Rights of a Child who have provided that in order for children to experience meaningful participation they are to be provided with adequate and appropriate information about the decision at hand, how the participation will take place, how their views will be taken into account and information regarding the final decision taken and on any follow-up procedures.³⁸⁵ The reason that this is so important is that the quality of a decision depends on the quality and quantity of information the individual has received about the

³⁷⁷ To be discussed in more detail below.

³⁷⁸ A Parkes *Children and international human rights law – the right of a child to be heard* (2013) 15.

³⁷⁹ Note 341 above, 8(2) (a), (d) & (e)

³⁸⁰ Note 341 above, 8(2)(b)

³⁸¹ Note 341 above, section 8(2)(c).

³⁸² Note 341 above, section 8(2)(f).

³⁸³ Note 341 above, section 8(2) (a), (d) & (e)

³⁸⁴ Note 341 above, Section 8(2)(a).

³⁸⁵ Note 4 above, paras 41(a), 132(a) & (i).

process.³⁸⁶ And in order to empower children to express their views and wishes, it is necessary to first ensure that they have a right to be informed about the processes and facts needed for good decision-making.³⁸⁷ Furthermore, it is vital that the child receives the information in a “manner and language that he or she understands”³⁸⁸, otherwise the information that he or she receives will be of no use. Section 8(2)(d) and (e) do not require the information to be given to the child in a “manner and language that the child understands”³⁸⁹. This creates a potential weakness in these subsections.

Section 8(2)(b) addresses the issue of providing the child with an opportunity to participate. There are different forms of opportunities that can be given to the child “depending on the child’s age, maturity and level of understanding”.³⁹⁰ Section 8(2)(b) addresses this by stating that the child must be given an opportunity “according to the child’s age, maturity and level of understanding.”³⁹¹ As a child matures, he/she may be able to initiate the participation him/herself, and his/her views may hold more weight.³⁹² On the other hand, parents with very young children may have to adopt a ‘consultative’ approach to participation.³⁹³ A consultative approach is where the parents consults with the child and considers the views of the child in coming to the final decision, but the child does not make the final decision.³⁹⁴ An analysis of this section reveals the following strengths and weaknesses.

Ensuring that a child is given an opportunity to participate is important as a child’s right to participate cannot be implemented unless the child is given the opportunity to participate.³⁹⁵ However the wording of section 8(2)(b) is very limited as it does not refer to the types of participation opportunities a child should be given according to their age and maturity and level of understanding. A parent reading this section is unlikely to have this knowledge themselves. It would have improved the implementation of the right if the section had referred to the different forms of participation that become appropriate depending on the

³⁸⁶ ‘Children’s right to be heard in Canadian judicial and administrative proceedings – submission for the Committee on the Rights of the Child General Day of Discussion’ *Justice for children and youth - Canadian Foundation for Children, Youth & The Law* at <http://jfcy.org/wp-content/uploads/2013/10/UNDiscussionPaper.pdf> accessed on 14 November 2015, 2.

³⁸⁷ *Ibid.*

³⁸⁸ Note 341 above, section 8(2)(a).

³⁸⁹ Note 341 above, section 8(2)(a).

³⁹⁰ Note 3 above, 12, 147, 148, 150.

³⁹¹ Note 341 above, section 8(2)(b).

³⁹² Note 3 above, 12, 150.

³⁹³ Note 3 above, 12, 147.

³⁹⁴ *Ibid.*

³⁹⁵ *Ibid.*

“child’s age and maturity and level of understanding”³⁹⁶ namely, consultative participation,³⁹⁷ collaborative participation³⁹⁸ and child-led participation.³⁹⁹ Child-led participation is where the child initiates the participation and the adult merely acts as a guide in making the final decision.⁴⁰⁰

Section 8(2)(c) provides that a child must be given “any assistance that is necessary for the child to express their wishes or views.”⁴⁰¹ Assistance could take various forms, for example a child with a speech or hearing disability may require assistance in trying to communicate their views. In the contents of judicial and administrative proceedings assistance could be provided through a legal representative.⁴⁰² It is less obvious what assistance would be required in the family environment. An analysis of this subsection reveals that the wording of this subsection is very opened-ended. However it is impossible to foresee all the various forms of assistances a child may require. Wording the section in this manner is therefore appropriate as it places a duty to provide a child with assistance if necessary, but does not limit the type of assistance that may be provided.

Lastly, section 8(2)(f) provides that children must be given an “opportunity to respond to the decision made”⁴⁰³. This is a natural progression from the previous section, where the child is informed of the decision made. Upon being informed of the decision made the child may want to agree, disagree or provide an alternative option.⁴⁰⁴ An analysis of the subsection reveals the following. The section is written in straight forward, easy to comprehend language. It does not need to address the concept in more detail as it is simple, a child must be provided with an “opportunity to respond to the decision made.”⁴⁰⁵ However it would have been appropriate for section 8(2) to follow on by addressing the issue of complaints, remedies and redress procedures. If the child is unhappy about the fact that his/her view and wish has not been taken into account, the child should be able to approach a body to review the final decision. The Committee on the Rights of a Child have provided that in order to effectively

³⁹⁶ Note 341 above, section 8(2)(b).

