



Child Participation in Custody Proceedings in Customary Courts in Nigeria

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DEDICATION

To my late grandmothers, Mrs Olabisi Adeyoriyu and Mrs Esther Modupe Soola, and to my late uncle, Oluwafemi Adegun.

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LIST OF ABBREVIATIONS

ACERWC	African Committee of Experts on the Rights and Welfare of the Child
ACRWC	African Charter on the Rights and Welfare of the Child
AU	African Union
CCL	Customary Courts Law
CRA	Child's Rights Act
CRL	Child's Rights Law
CWPL	Child Welfare and Protection Law
FCPR	Family Court Procedure Rules
UNCRC Committee	United Nations Committee on the Rights of the Child
UNCRC	United Nations Convention on the Rights of the Child

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CHAPTER ONE

1. Background

Nigeria has over 250 ethnic groups with diverse customary laws that govern people's inter-personal relationships, activities, and ways of life.¹ Customary laws and Islamic law in Nigeria existed before the colonial period, and despite several adaptations of some customary laws during the colonial and post-colonial periods,² some customary laws are preserved till date. An example of such customary laws is that which governs the celebration of customary marriage.³

During the colonial period which started in 1884,⁴ the British introduced statutory marriage through the Marriage Ordinance of 1863. The Marriage Ordinance of 1863 was subsequently amended by the Marriage Act of 1884. The nature of marriage introduced by the Marriage Act of 1884 is monogamous,⁵ different from customary and Islamic marriages that are polygynous.⁶

The Marriage Act of 1884 was later replaced by the Marriage Act of 1914 which is still in force, and marriage governed by the Marriage Act of 1914 is generally known as statutory marriage. Thus, in the Nigerian legal system, there exist statutory, customary, and Islamic marriages, and the same parties can celebrate their marriage under any one or combination of two or the three systems.⁷

¹ HE Reed & BU Mberu 'Ethnicity, religion, & demographic behaviour in Nigeria' in R Saenz *et al* (eds) *The international handbook of demography of race and ethnicity* (2015) 419; H Canci & OA Odokoya 'Ethnic and religious crises in Nigeria: A specific analysis upon identities (1999 – 2013)' (2016) 16 *African Journal of Conflict Resolution* 89 90 available at <https://www.ajol.info/index.php/ajcr/article/view/144735> (accessed 27 July 2024); El Onah 'Nigeria: A country profile' (2014) 10 *Journal of International Studies* 151 available at <https://e-journal.uum.edu.my/index.php/jis/article/view/7954> (accessed 27 July 2024).

² Over the years, some customary laws have been held invalid because they are repugnant to natural justice, equity and good conscience. An example is customary law that denies female children from inheriting their fathers' properties as evidenced in the Nigerian Supreme Court decision in *Ukeje v Ukeje* (2014) LPELR - 22724(SC); S Oshodi 'The inheritance rights of women in Nigeria' available at https://www.iawj.org/content.aspx?page_id=2507&club_id=882224&item_id=4986 (accessed 28 July 2024).

³ EE Iroegbu 'The essential elements of customary law marriage in Nigeria: A critique' available at [https://www.academia.edu/103633459/THE_ESSENTIAL_ELEMENTS_OF_CUSTOMARY_LAW_MARRIAGE_IN_NIGERIA_A_CRITIQUE_EZINNA_EDGE_IROEGBU_LL_B_PDE_MSc_NIGERIA#:~:text=where%20the%20Nigerian%20Supreme%20Court,\(1973\)%2010%20SC%201](https://www.academia.edu/103633459/THE_ESSENTIAL_ELEMENTS_OF_CUSTOMARY_LAW_MARRIAGE_IN_NIGERIA_A_CRITIQUE_EZINNA_EDGE_IROEGBU_LL_B_PDE_MSc_NIGERIA#:~:text=where%20the%20Nigerian%20Supreme%20Court,(1973)%2010%20SC%201) (accessed 26 July 2024); SU Nweke-Eze 'An appraisal of customary law marriages in Nigeria' available at <https://journals.ezenwaohaetorc.org/index.php/JOCINL/article/view/2082/2125> (accessed 26 July 2024), where the essential elements of customary marriage are stated to include consent of parties and bride price which are observed till date. Islamic law and Islamic marriage are also preserved.

⁴ <https://u.osu.edu/introhumanitiesonline/2020/02/04/history-of-the-british-takeover-of-nigeria/> (accessed 28 July 2024).

⁵ H Boparai 'The customary and statutory law of marriage in Nigeria' (1982) 46 *The Rebel Journal of Comparative and International Private Law* 530 available at <https://www.jstor.org/stable/pdf/27876669.pdf> (accessed 27 July 2024).

⁶ A Iyoha 'Polygamous marriage in Nigeria and Ghana: A legal perspective' available at <https://www.nigerianjournalonline.com/index.php/IJOCLEP/article/viewFile/4070/3946#:~:text=Two%20system%20of%20marriage%20are,marry%20more%20than%20one%20wife> (accessed 28 July 2024).

⁷ Marriage Act of 1914 sec 33(1); Action for Justice Nigeria 'Marriages and their legal framework in Nigeria' available at https://nigeria.action4justice.org/legal_areas/womens-rights-focusing-on-marriage-rights/marriages-

Where the same parties celebrate their marriage under two or three systems of marriage like a combination of statutory and customary marriages, this is known as 'double-decker' marriage with legal implications which is beyond the scope of this research.⁸ The legal implication for the same parties who celebrate 'double-decker' marriage is different from where same parties celebrate only customary marriage. Where same parties celebrate only customary marriage, the dissolution of such marriage and child custody issue that arise therefrom are governed by customary law. Also, where parties are unmarried, that is bride price and other customary marriage essentials are yet to be observed, a child born in such union may be subject to customary law.⁹ This research therefore focuses on children that the determination of their custody in contested cases is subject to customary law which customary courts in Nigeria have jurisdiction to adjudicate. Custody in the context of this research is the determination of a child's residence, who has care and control, and the right to make decisions for a child. Sole or joint custody may be ordered, and where a parent is granted sole custody, the other parent may be granted access depending on the circumstances of each case and the best interest of the child.¹⁰

Thus, unlike statutory marriage that its formation, dissolution and issues of custody arising therefrom are governed by the Marriage Act of 1914, the Matrimonial Causes Act of 1970 and the Matrimonial Causes Rules of 1983, the formation, dissolution and other matrimonial causes arising from customary marriage are governed by the customary law¹¹ to which parties are subject which is largely unwritten, flexible and varies from one community to another.¹² Islamic law is applied in the cases of Islamic marriage.¹³

[and-their-legal-framework-in-nigeria/#:~:text=To%20enjoy%20marriage%20rights%20in,Customary%20law%2C%20and%20Islamic%20law](#)

(accessed 10 August 2024); OS Oyelade & A Abuloye 'Juxtaposing statutory and customary marriages in Nigeria: The challenges and prospects' (2022) 1 *African Journal of Law and Justice System* 1.

⁸ EF Ijalana & JO Agbana 'A critical appraisal of double-decker marriage under the Nigerian family law' (2021) 12 *Beijing Law Review* 1163 available at <https://www.scirp.org/journal/paperinformation?paperid=113876> (accessed 10 August 2024); SM Olokooba 'Analysis of legal issues involved in the termination of double-decker marriage under Nigeria law' available at <https://nials-nigeria.org/pub/NCLR7.pdf> (accessed 10 August 2024).

⁹ AAR Nwabude 'Traditional African (the Igbo) marriage customs & the influence of the western culture: Maxists approach' (2022) 10 *Open Journal of Social Sciencies* 224.

¹⁰ FO Abimbola & AO Abiola 'Custody of children: The jurisdiction of family courts versus the state high courts in protecting the interest of the child in matrimonial proceedings' available at https://papers.ssm.com/sol3/papers.cfm?abstract_id=4335267 (accessed 24 September 2024).

¹¹ Customary law means a set of rules that communities have adopted as principles that govern their conducts, and it varies from one community to another, though some principles of customary law like bride price are common to communities; R Zahn 'Human rights in the plural legal system of Nigeria' (2009) *Edinburg Student Law Review* 66 available at https://heinonline.org/HOL/Page?handle=hein.journals/edinslr1&div=10&g_sent=1&casa_token=&collection=journals (accessed 8 July 2024); MI Gwangndi 'The socio-legal context of the Nigerian legal system and the Shari'a controversy: An analysis of its impact on some aspects of the Nigerian women's rights' (2016) 45 *Journal of Law, Policy and Globalization* available at <https://core.ac.uk/download/pdf/234650461.pdf> (accessed 7 July 2024).

¹² Oyelade & Abuloye (n 7) as above; Lagos State Customary Courts Law of 2011 (Lagos CCL) secs 25 and 26 provide for applicable customary law that will apply in civil causes and matters depending on different circumstances.

The co-existence of the three systems of marriage affirms Nigeria's legal pluralism to the effect that different systems of laws co-exist, that is, the common law, statutory law, customary law and Islamic law.¹⁴ Customary law and Islamic law govern persons or conduct subject to them.¹⁵ Unlike common law, courts in Nigeria do not apply customary law as a matter of cause, courts apply customary law that is judicially noticed, that is, established in previous case(s) or has been proved because customary law is regarded as a question of fact.¹⁶ In addition, for court to apply customary law in any case, such customary law must not be repugnant to natural justice, equity and good conscience, not be contrary to public policy and not be incompatible with any written law in force.¹⁷ This is similar to sections 211(3) of the Constitution of the Republic of South Africa of 1996 (South African Constitution) which provides that application of customary law be subject to the Constitution and other legislations.

The question of whether a court can apply customary law is determined by the court's enabling statute including the Constitution of the Federal Republic of Nigeria of 1999 (Nigerian Constitution). Thus, the Nigerian Supreme Court and the Court of Appeal apply customary law when exercising appellate jurisdiction in cases where issues of customary law are raised.¹⁸ The High Court of states,¹⁹ the High Court of the Federal Capital Territory,²⁰ the Customary Court of Appeal²¹ and the Magistrates' Court²² also apply customary law in cases where issues of customary law arise in matters within their jurisdiction.²³

¹³ MS Ikujuni & I Kolade-Faseyi 'Revisiting the dissolution of marriage under Islamic law in Nigeria' available at <https://publications.achievers.edu.ng/publications/62/mSPLt4DZhsQn.pdf> (accessed 7 July 2024); *Khairie Zaidan v Fatimah Khalil Mohseen* (1973) LPELR-SC52/1773.

¹⁴ O Lewis 'Legal pluralism and land ownership in Nigeria: A tale of two unworkable systems' available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4335865#:~:text=This%20article%20argues%20that%20the,ownership%20of%20land%20in%20Nigeria (accessed 8 July 2024); There is also the received English Law which comprises the Common Law, Rules of Equity and Statute of General Application in force in England on or before the 1 January 1900 as provided in High Court Laws like the High Court of the Federal Capital Territory Act of 1957 sec 23.

¹⁵ <https://www.learnnigerianlaw.com/learn/legal-methods/law-sources> (accessed 7 July 2024); It is important to state that by section 51 of the Lagos CCL for example, customary law includes Islamic law. However, for the purpose of this research and the fact that in terms of origin and characteristics, customary law is considered different from Islamic law. Thus, Islamic law is not considered as part customary law in this research; JM Busari 'Shari'a as customary law? An analytical assessment from the Nigerian Constitution and judicial precedent' available at <https://journal.uinjk.ac.id/index.php/ahkam/article/viewFile/18815/9080> (accessed 8 July 2024); AA Oba 'Religious and customary laws in Nigeria' (2011) 25 *Emory International Law Review* 881.

¹⁶ Evidence Act of 2011 (Evidence Act) secs 16, 17 & 18(1).

¹⁷ Evidence Act sec 18(3); Kaduna State Customary Courts Law of 2001 (Kaduna CCL) sec 24(a); Lagos CCL sec 25(1).

¹⁸ Supreme Court Act of 1960 sec 17(e); Constitution of the Federal Republic of Nigeria of 1999 (Nigerian Constitution) sec 245(1).

¹⁹ Lagos State High Court Law of 1955 sec 24.

²⁰ High Court of the Federal Capital Territory Act of 1957 sec 29.

²¹ Nigerian Constitution sec 267 & 282(1); Kaduna State Customary Court of Appeal Law of 2001 sec 48.

²² Lagos State Magistrates' Court Law of 2009 sec 34.

²³ AC Diala 'A critique of the judicial attitude towards matrimonial property rights under customary law in Nigeria's southern states' (2018) 18 *African Human Rights Law Journal* 100 109.

Below the hierarchy of these courts are customary courts established by laws made by States' Houses of Assembly,²⁴ and the Federal House of Representatives for the Federal Capital Territory, Abuja.²⁵ Consequently, customary courts exist in different states,²⁶ and common to the customary courts laws is customary courts' jurisdiction to adjudicate custody matters which are subject to customary law.²⁷ On the other hand, States' High Courts and the High Court of the Federal Capital Territory have jurisdiction to adjudicate custody matters arising from statutory marriage.²⁸ Noteworthy is the fact that in most cases, issue of child custody in customary courts forms part of the issues in the judicial dissolution of customary marriage.²⁹

Compared to the high courts, customary courts' proceedings are not as technical, and study³⁰ shows that when adjudicating child custody in customary courts, the patriarchal cultural belief that men are owners of their children influence decisions in majority of the cases, and the best interest of the child plays minimal role.³¹ This suggests possible challenge to child participation in such proceedings.

Child's right to participate in judicial proceedings that affect the child is guaranteed under article 12 of the United Nations Convention on the Rights of the Child (UNCRC) and article 4(2) of the African Charter on the Rights and Welfare of the Child (ACRWC) to which Nigeria is a party. Custody matters in customary courts being judicial proceedings that affect

²⁴ Nigerian Constitution sec 6(4)(a) & Second Schedule part I para 61.

²⁵ TK Adekunle 'Nigerian indigenous courts and their dispute resolving mechanisms in global perspectives' available at <https://aija.org.au/wp-content/uploads/2017/08/Adekunle1.pdf> (accessed 27 July 2024).

²⁶ Examples are the Federal Capital Territory Customary Court Act of 2007 (FCT CCA) sec 14(2); Lagos CCL secs 21 & 22; Kaduna CCL sec 21; Ekiti State Customary Courts Law of 1978 (Ekiti CCL) sec 17(3); Oyo state Customary Courts Law of 2018 (Oyo CCL) sec 3; Edo State Customary Courts Law of 1984 sec 20(1); Delta State Customary Courts Law of 1984 sec 20(1); Akwa Ibom State Customary Courts Law of 2000.

²⁷ UJ Idem 'The judiciary and the role of customary courts in Nigeria' (2017) 5 *Global Journal of Politics and Law Research* 33.

