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ENTRENCHING CHILD RIGHTS IN NIGERIA: THE PROBLEM OF CONSTITUTION AND CULTURE

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10/24/2017

A thesis submitted to the University of Nottingham in fulfilment of the requirements for the degree of Doctor of Philosophy

The law is stated as at October 2017 and all the websites and internet sources referred to in the thesis were present and accessible as at 18th October, 2017

ABSTRACT

The thesis examines child rights protection in Nigeria particularly in the context of problems created by the constitution and culture in establishing an effective child rights framework. Its central argument is that the peculiar constitutional arrangement hinders the effective implementation of the Nigerian Child Rights Act (CRA) 2003. It also argues that cultural perceptions with respect to children also serve as formidable opposition to the recognition of children as rights holders. Having argued along these lines, the thesis proposes certain reform measures that may be adopted in resolving the problems created by these factors and assesses their suitability to the Nigerian society.

ACKNOWLEDGMENTS

First of all, I thank the Almighty God for helping me all the way through the research programme. I also want to thank my research supervisors, Professor Ralph Sandland and Professor David Fraser for their invaluable comments, advice, assistance and suggestions. My most sincere appreciation also goes to every member of my family who supported and assisted me to the best of their ability. I also appreciate the efforts of the various institutions that have provided useful research material necessary for the amplification of the concepts and ideas considered in the thesis. While I cannot specifically acknowledge every single individual who has contributed in one way or another to this thesis, I pray for God's blessing upon every single one of them.

TABLE OF CONTENTS

Abstract

Acknowledgements

CHAPTERS

1. INTRODUCTION **6-18**

- Introduction 6-8
- Why Constitution and Culture 8-9
- Need for the Research Project 9-11
- Structure 11-18

2. CHILDHOOD AS A CONSTRUCT **19-40**

- Childhood in the Western World 19-22
- Nigeria and Childhood 22-29
- Religion, Rights And Modernization 29-35
- Childhood in 21st Century Nigeria 35-37
- Conclusion 37-40

3. HISTORY OF CHILD RIGHTS PROTECTION IN NIGERIA **41-66**

- Child Rights And Nigerian Law: The Pre-Colonial Era 41-42
- Colonialism, Post-Colonialism And Child Rights Protection 43-56
- Constitutional Development And The Nigerian Child 56-59
- Nigerian Law And Child Rights 59-65
- Conclusion 65-66

4. THE CHILD RIGHTS ACT 2003 **67-91**

- History 68-71
- The Child Rights Act 2003 71-78
- The CRA And Existing Laws: Any Improvement? 79-83

- State Implementation Post-CRA 83-90
- Conclusion 90-91

5. REGIONAL AND INTERNATIONAL CHILD RIGHTS PROTECTION: THE CRA IN CONTEXT 92-124

- The CRA And The CRC 93-110
- The CRA And The African Charter 110-118
- An Overall Analysis 119-123
- Conclusion 123-124

6. CHILD RIGHTS PROTECTION IN NIGERIA: THE PROBLEM OF THE CONSTITUTION 125-154

- Constitutional Development In Nigeria 126-132
- Fundamental Rights and the Constitution 133-141
- The Nigerian Constitution And Child Rights 141-155
- Conclusion 154

7. ENTRENCHING CHILD RIGHTS IN NIGERIA: THE PROBLEM OF CULTURE155-185

- What Is Culture? 155-159
- Culture And The Law 160-173
- Culture, Law And Rights: The Nigerian Example 173-184
- Conclusion 184-185

8. EFFECTIVE CHILD RIGHTS PROTECTION: WHITHER NIGERIA? 186-215

- Progressive Steps? 187-192
- Reform Measures 192-213
- Conclusion 213-215

9. SUMMARY/CONCLUSIONS 216-222

BIBLIOGRAPHY 223-234

CHAPTER ONE: INTRODUCTION

'There is no trust more sacred than the one the world holds with children. There is no duty more important than ensuring that their rights are respected, that their welfare is protected, that their lives are free from fear and want and that they can grow up in peace'