³⁹⁷ Ibid.

³⁹⁸ Note 3 above, 12, 148.

³⁹⁹ Note 3 above, 12, 150.

⁴⁰⁰ Note 3 above, 12, 150.

⁴⁰¹ Note 341 above, section 8(2)(c).

⁴⁰² Note 4 above, para 36.

⁴⁰³ Note 341 above, section 8(2)(f).

⁴⁰⁴ Note 4 above, para 45.

⁴⁰⁵ Note 341 above, section 8(2)(f)

implement the child's right to participate, the legislation must include complaints, remedies and redress procedures.⁴⁰⁶ In the context of the family environment, the Committee provides that the child "should be able to turn to a person in the youth services of the community."⁴⁰⁷ Section 8(2)(a)(iv) provides that a child must be informed of any relevant complaint or review procedures, but does not indicate what complaint or review procedures are in place for children whose rights are violated. This is a shortfall in the subsection.

4.2.1.2 Section 27(4)(e) of the Children's Act 8 of 2009

The child's right to participate within the family is found under the provision dealing with parental responsibilities and rights. The relevant section reads as follows:

"Every parent shall have the duty in respect of his or her child to – encourage the child's participation in household decisions and actions subject to the child's age, maturity and level of understanding."⁴⁰⁸

Certain features in this subsection requires further description and analysis. Firstly, the fact that section 27(4)(e) is presented as one of the parental duties means that parents are obliged to fulfil the obligations of this subsection. The next important feature is the use of the word 'encourage,' which suggests that children might not take the initiative to participate, and thus may require encouragement to do so. The arena that the children are to be encouraged to participate is in 'household decisions and actions.' This choice of wording opens up the scope of participation to all decisions and actions taken within the household. This scope of the participation is therefore not limited to 'major decisions' affecting the child as is done in other jurisdictions.⁴⁰⁹ Children who are of insufficient age, maturity and level of understanding will be prevented from participating. An analysis of the subsection 27(4)(e) of the Botswana Children's Act⁴¹⁰ presents the following advantages and shortfalls.

The requirement to 'encourage' participation is important in communities which previously discouraged children from sharing their views on household decisions, as children may not be

⁴⁰⁶ Note 4 above, paras 46, 47.

⁴⁰⁷ Note 4 above, paras 46.

⁴⁰⁸ Note 341 above, section 27(4)(e).

⁴⁰⁹ Children (Scotland) Act 1995, section 6; Children's Act 38 of 2005, section 35(1)(b).

⁴¹⁰ 8 of 2009.

accustomed to participating in decision making.⁴¹¹ In the context of Botswana, this encouragement may be necessary given the traditional African cultural attitude towards child participation.⁴¹² The next feature of the subsection is requiring parents to encourage their child's participation in 'household decisions and actions.' The fact that this duty is not limited to major decisions/certain types of decisions taken within the home can be regarded as impractical and too burdensome for parents.⁴¹³ The reason for this is that a discussion will also be required over minor household decisions and actions which may not significantly affect the child. It has been argued that requiring a parent to consider their child's views on every decision made, including minor decision can be unduly burdensome.⁴¹⁴ And in this respect the wording of section 27(4)(e) renders it not easily implementable.

Lastly children may only participate if they are of "sufficient age, maturity and level of understanding".⁴¹⁵ "Age, maturity and level of understanding"⁴¹⁶ are therefore prerequisites to child participation within the home. Unlike the CRC which provides that these categories should only be taken into account when deciding how much weight to attribute to the child's views.⁴¹⁷ These factors are therefore not prerequisites to participation, they are merely factors to be considered when attributing weight to the child's views.⁴¹⁸ However, from the wording of this section it is clear that only children of sufficient age and maturity may participate.

4.2.2 Summary

The Botswana Children's Act provides the child with the general right to be heard in much the same way as the South African Children's Act through section 8(1). However section 8(2) provides a list of valuable and rich guidelines which certainly improves the implementation of the child's right to be heard. Although these guidelines do not pertain exclusively to the child's right to be heard within the family environment they can certainly be used in that context. Parents can apply these guidelines in order to ensure that the child experiences

⁴¹¹ J Sloth-Nielsen 'Modern African childhoods: does law matter?' in M Freeman (ed) *Law & childhood studies: current legal issues* 127.

⁴¹² Gwandwe C & Mayekiso T 'Promoting children's participation in South Africa: a social system control perspective' (2011) 19 *International Journal of Children's Rights* 242.