²⁸ Matrimonial Causes Act of 1970 (MCA) sec 2, and the general rules provided in the MCA and the Matrimonial Causes Rules of 1983 are the same for every high court in Nigeria.

²⁹ Idem (n 27) as above. This can be by mutual agreement of parties or unilateral decision of one of the parties which have been said to be disadvantageous to the parties as it is difficult to determine the specific time and the circumstances of the divorce, and the return of bride price can also serve as evidence of dissolution of such customary marriage.

³⁰ LFC Ntoimo & FC Ntoimo 'Who owns a child? Conflict of culture and human right in the dissolution of customary law marriage in Nigeria' available at <https://iussp.org/sites/default/files/Ntoimo%20-%20Full%20paper%20-%20Conflict%20of%20culture%20and%20human%20right%20in%20the%20dissolution%20of%20customary%20law%20marriage%20in%20Nigeria.pdf> (accessed 20 July 2024); AA Yusuff 'Implications of child custody in Islamic family law: A case study of customary courts in Oyo State, Nigeria' 362 available at <https://icrjournal.org/index.php/icr/article/download/105/91/443> (accessed 22 September 2024).

³¹ A Musa, B Yahaya & TN Samu 'Customary law in Nigeria and parental perception of right of the child' (2021) *International Journal of Advanced Research* available at https://www.researchgate.net/publication/351521946_CUSTOMARY_LAW_IN_NIGERIA_AND_PARENTAL_PERCEPTION_OF_RIGHT_OF_THE_CHILD/link/609be86f299bf10fbb0e0fb9/download?tp=eyJjb250ZXh0ljp71mZpcnN0UGFnZSI6InB1YmxpY2F0aW9uIiwicGFnZSI6InB1YmxpY2F0aW9uIn19 (accessed 22 April 2024).

children means that customary courts must respect children's right to participate in such proceedings, notwithstanding customary belief to the contrary.³²

Nigeria domesticated the UNCRC and the ACRWC by enacting the Child's Rights Act of 2003 (CRA) with equivalent child's rights legislations at state level. The CRA provides for instances where a child is allowed to express his or her wishes, like in criminal proceedings under section 215 of the CRA, and custody proceedings under sections 75, 155 and 158 of the CRA. However, an analysis of these provisions in the context of article 12 of the UNCRC and article 4(2) of the ACRWC shows that the CRA provisions on child participation is not comprehensive. Salient principle of child participation like the requirement that the child's views be given due weight is absent.³³ Section 75 of the CRA which requires a judge to consult a child's wishes in custody proceeding is not worded as a right of the child, but as an inherent discretionary power of the judge, and section 215 CRA is restricted to criminal proceedings.

That notwithstanding, sections 155 and 158 of the CRA provide better opportunity for children to be heard in custody proceedings.³⁴ Section 155 CRA guarantees a child's right to legal practitioner and free legal aid in matters that affect the child, and section 158 provides that court proceeding be conducted in an atmosphere that allows a child to express his or her views and participate in proceedings. Section 83 CRA provides that the court can appoint a legal practitioner or guardian *ad litem* to represent a child's interest.³⁵

However, these provisions do not provide that the views of the child be given due weight, and the courts to which they apply do not include customary courts (with the exception of Kaduna state),³⁶ despite that customary courts deal with issues that affect children.³⁷ Noteworthy is the fact that customary courts laws for Abuja and Lagos for example were enacted after their respective child's rights legislations,³⁸ and despite exclusion of customary courts in the category of family courts in the CRA and the Lagos Child's Rights Law of 2007 (Lagos CRL), customary courts laws subsequently enacted retained the jurisdiction of the

³² United Nations Committee on the Rights of the Child, General Comment 12 (UNCRC General Comment 12).

³³ Unlike the case of South Africa that its Children's Act 38 of 2005 sec 10, and that of Kenya that its Children's Act 29 of 2002 sec 8(3) provide for the principle of child participation and evolving capacity of the child in any matter that affects the child.

³⁴ Similar provisions in Lagos state Child's Rights Law of 2007 (Lagos CRL) secs 144 & 147; Kaduna state Child Welfare and Protection Law of 2018 (Kaduna CWPL) secs 150 & 153; Ekiti state Child's Rights Law of 2007 (Ekiti CRL) secs 155 & 158; Oyo state Child's Rights Law of 2006 (Oyo CRL) secs 156 & 159.

³⁵ Lagos CRL sec 83; Ekiti CRL sec 83; Oyo CRL sec 91; Kaduna CRL sec 83.

³⁶ CRA secs 149, 150 & 162(1); Lagos CRL secs 138, 139 & 151(1); Ekiti CRL secs 149, 150 & 162(1); Oyo CRL secs 150, 151 & 163(1). The position is different under the Kaduna CWPL which by its sections 142 & 143(b) includes customary courts as part of family court established by the law.

³⁷ (n 26) as above.

³⁸ (n 26) as above.

customary courts to adjudicate custody matters which are subject to customary law. This affirms the intention of legislators that customary courts adjudicate such matters.

Notwithstanding legislative gaps on child participation, the 'best interest of the child' in section 1 of the CRA³⁹ applies to customary courts, and it is important to assess whether customary courts use the 'best interest' in allowing child participation in custody proceedings noting that child participation is an important methodology to ascertain a child's best interest.⁴⁰

It is against this background that this research seeks to assess the extent of child participation in custody proceedings in customary courts with an end to ensure customary courts implement child participation in custody proceedings which are judicial proceedings that affect children.

2. Problem statement

Child participation as a right and a principle in judicial proceeding is expressly provided in article 12 of the UNCRC and article 4(2) of the ACRWC. In domesticating the UNCRC and the ACRWC, Nigeria enacted the CRA. Though the CRA contains provisions that give a child the opportunity to express his or her views in certain judicial proceedings in sections 75, 83, 155, 158 and 215 of the CRA, these provisions are not comprehensive in compliance with the provisions of article 12 of the UNCRC and article 4(2) of the ACRWC. For example, the CRA does not provide that the views of the child be given due weight which is an essential element of child participation.

Also, is the fact that child participation is not provided as a general principle that should guide the interpretation and implementation of all rights in the CRA because provisions in the CRA where the wishes of the child are required to be consulted are with reference to some aspects of judicial proceedings like custody and criminal proceedings applicable only to courts designated as family courts. Child participation is limited to certain judicial proceedings, and administrative proceeding are also excluded. It is therefore arguable that child participation as a core principle of child's rights which should inform the interpretation and implementation of all other rights in the CRA is absent in the CRA.

This challenge is further exacerbated by the fact that customary courts are excluded from family courts to which these provisions apply (with the exception of Kaduna state) despite that customary courts deal with issues that affect children.⁴¹ Exclusion of customary courts has discriminatory implication for children whose custody issues are subject to customary

³⁹ Lagos CRL sec 1; Ekiti CRL sec 1; Kaduna CWPL sec 4; Oyo CRL sec 3.

⁴⁰ UNCRC General Comment 12 paras 70 – 74.

⁴¹ (n 26) as above.

law and are adjudicated in customary courts, unlike children of statutory marriage whose custody issues are adjudicated in the high court which forms part of family courts to which sections 83, 155 and 158 of the CRA apply.

In addition, CRA does not automatically apply in the 36 states of the federation because based on Nigeria's federal structure, the issue of children's rights is a residual matter by provisions of the Nigerian Constitution, and therefore within the legislative competence of states' Houses of Assembly.⁴² For provisions of the CRA to apply to states, the states' Houses of Assembly must domesticate provisions of the CRA by enacting states laws incorporating provisions in the CRA.⁴³ States which have domesticated the CRA copied the CRA provision on child participation, which is not comprehensive, thereby suggesting challenge to child participation in those states. Kaduna state however includes customary courts in the category of family courts in the Kaduna state Child Welfare and Protection Law of 2018 (Kaduna CWPL) which provision on child participation is also not adequate. Lagos on the other hand has the Child's Rights Law of Lagos State (Family Court Procedure) Rules of 2018 (Lagos FCPR) with provisions on child participation that fills the gap in the Lagos CRL, but Lagos FCPR is only applicable in the high courts and magistrates' courts.

Also prevalent is the patriarchal belief that gives preference to men in custody cases under customary law, and the cultural belief that prioritise children's protection over children's participation in important decision-making processes that impact their lives like custody. Despite the identified gaps on child participation, the principle of 'best interest of the child' is provided as a general principle in the CRA and the states' laws on child's rights, and therefore applicable to customary courts. There is a possibility that the customary courts' judges may use their discretion to allow children to participate in custody proceedings based on the best interest principle or that children are excluded because of the gaps in the law on child participation. The gaps in the law on child participation in Nigeria may have implications on the implementation of child participation in custody proceedings in customary courts which this research seeks to assess.

3. Objectives of study

1. To highlight the relevance and importance of child participation in custody proceedings in customary courts.

⁴² Nigerian Constitution sec 4, second schedule parts i & ii; KZ Oyeyemi ' Nationwide application of the Nigerian Child's Rights Act, 2003:Constitutional thoughts and possibilities' (2023) 5 *International Journal of Law, Policy and Social Review* 144.

⁴³ <https://www.partnersnigeria.org/childs-rights-law-tracker/> (accessed 30 July 2024).

2. To assess whether customary courts allow children to participate in custody proceedings, and to identify the challenges that inhibit child participation in custody proceedings in customary courts.
3. To identify good practices on child participation in custody proceedings from other jurisdiction in Africa which customary courts in Nigeria can adopt or adapt to enhance child participation in custody proceedings in customary courts.
4. To suggest framework in terms of law, procedure, and practice necessary to enhance child participation in custody proceedings in customary courts in Nigeria.

4. Research question

4.1 Main question

Is child participation applied in custody proceedings in customary courts in Nigeria?

4.2 Sub-questions

1. Is child participation relevant and important in custody proceedings in customary courts?
2. Do customary courts currently allow children to participate in custody proceedings, and what are the challenges that inhibit child participation where it is found that children are currently not allowed to participate?
3. Are there good practices on child participation in custody proceedings in an African country which can be adopted or adapted in custody proceedings in customary courts in Nigeria to enhance child participation in such proceedings?
4. What framework in terms of law, procedure and practice can be proposed to enhance child participation in custody proceedings in customary courts in Nigeria?

5. Theoretical framework

This research is based on the theory of adaptive legal pluralism which means the integration of indigenous laws like customary laws with contemporary state laws including international

human rights law.⁴⁴ In this sense, customary laws applied in custody proceedings in customary courts are to observe the principle of child participation guaranteed in the UNCRC and ACRWC. Thus, based on the adaptive legal pluralism theory, child participation as a right and core principle of children's rights are to be applied to customary system of laws and court systems like customary courts.

6. Literature review

(a) General principle on child participation

By article 12 of the UNCRC and article 4(2) of the ACRWC, child participation is both a right and a core principle of children's rights applied in the interpretation and implementation of other rights.⁴⁵ Child participation is a complex phenomenon which should not be viewed as a stand-alone right but as 'cluster of rights'⁴⁶ as it comprises several rights in the UNCRC⁴⁷ including respect for the views of the child,⁴⁸ freedom of expression,⁴⁹ right to freedom of thought conscience and religion,⁵⁰ the right to freedom of association and peaceful assembly⁵¹ and the evolving capacities of the child.⁵²

As subjects of rights, children's right to participation should be observed in any decision making process that affects them as this aids the fulfilment of other rights.⁵³ Article 12 of the UNCRC does not provide details of what is required in practice to ensure its implementation, however, the UN Committee on the Rights of the Child General Comment 12 (UNCRC General Comment 12) provides some details in that regard. Child participation can be achieved through direct involvement or indirect participation through representation.⁵⁴

⁴⁴ AC Diala 'Legal pluralism and the future of personal family laws in Africa' (2021) *International Journal of Law, Policy and the Family* 1 available at https://repository.uwc.ac.za/bitstream/handle/10566/7355/Diala_law_2021.pdf?sequence=1&isAllowed=y (accessed 25 July 2024); A Diala 'Our laws are better than yours: The future of legal pluralism in South Africa' (2019) 26 *Revista General de Derecho Publico Comparado* 1.

⁴⁵ E Fokala 'Calibrating children's rights to participate in a family setting 30 years after the adoption of the Convention on the Rights of the Child and the African Children's Charter' (2020) 34 *Spec Juris* 188.

⁴⁶ F Ang *et al* 'Participation rights in the UN Convention on the Rights of the Child' in F Ang *et al* (ed) *Participation Rights of Children* (2006) 9; D Archard 'Preface' in F Ang *et al* (ed) *Participation Rights of Children* (2006) v.

⁴⁷ M Flekkoy 'A framework for children's participation' in E Verhellen (ed) *Understanding Children's Rights* being collected papers presented at the fourth International Interdisciplinary Course on Children's Rights, Gent, Children's Right Centre of 2000 61.

⁴⁸ United Nations Convention on the Rights of the Child (UNCRC) art 12; African Charter on the Rights and Welfare of the Child (ACRWC) art 4(2).

⁴⁹ UNCRC art 13.

⁵⁰ UNCRC art 14.

⁵¹ UNCRC art 15.

⁵² UNCRC art 5.

⁵³ A Parkes 'Article 12 and child participation' in A Parkes *Children and international human rights law: The right of the child to be heard* (2013) 13.

⁵⁴ A Parkes 'The voice of the child in family law proceedings' in Parkes (n 53) 89.

The components of article 12 UNCRC are: (1) a child who is capable of forming his or her own views; (2)(a) the right of the child to freely express himself or herself in all matters affecting the child, (b) the right of the child to have his or her view being given due weight in accordance with the age and maturity of the child, (c) the right of the child to be heard in judicial and administrative proceedings affecting the child and (e) state obligation in assuring the right to participation is implemented.⁵⁵ Child participation can be consultative, collaborative or child-led participation, and models of child participation include Hart's ladder of child participation, Shier's model, Lundy's model and balanced model.⁵⁶

It is also noted that both the UNCRC and the ACRWC do not mention specific age for a child to participate, and the principle of evolving capacity of the child is emphasised which is determined on a case-by-case basis.⁵⁷ In custody proceedings, the child's views have possible influence on the outcome of the proceedings.⁵⁸ The relationship between child participation and best interest of the child is identified,⁵⁹ as while in some cases, both principles complement each other, in some instances they conflict of which the best interest of the child is prioritised.

Literature is however silent as to how the principle of child participation can be applied in judicial proceedings in dualist countries like Nigeria which are parties to the UNCRC and the ACRWC but have child's rights laws that do not have comprehensive provisions on child participation, and the relevance of child participation in the context of customary judicial proceedings. Also, literature on child participation with focus on the CRA does not provide detailed analysis of CRA in that regard to identify gaps in the CRA on child participation.

