

PARTICIPATORY RIGHT OF THE NIGERIAN CHILD – REMEMBERING THE PAST, APPRECIATING THE PRESENT AND FORECASTING THE FUTURE

Michael A. AjaNwachuku, Ph.D*

Abstract

The past was the era of non-existence of participatory rights for children. The present is the entrenchment of such rights in international instruments and some national laws including Nigeria's Child's Rights Act, 2003 wherein some participatory rights were specifically stated to be, and others not so specifically stated. The forecast is that Nigeria's Child's Rights Act shall in future, state as specific, the participatory rights not so stated.

Keywords: Participatory right, Nigerian child, the Act, Universal Declaration of Human Rights, international instruments.

1. Introduction

Children¹ have long been recognized as a vulnerable group. Essentially, they are vulnerable because (for reason of their young age and immature minds), they can neither take meaningful decisions even in their own affairs, nor are able to execute the decision taken for them by adults. Their inability to manage their affairs means that everything concerning their welfare and protection is abdicated to specific adult, whether biological parents or guidance.

This state of affairs has created an imbalance between adults and children: a superordinate and subordinate relationship wherein adults are superiors and children are inferiors, even when adults and children are born equal. The effect was that adults and children are born equal but to the extent that adults and not children can perform participatory roles, adults are more equal than children.

By the provisions of the Universal Declaration of Human Rights 1948,² a paradigm shift was made to the effect that all human beings (adults and children) are born equal in dignity and in law. The effect of the provision is that children are not less than adults even in participating in their affairs as provided for, by and under the law. International instruments like the United Nations Convention on the Rights of the Child,³ regional instruments like the African Charter on the Rights and Welfare of the Child,⁴ and some national laws like Nigeria's Child's Rights Act⁵ have espoused on the equality principle introduced by the Declaration, by making specific provisions on the participatory rights of the child. This is the global state of the law on the rights of children to participate in the management of their affairs or in deciding on matters that affect them.

With the past being absence of participatory rights and the present being the existence of such rights with recognized examples, some emphatically stated to be participatory and others not so

* **BL. Senior Lecturer in Law and former Dean, Faculty of Law, Ebonyi State University Abakaliki, Nigeria.**

¹ These are persons below the age of eighteen, as provided for in several international instruments, including the Convention on the Rights of the Child, 1990, some regional instruments like the African Charter on the Rights and Welfare of the Child and some State Laws, for instance, Nigeria's Child's Rights Act, Cap C50 Laws of the Federation of Nigeria, 2010. The respective articles and sections are Article I; Article II and section 277.

² The instrument shall hereinafter simply be referred to as "the Declaration".

³ The instrument shall hereinafter simply be referred to as "the Convention".

⁴ The instrument shall hereinafter simply be referred to as "the Charter".

⁵ The instrument shall hereinafter simply be referred to as "the Act".

stated, the forecast is that in the future the rights that are participatory but not so stated, shall so be stated.

This paper remembers the past when participatory rights were absent, appreciates the present that it exists, and forecasts that in the future, the rights that are not specifically stated to be participatory shall specifically be stated to be participatory. The theoretical framework shall be the past, the present, the future and conclusion.

2 The Past

Like most legal concepts, it is not quite easy to ascertain what a child's participatory right connotes. However, as shall be gleaned from what has been known to be participatory right of children under the Convention, the Charter and the Act, (as we shall see in the course of this paper) the participatory right of a child contemplates interaction between children and adults wherein children express their views and the expressed views taken into consideration when determining the subject matter on which the views have been expressed, which subject matter must be of concern to children. In other words, it could be regarded as the involvement of a child in determining his destiny. It is for this reason that participatory right of a child is said by the United Nations Committee on the Rights of the Child to comprise of:

ongoing processes which include information-sharing and dialogue between children and adults based on mutual respect, and in which children can learn how their views and those of adults are taken into account and shape the outcome of such processes.⁶

Before the Declaration in 1948, it was not within contemplation that children possess or can possess participatory right. The impression was so because of their young age and immature minds on account of which they were deemed not able to reason out issues and make proper articulations even on matters that concern them. The impression was natural because adults take care of and protect children from the gestation period (by their mothers) to birth and infancy. At

⁶KidsRights, "Child Participation from Rights to Reality" p.9. Available at www.kidsrights.nl/Portals/0/Reports/KidsRights%20Report%20Rights%20Child%20Participation_website.pdf.

these stages, children are helpless and needed to be cared for and protected; and are indeed cared for and protected. Several instruments of the world as already stated have pegged the age of childhood to below 18 years of age and have fixed people below that age under the cocoon of their parents and the adults; even when they can express views on matters that concern them.