⁴¹³ Note 4 above, 169; Scottish Law Commission, *Report on Family Law*, Scot Law Corn No 135 (1992), para 2.62.

⁴¹⁴ Scottish Law Commission, *Report on Family Law*, Scot Law Corn No 135 (1992), at para 2.62.

⁴¹⁵ Note 318 above.

⁴¹⁶ *Ibid.*

⁴¹⁷ Note 4 above, para 28.

⁴¹⁸ Note 3 above, 22.

meaningful and impactful participation. Section 27(4)(e), which relates exclusively to the child's right to be heard within the family is a very brief section. Apart from the use of wording 'encourage,' this section is impractical in its failure to limit the type of household decisions that it applies to. Therefore the Botswana Children's Act contains both strengths and weaknesses.

4.3 Scotland

Scotland has incorporated the right to be heard within the family through section 6 of the Children (Scotland) Act 1995. What follows is brief description and thereafter an analysis of section 6 of the Scotland's Children (Scotland) Act 1995. The purpose of the analysis is to determine how effective the relevant section is in implementing the child's right to be heard within the family environment and based thereon any mechanisms South Africa can adopt to improve its implementation of the right. Article 24(1) of the EU Charter of Fundamental Rights provides that "children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity."⁴¹⁹ Scotland is a member of the EU, and accordingly is obliged to observe this article.

4.3.1 Section 6 of Children (Scotland) Act 1995

The Children Act 1995 was drafted by the Scottish Law Commission was to a large extent influenced by the CRC and the European Convention on Human Rights 1953 (ECHR).⁴²⁰ As discussed above General Comment No. 12 specifically makes reference to the right to be heard within the family.⁴²¹ In drafting the Children (Scotland) Act, the Scottish Law Commission felt that it was desirable for children to be consulted by parents before a decision was made that affected that child⁴²². The Scottish Law Commission explained that it was important for a child to be consulted with by their parents in such instances as 'a child is a person in his or her own right and his or her views are entitled to respect and consideration.'⁴²³ Section 6(1) places this obligation on parents and reads as follows:

⁴¹⁹ European Union Charter of Fundamental Rights 1953, Article 24(1).

⁴²⁰ Note 17 above, 168; Note 381 above, paras 2.60 – 2.66.

⁴²¹ Note 4 above, paras 92 – 96.

⁴²² Children (Scotland) Act 1995, section 6(1).

⁴²³ Note 381 above, para 2.62.

“A person shall, in reaching any major decision which involves—

- a. his fulfilling a parental responsibility or the responsibility mentioned in section 5(1) of this Act; or
- b. his exercising a parental right or giving consent by virtue of that section, have regard so far as practicable to the views (if he wishes to express them) of the child concerned, taking account of the child’s age and maturity, and to those of any other person who has parental responsibilities or parental rights in relation to the child (and wishes to express those views); and without prejudice to the generality of this subsection a child twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view.”⁴²⁴

Certain aspects of this section require further description and analysis in order to establish the section’s true value in implementing the child’s right to be heard within the family. The aspects that are to be considered are the use of the words “as far as practicable”; “wishes to express those views;” “child of twelve years of age or more shall be presumed to be of sufficient maturity;” and “major decision.”

Section 6 of the Children’s (Scotland) Act only requires parents to have *regard so far as practicable* to their child’s views. Parents are therefore not under an obligation to regard the views of their child every time a decision is made, but only when it is practicable to do so.⁴²⁵ After analysis it is apparent that this aspect of the provision provides certain advantages and disadvantages.

It has been argued that it is not practical to expect parents to consider the views of their child in every decision concerning the child.⁴²⁶ Where a parent makes a minor decision concerning their child it may not be necessary for them to engage in a consultative process with the child regarding the child’s views. Placing an obligation on parents to do so would therefore be unduly burdensome and unrealistic.⁴²⁷ The provision is therefore implementable if parents are obliged to regard the views of their child only when it is practicable. And in this way this aspect of section 6 improves the implementation of the child’s right to be heard within the family. However the danger with this provision is that it provides no guidelines. When is it

⁴²⁴ Note 388 above, section 6(1).

⁴²⁵ Ibid.

⁴²⁶ Ibid.

⁴²⁷ Ibid.

practical to consider a child's views and when is it not? Parents may readily dispose of the obligation to consider their child's views on the basis that it is not practical. The vagueness in this provision is therefore a threat to the security of the child's right to be heard.

Section 6 of the Children (Scotland) Act indicates that children are not obliged to express their views. Children are therefore not obliged to participate in a family decision if they wish not to. This aspect of the provision addresses one of the basic requirements for the implementation of the child's right to be heard as provided for by the Committee on the Rights of a Child. The Committee has provided that "children should never be coerced into expressing views against their wishes and they should be informed that they can cease involvement at any stage."⁴²⁸ The Committee on the Rights of a Child has urged all state parties to include this requirement in all legislative measures for the implementation of the child's right to be heard.⁴²⁹ By addressing this issue the provision complies with the obligation by the Committee, as well as alerts parents to the fact that the child's participation has to be voluntary.