(b) Child participation in custody proceedings in customary courts in Nigeria

There is scholarly research on dissolution of marriages in Nigeria including dissolution of customary marriages, however, research focused on child participation in custody proceedings flowing from statutory marriages at the high courts.⁶⁰ Challenges in applying the principle of child participation in practice are identified including that child participation is based on discretion of the judges and the precaution to not make the child involved in

⁵⁵ Ang (n 46) as above.

⁵⁶ Parkes (n 53) 15; Fokala (n 45) as above.

⁵⁷ A Kaldal 'Children's participation in legal proceedings-conditions by adults views of children's capacity and credibility available at <https://brill.com/edcollchap-oa/book/9789004511163/BP000009.xml?language=en> (accessed 24 April 2024).

⁵⁸ Kaldal (n 57) as above.

⁵⁹ E Fokala 'The impact of the best interests and the respect for the views of the child principles in child custody case' (2019) *Nordic Journal of International Law* 614.

⁶⁰ CQ Umeobika 'Evaluation of the rights of the child to participate in divorce/custody matters in Nigeria' (2018) 2 *Nnamdi Azikiwe University Journal of International Law and Jurisprudence* 122; MS Ikuji 'An appraisal on the participation of children in divorce and custody proceedings in Nigeria' (2021) 1 *Achievers University Law Journal* 176.

conflicts between both parents.⁶¹ For custody in customary courts in Nigeria, researchers have focused on how customary courts have applied the best interest of the child's principle in custody cases. However, patriarchal system which gives preference to men in custody cases influences some decisions of customary courts.⁶²

In a study carried out in 2017 on divorce and custody proceedings in customary courts with focus on customary courts in Ekiti state, out of the 15 cases sampled, there were issues of custody in nine, and custody of children of the customary marriages was given to the men in eight of the cases, whereas temporary custody was given to the woman in one case.⁶³ In another study on custody proceedings in customary courts in Oyo state, 200 cases between 2013 – 2017 involving 520 children were sampled.⁶⁴ The findings are that custody of 293 children were given to the fathers, while custody of 277 children were given to the mothers, and the factors the customary courts used in these cases are age of the children, parents' pleas, sex of the child and conduct of parties.⁶⁵ These studies are however silent on how child participation are observed and the extent it is considered in custody proceedings in customary courts.⁶⁶

This research therefore aims to fill this gap as it assesses child participation in custody proceedings in customary courts in Nigeria. This aims to achieve law reform, and to illustrate that child participation applies to custody proceedings in customary courts.

7. Methodology

Doctrinal legal research methodology and qualitative methodology are used to conduct this research. Desk research method is used in the doctrinal research methodology as the research uses and analyses existing literature on child participation, international and regional human rights instruments on child participation, specifically the UNCRC, ACRWC, national laws including the Constitution, CRA, customary courts laws and other relevant legal instruments.

This research also uses primary data which are decisions of customary courts collected and analysed, and secondary data from research done on custody cases in customary courts in Nigeria.

⁶¹ Umeobika (n 60) as above.

⁶² Ntoimo (n 30) as above.

⁶³ Ntoimo (n 30) 398.

⁶⁴ Yusuff (n 30) 366.

⁶⁵ Yusuff (n 30) 366 & 367.

⁶⁶ Umeobika (n 60) as above.

8. Limitations of study

Customary courts in Nigeria cut across the 36 states in Nigeria with different but similar laws. In view of the limitation of time, and resources to carry out this research, customary courts in all the states in Nigeria cannot be captured. This research focuses on analysing customary courts in five jurisdictions, Abuja, Lagos, Ekiti, Kaduna and Oyo states. These jurisdictions are chosen because, CRA applies in Abuja which serves as model that majority of states in Nigeria adopt, Lagos enacted Lagos FCPR which has provisions on child participation that are improvements on Lagos CRL. There is research on custody proceedings in customary courts in Ekiti and Oyo states which are important for deductions in aid of this research. Kaduna CWPL includes customary courts in the category of family court unlike the other four jurisdictions which necessitates an assessment of Kaduna customary courts' decisions as to whether inclusion of customary courts in category of family court has any positive implication on child participation in custody proceedings.

The decisions of customary courts in Kaduna between 2015 to 2024 are sampled and analysed. Secondary data from the research conducted on custody in customary courts in Ekiti and Oyo states are used to support the analysis. Customary courts decisions in Abuja and Lagos are excluded because their decisions are not accessible as at the time of concluding this research. That notwithstanding, findings in this research are relevant to all the states which have customary courts.

In addition, this research excludes child participation in criminal proceedings involving children in conflict with the law, and other civil proceedings like adoption. Also, custody proceedings in Magistrates' Courts, Area Courts, Islamic Courts, and *Khadis* Courts which exist in some states are excluded, though findings in this research may be relevant in these contexts.

In terms of lessons on child participation from other jurisdictions in Africa, the research is limited to South Africa. South Africa is used because of its established practice of child participation in custody proceedings which is affirmed in a 2024 report on South Africa's child participation framework to the effect that South Africa has good practice on child participation in judicial proceedings.⁶⁷

⁶⁷ L Jamieson & H Manjang 'A critical review of South Africa's child participation framework' (2024) available at <https://bettercarenetwork.org/sites/default/files/2024-08/ci-iccrp-child-participation-report-2024.pdf> (accessed 19 August 2024).

9. Structure

This dissertation is divided into five chapters. Chapter one comprises the background, the problem statement, objectives of study, research questions, theoretical framework, literature review, methodology and limitation of study.

Chapter two discusses the meaning of child participation provided under the UNCRC and the ACRWC. National legal framework relevant to child participation including the Constitution, the CRA and other laws are analysed. The relevance and the importance of child participation to custody proceedings in customary courts are highlighted.

Chapter three examines customary courts, their history, composition, and jurisdiction in custody cases. This chapter assesses whether customary courts allow children to participate in custody proceedings, and the challenges that inhibit children's participation in such proceedings. To this end, some customary courts' decisions are analysed, and conclusions are drawn from the analysis.

Chapter four identifies good practices on child participation in custody proceedings in South Africa which can be adopted or adapted to custody proceedings in customary courts in Nigeria to enhance child participation in custody proceedings.

Chapter five comprises the conclusion and recommendation including suggestion on law reform, practice and procedure that can aid child participation in custody proceedings in customary courts in Nigeria.

CHAPTER TWO

2.0 Legislative Framework on Child Participation In Nigeria

2.1 Introduction

The UNCRC, and the ACRWC have four core principles that guide the interpretation and implementation of all the rights therein⁶⁸ which are non-discrimination,⁶⁹ best interest of the child,⁷⁰ live, survival and development⁷¹ and the right to be heard.⁷² These principles are also rights in themselves.⁷³ In this chapter, children in Nigeria's socio-cultural context is discussed, legislative framework on child participation at international, regional and domestic levels are identified and analysed including the relevance of child participation to customary courts.

2.2 Child participation and children in Nigeria's socio-cultural context

In simple terms, child participation means giving a person below the age of 18⁷⁴ an opportunity to freely form and communicate his or her views in all matters that affect him or her, and the views so expressed being taken seriously in accordance with the age and maturity of the child.⁷⁵ As a substantive and procedural right,⁷⁶ child participation recognises the child as subject of right which is a shift from the traditional perception of children as objects of rights who only need the provision and protection of adults.⁷⁷

It is pertinent to note that as simple as child participation seems, some concerns have been raised about its application which include the question of a child's capacity to make rational decision, the adversarial nature of some settings which are harmful to the child, the need to protect the child's best interest, possible manipulation of a child, and that implementation of

⁶⁸ G Lansdown *et al* 'Introduction' in Z Vaghri *et al* (eds) *Monitoring state compliance with the UN Convention on the Rights of the Child, children's well-being indicators and research* (2022) 2; K Hanson & L Lundy 'Does exactly what it says on the tin: A critical analysis and alternative conceptualisation of the so-called general principles of the Convention on the Rights of the Child' (2017) 25 *International Journal of Children's Rights* 285.

⁶⁹ UNCRC art 2; ACRWC art 3.

⁷⁰ UNCRC art 3(1); ACRWC art 4.

⁷¹ UNCRC art 6; ACRWC art 5.

⁷² UNCRC art 12; ACRWC arts 4(2) & 7.

⁷³ Humanium 'The guiding principles of the child's rights convention' available at <https://www.humanium.org/en/the-guiding-principles-of-the-childrens-rights-convention/> (accessed 8 August 2024).

⁷⁴ UNCRC art 1; ACRWC art 2.

⁷⁵ UNCRC art 12; ACRWC arts 4(2) & 7.

⁷⁶ A Parkes 'The nature and scope of Article 12 of the CRC' in Parkes (n 53) 31; Lansdown (n 68) 42.

⁷⁷ Lansdown (n 68) 42.

child participation is cost intensive especially when it involves younger children and children with disabilities.⁷⁸

However, it has been noted that children indeed have capacities to make certain decisions for themselves which some parents or guardians have acknowledged in certain instances including allowing children choose their schools, friends and carry out simple tasks. Therefore, it is submitted that focus should not be to use these concerns as justification to exclude children from decision making process that affects them, but should be to ensure the environment is child-friendly and that appropriate measures are put in place to enable children participate effectively and are protected from harm.⁷⁹ This is in view of the fact that the advantages of allowing children to participate in decision making process that affects them outweighs these concerns including that it helps the making of an informed decision, it aids children's trust in the process, helps their development and confidence, and makes them to be responsible citizens in the short and long term as their experience will make them value the importance of people's participation in decision making process in society.⁸⁰

Noting that this research focuses on customary courts which applies customary law, it is important to touch on the perception of children in Nigeria's socio-cultural context to appreciate the extent of the impact of cultural beliefs on child participation which may influence proceedings in customary courts. Generally, children are special beings of value in different cultures in Nigeria to be provided for and protected against harm because children are considered strangers in the world who need adults' nurture to aid their successful journey in life.⁸¹ Thus, communities believe adults are in the best position to determine what is best for children, and to express children's feelings, wishes or opinions on their behalf.⁸²

⁷⁸ T Gali & BF Duramy 'Enhancing capacities for child participation: Introduction' in T Gali & BD Duramy (eds) *International perspectives and empirical findings on child participation: From social exclusion to child-inclusive policies* (2015) 1.

⁷⁹ Gali & Duramy (n 78) 3.

⁸⁰ Gali & Duramy (n 78) 4.

⁸¹ AO Omobowale *et al* 'The context of children in Yoruba popular culture' (2019) 9 *Global Studies of Childhood* 18 available at <https://journals.sagepub.com/doi/epub/10.1177/2043610618815381> (accessed 30 August 2024); OC Okoye 'Child rearing and modernity among the Igbo of southeast Nigeria' (2022) 1 *International Journal of Interdisciplinary Research in Social Sciences* 1 available at <https://repository.kcau.ac.ke/bitstream/handle/123456789/1282/Okoye-Child%20Rearing%20And%20Modernity%20Among%20The%20Igbo%20Of%20Southeast%20Nigeria.pdf?sequence=1&isAllowed=y#:~:text=Thus%2C%20childlessness%20is%20considered%20the,to%20themselves%20and%20the%20society> (accessed 30 August 2024).

⁸² DM Chirwa 'The merits and demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *The International Journal of Children's Rights* 157 160 available at https://heinonline.org/HOL/Page?handle=hein.journals/intjchr10&div=19&g_sent=1&casa_token=moWHCKtUUYQAAAAA:qtZE5w8btKsvywBF5uwt5lvPNqrj5XWUkLpa_hDOK1tDXlqF5ch7j36uvdvnGfsNZaBfZibNAU&collection=journals (accessed 4 August 2024); A Lloyd 'A theoretical analysis of the reality of children's rights in Africa: An introduction to the African Charter on the Rights and Welfare of the Child' (2002) 2 *African Human Rights Law Journal* 11 18 available at https://www.ahrlj.up.ac.za/images/ahrlj/2002/ahrlj_vol2_no1_2002_amanda_lloyd.pdf (accessed 8 August 2024).

Parental autonomy is therefore prioritised over children's autonomy.⁸³ For example, a 2021 research on child participation in Yoruba family setting⁸⁴ found that the Yoruba culture believes children have the capacity to make good decisions only when they are old enough based on adult's perception. On the other hand, the children interviewed believe their parents always act in their best interest. It is believed that a child cannot have the wealth of experience of an adult, and the child is always limited to what he or she knows, thus needs adults' protection and guidance.⁸⁵ Even when allowed to speak, a child's opinion should be subject to that of the adult based on experiences adults have acquired over the years.⁸⁶

In some communities, children are made to participate in some simple activities like cultural display and home chores as a means to pass on cultural knowledge and practices, but are excluded from contributing to substantial issues.⁸⁷ Some modern families believe children should be given some autonomy and be able to make decisions on issues like what they like to eat, cloth preference, schools they like to attend etc.⁸⁸ However, this is not a standard observed in many families as some still believe giving children such autonomy has repercussions and may make children become irresponsible adults.

Also, in some communities like the Yorubas and Igbos, children perceived to be 'special' because they have spiritual or uncommon abilities are treated differently from other children, they are allowed to participate in some decision making processes, and their words are taken seriously because it is believed deities or ancestors speak through them.⁸⁹ This may be different for children with disabilities who are regarded as abomination in some communities,⁹⁰ and for female children in some communities who are regarded as inferior.⁹¹

In view of these facts, it is submitted that child participation in Nigeria's socio-cultural context is not a standard that cuts across all cultures and settings. It is dependent on several factors

⁸³ Lloyd (n 82) as above.

⁸⁴ EO Okewumi & O Akanle 'Children's participation in decision making with the family context of Yoruba culture' (2022) 15 *Child Indicators Research* 235 available at <https://link.springer.com/uplib.idm.oclc.org/content/pdf/10.1007/s12187-021-09866-5.pdf> (accessed 28 August 2024).

⁸⁵ Okewunmi & Akanle (n 84) 241.

⁸⁶ F Gambo 'An exploratory examination of the cultural understanding of communication competence among Nigerian immigrant adult children' unpublished Master's thesis, Old Dominion University, 2023 para 2.6.3 available at https://digitalcommons.odu.edu/cgi/viewcontent.cgi?article=1023&context=communication_etds (accessed 8 August 2024).

⁸⁷ Fokala (n 45) 189.

⁸⁸ Okewunmi & Akanle (n 84) 240.

⁸⁹ UR Onunwa 'Igbo traditional attitude to children: A religious interpretation of a socio-economic need' available at https://www.jstor.org/stable/pdf/40760332.pdf?refreqid=fastly-default%3Afd8e2c3881ccce79213a07f551ab86c4&ab_segments=&origin=&initiator=&acceptTC=1 (accessed 28 August 2024).