Adults regard children as not sufficiently matured in mind to know what is good for them, and firmly believe that their parents and the adults know. This state of affairs created the impression that children were not holders of rights, but objects of rights whose needs were not beyond care, nurture and protection by and under the law, a circumstance that was best appreciated by their parents and adults and could best be executed by their parents and the adults. The further impression created by the state of affairs was that adults and children share the common ground of birth and dignity but that adults were superior to children in determining the affairs of children. The state of affairs was engendered by the traditional impression in most legal systems of the world that children were recipients of care and welfare, objects of protection and part of the family unit.⁷ The fact that in the past, children were regarded as not having separate existence from the family unit but part of it dates back to more than two thousand years ago. For instance, amongst the Christians, the biblical account of how Jesus Christ fed 5,000 people with five loaves of bread and two fishes and how He fed 4,000 people with seven loaves of bread and few fishes, took census of the 5,000 people and the 7,000 people without (women and) children.⁸ Children were therefore perceived by the society as passive objects⁹ and at best of the status of being subordinate to adults in the hierarchy of power and influence in the social order of the society.¹⁰

The past had the feature of not regarding children as equal to adults, save on the issue of birth, and possessing life as human beings.

⁷ Rebecca Stern, “The Child’s Right to Participation – Reality or Rhetoric?” (Doctor of Laws Degree (Ph.D) Dissertation, Uppsala Universitet Sweden, 2006), p. 28. Available at www.urn.kb.se/resolve?urn=urn:rbn:se:uu:diva-7083. Accessed on 18th March, 2017.

⁸ In Matthew chapter 14 verse 21, the verse records that “and they that had eaten were about five thousand men, beside [women and] children”. In Matthew chapter 15 verse 38, the verse reads “and they that did eat were four thousand men, beside [women and] children”.

⁹ Note 6, *loc.cit.*

¹⁰ Note 6, *op.cit.*, p. 133.

3. The Present

The present is marked with the provisions in section 12 of the Declaration of 1948 that “all human beings are born free and equal in dignity and in rights”.¹¹ By this provision is meant that adults and children are born free and equal in dignity and rights, pre-supposing that there is a great departure from the presumption that children are mere objects worthy of care, welfare and protection to the recognition of children as being of equal dignity with adults and possessing equal rights with adults, including the right to participation. The Declaration merely declared “all human beings” (i.e. adults and children) “equal in dignity and rights” and never explicitly provided for the right of participation of children, which right exists for adults. However, in spite of the non-express provision for the right to participation of children, the right can easily be inferred. If as it were, adults have the right to participation and children are equal to adults in rights, it logically and uncontroversibly follows that children have the right to participation as adults have.

A further progress was made on the participatory right of children when the Convention specifically provided for the right of children to participation. In the words of the Convention,

1. State Parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.
2. For this purpose, the child shall in particular be provided the opportunity to be heard in any judicial and administrative proceedings affecting the child, either directly, or through a representative or an appropriate body, in a manner consistent with the procedural rules of national law.¹²

The provision is quite interesting for stipulating that the child shall be assured of the right and for further stipulating that the logistics for realising the assured right must be made available. However, there is a limitation to the participatory right: the child must be “capable of forming his or her own views”. The effect therefore is that the participatory right is not available to a child who is not capable of forming his or her own views. The question may well be, how is it to

¹¹ The Declaration, GA Resolution 217 A (iii).

¹² Note 3, Article XII (1) & (2).

be determined that a child is capable of or not capable of forming his or her own views? One is of the considered opinion that it could only be determined by an attempt made to elicit the views. This is so because it is only when the views are sought to be elicited and the child could not express any, can it be said that the child is not capable of expressing his or her views. Therefore, whether or not a child can express his or her views cannot be determined by presumption, imagination or conjecture. The determination must be in practical terms and shall be on an objective assessment of the child, not on the subjective impression of the person or body determining whether or not the child is capable of expressing his or her own views. The provision has interestingly provided that the views of the child must be “given due weight” thereby showing that the Convention did not contemplate that the expression of the views of a child shall be a mere formality. Again, the Convention has interestingly provided that the weight to be ascribed to the views shall take cognizance of the “age and maturity of the child”. What this envisages is that there is no uniform yardstick of measuring the weight to be attached to the views of a child and eliminates the yardstick of evidence expected of an adult who has a matured mind, as the parameter to considering the views of a child and ascribing weight to them.