The Children (Scotland) Act creates the presumption that children 12 years old and older should be presumed capable of forming a view. In order for a child's views to be considered the child has to be of sufficient age and maturity. Thus it is presumed that a child who is 12 years or older is of sufficient maturity to make decisions. An analysis of this presumption reveals the following advantages and disadvantages.

Firstly, one has to consider why the Scottish Law Commission has adopted an age criteria of 12 years old. Is this age criteria arbitrary? The Scottish Law Commission has suggested that the criterion of 12 years old is in line with psychological research and is in line with the Scottish Common Law.⁴³⁰ However, more than a decade after the Scottish Law Commission Report on Family Law,⁴³¹ the Committee on the Rights of a Child suggested that age criterion alone is not sufficient in determining the significance of a child's views.⁴³² The General Comment No. 12 refers to research which has shown "that information, experience, environment, social and cultural expectations, and levels of support all contribute to the

⁴²⁸ Note 4 above, para 134(b).

⁴²⁹ Note 4 above, para 133.

⁴³⁰ Note 381 above, para 2.65.

⁴³¹ Note 38 above.

⁴³² Note 4 above, para 29.

development of a child's capacities to form a view."⁴³³ It has been suggested that even very young children are able to express a reasoned view through crying and other gestures.⁴³⁴ It is therefore desirable that age limits be avoided, and instead the "child's capacity to participate be considered on a case by case basis."⁴³⁵

The next important aspect to consider is the effect that the presumption has on the implementation of the child's right to be heard within the family. The Scottish Law Commission foresaw the possibility of parents too readily dismissing their child's right to be heard on the basis that the child was "too young to understand and form reasonable views."⁴³⁶ By including the presumption, parents would be obliged to listen to the views of children over the age of 12 years. In this way the presumption provides increased protection to the right to be heard for children over 12 years. However, the concern is whether the presumption negatively impacts on the rights of children under the age of 12 years. The Scottish Law Commission explained that the age criterion was not intended to create the impression that the views of children under 12 years old are unimportant.⁴³⁷ And in order to convey this, the Scottish Law Commission drafted into the section the words "and without prejudice to the generality of this subsection"⁴³⁸. It has been suggested by Sutherland that in terms of this section, parents are still obliged to listen to the views of children younger than 12 years.⁴³⁹ In support of this Sutherland explained that a similar presumption exists in relation to a child's right to be heard in judicial proceedings, and it has not prevented the courts from listening to the views of children under the age of 12 years.⁴⁴⁰

Based on the above, is the inclusion of a presumption desirable? It has been found that age alone is insufficient to establish a child's ability to form a reasoned view. And on this basis the Committee on the Rights of a Child has advised against placing an age limit.⁴⁴¹ However the Children's Act (Scotland) does not place an age limit but rather creates a presumption. Furthermore, the section is worded in a way so as to avoid creating the

⁴³³ Note 4 above, para 29; L Krappmann 'The weight of the child's view (Article 12 of the Convention on the Rights of the Child)' (2010) 18 *International Journal of Children's Rights* 507.

⁴³⁴ Note 2 above 507.

⁴³⁵ *Ibid.*

⁴³⁶ Note 381 above, para 2.65.

⁴³⁷ *Ibid.*

⁴³⁸ Children (Scotland) Act 1995, section 6.

⁴³⁹ Note 17 above, 169.

⁴⁴⁰ *Ibid.*

⁴⁴¹ Note 4 above, para 29.

impression that the views of younger children are not important. However, the danger created by the presumption is that parents may too-readily dismiss the views of younger children on the basis that the children are too young to be able to form a view. It is therefore argued that although the section improves the protection of the right for children over 12 years, it weakens the protection of the right for children under the age of 12 years, and is accordingly undesirable.

The Children's (Scotland) Act allows for the child's right to be heard within the family to 'major decisions.' Therefore the child does not have a right to be heard in trivial household decisions, but only those decisions that are considered major. Placing an obligation on parents to consider the views of the child in every household decision has been considered too burdensome and unrealistic.⁴⁴² However the Scottish Law Commission did not go on to define the category 'major decision.' It expressed that it could not define 'major decision' with any precision, and on that basis left the term undefined.⁴⁴³ The Scottish Law Commission recognised that this would render the provision vague but expressed that the provision was still valuable as it could have the effect of influencing behaviour.⁴⁴⁴

In analysing the above the following observations are made. Firstly, providing a list of decisions regarded as "major decisions" may limit the ambit of a child's right to participate within the family. However, in order for a section to be "implementable" the lay person has to be able to read and understand when to implement it. Failing to define "major decisions" makes it difficult for individuals to grasp how and when the section is to be implemented. The Children (Scotland) Act failures to define the concept "major decision," this therefore can be regarded as a shortfall in the Act.