⁹⁰ E Etieyibo & O Omiegbe 'Religion, culture, and discrimination against persons with disabilities in Nigeria' (2016) 5 *African Journal of Disability* 192 available at <https://www.ncbi.nlm.nih.gov/pmc/articles/PMC5433448/> (accessed 30 August 2024).

⁹¹ IC Isidienu 'Attitude towards a male and a female child among the Igbo of Nigeria' (2022) 5 *Sapientia Global Journal of Arts, Humanities and Development Studies* 41 available at <https://www.sgojahds.com/index.php/SGOJAHDS/article/view/341/368> (accessed 30 August 2024).

including the age of the child involved, the gender of the child, whether the child is a child with or without disabilities, whether the child has uncommon abilities, the context of participation, the settings, the issues involved whether complex or simple, and the adults in charge of the decision-making process whether they believe in child participation or otherwise. Non-standardisation of child participation in Nigeria's socio-cultural context may have implication on customary courts' custody proceedings which is assessed in chapter three of this research.

Further, the common denominator observed is that provision and protection for children are prioritized over participation which may be the reason provisions in the CRA and its equivalent at state level emphasise the provision and protection aspects of children's rights over participation. Also, it is submitted that prioritisation of provision and protection over participation may be the reason some states' child's rights legislations are titled to reflect only 'welferism' and 'protection' like the child's 'rights' law of Kaduna is titled 'Child Welfare and Protection Law of 2018' and Katsina is titled 'Child Protection Law of 2020'.

2.3 International and regional legal framework on child participation relevant to custody proceedings

Article 12 of the UNCRC and article 4(2) of the ACRWC are the core provisions on 'child participation',⁹² though the phrase 'child participation' incorporates other participatory rights⁹³ that recognise children's autonomy and give them the opportunity to engage and express themselves in private and public affairs.⁹⁴

Unlike the UNCRC which makes separate provisions for the best interest as primary consideration and child participation under articles 3 and 12 of the UNCRC respectively, the ACRWC provides for the child's best interest and child participation in the same article 4. The African Committee of Experts on the Rights and Welfare of the Child (ACERWC) Guidelines on Child participation of 2022 referenced articles 4(2) and 7 of the ACRWC as core provisions on child participation,⁹⁵ it is submitted that though child participation under article 4(2) and freedom of expression under article 7 ACRWC belong to the class of

⁹² G Lansdown 'Article 12: The right to be heard' in Vaghri (n 68) 42.

⁹³ Other participatory rights include the right to freedom of expression (UNCRC art 13; ACRWC art 7), the right to freedom of thought, conscience and religion (UNCRC art 14; ACRWC art 9), the right to freedom of association and peaceful assembly (UNCRC art 15; ACRWC art 8), evolving capacities of the child (UNCRC art 5), right to participate in cultural and artistic life (ACRWC art 12), the right of children with disabilities to participate in their communities (ACRWC art 13).

⁹⁴ F Ang *et al* 'Participation rights in the UN Convention on the Rights of the Child' in Ang (n 46) 9; Ang (n 46) as above.

⁹⁵ African Committee of Experts on the Rights & Welfare of the Child, Guidelines on Child Participation of 2022 para 1.

participatory rights, both provisions are different in principle.⁹⁶ Consequently, clear distinction in the UNCRC between the best interest, child participation and freedom of expression under articles 3, 12 and 13 respectively is preferred to the ACRWC. Thus, child participation for the purpose of this research is with reference to article 12 UNCRC and article 4(2) ACRWC.

It is pertinent to note that though provisions of article 4(2) of the ACRWC are similar to article 12 of the UNCRC, there are areas of divergence.⁹⁷ Child participation provided under article 4(2) of the ACRWC is restricted to judicial and administrative proceedings, whereas article 12 of the UNCRC has no restriction as it provides for 'all matters affecting the child'. Restriction of child participation to judicial and administrative proceedings under article 4(2) of the ACRWC could be the basis the ACERWC uses article 7 of the ACRWC to complement article 4(2) as reference is made to 'all matters' in article 7 ACRWC. However, it is submitted that this should not have been the case as articles 4(2) and 7 ACRWC are different in principle.⁹⁸ It is more appropriate for the ACERWC to use article 12 of the UNCRC with regard to 'all matters affecting the child' pursuant to article 1(2) of the ACRWC that states that provisions in international law that better protect children's rights can be relied on.

Further, article 4(2) of the ACRWC guarantees the right to participate for a child 'capable of communicating his or her own views', whereas under article 12 of the UNCRC, the right is for a child 'capable of forming his or her own views'. Thus, under the UNCRC, a child who can form a view but deficient in communicating the view is still covered, and as such, a child with disabilities who has difficulties in communicating through the traditional means of communication can enjoy the right which is more expansive.⁹⁹

Article 12 of the UNCRC provides that the views expressed by a child be given due weight in accordance with the age and maturity of the child, whereas article 4(2) ACRWC makes no reference to a child's 'age and maturity', but states that a child's views be given due consideration in accordance with 'provisions of appropriate law'. 'Appropriate law' in this context could mean domestic law enacted for that purpose. It is however submitted that such

⁹⁶ UNCRC General Comment 12 paras 80 & 81 where the UNCRC Committee states that though article 12 on child participation and article 13 on freedom of expression are related and complement each other, they are different. This is because freedom of expression under article 13 comprises the right of the child to seek, receive and impart information with a negative duty on the state to refrain from any action that restricts this right. On the other hand, child participation under article 12 means the freedom of the child to form and express an opinion on matters that affect the child which should be given due weight with a positive duty on the state to put in place legislative, admirative and other measures for the fulfilment of the right. Also, that the positive duty on the state to fulfil the right under article 12 has corresponding positive effect of realisation of the right under article 13, but both rights are different in principle.

⁹⁷ Chirwa (n 82) 125 - 128.

⁹⁸ (n 96) as above.

⁹⁹ K Cleophas & UM Assim 'Child participation in family law matters affecting children in South Africa' (2015) 2 *European Journal of Law Reform* 294 296 available at https://www.elevenjournals.com/tijdschrift/ejlr/2015/2/EJLR_1387-2370_2015_017_002_008 (accessed 6 August 2024).

domestic law should not defeat the purpose of effective child participation under international law in the overall best interest of the child.¹⁰⁰ Also, it is opined that the ‘age and maturity’ requirements under article 12 of the UNCRC can be implied in ‘a child capable of communicating his or views’ provided under article 4(2) of the ACRWC.¹⁰¹

Article 4(2) of the ACRWC provides that a child be heard ‘either directly or through an impartial representative as a party to the proceedings’ which gives the child an opportunity to be represented by legal representative as a party, therefore on equal footing with other parties. The requirement to be party to proceedings is not provided in article 12 of the UNCRC, though this can be implied in article 12(2) as a child can participate directly or through representatives or body in a manner which is consistent with national law, of which being a party to a proceeding is one of the methods of participation in some jurisdictions like South Africa.¹⁰²

Despite these distinctions, child participation under the UNCRC and the ACRWC are similar in substance and complement each other,¹⁰³ and the principle applies to all proceedings including judicial proceedings that affect children like custody proceedings.

2.4 Other international and regional instruments relevant to child participation in custody proceedings

Aside the UNCRC and the ACRWC, there are other international and regional human rights instruments that are relevant to child participation in custody proceedings.¹⁰⁴ Though some of these instruments are not designed for children, they are relevant as children are part of human beings for the purpose of which they were drafted, thus, complement the UNCRC and the ACRWC. These include the Universal Declaration of Human Rights,¹⁰⁵ the United Nations Convention on Rights of Persons with Disabilities,¹⁰⁶ and the Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa.¹⁰⁷

¹⁰⁰ UNCRC General Comment 12 para 38; Chirwa (n 82) 189; *Constitutional Rights Project and Others v Nigeria* (2000) AHRLR 227 paras 39 – 44; ACRWC art 4(1).

¹⁰¹ Cleophas & Assim (n 99) 296.

¹⁰² *Ex Parte Van Niekerk: In re Van Niekerk v Van Niekerk* 2005 JOL 14218 (T).

¹⁰³ ACRWC art 1(2).

¹⁰⁴ Universal Declaration on Human Rights (UDHR) arts 10 & 19; International Covenant on Civil and Political Rights arts 14 & 19.

¹⁰⁵ UDHR arts 10 & 19.

¹⁰⁶ UN Convention on the Rights of Persons with Disabilities art 7(3).

¹⁰⁷ Protocol to the African Charter on Human and Peoples’ Rights on the Rights of Persons with Disabilities in Africa arts 4(j), 27 & 28.

Relevant soft law includes the UNCRC Committee General Comments 12, 14, and 7, the ACERWC General Comments 3, 5, ACERWC Guidelines on Child Participation of 2022, ACERWC Africa's Agenda for Children of 2040,¹⁰⁸ and African Union Agenda 2063.¹⁰⁹

2.5 Child participation provided in Nigeria's domestic law relevant to custody proceedings in customary courts

Nigeria ratified the UNCRC on 19 April 1991¹¹⁰ and the ACRWC on 23 July 2001.¹¹¹ Nigeria as a State party to the UNCRC and the ACRWC has an obligation to implement provisions of the two instruments by enacting legislation and adopting other measures to give effect to the treaties.¹¹²

Worthy of note however is that Nigeria had ratified the UNCRC in 1991 before the enactment of the Nigerian Constitution in 1999, but the Nigerian Constitution does not provide for rights specific to children. This may be the result of the pushbacks on religious and cultural grounds against the child's rights bill in 1993 which took several years before it was passed in 2003.¹¹³ This is unlike the South African Constitution which provides for some child-specific rights including the best interest of the child.¹¹⁴ However, section 36(1) of the Nigerian Constitution on fair hearing, and section 46(4) (a) and (b) on legal aid,¹¹⁵ though not child specific are relevant to child participation in custody proceedings.

Nigeria domesticated the UNCRC and the ACRWC by enacting the CRA with similar provisions in states' child's rights laws.¹¹⁶ States have in force their respective child's rights laws or child protection laws.¹¹⁷ The states' child's rights laws are substantially similar to the CRA on the subject of child participation, thus, the CRA will be used as the basis of analysis with similar provisions referenced in some states' laws.

¹⁰⁸ ACERWC Africa's Agenda for Children 2040 aspiration 10 available at https://www.acerwc.africa/sites/default/files/2022-10/Agenda_2040_for_Children_Rights_in_Africa_10.pdf (accessed 8 August 2024).

¹⁰⁹ African Union Agenda 2063 para 47 available at https://au.int/sites/default/files/documents/36204-doc-agenda2063_popular_version_en.pdf (accessed 8 August 2024).

¹¹⁰ https://tbinternet.ohchr.org/_layouts/15/TreatyBodyExternal/countries.aspx?CountryCode=NGA&Lang=EN (accessed 8 August 2024).

¹¹¹ <https://www.acerwc.africa/en/member-states/ratifications> (accessed 8 August 2024).

¹¹² UNCRC art 2; ACRWC art 1(1). Nigeria is a dualist State, and by section 12 of the Constitution of the Federal Republic of Nigeria of 1999 for provisions of the UNCRC and the ACRWC to be implemented at the domestic level, Nigeria has to domesticate the provisions by enacting a law and this was done by the enactment of the Child's Rights Act of 2003.

¹¹³ Z Bashir 'An evaluation of the impact of the Child Rights Act in regulating the rights of a child in Nigeria' available at https://www.iawj.org/content.aspx?page_id=2507&club_id=882224&item_id=4600 (accessed 31 August 2024).

¹¹⁴ Constitution of the Republic of South Africa of 1996 (South African Constitution) sec 28.

¹¹⁵ Legal Aid Act of 2011 sec 8.

¹¹⁶ (n 35) as above.

¹¹⁷ <https://www.partnersnigeria.org/childs-rights-law-tracker/> (accessed 8 August 2024).

2.5.1 Analysis of CRA (with equivalent provisions at state level) and other laws relevant to child participation in custody proceedings

On the issue of child participation in custody proceedings, there are provisions in the CRA that make reference to the consultation of the wishes of the child in judicial proceedings.¹¹⁸ However, an analysis of these provisions through the lenses of article 12 of the UNCRC and article 4(2) of the ACRWC evidenced that they are not comprehensive to achieve effective child participation in custody proceedings in Nigeria.

Section 75 of the CRA which provides for the power of the court to consult a child's wishes is in the context of custody cases adjudicated under sections 72, 73 and 74 of the CRA which concern issues of custody where a parent had abandoned a child and later claims custody of the child. Thus, section 75 of the CRA is not applicable to custody cases where child abandonment is not an issue. If on the other hand it is argued that consultation of the child's wishes under section 75 of the CRA applies to all custody matters, another issue with section 75 CRA is that it is worded not as a right that the judge is mandated to implement, but as an inherent discretionary power of a judge. It is also not provided in section 75 of the CRA that the expressed views of the child be given due weight, and it is restricted to court proceedings excluding other proceedings outside the court system.

Also, the right of the child to express his or her views in section 215(1)(a) of the CRA is with regard to criminal proceedings for a child in conflict with the law, thus not applicable to civil proceedings like custody. Like section 75 of the CRA, section 215(1)(a) does not provide that the child's view be given due weight.

In addition are sections 3, 155 and 158 of the CRA. Section 3 provides that fundamental rights provided in chapter iv of the Nigerian Constitution are implied in the CRA. Fundamental rights in chapter iv of the Nigerian Constitution which are relevant to custody proceedings are fair hearing and legal aid which are only applicable in cases of enforcement of fundamental rights.¹¹⁹ Thus, the manner these provisions are couched affirms their limited scope to aid the realisation of child participation as provided under article 12 of the UNCRC and article 4(2) of the ACRWC.

Section 155 of the CRA¹²⁰ provides for the right of the child to be represented by a legal practitioner and to free legal aid, and section 89(3) and (4) CRA¹²¹ provide that the court can

¹¹⁸ CRA secs 75, 155, 158 & 215; Lagos CRL secs 70, 244, 147 & 203; Ekiti CRL secs 75, 155, 158 & 215; Kaduna CWPL secs 150 & 153.

¹¹⁹ Nigerian Constitution secs 36(1) & 46(4)(b).

¹²⁰ Lagos CRL sec 144; Ekiti CRL sec 155; Oyo CRL sec 156; Kaduna CWPL sec 150.