-Kofi Annan[1]

'No guarantees come with children's liberation. But neither the promise of great benefits to all nor the prediction of great difficulties ahead can serve as the reason for granting or denying rights to children. Rights will be granted because without them children are incapacitated, oppressed, and abused-

-Richard Farson[2]

There has over the last three decades been an increase in rhetoric in relation to children being right-holders. This is not to suggest that there was been no discussion as to the rights of children in earlier times.[3] The Declaration of the Rights of the Child 1924 declared that mankind 'owed to the child the best it had to give'[4] while the Declaration on the Rights of the Child 1959 recognized the need for special protection being afforded to the child by reason of his physical and mental immaturity'.[5] The discussion and rhetoric relating to the status of children as legal right holders reached a climax in 1989 with the adoption of the Convention on the Rights of the Child (CRC)[6], which creates binding legal obligations on all states party to it. Political developments in the years following the adoption of the CRC have indicated a shift towards a world-wide recognition of the status of children as right-holders. The CRC for example is the most widely-

[1] Annan, Kofi, State of the World's children: Foreword (2000) available at https://www.unicef.org/sowc00/foreword.htm
[2] Farson, Richard, *Birthrights*(Penguin Books, 1974), 226
[3] See the *Declaration on the Rights of the Child 1924, Declaration on the Rights of the Child* (1959)
[4] Also known as the 'Geneva Declaration'. A copy of the declaration is available at http://www.un-documents.net/gdrc1924.htm (last accessed 12th May, 2017)
[5] UN General Assembly, *Declaration of the Rights of the Child*, 20 November 1959, A/RES/1386(XIV), available at: http://www.refworld.org/docid/3ae6b38e3.html [accessed 13 May 2017]
[6] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: http://www.refworld.org/docid/3ae6b38f0.html [accessed 30 May 2018]

adopted human rights convention.[7] For a human rights instrument that has been in existence for less than three decades, this is a powerful statement in relation to the level of regard accorded to children in the 21st century.

Nigeria signed the CRC on 26th June, 1990 and ratified same on 19th April,1991, less than two years after the Convention came into force. It is observed that this step was taken in an era of military dictatorship, a leadership period often associated with gross human rights violations, especially as far as children are concerned. This background creates a presumption of willingness on the part of the Nigerian government to comply with international human rights standards. However, the fact that the provisions of the CRC were only incorporated into domestic law in 2003 by the passage of the Child Rights Act (CRA) (over a decade after ratification) suggests that commitment to child rights protection did not progress as rapidly as the 1991 events would have implied.[8] This does not however render the steps already taken with respect to child rights protection insignificant.

The sluggish movement in the development of a comprehensive and well-structured child rights protection system in Nigeria gives rise to this research thesis. The principal aim of this thesis is to assess the child rights protection framework in Nigeria with the CRA serving as the legislative basis upon which this protection is assessed. It is recognised under international law that one of the most significant measures of domestic implementation of Convention standards is the enactment of legislation to that effect.[9]

[7] Only the United States of America is yet to ratify the convention. There are however many countries that have ratified the said convention with reservations. For an updated status of ratification of the UN Convention on the Rights of the Child, See https://treaties.un.org/pages/viewdetails.aspx?src=ind&mtdsg_no=iv-11&chapter=4&clang=_en (last accessed 4th June, 2018)

[8] This may have been due to various factors including change in leadership and general instability especially in the period spanning 1995-1998 as well as opposition from major ethnic groups in the years following. These issues would be considered in more detail in Chapter 2.

[9] See Committee on Economic, Social and Cultural Rights (CESCR), General Comment No.9 on the Domestic Application of the Covenant (1998) U.N Doc.E/1999/22. See also Wieruszewski, Robert, 'National Implementation of Human Rights' in Rosas and Helgesen (eds), *Human Rights in a Changing East-West Perspective* (Pinter Publishers, 1990). In a study conducted by Pillay on the advancement of child rights in

Mere adoption of domestic legislation has however been observed as being an insufficient yardstick to determine compliance. There are other important factors worth examining which may aid or hinder the effective implementation of legislation or rules and regulations grounded in other sources of law as the case may be.[10] The focus of this research project is on the issues of constitution and culture and these two concepts will form the central themes of this project.