The Scottish Law Commission drew a comparison with the duty of the local authority to listen to views in public decision making.⁴⁴⁵ In making decisions the local authority has to be accountable to the public and its decisions are subject to judicial review.⁴⁴⁶ However the relationship between the child and his or her parents is very different and it is difficult to imagine what the sanction would be for non-compliance. The Scottish Law Commission

⁴⁴² Note 381 above, para 2.62.

⁴⁴³ Ibid.

⁴⁴⁴ Ibid.

⁴⁴⁵ Ibid.

⁴⁴⁶ Ibid.

recognised that placing a sanction would render the provision unenforceable but recognised that the provision would have value in that it could influence behaviour.⁴⁴⁷

4.3.2 Summary

The above analysis of section 6 of the Children (Scotland) Act 1995 reveals that the section has both advantages and disadvantages to section 31 of the South African Children's Act. The wording of the sections may carry different meaning, but not to the extent of changing the overall meaning of either of the sections. The major differences lie in additional criteria drafted into each section. The Children (Scotland) Act contains positive implementation mechanisms in expression that the parents are to have regard for the child's views "*as far as practicable*".⁴⁴⁸ A further feature of the Children (Scotland) Act is that it respects the child's individuality by recognising that he/she may not wish to voice views. The last and very important difference is the inclusion of the presumption. The presumption offers greater protection to the rights of children over 12 years old, while not disregarding younger children. The major shortfall in the Children (Scotland) Act is that it does not define the concept "major decision". This certainly effects the efficacy of the section as a parent has no guideline on when he or she is supposed to invoke this section. Nevertheless section 6 of the Children (Scotland) Act provides some effective implementation mechanisms which if applied in South Africa could improve the implementation and protection of the child's right to be heard within the family.

4.4 Comparison with South Africa and conclusions drawn

Although section 8(1) and section 8(3) of the Botswana Children's Act do not contain mechanisms that can improve the implementation of the child's right to be heard within South African law, section 8(2) certainly does. Section 8(2) of the Botswana Children's Act refers to a list of requirements that need to be met in order for the child to participate effectively. As discussed these requirements cover the following aspects of participation, providing the child with the appropriate information; providing the child with an opportunity to participate; providing the child with assistance in participation and giving the child an opportunity to respond to the decision made.⁴⁴⁹ Meeting these requirements is crucial in ensuring effective participation. The South African Children's Act does not have a similar

⁴⁴⁷ Ibid.

⁴⁴⁸ Note 338 above, section 6.

⁴⁴⁹ Note 241 above, section 8(2).

provision, and therefore fails to ensure that the child's right to be heard is implemented properly. South Africa would therefore greatly improve its implementation of a child's right to be heard within the family by including a provision similar to section 8(2) of the Botswana Children's Act. In order to address this shortfall, South Africa could introduce similar provisions in the form of regulations.

The next relevant section of the Botswana Children's Act is section 27(4)(e). The three distinguishing features to the South African Children's Act are, the inclusion of the word "encourage", the application of the right to "all household decisions and actions" and impact of "the child's age, maturity and level of understanding"⁴⁵⁰ on the child's enjoyment of the right. The African culture does not generally encourage child participation, thus children may not be accustomed to participate and may need encouragement to participate.⁴⁵¹ Therefore the wording "encourage the child's participation"⁴⁵² in the Botswana Children's Act is relevant in the African context. By including similar wording the South African Children's Act would improve its implementation of the right.

The next feature is the application of the right. The child's right to participate within the family as contained in the Botswana Children's Act is not limited to 'major decisions'. This places a heavy burden on parents, which is undesirable and impractical. The South African Children's Act limits the scope of the right to a list of major decisions. This makes the implementation of the right manageable for parents, and is therefore preferable.

Lastly, in the Botswana Children's Act the child's right to participate in household decisions is subject to the "child's age, maturity and level of understanding."⁴⁵³ In the South African Children's Act children have the right to participate regardless of the child's age, maturity and level of understanding, these factors are only taken into account in determining how much weight to attribute to the child's views.⁴⁵⁴ In this way the South African Children's Act therefore provides greater protection to the right, and is therefore preferable. In conclusion, although certain aspects of the South African Children's Act are preferable, the Botswana

⁴⁵⁰ Note 341 above, section 27(4)(e); Note 15 above, section 10.

⁴⁵¹ Note 2 above, 420.

⁴⁵² Note 341 above, section 27(4)(e).

⁴⁵³ Note 341 above, section 27(4)(e).

⁴⁵⁴ Note 15 above, section 31(1)(b) and section 10.

Children's Act contains a number of features that have the potential to improve the implementation of a child's right to be heard within the family.