¹²¹ Lagos CRL secs 83(3), & (4); Oyo CRL sec 91(3) & (4); Ekiti CRL sec 89(3) &(4); Kaduna CWPL sec 83(3) &(4).

appoint a legal practitioner to present a child in a proceeding where a child has no legal practitioner, and there is no guardian *ad litem* appointed for the child or that the child has sufficient understanding to instruct a legal practitioner and he or she wishes to do so or the court considers it to be in the best interest of the child for a legal practitioner to be appointed to represent the child. Section 89(2) CRA¹²² gives the court the power to appoint guardian *ad litem* according to the rules of the court, and the appointed guardian *ad litem*'s duty is to safeguard the interest of the child in accordance with the rules of the court. The guardian *ad litem* has access to record and can make a report which the court can rely on.¹²³ However, the limitation in these provisions is that they are applicable only to courts designated as family court of which customary courts are excluded except for Kaduna which its Kaduna CWPL includes customary courts in the category of family court, and as such provisions equivalent to sections 89 and 155 CRA apply to customary courts in Kaduna state.¹²⁴ Also, the requirement that the child's views be given due weight is not provided, and representation of the child in such proceedings is only limited to legal practitioner and guardian *ad litem* without provision for an open ended representation with a child's right to choose a preferred mode of participation.¹²⁵

Of importance is the Lagos FCPR which fills the gap on child participation in the Lagos CRL by providing that a child be heard directly or through legal representative and recognition of the evolving capacities of the child,¹²⁶ that a child be assisted in proceedings in case of language barrier or disability¹²⁷ among other laudable provisions to aid effective child participation.¹²⁸ However, the challenge is that Lagos FCPR like provisions on child participation in the Lagos CRL are not applicable to customary courts because they are excluded in the category of courts designated as family court.¹²⁹ Customary courts are excluded from family court category (with the exception of Kaduna) in Abuja, Ekiti, and Oyo, thus customary courts in these jurisdictions face the same legislative challenge like those in Lagos. The Child Rights (Enforcement Procedure) Rules of 2015¹³⁰ applicable in Abuja contains similar provisions like CRA on child participation with no innovative provisions like Lagos FCPR. Though for Kaduna, family court exists at the level of customary court, Kaduna is yet to have rules of procedure like Lagos FCPR with provisions to aid effective child

¹²² Lagos CRL sec 83(2); Oyo CRL sec 91(2); Ekiti CRL sec 89(2); Kaduna CWPL sec 83(2).

¹²³ CRA secs 89(6) & 90; Lagos CRL secs 83(6) & 85; Kaduna CWPL secs 83(6) & 85; Oyo CRL secs 91(6) & 93; Ekiti CRL secs 89(6) & 90.

¹²⁴ Kaduna CWPL secs 3, 83, 144 & 147.

¹²⁵ UNCRC General Comment 12 para 35.

¹²⁶ Child's Rights Law of Lagos State (Family Court Procedure) Rules of 2018 (Lagos FCPR) rule 7.

¹²⁷ Lagos FCPR rule 31

¹²⁸ Lagos FCPR rule 9, 12, 34, 37, 38, 44, 45, 99, 100, 101 & 114.

¹²⁹ Lagos FCPR rule 2.

¹³⁰ Child Rights (Enforcement Procedure Rules) of 2015 rules 14(4), 18(5) & 23(6),(7) & (8).

participation, and the Kaduna Customary Courts and Upper Customary Courts (Civil Procedure) Rules of 2013 has no specific provisions on child participation.

Exclusion of customary courts from the category of family court is problematic particularly for Lagos because it was found that the Chief Judge of Lagos state recently made administrative adjustments and stripped the customary courts of jurisdiction to adjudicate custody matters, and made family courts (high court and the magistrates' court) the only courts to adjudicate on such matters.¹³¹ This is despite that the legislators indeed gave customary courts the jurisdiction on custody matters pursuant to the customary courts law which was enacted in 2011 (subsequently amended in 2018)¹³² after the Lagos CRL in 2007. The administrative decision is therefore contrary to law and defeats the essence of legal pluralism. The focus should have been to restructure customary courts to enable it adequately deal with the matters within its jurisdiction, not to administratively strip them of jurisdiction to adjudicate custody matters when the law which gives them such jurisdiction has not been repealed.

Further, exclusion of customary courts from family courts means that experts in children's matters like child psychologists who sit with judges and magistrates in family courts provided in sections 152(1), (3) and 153(1), (3) of the CRA¹³³ do not operate in customary courts. This is unlike Kaduna where section 143(a)(ii) Kaduna CWPL includes customary court in the category of family court, thus, section 147(3) Kaduna CWPL provides that when dealing with custody matter, the court be composed of a customary court judge and two assessors one of whom should have experience in dealing with children like a child psychologist. The exclusion also means section 154 of the CRA¹³⁴ that mandates the professional training on child specific issues for judges and other personnel in family courts does not apply to personnel in customary courts despite that they deal with matters affecting children.

Section 158 of the CRA provides that best interest of the child should be considered in court's proceeding and that the child be allowed to express himself or herself and participate in the proceedings, but its application excludes customary courts, and it does not provide that the child's wishes be given due weight.

¹³¹ H Abiola 'Justice at the customary courts level in Lagos State' available at <https://loyalnigerianlawyer.com/justice-at-the-customary-court-level-in-lagos-state/#:~:text=The%20principal%20law%20governing%20Customary,Commission%20acting%20on%20the%20rcommendation> (accessed 17 August 2024).

¹³² Lagos State Customary Court (Amendment) Law of 2018.

¹³³ Lagos CRL secs 141(1),(3) & 142(1),(3).

¹³⁴ Kaduna CWPL sec 149; Lagos CRL sec 143; Ekiti CRL sec 154.

Interestingly, when providing information on the implementation of article 12 of the UNCRC in its joint 3rd and 4th periodic report of 2008 to the UNCRC Committee,¹³⁵ Nigeria referenced sections 210 and 214(1) of the CRA as sections that domesticate article 12 of the UNCRC. Both sections provide for the right to fair hearing, the right of the child to legal representation and free legal aid in a child justice system which is a criminal proceeding. Also, section 16 of the CRA was referenced which is in the context of cultural life.

The UNCRC Committee in its concluding observation for Nigeria in 2010 noted Nigeria's limited implementation of article 12, and recommended that child participation be extended to civil and administrative proceedings and all aspects of life which affect children in compliance with its General Comment 12.¹³⁶ The UNCRC Committee however did not note the identified gaps in the law on child participation which are impediments to implementation of child participation in all proceedings affecting a child including in custody proceedings in customary courts.

With regard to policy, there is no comprehensive national policy on children or national policy on child participation, though pockets of policies provide for child participation like the National Child Health Policy of 2018,¹³⁷ but are not relevant to this research.

The fact that child participation is a right and a core principle cannot be overemphasised. In view of the gaps identified above, it is submitted that though the CRA has pockets of provisions on child participation, it lacks a comprehensive legislation on child participation¹³⁸ when compared to Ghana,¹³⁹ Botswana,¹⁴⁰ South Africa¹⁴¹ and Kenya¹⁴² whose respective child's rights legislations have similar contents to article 12 of the UNCRC and article 4(2) of the ACRWC. Assuming the CRA and its equivalent state legislations provide for child participation as done in Ghana, South Africa, Botswana and Kenya, Nigeria would have good legislative framework for effective child participation in all court proceedings and settings with the requirement that the child's view be given due weight in accordance with

¹³⁵ Nigeria's joint 3rd & 4th periodic reports to the UN Committee on the Rights of the Child paras 3.4.1, 3.4.2 & 3.5 available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FNGA%2F3-4&Lang=en (accessed 7 August 2024). Aside legislations, constitution of children's parliament is the only step Nigeria stated to have taken to implement Article 12 of the UNCRC at the domestic level; Nigeria's 2nd and 3rd Periodic Report to the ACERWC paras 3.4 & 3.5 available at <https://www.acerwc.africa/en/states-parties/reporting/overview> (accessed 10 August 2024).

¹³⁶ Committee on the Rights of the Child Concluding Observation of 2010 paras 34 & 35 available at https://tbinternet.ohchr.org/_layouts/15/treatybodyexternal/Download.aspx?symbolno=CRC%2FC%2FNGA%2FCO%2F3-4&Lang=en (accessed 7 August 2024).

¹³⁷ National Child Health Policy of 2018 para 4.9 available at <https://platform.who.int/docs/default-source/mca-documents/policy-documents/policy/nga-cc-10-03-policy-2018-eng-nat-ch-health-policy.pdf> (accessed 9 August 2024).

¹³⁸ CRA secs 1, 4 & 10; Lagos CRL secs 1, 3 & 9; Kaduna CWPL secs 4, 7 & 13; Ekiti CRL secs 1, 4 & 10.

¹³⁹ Children's Act of 1998 sec 11.

¹⁴⁰ Children's Act 8 of 2009 secs 6(1)(h) & 8.

¹⁴¹ Children's Act 38 of 2005 sec 10.

¹⁴² Children's Act 29 of 2022 sec 8(3).

age and maturity of the child expressly provided. It is therefore important that these gaps are addressed.

2.6 Relevance and importance of child participation to customary courts

Custody matters which are subject to customary laws and are adjudicated in customary courts are judicial proceedings that affect children, and as such provisions of article 12 of the UNCRC and article 4(2) of the ACRWC apply. Thus, as an obligation, customary courts should ensure that in custody proceedings, they assess the capacities of children whose custody is in issue to form and communicate their views, either directly or through a representative or appropriate body, and that the views expressed are given due weight in accordance with age and maturity of each child. This will ensure that the right of every child who is subject of custody to participate in such proceedings is respected in all courts in Nigeria irrespective of hierarchy, thereby eliminating discriminatory practice which excludes proceedings in customary courts. With the application of child participation in customary courts, legal pluralism is further enhanced, and customary courts are preserved. The possibility of undermining their jurisdiction to adjudicate custody matters as currently done in Lagos is prevented.¹⁴³

Child participation is important as it gives children the opportunity to participate in proceedings that impact their lives. It also aids the fulfilment of other rights and development of children.¹⁴⁴ Child participation helps the court to arrive at what is in the best interest of the child, and it is a recognition that children are subject of rights whose voices should be heard in matters that affect them.¹⁴⁵ It helps the judge to appreciate the psychological and emotional impact such proceedings have on the child.¹⁴⁶ This is despite that conceptualization and the practical application of child participation in Africa generally have been a challenge due to social and cultural practices among other factors,¹⁴⁷ but can be overcome with good legislation and consistent application which addresses the socio-cultural barriers.

¹⁴³ Abiola (n 131) as above.

¹⁴⁴ Parkes (n 53) 13.

¹⁴⁵ RC Soh 'Children's participation in custody and access proceedings' (2014) 22 *IIMU Law Journal* 53 57 available at

https://heinonline.org/HOL/Page?handle=hein.journals/iiumlj22&div=6&g_sent=1&casa_token=StpX0OCnTXsAAA:ZJLafkLivap1Ed4YDS9tnbfTuEJ5OcxITtKdKsy7r5U1xdeTUW8Baf18FPbqI4NUkMER3EROT3I&collection=journals (accessed 7 August 2024); CM Szaj 'The fine art of listening: Children's voices in custody proceedings' (2002) 4 *Journal of Law & Family Studies* 131 146 available at https://heinonline.org/HOL/Page?handle=hein.journals/jlfst4&div=14&g_sent=1&casa_token=EkHAWMF2dmUAA:qoD4UHld5gkYXDX17_GsMB3gjxmP_0McmvSpuCOD8Laisiq9Tp9830MyFrdC-FgPgbT--BIRVRI&collection=journals (accessed 7 August 2024).

¹⁴⁶ Soh (n 145) 72.

¹⁴⁷ JJ Sloth 'The African Charter on the Rights and Welfare of the Child' in T Boezaart (ed) *Child Law in South Africa* (2017) 424 431 available at <https://scholarlypublications.universiteitleiden.nl/access/item%3A2974332/view> (accessed 5 August 2024); African Child Policy Forum 'A study on child participation in eastern Africa' (2015) iii available at <https://app.box.com/s/it4uk19dtg1p766yk4piqljqfuuqr6p> (accessed 5 August 2024).

2.7 Conclusion

It is apparent that child participation is relevant and important to custody proceedings in customary courts in Nigeria, notwithstanding the gaps in Nigeria's domestic laws. However, in view of the 'best interest of the child', it is needful to assess whether customary courts use 'best interest' or other measures to allow child participation in custody proceedings in the next chapter.

CHAPTER THREE

3.0 Child Participation in Custody Proceedings in Customary Courts in Nigeria

3.1 Introduction

Since Nigeria's pre-colonial period, there has been a system of administration of justice indigenous to the people, as disputes are settled between natives by different authorities including family heads, elders, kings, and the chiefs.¹⁴⁸ Native courts were subsequently established during the colonial period which have been severally adapted, and are today established by the respective states' laws as customary courts, area courts, district courts, sharia courts depending on each state's preference.¹⁴⁹ This chapter highlights the history of customary courts and their characteristics. The chapter analyses selected decisions of customary courts in Kaduna, Ekiti and Oyo states, makes deductions from the case analysis, and concludes with the identification of challenges to child participation in customary courts which include lack of comprehensive legal framework.

3.2 Historical background of customary courts in Nigeria

Indigenous system of dispute resolution like the kings existed in the pre-colonial period which resolved disputes between natives. To establish a system of dispute resolution different from the indigenous system to resolve trade disputes between natives and British merchants, the British in 1849 appointed the British consul, and established the equity and consular courts.¹⁵⁰ In 1862 when Lagos became a colony, English laws were introduced in the colony administered by the equity and consular courts. 1863 witnessed the enactment of the Supreme Court Ordinance, replaced in 1876 by another Supreme Court Ordinance which established a Supreme Court with jurisdiction to administer English laws.¹⁵¹

Subsequently, the Southern Nigeria Order in Council of 1899 was enacted which took effect on 1 January 1900. Pursuant to the Order, the high commissioner enacted the Supreme Court Proclamation of 1900 which established a Supreme Court with power to administer the English laws. Native Courts Proclamation was enacted in 1906 to administer customary

¹⁴⁸ IO Igwe *et al* 'A review of continuous relevance of the traditional methods of dispute resolution mechanism in southeast Nigeria' (2020) 11 *Beijing Law Review* 34 available at <https://www.scirp.org/journal/paperinformation?paperid=97760#:~:text=Resolutions%20of%20disputes%20were%20handled,administration%20and%20regular%20court%20system> (accessed 12 August 2024); H Abiola 'The historical evolution of court system in Nigeria from 1800 to 2023' available at <https://loyalnigerianlawyer.com/the-historical-evolution-of-court-systems-in-nigeria-from-1800-to-2023/> (accessed 12 August 2024).

¹⁴⁹ TK Adekunle 'Nigerian indigenous courts and their dispute resolving mechanisms in global perspective' available at <https://aija.org.au/wp-content/uploads/2017/08/Adekunle1.pdf> (accessed 16 August 2024).

¹⁵⁰ Igwe (n 148) 38.