The Charter has the right of a child to participation in these words:

In all judicial or administrative proceedings affecting a child who is capable of communicating his or her views, an opportunity shall be provided for the views of the child to be heard either directly or through an impartial representative as a party to the proceedings, and those views shall be taken into consideration by the relevant authority in accordance with the provisions of appropriate law.¹³

This specific provision of the Charter on the right to participation of a child is of the same force with the identical provision under the Convention. The above provisions of the Convention and the Charter are set out in the Act, but restricted to judicial proceedings involving children.¹⁴ In the words of the Act,

¹³ Note 4, Article IV (2).

¹⁴ The judicial proceedings are in the courts specially set up to handle civil and criminal cases involving children. Note 5, *op.cit.*, sections 149 and 150.

the proceedings in the court shall be conducive to the best interest of the child and shall be conducted in an atmosphere of understanding allowing the child to express himself and participate in the proceedings.¹⁵

Therefore, under the Convention, the Charter and the Act, children have the right to participate in the proceedings wherein their affairs and destiny are to be determined. In addition to the common denominator of participating in proceedings, the Convention, the Charter and the Act share the common characteristic of making specific provisions on the right of children to participation.

The specific rights to participation which are of the same effect are:

3.1 The Right of a Child not to be Separated from the Parents:

Under the Convention,¹⁶ a child has the right not to be separated from his or her parents. The Convention further provides that a child could be separated from his or her parents, if he or she so wishes. The effect therefore is that the child has the participatory right to decide whether or not they would be separated from their parents. However, a child shall be separated from the parents when competent authorities subject to judicial review determine, in accordance with the applicable law and procedures, that such separation is necessary for the best interest of the child. Such determination may be necessary in a case involving abuse or neglect of the child by the parents, or in a case where the parents are living separately and a decision must be taken as to where the child shall reside.

Where a child is separated from the parents either because the child so volunteered or pursuant to the intervention of competent authorities, the child has the participatory right to maintain personal relations and direct contact with the parents unless such contact is not in the best interest of the child. If the separation is from competent authorities, the child shall have the right to participate in the process of determination of the separation.

A provision identical to the right of a child not to be separated from the parents exists under the Charter.¹⁷ The provision of this participatory right is to the effect that every child “shall, whenever possible, have the right to reside with his or her parents”. This right presupposes that

¹⁵ Note 5, *op.cit.*, section 158.

¹⁶ Note 3, *op.cit.*, Article IX (1)(2)(3).

¹⁷ Note 4, *op.cit.*, Article XIX (1)(2).

the child has the participatory right not to reside with their parents and the participatory right to reside with their parents. Also under the Charter, a child has the participatory right not to be separated from their parents against their will, except when a judicial authority determines with the appropriate law that the separation is in the best interest of such child.

Under the Act,¹⁸ a child has the participatory right not to be separated from the parents or to be separated from the parents. However, the Act stipulated two circumstances on which a child shall be separated from their parents. The first is where the separation is for the purpose of the education and welfare of the child and the other is in the exercise of a judicial determination, in accordance with the provisions of the Act, in the best interest of the child.

3.2 The Right to Freedom of Association and to Freedom of Peaceful Assembly

A child has the participatory right to freedom of association and freedom of peaceful assembly under the Convention.¹⁹ This right is participatory because the child decides to associate or not to associate. Again, where the decision is to associate, the child embarks on the association themselves. The child has the freedom of peaceful assembly which again is participatory because they decide whether or not to be part of the assembly and if they so decide, embark on the association themselves. The freedom of peaceful assembly contemplates an assembly that is peaceful and not otherwise, so that a child does not have the participatory right to an assembly that is not peaceful. Also, the right has yet another exception: the exercise of the right, shall be “in conformity with the law”. For example, the child shall not exercise his right to freedom of movement and of peaceful assembly where the exercise of the right shall not be in the interest of national security, public safety or public order; the protection of public health or morals or the rights and freedom of others.

The Charter has also provided for the participatory right to free association and freedom of peaceful assembly “in conformity with the law”.²⁰ The participatory right under the Convention and under the Charter are of the same effect, so also the exceptions, having stated that the right is for enjoyment only “in conformity with the law”. Both instruments employed the same

¹⁸ Note 5, *op.cit.*, section 14 (1).

¹⁹ Note 3, *op.cit.*, Article XV (1)(2).