There were a number of features in the Children (Scotland) Act which were distinguishable from the South African Children's Act. These features are namely the requirement to consider the child's views 'as far as practicable;' the child only has to participate if he or she 'wishes to express views;' children 'twelve years of age or more shall be presumed to be of sufficient age and maturity to form a view' and the non-description of the phrase 'major decisions.'⁴⁵⁵

The inclusion of the words 'as far as practicable' takes account of the reality, that it may not always be practical for parents to consider their child's views. However as discussed above this wording leaves the right open to abuse. The South African Children's Act has limited its scope to a number of specified decisions. It may not be practical for parents to consult the views of their children in every decision, but they at least have to ensure that it is done when taking decisions referred to in section 31(1)(b) of the South African Children's Act. The wording of the South African Children's Act provides greater protection to the right while still accommodating the fact that parents cannot consult the views of their child in every household decision. The wording of the South African Children's Act is therefore preferable.

The next feature in the Children (Scotland) Act's is the inclusion of the words 'wishes to express views.' This addresses an important aspect of participation – that it must be voluntary. The South African Children's Act does not expressly address the issue of voluntary participation and it is recommended that it is included in the Act. The next feature of the Children (Scotland) Act is the presumption contained in the Act. As discussed above, although the presumption improves the protection of the right for children over 12 years, it has the potential to negatively impact on the right of children under 12 years. Furthermore the presumption is not in line with current research. It is therefore argued that the South African Children's Act approach of excluding an age criteria is preferable.

⁴⁵⁵ Note 17 above, 169.

Lastly, while the South African Children's Act has limited the application of the right to a list of major decisions,⁴⁵⁶ the Children (Scotland) Act has not. Although the Scottish Law Commission believed it to be 'difficult to define major decision with any precision' the South African Children's Act has provided a 'workable' definition to concept 'major decision.'⁴⁵⁷ It is therefore argued that in this respect the wording of the South African Children's Act is preferable.

4.5 Summary

An analysis of the law of Botswana and Scotland which deals with the child's right to be heard within the family environment has rendered useful insights. It has revealed both South Africa's strengths and weaknesses in implementing the right. South Africa has definitely done well in defining the 'major decisions' to which this right applies, in a way that Botswanan and Scottish law were unable to. Section 8(2) of the Botswana Children's Act is innovative in providing a list of requirements that need to be followed in order to ensure effective participation. South Africa could greatly improve its implementation of the right by including a similar provision. Further, the Botswana Children's Act places an obligation on the parents to encourage child participation within the family. In an African traditional context, this is very important. South Africa would improve its implementation of the right by including a similar provision. The Children (Scotland) Act incorporation of an age limit is undesirable. The major strengths of the Children (Scotland) Act is that participation is optional. The insights rendered from this analysis will be useful in compiling the recommendations for the implementation of the right.

⁴⁵⁶ Note 15 above, section 31(1)(b).

⁴⁵⁷ Note 17 above, 169.

CHAPTER FIVE

CONCLUSION & RECOMMENDATIONS

5.1 Introduction

Prior to the adoption of the CRC, and in particular Article 12, the voices of children received little recognition, and children were rarely given the opportunity to participate in the decisions that shaped their daily lives and futures.⁴⁵⁸ The child's right to be heard in matters that affect them was affirmed through South Africa's ratification of the CRC and its incorporation of the right into sections 10 and 31 of the Children's Act.⁴⁵⁹ The Children's Act has provided the child with the right to be heard in all matters affecting the child, including decisions made within the family. While considerable research and concern has been afforded to the child's right to be heard in general, and in public and institutional settings, the child's right to be heard within the family has been largely ignored. South Africa being one of the few countries to specifically address the child's right to be heard within the family in its domestic law.⁴⁶⁰ The diversity of cultures, existence of traditional mind-sets as well as other barriers makes the effective implementation of this right rather challenging. In light of this the writer identified the need to critically analyse the South African legal framework which protects the right of the child to be heard within the family. The analysis was done in light of the relevant international and foreign comparative materials, with a view of potentially making suggestions for improving the implementation of that legal framework.

The research aimed to address the following questions:

- 5.1.1 What does international law require in respect of children's right to be heard in decisions within the family environment?
- 5.1.2 What does the Children's Act 38 of 2005 require with regards to children's right to be heard in decisions within the family environment?
- 5.1.3 What are the implementation mechanisms contained in the Children's Act in terms of this right?
- 5.1.4 What are the potential weaknesses of these mechanisms?

⁴⁵⁸ Note 2 above, 502; G Note 3 above, 81.

⁴⁵⁹ 38 of 2005.

⁴⁶⁰ Note 17 above, 164.

5.1.5 What can South Africa learn from Scotland and Botswana in implementing the right of a child to be heard within the family environment?

Through the following summary of the proceeding chapters, the writer will illustrate how these research questions have been addressed and answered, and based thereof conclusions and recommendations that the research has rendered.