¹⁵¹ Learn Nigerian Law 'History of the Nigerian legal system' available at <https://www.learnnigerianlaw.com/learn/legal-system/history> (accessed 12 August 2024).

laws.¹⁵² In the northern protectorate, the high commissioner established Supreme Court, provisional courts and cantonment courts through the Protectorate Courts Proclamation of 1900, and the native courts were established through the Native Courts Proclamation of 1906.¹⁵³

In 1914 when the colony of Lagos, and the protectorates of northern and southern Nigeria were amalgamated, the Native Courts Ordinance of 1915 – 18 was enacted. Subsequently in the northern Nigeria, Native Courts Law of 1956 was enacted with civil and criminal jurisdiction. Northern Nigeria later replaced native courts with area courts in 1967, though some northern states like Kaduna later changed the area courts to customary courts.¹⁵⁴

In the eastern and the western parts of Nigeria, the native courts existed in the form of warrant chiefs. Judicial officers who administered justice in the communities later developed into customary courts through the enactment of Customary Courts Law of 1957 for western Nigeria, and Customary Courts Law of 1956 for eastern Nigeria.¹⁵⁵ When the mid-western Nigeria was carved out of the western Nigeria, the Customary Courts Law of 1957 was applied in the mid-western Nigeria until 1966, when the mid-western Nigeria enacted its Customary Courts Edict of 1966.¹⁵⁶

With the creation of states out of these regions, north, east, west, and mid-west at different periods in 1967, 1976, 1987, 1991 and 1996 resulting in the present 36 states and a federal capital territory,¹⁵⁷ the native courts law in the north, and customary courts laws in the old western, mid-western, and eastern regions went through adaptations with each state's House of Assembly enacting its customary courts law.¹⁵⁸

Thus, the foundation of customary courts is the indigenous system of dispute resolution, subsequently metamorphosed into native courts, and later customary courts created by states laws.

¹⁵² Abiola (n 148) as above.

¹⁵³ Abiola (n 148) as above.

¹⁵⁴ SH Makeri 'Jurisdictional issues in the application of customary law in Nigeria' a paper delivered at the 2007 Nigerian judges conference available at <https://edojudiciary.gov.ng/wp-content/uploads/2016/10/Jurisdictional-Issues-In-The-Application-Of-Customary-Law-In-Nigeria.pdf> (accessed 16 August 2024).

¹⁵⁵ Makeri (n 154) 5.

¹⁵⁶ Makeri (n 154) 5.

¹⁵⁷ EN Ota 'Creation of states in Nigeria, 1967 - 1996: Deconstructing the history and politics' (2020) 6 *American Research Journal of Humanities and Social Sciences* 1 available at <https://www.arjonline.org/papers/arihss/v6-i1/5.pdf> (accessed 16 August 2024).

¹⁵⁸ Makeri (n 154) as above.

3.3 Establishment, composition, qualification, and jurisdiction of customary courts in Nigeria

As inferior courts, customary courts are not specifically mentioned in the Nigerian Constitution like the superior courts of records.¹⁵⁹ They are established by laws enacted by states' Houses of Assembly and the Federal House of Representatives for Abuja.¹⁶⁰ It is observed that customary courts laws of states are substantially similar particularly regarding jurisdiction on civil matters. However, they differ in certain aspects like gradings and qualifications.¹⁶¹

Customary courts in Abuja have three grades, Grades 'A', 'B' and 'C', and are established by a warrant issued by the President of Nigeria in consultation with the Chief Judge of Abuja.¹⁶² Kaduna state has two levels known as Upper Customary Court and Customary Court¹⁶³ established by the president of the Customary Court of Appeal of Kaduna after consultation with Kaduna state's judicial service commission.¹⁶⁴ Ekiti state has two grades, Grade I and Grade II which are established by the governor under a warrant after consultation with the state's judicial service commission.¹⁶⁵ Oyo state also has two grades, Grades 'A' and 'C'.¹⁶⁶ Unlike other states' customary courts laws, the Oyo state Customary Courts Law of 2018 (Oyo CCL) is silent on the authority that establishes the customary courts, however, it can be implied that the Oyo state's judicial service commission is the institution with such authority based on its power to appoint and discipline members and officers of the court.¹⁶⁷ In Lagos state, customary courts are established by the state's judicial service commission on the recommendation of the Attorney-General of Lagos state, subject to the approval of the governor.¹⁶⁸ It should be noted that unlike in Abuja, Kaduna, Oyo and Ekiti, customary courts in Lagos have no grades or levels.¹⁶⁹

¹⁵⁹ Nigerian Constitution secs 6(1),(2), (3) & (5).

¹⁶⁰ Nigerian Constitution sec 6(4)(a).

¹⁶¹ JO Olubor 'Customary laws practice and procedure in the area/customary court, and the customary court of appeal' available at <https://edojudiciary.gov.ng/wp-content/uploads/2016/10/Customary-Laws-Practice-And-Procedure-In-The-Area-Customary-Court-And-The-Customary-Court-Of-Appeal.pdf> (accessed 13 August 2024).

¹⁶²FCT CCA sec 1(1), (2) & (3); FCT CCA sec 1(4) provides for the power of the President of Nigeria to vary, suspend and cancel established customary courts.

¹⁶³ Kaduna CCL sec 4(2)(a); Kaduna CCL sec 4(5) is like FCT CCA sec 1(4) on variation, suspension, and cancelation of customary courts.

¹⁶⁴ Kaduna CCL sec 4(1).

¹⁶⁵ Ekiti CCL secs 1 & 17; Ekiti CCL sec 1(1)(c) is like FCT CCA sec 1(4) on variation, suspension, and cancelation of customary courts.

¹⁶⁶ Oyo state Customary Courts Law of 2018 (Oyo CCL) sec(3)(1).

¹⁶⁷ Oyo CCL secs 5(1), 10 & 12.

¹⁶⁸ Lagos CCL sec 1; Lagos CCL does not have provision like FCT CCA sec 1(4) on variation, suspension, and cancelation of customary courts.

¹⁶⁹ Lagos State Customary Courts Law of 2011 (Lagos CCL) sec 49.

In Abuja, three members preside in customary courts, that is the chairman and two other members, all of whom are appointed by the judicial service committee,¹⁷⁰ and the three constitute a quorum.¹⁷¹ In Kaduna, the customary court consists of a judge and two other members,¹⁷² and quorum is formed when a judge and a member preside.¹⁷³ As noted in section 2.5.1 in chapter two of this dissertation, section 143(a)(ii) Kaduna CWPL includes customary courts in the category of family court, thus, section 147(1) and (3) Kaduna CWPL provide that when dealing with custody matter, the customary court be composed of a customary court judge not below the rank of an upper customary court judge, and two assessors one of whom should have experience in dealing with children preferably in child psychology. Ekiti is similar to Abuja save for the fact that in Ekiti, the chairman is referred to as the president,¹⁷⁴ and the composition of customary courts in Oyo state is three presided over by the president, two of whom form a quorum.¹⁷⁵ In Lagos, composition is a minimum of three and a maximum of five members, one of whom is the president of the customary court, and it is mandatory that one of the members presiding over any matter has sufficient knowledge in native law, custom and tradition.¹⁷⁶

On qualification, for customary courts in Abuja, the chairman is required to be a qualified legal practitioner in Nigeria for not less than five years, while the other two members are required to either be qualified as legal practitioners for not less than two years or that they are literate in English language and any other Nigerian language with knowledge of customary law.¹⁷⁷ Also, the chairman and the two members are required to be of good character, not less than 25 years old and not more than 60 years old among other qualities.¹⁷⁸ In Ekiti, members of the customary courts are not required to be legal practitioners. Members are required to be literate in English and local languages, have at least primary or standard six certificate or its equivalent with suitable experience, and be a native of the local government area where the customary court is situated among other conditions including having no criminal record.¹⁷⁹ Though the law is silent on the minimum age for appointment, the law provides for the maximum age, which is 65.¹⁸⁰

For Kaduna, the judge is required to be qualified as a legal practitioner in Nigeria for not less than two years or that the judge has a bachelor's degree in law from a recognised

¹⁷⁰ FCT CCA sec 2(1).

¹⁷¹ FCT CCA sec 2(2).

¹⁷² Kaduna CCL sec 5.

¹⁷³ Kaduna CCL sec 12(1).

¹⁷⁴ Ekiti CCL sec 2(1).

¹⁷⁵ Oyo CCL sec 4(1)&(2).

¹⁷⁶ Lagos CCL sec 2(2).

¹⁷⁷ FCT CCA sec 4(1).

¹⁷⁸ FCT CCA sec 4(2).

¹⁷⁹ Ekiti CCL sec 4.

¹⁸⁰ Ekiti CCL sec 2(2).

university.¹⁸¹ Also, the law does not specify the minimum age or maximum age for appointment. For Lagos state, the president of customary court is required to be a legal practitioner or law graduate, be at least 50 years old and have integrity and good standing in the society.¹⁸² For other members of the court, such must have at least a degree in a recognised university or polytechnic, be at least 50 years and have integrity and good standing in the society.¹⁸³ For Oyo, only the president of the Grade 'A' customary court is required to be a legal practitioner, whereas legal education is not required for the president of Grade 'C' and other members in both grades of customary courts. A person is qualified to be president of Grade 'C' if literate in English and has good education, of good character, integrity and is intelligent.¹⁸⁴ For other members of the court, those eligible to be appointed are accredited chiefs, *mogajis*, justice of peace, responsible citizen within the area the court is situated, and those who have knowledge of customary law.¹⁸⁵

Further, customary courts allow for family members and other individuals having requisite authority to represent a party in proceedings.¹⁸⁶ However, for legal representation, customary courts in Abuja and Kaduna permit legal representation,¹⁸⁷ whereas for Ekiti, legal representation is prohibited.¹⁸⁸ This may be because the president and members in Ekiti customary courts are not required to have legal education, thus, may not be able to adequately appreciate some technicalities of law which lawyers are trained to use in proceedings. For Lagos, legal representation is not expressly prohibited, however, it is presumed that legal representation is allowed in customary courts in Lagos.¹⁸⁹ In the case of Oyo, legal representation is expressly allowed in Grade 'A' customary courts, and not expressly prohibited in Grade 'C' customary courts. It can be implied that legal representation is not allowed in Grade 'C' because legal education is not a requirement to be a member or president of Grade 'C' customary courts.¹⁹⁰

Proceedings in the customary courts are not required to be technical as in superior courts of records. Thus, provisions of the Evidence Act of 2011 do not apply to civil proceedings in customary courts,¹⁹¹ but they have their rules of procedure which guide their proceedings.¹⁹²

¹⁸¹ Kaduna CCL sec 7(a).

¹⁸² Lagos CCL sec 5.

¹⁸³ Lagos CCL sec 5A.

¹⁸⁴ Oyo CCL sec 7.

¹⁸⁵ Oyo CCL sec 4(1),(3)&(4).

¹⁸⁶ FCT CCA sec 22; Lagos CCL sec 30(2); Ekiti CCL sec 24(3); Kaduna CCL sec 29(2); Oyo CCL sec 23(3).

¹⁸⁷ FCT CCA sec 21; Kaduna CCL sec 29(3).

¹⁸⁸ Ekiti CCL secs 4 & 24(1).

¹⁸⁹ Lagos CCL sec 30.

¹⁹⁰ Oyo CCL secs 7 & 23(1)(a).

¹⁹¹ Evidence Act of 2011 secs 252 & 256.

¹⁹² FCT CCA sec 61; Lagos State Customary Courts Rules of 2011; Ekiti State Customary Courts Rules of 1996.

On jurisdiction, customary courts exercise jurisdiction over persons within their territorial jurisdiction who are subject to customary law,¹⁹³ and they apply customary law in civil matters they adjudicate provided the customary law is not repugnant to natural justice, equity and good conscience and not contrary to any written law.¹⁹⁴ They also apply other laws that confer jurisdiction on them.¹⁹⁵ On jurisdiction to adjudicate custody matters, all the grades of the customary courts in the states have jurisdiction to adjudicate issues of custody of children under customary law.¹⁹⁶

Pertinent to note section 27(1) of the Kaduna state Customary Courts Law of 2001, section 22(1) of the Ekiti state Customary Courts Law of 1978, and section 28(1) of the Lagos State Customary Courts Law of 2011 provide that in matters of custody, the interest and welfare of the children shall be the first and paramount consideration. Under the Abuja Customary Courts Act of 2007 (CCA), provision that the 'interest and welfare of the child shall be the paramount consideration' in section 18(2) is made with reference to guardianship. However, the fact that item 2 of the schedule to the CCA groups custody and guardianship together, it can be implied that section 18(2) of the CCA on interest and welfare of the child also applies to custody matters. Oyo is similar to Abuja in the sense that section 18(1) of Oyo CCL that provides that the interest and welfare of the child be the first and paramount consideration is in respect to guardianship. The interpretation of these provisions together with section 3 of the Child's Rights Act and equivalent provision in states' child's rights laws¹⁹⁷ on the principle of the best interest of the child shows there is no doubt about the relevance and application of the best interest principle in customary courts, and the best interest principle has been held to be applicable to customary law which customary courts apply.

Thus, the Supreme Court of Nigeria and other superior courts have affirmed the application of the best interest of the child in custody proceedings in Nigeria. In *Okwueze v Okwueze*¹⁹⁸ the Supreme Court held that though in most customary laws in Nigeria, legitimate or legitimated children belong to their fathers, and their custody will be given to the fathers, however, customary law also recognises that custody will not be given to the father where it will be detrimental to the child's interest and welfare.¹⁹⁹ Where a child is of tender age, the

¹⁹³ FCT CCA sec 14(1); Ekiti CCL sec 16; Lagos CCL sec 21; Kaduna CCL sec 10; Oyo CCL sec 13.

¹⁹⁴ FCT CCA sec 16; Ekiti CCL secs 19 & 20; Lagos CCL secs 25 & 26; Kaduna CCL sec 24; Oyo CCL secs 15 & 16.

¹⁹⁵ FCT CCA sec 16; Ekiti CCL sec 19; Kaduna CCL sec 24(a) & (b); Lagos CCL sec 25 (3); Oyo CCL sec 15 (b),(c) & (d).

¹⁹⁶ FCT CCA first schedule items 1 & 2; Ekiti CCL sec 17 & second schedule item 2; Lagos CCL sec 22 (1) & first schedule part 1 item 2; Kaduna CCL sec 21 & first schedule item 4; Oyo CCL sec 14(2) & second schedule parts 1 & 2 item 3.

¹⁹⁷ Ekiti state Child's Rights Law of 2007 sec 1; Kaduna state Child Welfare and Protection Law of 2018 sec 4; Lagos state Child's Rights Law sec 1; Oyo state Child's Rights Law of 2006 sec 3 are equivalent sections on the best interest of the child in these states' laws.

¹⁹⁸ (1989) 3 NWLR (Pt. 109) 321.