WHY CONSTITUTION AND CULTURE?

Nigeria, a federation comprised of 36 states, operates a federal system of government to which end law-making powers are divided between the federal and state legislative houses.[11] An implication of this is the fact that certain matters, even those of national significance, are not within the exclusive competence of the federal legislative houses. Under the Nigerian constitution, matters listed under the exclusive legislative list are within the law-making preserve of the national Assembly while matters under the concurrent legislative list can be legislated upon by both the national and state houses of assembly.[12] For the purpose of this thesis, it is worth stating that the subject of child rights is not included in the matters to which legislative competence has been decided.[13] Consequently, any law passed by the federal legislature in this area must be incorporated into state legislation to make it binding on the state concerned.[14] This is a problematic position in a nation like Nigeria where the ethnic, religious and social

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Africa, it was determined that virtually all the participants 'highlighted as significant the development of legal frameworks to promote children's rights, including various Acts and instruments both at a regional and international level'. See Pillay, J, 'Advancement of Children's Rights in Africa, a social justice framework for school psychologists' (2014) *School Psychology International* Vol. 35 Issue 3, 225-240,230

10 This is not an uncommon scenario in human rights law. Hence, many human rights instruments are in themselves political agreements which have been granted the privilege of legal status only because other non-legal factors have been taken into consideration.

11 Federalism describes a system wherein the national government and smaller political subdivisions (states) both have law-making power and states enjoy a certain level of political autonomy. This is similar to the system of government in the United States. See http://www.law.cornell.edu/wex/federalism. In Nigeria, the National Assembly is divided into the House of Senate and the House of Representatives.

12 See: Second Schedule of the Constitution of the Federal Republic of Nigeria 1999(as amended) available at http://www.nass.gov.ng/nass/acts.php?pageNum_bill=10&totalRows_bill=219

13 i.e it falls into the residual legislative list

14 This does not necessary apply to constitutional provisions which guarantee fundamental rights to all individuals. Matters relating to child rights, insofar as such can be brought under the areas outlined under the exclusive legislative list, would also be exempt.

divisions imply different approaches by states to child rights. Unsurprisingly, many states have either failed to incorporate the provisions of the CRA into their law or refused to implement these provisions where such incorporation has taken place.[15] In the absence of any significant political upheaval leading to the collapse or disintegration of the Nigerian state, it is highly unlikely that this situation will change in the foreseeable future. As a result, there is a reasonable belief that the problems arising from this particular constitutional arrangement would persist.

The problem of culture as it relates to child rights is a significant one under international human rights law. In certain circles, human rights are still often seen as a 'western/first world imposition' which does not take into account the peculiar cultural norms and practices that form a critical part of non-western societies.[16] The conflict of human rights standards with certain cultural practices, as is the case in other jurisdictions, is also a recurring theme in the Nigerian human rights protection framework. A peculiar characteristic of certain aspects of Nigerian culture is the fact that it is highly influenced by religious thought, which influence is seen even in the law-making sphere.[17]

NEED FOR THE RESEARCH PROJECT

Child rights law is still very much in the infant stages of an albeit rapid development. However, child rights as a subject is rarely discussed in academic and political circles in

[15] Even in states that have adopted the Child Rights Act, there is a lack of uniformity in terms of implementation of the provisions and concepts defined and stated under the Act. See Iguh, N.A and Nosike, O, 'An examination of the Child Rights Protection and Corporal Punishment in Nigeria' available at www.ajol.info/index.php/naujilj/article/download/82391/72546(last accessed 13th January,2015)

[16] Micheal Ignatieff, 'The Attack on Human Rights' in McCorquodale, Robert(eds), *Human Rights* (Ashgate Publishing,2003),407-423. For more on the culture and human rights debate, see Pannikar, 'Is the Notion of Human Rights a Western concept?' in Alston, Philip (ed) *Human Rights Law* (Dartmouth Publishing,1996),161-189, An-Na'im(ed), *Human Rights in Cross-Cultural Perspectives: A Quest for Consensus* (University of Pennsylvania Press,1992).