5.2 Summary of chapters

In chapter two a foundation to this research was laid, by identifying the benefits, concerns and challenges associated with the child's right to be heard within the family. By identifying the benefits the importance of the right is understood. By addressing the concerns, any hesitations that the one may hold towards child participation within the family have hopefully dissipated. And lastly, by identifying the challenges associated with child participation within the family one can analyse whether the legislative mechanisms in place are sufficient. It was found that it is important to give recognition to this right as it gives respect and recognition to the individual identity and human dignity of the child. Furthermore, the right is important in the role it plays in enhancing other rights. The right is also beneficial as it plays a role in developing a child's social and participation skills; improves the quality of family decision; and aids in protecting children from abuse.⁴⁶¹ The concerns of parents towards child participation within the family were further identified. The concerns were namely the child's incompetence and inexperience to participate; the need for children to learn to take responsibility before they can be granted rights; the right would affect the enjoyment of childhood; the undermining of parental authority and lack of respect for parents; conflict with traditional and cultural values; children burdened with unnecessary responsibility or information; participation is time consuming; and the possibility of children making mistakes. These concerns were found to be largely unfounded.

Chapter two lastly considered the challenges encountered in the implementation of the child's right to be heard within the family environment. The challenges addressed and identified were the tension between parent and child roles; the individual attitudes of family members towards the right of a child to be heard within the family environment; tradition and culture and the private nature of the family environment. These challenges have the potential to

⁴⁶¹Note 3 above, 5 – 9.

disrupt the effective implementation of the right to be heard within the family. Identifying these challenges was therefore important, and needed to be done before the applicable law was considered and analysed.

Chapter three explored the international and national law pertaining to a child's right to be heard in decisions within the family environment. The analysis of the international law was limited to the relevant provisions of the CRC and the ACRWC. Article 12 of the CRC provides that the child has a right to be heard in all matters affecting them. The child's right to be heard within the family environment falls within this ambit. Whilst article 12 itself does not expressly provide for the right to be heard within the family environment, its interpretive instrument, General Comment No. 12 refers extensively to this. On an analysis of the relevant paragraphs of the General Comment it was identified that there were three main points that the Committee made in relation to child participation within the family specifically. Namely, that parents must give recognition to the evolving capacities of the child, there is no age limit prescribed. That the state parties must implement legislation and policy, which encourage parents, guardians and childminders to listen to children and give due weight to their views in matters that concern them. Lastly, paragraphs 132 – 134 of the General Comment No. 12⁴⁶² provide general guidelines for ensuring that children experience meaningful participation.

The ACRWC only provides expressly for the child to be heard in judicial and administrative proceedings. The treaty does not provide children with a right to be heard within the family. The only reference that there is to the child's right to be heard within the family is where it places a duty on children to be active participants of their community.⁴⁶³ This could be understood to mean participating verbally in the community. However it is well established that children generally play a subservient role in traditional African families. It would be unlikely for children to provide their views without parents encouraging them to do so. The treaty therefore fails to provide protection to the child's right to be heard within the family.

The national law that formed the focus of this study was section 31 of the Children's Act. It was found that the Children's Act contains a workable definition for the list of decisions that it refers to. It also complies with the requirements of General Comment by placing an obligation on parents to both listen to their child's views and to give the views due weight.

⁴⁶² Note 4 above.

⁴⁶³ Note 342 above, preamble.

However, the Children's Act failed in its requirements under international law in that it does not prescribe for policy measures to be taken in the implementation of the right. It also does not provide a list of requirements that must be met in order to ensure the effective implementation of the right.

Lastly, chapter four provided a comparative analysis of section 31 of the Children's Act with the Botswana Children's Act and the Children (Scotland) Act. The comparative analysis of these jurisdictions revealed that the South African Children's Act has done well to include a workable definition of the list of decisions that the right applies to. Furthermore the Children's Act has not included an age criteria which is preferable. However it is recommended that the Children's Act could improve its implementation of the right by incorporating a section providing for the requirements that need to be met in order to ensure effective participation. Furthermore, the Children's Act must address the issue that child participation within the family is voluntary. Parents are also to have a duty to encourage child participation within the home as it is uncommon in many cultures. Despite these recommendations the South African Children's Act can truly be commended for the protection that it has afforded to the child's right to be heard within the family environment. Its protection of this right is innovative, and revolutionary in a traditional African context.

5.3 Recommendations

Based on the analysis of the relevant international, foreign and national law, and potential obstacles that one faces in implementing the right the following recommendations are made:

The South African national law should prescribe for policy measures to be taken for implementation of the right. The first motivation for this is that the CRC requires "state parties to take appropriate legislative...and *other* measures for the implementation of the right."⁴⁶⁴ Therefore, South Africa is obliged to take measures in addition to enacting appropriate legislation. The Committee on the Rights of a Child has stated in relation to the child's right to be heard within the family environment that state parties should adopt policy and educational programmes to promote the participation of the child within the family.⁴⁶⁵ Families can only be expected to implement the right if they are aware that it exists.⁴⁶⁶ It is

⁴⁶⁴ Note 12 above, article 4.