²⁰ Note 4, *op.cit.*, Article VIII.

expression “in conformity with the law” but the Convention in addition thereto gave examples (set out in the immediate preceding paragraph of this paper), unlike the Charter that just stopped at the expression. Certainly, the examples given under the Convention are good guides to what is in the contemplation of the Charter while employing the expression.

The Act has a provision for the freedom of association and peaceful assembly as provided for under the Convention and under the Charter.²¹ Like the Convention and the Charter, it created the participatory right of a child to association and peaceful assembly and provided for the exception that the rights shall be exercised and enjoyed “in conformity with the law”. The Act however created a further exception that the rights shall be exercised and enjoyed “in accordance with the necessary guidance and directions” of the “parents and guardians” of the child. This limitation is quite interesting for employing the word “necessary”. The effect therefore is that the participatory right of the child cannot be curtailed by guidance and directions of the parents and guardians that are not necessary.

3.3 The Right to Rest, Leisure, Play and Recreational Activities

Under the Convention,²² a child has the participatory right to rest and leisure, and to engage in play and recreational activities and to participate in cultural activities and arts. The decision to enjoy and exercise this right is that of the child and if the child so decides, the enjoyment and participation are also their exclusive acts. The right is undoubtedly participatory.

The Charter has a similar provision on this participatory right of the child²³ when it made provision for the right of the child to rest, and leisure, to engage in play and recreational activities and to participate fully in cultural life and arts. These set of rights are participatory for the decision to enjoy and exercise them and having so decided, the actual enjoyment and exercise of them are those of the child. These rights have interesting additional right attached to them. The additional right is that it is the right of the child for their country to recognize the rights. In the words of the Charter,

²¹ Note 5, *op.cit.*, section 6.

²² Note 3, *op.cit.*, Article XXXI (1).

²³ Note 4, *op.cit.*, Article XII (1).

state parties recognize the right of the child to rest and leisure, to engage in play and recreational activities appropriate to the age of the child and to participate freely in cultural life and the arts.

The Act has provided for the participatory right of the child to rest and leisure and to engage in play, sports and recreational activities.²⁴ The child also has the participatory right to cultural and artistic activities. The decision to enjoy or not to enjoy and exercise these rights is that of the child. If in the positive, the enjoyment and exercise of the rights are also to be personally undertaken by the child. For certain, these rights are participatory.

4. The Future

Most of the specific rights examined have employed words, indicating that the framers of the rights intended them to be participatory. These words were “the right of the child”,²⁵ “have the right”,²⁶ and “has a right”.²⁷

However, some of the rights were phrased without using the quoted phrases. The non-use of those quoted phrases may create doubts as to whether the framers of the rights intended them to so be. For instance, under the Convention, the provision on non-separation of a child from the parents states that “state parties shall ensure that a child shall not be separated from his or her parents against their will”²⁸. Under the Charter, the provision for the participation of a child in judicial or administrative proceedings affecting him was that “an opportunity shall be provided for the views of the child”.²⁹ Under the Act on the provision for leisure, recreation and cultural activities is that “every child is entitled to rest and leisure and to engage in play, sports and recreational activities”.³⁰ The further provision under the Act has it that “every child is entitled to

²⁴ Note 5, *op.cit.*, section 12 (1) (2).

²⁵ The right of a child not to be separated from the parents, under Article IX(3) of the Convention; the right to freedom of association and to freedom of peaceful assembly, under Article XV(1) of the Convention; the right to rest, leisure play and recreational activities, under Article XXXI(1)(2) of the Convention; and the right of rest, leisure, play and cultural activities, under Article XII(1)(2) of the Charter.

²⁶ The right of a child not to be separated from the parents, under Article XIX (1)(2) of the Charter; and the right to freedom of association and to freedom of peaceful assembly, under Article VIII of the Charter.

²⁷ The right of a child not to be separated from the parents, under section 14(1) of the Act; and the right to freedom of association and to freedom of peaceful assembly, under section 6 of the Act.

²⁸ Note 3, *op.cit.*, Article IX (1).

²⁹ Note 4, *op.cit.*, Article IV (2).

³⁰ Note 5, *op.cit.*, section 12 (1).

participate fully in the cultural and artistic activities of the Nigerian, African and world communities”.³¹

For reason that some provisions in the Convention, the Charter and the Act did not employ phrases that would undoubtedly show that a participatory right has been created as in the instances above cited, it is hoped that in the future, rights created for children to participate in must employ words showing that participatory rights were created.