¹⁹⁹ *Yange v Musa* (2018) LPELR-45269 (CA).

presumption is for custody to be given to the mother for purpose of proper care unless there is evidence to show that it is not in the interest of the child due to factors like immorality, infectious disease and cruelty to the child,²⁰⁰ and where the child is of age, custody may revert to the father.²⁰¹

However, the issue worthy of consideration in this dissertation is to assess the extent customary courts apply child participation in custody proceedings which includes whether child participation is a methodology used to arrive at the best interest of the child as analysed in cases discussed below.

3.4 Sampled custody cases in customary courts in Kaduna, Ekiti and Oyo states

*Charity Okafor v Paul Okafor*²⁰²

Parties were married under *Tiv* native law and custom in Benue state and subsequently lived in Kaduna as husband and wife. The wife later left the matrimonial home with the two female children of the marriage aged five and eight. The father sought custody of the children at the Sabon Tasha customary court in Kaduna. The customary court, in relying on the evidence of the father and mother, gave custody of the two children to the mother. The customary court based its decision on the fact that the children are females and were young but neglected other facts including the capacity of the father to care for the children. On appeal to the Customary Court of Appeal, the decision of the customary court was set aside, and custody was given to the father based on the parties' evidence considered in the best interest of the children which the Court of Appeal confirmed.

An analysis of this decision revealed that the children's views were neither consulted nor considered, and the appellate court did not consider non-participation of the children as an issue. There was no attempt to assess the children's capacity to participate in the proceeding. The court solely relied on evidence presented by the father and mother to determine the children's best interest.

*Ibrahim Yakunat v Cecilia Ibrahim*²⁰³

The petitioner sued the respondent at the Kaduna state customary court for dissolution of their marriage contracted under the *Bajju* custom and sought custody of their 11-year-old child. The respondent also sought custody of the child. The customary court applied section 27 of the Kaduna state customary law which provides that the interest and welfare of the

²⁰⁰ *Odogwu v Odogwu* (1992) 2 NWLR (Pt. 225) 539.

²⁰¹ *Sati Joshua v Joshua Monday UCCG/CV/101/2022* (unreported).

²⁰² (2016) LPELR-40264(CA).

²⁰³ CCST/CV/21/2015 (unreported).

child shall be the first and paramount consideration, and relied on the facts presented by the parties to arrive at the decision that the father having custody is in the child's best interest. The court based its decision on the fact that the child was living in the father's family house and was properly taken care of there. The court also noted the father had enrolled the child in school, took responsibility for the school fees and there was no evidence that the father did not care for the child. The court's decision does not reveal the child was consulted before the court made its conclusion on custody.

*Bassa Maxwell Akayat v Helen Maxwell*²⁰⁴

The customary court determined the question of custody of an eight-year-old child of a marriage contracted under *Bajju* custom, and assessed only the evidence of the petitioner and the respondent to arrive at what is in the interest and welfare of the child. The court relied on conduct of the parties to determine the issue of custody as custody of the child was given to the father because evidence was adduced that the mother left her matrimonial home and left the child with the father. She claimed the child three years after leaving her matrimonial home. The court based its decision on evidence presented by the mother and father.

*Sati Joshua v Joshua Monday*²⁰⁵

The customary court gave custody of the three-year-old child of the marriage to the mother on the basis that the child is female who lived with her mother who catered for her needs including medical expenses. The court however ordered that the child be with the mother until she is five years old, that is, custody will revert to the father when she turns five years. According to the court, the father can at any time before the child is five years report to the court if he feels the mother is not adequately taking care of the child. No record of assessment of the child's capacity to participate in the proceedings.

*Ayuka Danladi v Sarah Danladi*²⁰⁶

The petitioner prayed the court to dissolve his marriage contracted under the *Aninka* custom and for custody of two younger children of the marriage aged eight and six, female and male respectively. There are four children of the marriage of which the two older children lived with the petitioner, and he desired that all the four live with him under the same roof in the best interest of the children. The respondent did not contend the suit, and the court in granting custody to the petitioner relied solely on the evidence of the petitioner as to his capability to

²⁰⁴ UCCK/CV/54/2024 (unreported).

²⁰⁵ UCCG/CV/101/2022 (unreported).

²⁰⁶ UCCG/CV/16/2023 (unreported).

care for the children. According to the court, the youngest is already six and a male, thus, old enough to live with his siblings in their father's house.

Interestingly, the court stated that '...it is the place of the court to protect and strike a balance between the interests of the petitioner, the respondent and their children...' but the court neither sought the views of the children let alone to accord the views due weight to arrive at its decision. Consequently, how the court was able to strike a balance between parents and children's interests is questionable when the court's analysis revealed that the children did not participate in the proceeding.

*Ruth Reuben v Ibrahim Reuben*²⁰⁷

The petitioner sought dissolution of customary marriage contracted under *Gwantu* custom. Custody of the 7-year-old child of the marriage was given to the respondent because the child already lived with the respondent, and the petitioner did not claim custody in the proceeding. According to the court '...the court will not inquire into the understanding between the parties about the custody and care of the child...',²⁰⁸ and the court did not give any justification for its position in this regard.

*Rahila Adamu v Priscilla Emmanue*²⁰⁹

The grandmother of a seven-year-old child sued the wife of her late son for custody of the child for the purpose of teaching the child the father's family custom which is the *Jaba* custom. The grandmother also claimed that under the *Jaba* custom, if the wife of a deceased remarries outside the family of her late husband, she is required to leave all her children with her late husband's family as she is prohibited from taking the children to her new marriage. The court established that such custom exists, however, because the child has been living in the care of the mother and well taken care of amongst other evidence, the court held it is in the interest and welfare of the child for custody to be given to the mother. The court further held that the grandmother and the rest of her family should have access to the child.

*Lydia Philip v Philip Jeremiah*²¹⁰

Dissolution of the marriage contracted under *Ninzo* custom was sought. There are four children of the marriage, and the court did not inquire into the arrangement for their care as parties did not make it an issue. The court only admonished the parties to relate peaceably with each other in the interest and benefit of the children who are impacted by the separation of their parents.

²⁰⁷ UCCG/CV/24/2023 (unreported).

²⁰⁸ (n 207) para 7.

²⁰⁹ CCST/CV/20/2015 (unreported).

²¹⁰ UCCG/CV/14/2021 (unreported).

*Elizabeth Demeon v Demeon Joseph*²¹¹

In resolving the issue of custody of the three children of the marriage, the court granted sole custody to the petitioner, the mother based on the evidence presented in court to the effect that the mother has the financial capacity and the father was cruel to the mother. The court used the facts presented to determine the best interest of the children. The court's analysis of the facts does not reveal details about the children's ages and there is no information the children were consulted.

*Augustina Amos v Amos Alagbe*²¹²

There was a claim for custody of a two-year-old child of the marriage who lived with his mother since he was six months. It was established that two of the other children of the marriage lived with their father. Custody of the two-year-old was granted to the mother because of the child's tender age and access granted to the father. Access to the other children of the marriage was granted to the mother. Capacity of the two-year-old child and other children of the marriage to participate in the proceeding was not assessed and the older children did not participate.

Aside from the above cases decided by the customary court in Kaduna state, there was a study of decisions of customary courts on custody in Ekiti state covering the period between years 2002 and 2016, of which 15 cases were gathered and analysed.²¹³ The research finds that in most custody cases in customary courts, custody of children was given to the father even when 80% of the cases were initiated by the mothers on the ground of the fathers' neglect. Though the research focused on the issue of gender inequality in custody, it can be deduced that children were excluded in the custody proceedings. In another research on custody proceedings in customary courts in Oyo state, 200 cases between 2013 – 2017 involving 520 children were sampled.²¹⁴ The findings are that custody of 293 children were given to the fathers, while custody of 277 children were given to the mothers.²¹⁵ The factors the customary courts used in these cases are age of the child, parents' pleas, sex of the child and conduct of parties, but the views of the children were not considered as a factor.²¹⁶ Though the research explored customary courts' application of customary law to marriages subject to Islamic law, it can be deduced that child participation was not considered as an important factor in custody proceedings in the customary courts.

²¹¹ UCCK/CV/35/2024 (unreported).

²¹² UCCK/CV/46/2024 (unreported).

²¹³ Ntoimo (n 30) as above.

²¹⁴ Yusuff (n 30) 366.

²¹⁵ Ntoimo (n 30) as above.

²¹⁶ Yusuff (n 30) as above.

3.5 Deductions from the selected cases

1. The best interest of the child is a recognised principle in determining custody in customary courts, but child participation is not recognised as a standard principle, thus, not applied. Child participation is also not recognised as an important methodology to aid the court in determining the best interest of the child. Thus, no standard procedure on child participation.
2. Customary courts rely solely on evidence presented by the parties with no attempt to inquire about the views of the child or at least an assessment of the child's capacity to participate in the custody proceedings. The voice of the child is lost in custody cases in customary courts.
3. Where parties have made their private arrangement for custody of the children, customary courts do not bother to inquire into such arrangement to ascertain whether it is in the best interest of the child let alone to inquire about the child's views to ascertain whether the child is pleased with such private arrangement.

3.6 Factors inhibiting child participation in customary courts' custody proceedings

Based on analysis of the legislations in section 2.5.1 of this dissertation and the selected cases, the following are factors identified as inhibiting application of child participation in custody proceedings in customary courts in Nigeria:

1. Absence of comprehensive legal framework and standard procedure on child participation that apply to customary courts.
2. Lack of awareness of the relevance and importance of child participation provided in the UNCRC and the ACRWC to customary courts.
3. Lack of adequate capacity for judges and members of customary courts as some do not have legal background and being excluded from family courts in most states means provisions of child's rights legislations for training of judges on issues of children is not applicable to customary courts.
4. Less attention on need for children's rights to be protected in proceedings of customary courts because of the belief that customary courts are inferior courts which proceedings are not required to be technical like superior courts.

5. The fact that customary courts apply customary laws, of which under customary laws in most communities, children especially younger children are not regarded as having the capacity to have an opinion on important issues.
6. Less emphasis on child participation as standard principle in custody cases in superior courts like the Court of Appeal and the Supreme Court when hearing appeals in custody cases that commenced in customary courts.

3.7 Conclusion

The above evidenced that child participation in custody proceedings in customary courts is nothing to write home about. In the spirit of legal pluralism, there is need to pay attention to the application of child participation in customary courts because they deal with matters that affect children. Thus, the legislative framework and methods adopted in other jurisdiction in Africa, which Nigeria can adopt or adapt to aid effective child participation in customary courts are highlighted in the next chapter.

CHAPTER FOUR

4.0 Child Participation in Custody Proceedings: Lessons from South Africa

4.1 Introduction

South Africa's Traditional Court which is a customary institution similar to Nigeria's customary court has no jurisdiction to adjudicate custody matters, but only to give advice on customary law practice on such issue.²¹⁷ However, a 2024 report on South Africa's child participation framework²¹⁸ revealed South Africa's good practice in child participation in custody proceedings.²¹⁹ This chapter identifies child participation methods in South Africa including family advocate and curator *ad litem*, and highlights lessons that Nigeria generally, and Nigeria's customary courts can draw from the practice of child participation in custody proceedings in South Africa.

4.2 South Africa's legislation on child participation in custody proceedings

In South Africa, custody is referred to as 'care and contact'.²²⁰ The core domestic laws and policy that guide child participation in care and contact proceedings are the South African Constitution,²²¹ the Children's Act 38 of 2005²²² (CA) and the National Child Participation Framework.²²³

All proceedings which concern a child must ensure the respect, protection, promotion, and fulfilment of rights provided in the Bill of Rights in the South African Constitution and the CA which include child's best interest and child participation.²²⁴ Section 6(5) of the CA provides an obligation for the child to be informed of any action or decision taken in care and contact matters, and the views expressed being taken seriously.²²⁵ Unlike the Nigerian Constitution, the South African Constitution also enjoins courts to consider international law and foreign

²¹⁷ Traditional Courts Act 9 of 2022 sec 4(2)(a) & schedule 2 para (g)(iv).

²¹⁸ Jamieson & Manjang (n 67) as above.

²¹⁹ Children's Act 38 of 2005 secs 42 (1) & (2) & 45(1)(b); Recognition of Customary Marriage Act 120 of 1998 secs 1 & 8(4)(d); Magistrates' Court Act 32 of 1944; Courts in South Africa available <https://www.justice.gov.za/about/sa-courts.html> (accessed 24 August 2024).

²²⁰ Children's Act 38 of 2005 secs 23, 1(1) & (2) on definitions of 'care' and 'contact'; J Haynes 'Child custody- what you need to know about care and contact' available at <https://www.baileyhaynes.co.za/News/entryid/2353/child-custody-what-you-need-to-know-about-care-contact#:~:text=It's%20important%20to%20clarify%20that,parenting%20plan%22%20in%20South%20Africa>. (accessed 20 August 2024).

²²¹ South African Constitution sec 28(1)(h), & (2).

²²² Children's Act 38 of 2005 sec 10.

²²³ National Child Participation Framework of 2018; There are other laws and policies that provide for child participation in South Africa in varied contexts like criminal proceedings. For example, Child Justice Act 75 of 2008.

²²⁴ Children's Act 38 of 2005 sec 6(2)(a); South African Constitution sec 28(2); Children's Act 38 of 2005 sec 9; DR Mokotedi 'The development of the constitutional right to legal representation of children in civil matters' unpublished Master's thesis, University of Pretoria, 2021 1.

²²⁵ Children's Act 38 of 2005 sec 61.

law when interpreting the Bill of Rights,²²⁶ and courts are to give preference to a reasonable interpretation of domestic law that is consistent with international law over any interpretation that is not consistent with international law.²²⁷ This gives the court the authority to give effect to article 12 UNCRC and 4(2) of the ACRWC together with general comments and guidelines issued in that regard. This constitutional provision is significant in a legal pluralist country because other systems and laws are subject to the constitutional standard irrespective of religious and cultural beliefs to the contrary.

A child has the right of access to court,²²⁸ and to separate legal representation.²²⁹ Proceedings that concern a child are mandated to respect the child's inherent dignity, to treat the child fairly and equitably, and ensure that the child is not discriminated against or shut out because of any barrier on grounds of health or disability.²³⁰ Section 158 CRA also provides for proceedings to be conducive and conducted in an atmosphere of understanding, but it is generic and not as specific like that of South Africa's Children's Act 38 of 2005.

South Africa has Traditional Court but its jurisdiction is limited to give advice on customary law practice regarding custody of a minor or dependent children. Nigeria's customary courts on the other hand do not merely play advisory role but have jurisdiction to adjudicate cases of custody of children subject to customary law.²³¹ In South Africa, the high courts and the magistrates' courts have jurisdiction to adjudicate custody matters, however, the Regional Magistrates' Court designated as children's court has jurisdiction to adjudicate matters involving custody of children of customary marriage.²³² Though South Africa's Traditional Court does not adjudicate care and contact cases, South Africa has developed standard procedure on child participation in care and contact proceedings which can be adapted or adopted in custody proceedings in customary courts in Nigeria.