⁴⁶⁵ Note 4 above, para 92, 93.

⁴⁶⁶ Note 17 above, 169.

therefore vital that South Africa adopt such programmes in order to ensure that it is implemented effectively.

The South African national law should contain a list of requirements that need to be met in order to ensure effective participation. The Committee on the Rights of the Child has provided an extensive list of requirements that need to be met in order to implement the child's right to be heard.⁴⁶⁷ Along these lines, the Botswana Children's Act has enacted a comprehensive list of requirements that must be met in order to ensure effective participation.⁴⁶⁸ These requirements cover the following issues, providing the child with the appropriate information; providing the child with an opportunity to participate; providing the child with assistance in participation and giving the child an opportunity to respond to the decision made.⁴⁶⁹ Research has shown that all these aspects are important in ensuring effective participation.⁴⁷⁰ On this basis it is important that South Africa include a similar provision which will enable individuals to read the section and understand what steps have to be followed to ensure that the right is implemented effectively.

The South African national law should ensure that participation is voluntary. Article 12 provides that the child has a "right to express views freely."⁴⁷¹ The Committee on the Rights of a Child has expressed that the child must be able to express his/her views voluntarily.⁴⁷² According to the Committee on the Rights of the Child, one of the basic requirements to implement the right to be heard is to ensure that the right is exercised voluntarily.⁴⁷³ It is therefore vital that for the effective implementation of the right that the child and parents understand that all views are to be expressed voluntarily. Referring expressly to this requirement, the Children's (Scotland) Act will help ensure that parents and children are made aware of this important requirement.

⁴⁶⁷ Note 4 above, para 134.

⁴⁶⁸ Note 341 above, section 8(2).

⁴⁶⁹ Note 341 above, section 8(2).

⁴⁷⁰ 'Children's right to be heard in Canadian judicial and administrative proceedings – submission for the Committee on the Rights of the Child General Day of Discussion' *Justice for children and youth - Canadian Foundation for Children, Youth & The Law* at <http://jfcy.org/wp-content/uploads/2013/10/UNDiscussionPaper.pdf> accessed on 14 November 2015, 2; G Lansdown 'Every child has the right to be heard – a resource guide on the UN Committee on the Rights of the Child General Comment No.12' (2011) *Save the Children UK – London* available at http://www.unicef.org/french/adolescence/files/Every_Childs_Right_to_be_Heard.pdf accessed on 14 November 2015, 12, 147, 148, 150.

⁴⁷¹ Note 12 above, article 12.

⁴⁷² Note 4 above, para 22.

⁴⁷³ Note 4 above, para 34(b).

The South African national law should place a duty on parents to encourage participation. The Botswana Children's Act, states that parents must "encourage the child's participation in household decisions and actions."⁴⁷⁴ Similarly, the South African Children's Act could expressly provide that parents are to "encourage the child's participation." This is important in a nation where the cultural norm is not for children to be "seen and not heard."⁴⁷⁵ It is therefore likely that many children will not participate without being encouraged to do so.

South Africa has certainly done well in its implementation of the child's right to be heard within the family environment, by applying the recommendations discussed above South Africa will be able to provide a stronger protection of the right and ensure that it is implemented effectively.

⁴⁷⁴ Note 341 above, section 27(4)(e).

⁴⁷⁵ Note 2 above, 502.

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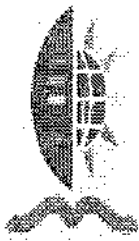
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10 September 2014

Mrs Ceridwen Emily Rose Zhekov 208509679
School of Law
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Dear Mrs Zhekov

Protocol reference number: HSS/1112/014M

Project title: An analysis of the implementation of the child's right to be heard within the family environment in accordance with section 31 of the South African Children's Act 38 of 2005

Full Approval – No Risk

In response to your application dated 28 August 2014, the Humanities & Social Sciences Research Ethics Committee has considered the abovementioned application and the protocol has been granted **FULL APPROVAL**.

Any alteration/s to the approved research protocol i.e. Questionnaire/Interview Schedule, Informed Consent Form, Title of the Project, Location of the Study, Research Approach and Methods must be reviewed and approved through the amendment /modification prior to its implementation. In case you have further queries, please quote the above reference number.

PLEASE NOTE: Research data should be securely stored in the discipline/department for a period of 5 years.

The ethical clearance certificate is only valid for a period of 3 years from the date of issue. Thereafter Recertification must be applied for on an annual basis.

I take this opportunity of wishing you everything of the best with your study.

Yours faithfully

.....
Dr Shenuka Singh (Chair)
Humanities & Social Sciences Research Ethics Committee

/pm

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