A forecast for the future is that the future holds further improvements on the rights to participation of the child by amending the rights that are not unequivocally child’s right participatory-specific as seen in this part of the paper, to make them so. The amendment will solve the potential legal problem of whether or not the framers of those rights intended them to be child’s rights participatory-specific.

Before the Declaration, cultural impediments to the rights of the child to participation exist. In the main, the cultural impediments include that children are meant to be seen and not to be heard. In many African countries, the impression is so much so, that there is the understanding that it is evidence of bad manners for a child to talk when adults are talking, even when the issue under discourse concerns the child. The future holds that by the participatory rights of the child as set out in the Convention, the Charter and some national laws including the Act, the right to participation of a child far outweighs the impression that it is bad manners for a child to talk when adults do, even in the affairs of the child. It is also certain that the right of a child to express himself also far outweighs the notion that they should not express themselves so as not to be adjudged as having bad manners. The freedom or right to express oneself is a fundamental right.

The world has come to terms with the practical fact that “he who wears the shoe knows where it hurts”. The future holds that with the participatory rights of children, adults shall readily allow them to participate in their affairs, for they know their circumstances better, from practical experience and can therefore make meaningful contributions. What is more, the ‘authority’ of

³¹ Note 5, *op.cit.*, section 12 (2).

adults is not undermined for children merely express their views, which are not binding, but are merely taken cognizance of.³²

5. Conclusion

Before the Declaration was the era of inequality between children and adults. From the Declaration to the Convention and the Charter was the era of recognition of equality between children and adults (as entrenched in the Declaration) and no more. From the Convention and the Charter was the epoch of entrenching the right of a child to participation, which rights the adults have. The equality between children and adults provided for in the Declaration was therefore exemplified with the right to participation of children in the Convention, in the Charter, and in national laws, for example, the Act, in Nigeria. This is the state of the law on children in the present. The future undoubtedly radiates a greater improvement on the right to participation of children by the Convention, the Charter and the Act being amended to make some provisions that seem non-participation-specific to be so.³³

It is expected that in future, children should participate not just in their affairs as chronicled under the Convention, the Charter and the Act, but in all affairs ranging from home, school, community, state and the nation, because every child's participation is unique and children's participation is children's empowerment.³⁴ Non-involvement of all children in all affairs that

³² Under Article XII (1) of the Convention, the expression is that the views of the child shall be given "due weight", while under Article IV (2) of the Charter, the expression is that the views of the child shall be "taken into consideration". The provisions in the Act are as found in note 15 in the body of the work and are quite narrow. First, it is restricted to judicial proceedings. Second, the Act only provided that the child shall be allowed "to express himself" and never said what shall happen to the expression e.g. that "due weight" shall be given to it as in under the Convention or that it "shall be taken into consideration" as in under the Charter. However, in spite of the fact that the words employed under the Convention and the Charter were omitted under the Act, the presumption is that the view expressed by a child under the Act shall be taken into consideration and or due weight attached to it. The presumption is anchored on two reasons. First, the Convention and the Charter from whence the provisions in the Act were culled say so. Second, if the expressed views are not given due weight or taken into consideration, no practical purpose is achieved by expressing them

³³ Some examples of the provisions where there could be an argument on the existence or otherwise of rights are found from the second paragraph of "The Future" in this paper.

³⁴ K. Shanmugavelayutham, "Right to Participation of Young Children in India", p.1. Available at www.crin.org/en/docs/resources/treaties/crc.37/FORCES_Tamil_Nadu_India.pdf accessed pm 21st March, 2017.

affect them, shall undoubtedly give rise to a self-perpetuating cycle of social and economic exclusion and shall lead to the neglect of children's ability to develop to the fullest.³⁵

The relevance of the right of children to participate in all matters that concern them cannot be over-estimated for the obvious reason that it recognizes the potential of children to enrich decision-making processes, to share perspectives, and to participate as citizens and actors of change.³⁶

Involvement of children not only improves upon social democratization, but helps children to better understand and accept the decisions taken by adults, as they contributed to them.³⁷ What is more,

children have unique perspectives and might come up with different and new creative ideas that adults may not have considered. When it comes to issues concerning children, their views hold additional importance given that they will be affected by their outcomes, and can offer essential information only known to children. This can provide adults with opportunities to bridge the gap between their perceptions of children's lives and the reality experienced by the children themselves.³⁸

³⁵ *Ibid.*, p.6.

³⁶ UNICEF, "The right to participation" available at www.unicef.org/crc/files/Right-to-Participation.pdf accessed on 21st March, 2017.

³⁷ Note 6, *op.cit.*, p.10.

³⁸ *Ibid.*