Thus, in terms of application, South Africa developed and applies direct and indirect methods to aid child participation in custody proceedings which include judicial interview, joining a

²²⁶ South African Constitution sec 39(1)(b) & (c).

²²⁷ South African Constitution sec 233.

²²⁸ Children's Act 38 of 2005 sec 14.

²²⁹ South African Constitution sec 28(1)(h); Children's Act 38 of 2005 sec 55.

²³⁰ Children's Act 38 of 2005 secs 6(2)(b),(c),(d) &(f), 56, 60(2) &(3).

²³¹ Traditional Courts Act 9 of 2022.

²³² Children's Act sec 42 (1) & (2), 45(1)(b); Recognition of Customary Marriage Act 120 of 1998 secs 1 & 8(4)(d); Magistrates' Court Act 32 of 1944; Courts in South Africa <https://www.justice.gov.za/about/sa-courts.html> (accessed 24 August 2024).

child to parents' proceeding,²³³ legal representation, family advocate,²³⁴ curator *ad litem* and experts' reports like social workers, psychologists.²³⁵

4.3 Methods of child participation in custody proceedings in South Africa

Judicial interview is a direct method of child participation and occurs where a judge directly interacts with the child to elicit from the child his or her views, and it is usually conducted in the judges' chambers.²³⁶ This is not usually used in South Africa because some judges believe they do not have the requisite training like child psychologists, social workers or other experts to conduct an effective interview. It is also not prevalent to avoid unnecessary burden or pressure on the child.²³⁷ Nevertheless, in some cases, experts like social workers assist the judge to conduct the interview as evidenced in *CD v MD*²³⁸ where the social worker assisted the judge in conducting an interview with the child, and this aided the judge to determine what was in the best interest of the child.

Separate legal representation for the child is another indirect method which has been applied in *Soller NO v G and Another*²³⁹ and *Ex Parte Van Niekerk & Another v In re Van Niekerk v Van Niekerk*.²⁴⁰ Legal representation comprises two models which are: client-directed legal representation and best interest legal representation.²⁴¹ The appropriate model depends on several factors including complexity of the issues, animosity of litigating parents and expert suggestion.²⁴² The client-directed legal representation is used by older children, and it is a lawyer-client relationship between the child and the legal representative. The best interest model is used by younger children, and the legal representative's role is to elicit the views of the child and determine what is in the best interest of the child. The 2016 guidelines²⁴³ to guide practitioners using any of the models which was developed by the

²³³ *Niekerk* (n 102).

²³⁴ Mediation in Certain Divorce Matters Act 24 of 1987.

²³⁵ Children's Act 38 of 2005 secs 62 & 63.

²³⁶ C O'Mahony & L O'Driscoll 'The voice of the child in private law proceedings: A comparative review' (2023) 16 available at <https://www.ucc.ie/en/media/academic/law/2023x2f2024/VoiceoftheChildinPrivateFamilyLawProceedingsAComparativeReview.pdf> (accessed 5 October 2024).

²³⁷ Family Laws South Africa 'Listening to the unheard: How a South African court prioritised children's voices in a landmark care and contact decision' available at <https://familylaws.co.za/prioritizing-childrens-voices-in-custody-decisions/#:~:text=Judicial%20Interviews%3A%20The%20judge%20considered,decision%2Dmakers%20in%20the%20dispute> (accessed 5 October 2024).

²³⁸ (2003) ZAGPPHC 1231 available at <https://familylaws.co.za/prioritizing-childrens-voices-in-custody-decisions/> (accessed 24 August 2024).

²³⁹ (2003) 5 SA 430.

²⁴⁰ *Niekerk* (n 102).

²⁴¹ Centre for Child Law 'Guidelines for legal representatives of children in civil matters' (CCL Guideline) (2016) 19 available at https://centreforchildlaw.co.za/wordpress21/wp-content/uploads/2019/03/2016_Guidelines_for_Legal_Reps_of_Children_web.pdf (accessed 25 August 2024).

²⁴² *R v M and Others* (unreported) DCLD 5493/02; Mokotedi (n 224) 43.

²⁴³ CCL Guideline pg 18 – 28.

Centre for Child Law is very instructive and their details are beyond the scope of this research.

Another method of child participation is curator *ad litem*. Curator *ad litem* is a common law provision used when a child has no parent or guardian, or the parents or guardians are not available or unwilling or there is actual or potential conflict of interests between the child and the parent or guardian.²⁴⁴ It is similar to guardian *ad litem* in the CRA.²⁴⁵ The curator *ad litem* initiates legal proceeding on a child's behalf and represents the interest of the child. In some cases, he or she assesses a child's situation and makes a report in that regard.²⁴⁶ This is distinct from legal representative in that a curator *ad litem* concerns himself or herself about what he or she considers to be in the best interest of the child, whereas a legal representative is not only concerned with what is in the best interest of the child, he or she ensures the child's wishes are argued and submitted in court.²⁴⁷

In addition is the family advocate established under section 2 of the Mediation in Certain Divorce Matters Act 24 of 1987 to play a neutral role by conducting an enquiring into what is in the best interest of the child, monitor court documents and arrangements in respect of the child. He or she mediates between parties,²⁴⁸ make recommendations on what is believed to be the child's best interest which are contained in a report submitted to court.²⁴⁹ The views of the child may be taken during the enquiry,²⁵⁰ and a family advocate can appear in court on behalf of a child where it is in the best interest of the child.

A child can also participate through experts' reports like psychologists, social workers etc.²⁵¹ It is important to note that the methods are not one size fit all. The determination of the appropriate method depends on case-by-case basis as several factors are considered including the individual capacity of the child, nature of the issues and parties involved.

Noteworthy is South Africa's Recognition of Customary Marriages Act 120 of 1998 which recognises customary marriages in South Africa.²⁵² Customary marriages are dissolved on the ground that they have broken down irretrievably,²⁵³ and issues of custody of the children are considered during dissolution of customary marriage.

²⁴⁴ Cleophas & Assim (n 99) 301.

²⁴⁵ (n 122) as above.

²⁴⁶ Cleophas & Assim (n 99) 301.

²⁴⁷ *Centre for Child Law and Another v Minister of Home Affairs and Others* cited in Mokotedi (n 224) 40.

²⁴⁸ Mokotedi (n 224) as above.

²⁴⁹ Mediation in Certain Divorce Matters Act 24 of 1987 sec 4.

²⁵⁰ Mokotedi (n 224) 5.

²⁵¹ Children's Act 38 of 2005 sec 62 & 63.

²⁵² Recognition of Customary Marriages Act of 120 of 1998 secs 2, 3 & 4.

²⁵³ Recognition of Customary Marriages Act of 120 sect 8(1)&(2).

In a qualitative research on divorce proceedings of customary marriages in South Africa 28 cases were analysed.²⁵⁴ It was found that the family advocate was involved in 17 of the cases where care and contact of the children was an issue to ascertain the children's best interest.²⁵⁵ Though evidence that other methods of child participation were used was not provided, the use of family advocate in care and contact cases of children subject to customary marriage shows the application of child participation to a certain degree.

4.4 Main lessons from South Africa on child participation in custody proceedings

4.4.1 South African Constitution is child's rights friendly

Unlike the Nigerian Constitution, the South African Constitution is child's rights friendly because its section 28 provides rights specific to children particularly the best interest of the child and legal representation. Also, by sections 39(1)(b) and 233 of the South African Constitution, courts are allowed to use international human rights law to interpret domestic legislations and are enjoined to prefer interpretation which complies with international law.

4.4.2 South Africa has good legislation on child participation

Section 10 of the CA is similar to article 12 of the UNCRC and article 4(2) of the ACRWC unlike the Nigeria's CRA and equivalent child's rights legislation at state level which do not have similar provision. Thus, in South Africa every institution dealing with matters affecting a child is bound by section 10 of the CA and has an obligation to ensure child participation which is provided as a general principle. This is unlike Nigeria's CRA which provides for child participation only in specific proceedings, and provisions that give room for child participation do not apply to customary courts which are excluded from family court to which the provisions apply as discussed in section 2.5.1 of this dissertation. Where the CRA and child's rights legislations in states have provision like section 10 of the CA, child participation will be a standard principle which all judicial and administrative proceedings dealing with issues of children will be bound to apply. Consequently, customary courts would be bound by such provision whether they are included in the category of family court or not.

²⁵⁴ C Himonga & E Moore 'Reform of customary marriage, divorce and succession in South Africa: Living customary law and social realities' available at <https://elenamoore.co.za/wp-content/uploads/2020/06/Living-Customary-Law-Research-Report-English-version.pdf> (accessed 24 August 2024).

²⁵⁵ C Himonga & E Moore 'Living customary law and families in South Africa' (2018) available at https://ci.uct.ac.za/sites/default/files/content_migration/health_uct_ac_za/533/files/living%2520customary%2520aw%2520and%2520families%2520in%2520South%2520Africa.pdf (accessed 24 August 2024).

4.4.3 South Africa developed methods to aid child participation in custody proceedings

Though full implementation of child participation in custody proceedings is still a challenge in South Africa, different direct and indirect methods have been developed to facilitate child participation which have been applied in custody proceedings.²⁵⁶ Based on the current state of customary courts in Nigeria, the family advocate may not be applicable as it is not provided in the Nigerian law. However, judicial interview, curator *ad litem*, legal representative, and experts' reports can be adopted and adapted as there is legal basis for these methods under the CRA, states' child's rights legislations and customary courts' laws of states. However, for the customary courts in Ekiti state, the legal representative may not be achievable because the customary courts law of Ekiti state does not allow legal practitioners in customary courts' proceedings, and legal education is not part of the qualifications to preside in customary courts in Ekiti.

4.5 Conclusion

South Africa's legislations on child participation in custody proceedings are compliant with international law unlike the case of Nigeria. Also, South Africa created methods to facilitate child participation in such proceedings which can be adapted in customary courts in Nigeria. In addition to the participation methods, it is important that customary courts are aware and apply the principle in Committee on CRC General Comment 12 and the ACERWC's Guidelines on child participation. Other requisite reforms in this regard are provided in chapter five.

²⁵⁶ (n 240) as above.

CHAPTER FIVE

Conclusion and Recommendations

5.1 Conclusion

This dissertation has shown the lack of application of child participation in custody proceedings in customary courts in Nigeria. The principle of child participation is a recognition of children as subjects of rights, and it is an important methodology that should be applied in all courts that have jurisdiction to adjudicate custody matter which include customary courts in Nigeria.²⁵⁷ Consequently, it is important for child participation to be applied in custody proceedings in customary courts as such proceedings impact children. Excluding application of the principle of child participation in customary courts not only defeats the essence of legal pluralism, but it is also discriminatory against children whose custody matters are adjudicated in customary courts. This is because children whose custody matters are adjudicated in magistrates' court and high court are not subject to the same treatment.

Therefore, for there to be an improvement in child participation in custody proceedings in customary courts in Nigeria, stakeholders including the parliament, the judiciary and the executive have roles to play in this regard.

5.2 Recommendations

5.2.1 Parliament

1. The Nigerian National Assembly should amend the Nigerian Constitution to provide for child's rights in the concurrent legislative list especially the core principles including child participation. This will ensure uniform standard across the country as the Nigerian Constitution is the supreme law to which all other laws and systems are subject. In addition, the CRA should be amended to expressly provide for child participation as provided in section 10 of South Africa's Children's Act. States' Houses of Assembly should amend their respective states' child's rights legislations accordingly.
2. The Nigerian National Assembly should amend the CRA to include customary courts as part of family courts for sections 155, 158 and other provisions in the CRA that aid child participation to apply to customary courts. States' Houses of Assembly should amend states' respective child's rights legislations with similar provisions.

²⁵⁷ UNCRC General Comment 12.

3. States like Ekiti state that their customary courts laws exclude legal practitioners from customary courts' proceedings should amend their customary courts law to allow for legal representation. Also, Ekiti state CCL that does not require legal education as part of the qualifications to preside in customary courts should be amended to at least mandate that the president of the customary court has legal education.

5.2.2 Judiciary

1. The chief judges of Ekiti, Oyo, and Kaduna, and the Chief Judge of the Federal Capital Territory, Abuja being heads of the judiciary in these jurisdictions should develop guidelines on child participation similar to the Lagos FCPR which should apply to all courts and judicial proceedings that deal with matters affecting children which include custody proceedings in customary courts. The guidelines should include the requirements that child appropriate information be provided and that the child's views be given due weight. The guidelines should make specific provisions to accommodate peculiarity of each child including children with disabilities.
2. The Lagos state Chief Judge should amend the Lagos FCPR to extend its application to customary courts in order for the child participation provisions in the FCPR to apply in custody proceedings in customary courts in Lagos state. The FCPR should also be amended to mandate a child being given appropriate information, and that child's views be given due weight.
3. The Lagos state Chief Judge should reverse the administrative decision to strip the Lagos state customary courts of jurisdiction to adjudicate custody matters of children subject to customary law because the administrative decision is contrary to legal pluralism which allows for the existence of indigenous courts. Since the Lagos CCL that gives customary courts the jurisdiction to adjudicate such matters is yet to be repealed, the Chief Judge should allow customary courts in Lagos state exercise their jurisdiction in this regard. The Chief Judge should ensure the Lagos FCPR is updated to allow for child participation in custody proceedings in customary courts.
4. There should be regular trainings for judicial officers including presidents and members of customary courts on child participation as provided by article 12 of the UNCRC, article 4(2) of the ACRWC, UNCRC General Comment 12 and the ACERWC Guideline on child participation. Trainings should involve practical application of child participation in custody proceedings in customary courts.

5. Experts like child psychologists should be attached to the customary courts to assist the court in ensuring effective child participation and giving reports on child's views.

5.2.3 Executive

1. The ministry of justice, the ministry of women affairs and social development and equivalent ministries at the state level that work on issues of children should raise awareness on article 12 UNCRC and article 4(2) of the ACRWC and their application to customary courts.
2. Ministry of justice, the legal aid council, the ministry of women affairs and social development and equivalent ministries at the state level should collaborate to ensure availability of legal aid to children in custody proceedings in customary courts where they choose to have legal representation.

5.2.4 National Human Rights Commission

1. National Human Rights Commission (NHRC) should collaborate with other stakeholders to raise awareness on child participation in judicial proceedings, and to monitor implementation of child participation in customary courts.
2. NHRC should institute programmes on children's rights particularly child participation to build capacity of customary courts judges and other officials in customary courts.

5.2.5 Civil society organisation and international organisations

1. To advocate on child participation and ensure proceedings in customary courts that affect children are part of the conversation when advocating child participation.
2. To initiate training and capacity building for customary courts' judges and officers in collaboration with other stakeholders like the judiciary.

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