[17] For instance, in 2004, the serving governor of Niger State, Abdulkadir Kure publicly made it known that his government could not adopt the Child's Right Act except it first passed through the council of Ulamas (an Islamic council) for approval. See Oderinde, O.A, 'The Religio-Cultural Context of Girl-Child Trafficking in Nigeria' (2014) *Review of European Studies* Vol.6 No. 1,190-195,191

Nigeria, a situation largely unchanged by the enactment of the CRA in 2003. Notwithstanding the fact that 24 states have implemented the CRA, there is still an impression among certain child rights activists that the CRA itself is 'non-functional' and little more than a 'white elephant project'.[18] This impression is not unconnected with the seemingly apathetic attitude towards child rights protection, especially in political decision making. In developing an appropriate approach towards making child rights protection an integral aspect of the Nigerian society, it is useful to conduct an appraisal of the general attitude towards children in Nigeria. The research project will provide a reasonably comprehensive appraisal in this respect.

Furthermore, it appears to be the case that there has been very little research work conducted into child rights as a legal subject in Nigeria, a consequence of which is the paucity of available scholarly material for use in this research project). For the purpose of obtaining research material, visits have been made to various academic institutions, human rights bodies and other relevant governmental [19] and non-governmental organisations.[20] Efforts in this regard have only exposed the limited attention given to children and child rights protection as a whole, which in itself shows the relevance of a project of this nature. It is envisaged that this project will stimulate a general societal awareness of the status of children as right holders and increase the level of scholarship in this area.

The incorporation of the CRC into Nigerian law by virtue of the CRA theoretically suggests that there is a shift towards considering children as legal right-holders. This

[18] See Garba Shehu, A white elephant called Child Rights Act available at http://theeagleonline.com.ng/a-white-elephant-called-child-rights-act-by-garba-shehu/ last accessed 10th January,2015

[19] Such as the National Human Rights Commission. Other relevant bodies consulted include the Office of the Public Defender, Ministry of Justice (Lagos State) and the Federal Ministry of Education. Judicial bodies (Lagos State Judiciary and legislative bodies such as the Office of the Senate President of the Federal Republic of Nigeria have also been consulted.

[20] Such as Centre for Law Enforcement Education (CLEEN) Foundation and United Nations International Children Emergency Fund (UNICEF) Nigeria.

does not however represent the practical reality. The thesis aims to examine some possible obstacles to this being the case in practice, with the constitutional problem in particular being examined in greater depth as it provides an insight into the difficulties in enforcement of child rights from a legal perspective. One may discover, as Ladan asserts, that securing the future of the Nigerian child lies well outside the realm of law.[21]

STRUCTURE

The central subject matter of this thesis cuts across different areas of scholarship including politics, law and sociology. It therefore seems most ideal to adopt an interdisciplinary approach in addressing the issues raised therein. Chapter 2 is a brief introduction of various concepts of childhood bearing in mind the Nigerian perception of these concepts. This chapter in effect examines the effect of social constructs, religious beliefs and cultural beliefs on the societal approach to children. In essence, as De Mause asks;

> What was it like to have been a child in colonial America, or in Renaissance Italy? Did parents always act much the same as they do today? Did they love and care for their children in similar ways, or has child care changed substantially over the centuries?[22]

The importance of this preliminary discussion of the concept of childhood is to provide a basic background for a proper understanding of the impact of 'child rights' on the societal approach to childhood. It may very well be the case that child rights as reflected in child rights law instruments are nothing more than a written reflection of existent societal prejudices relating to children, whether in Nigeria or in other parts of the world. There has been a great deal of research work conducted into the historical development

[21] See Ladan, M.T, 'The Child Rights Act, 2003 And The Challenges Of Its Adoption By State Governments In The 19 Northern States' available at www.abu.edu.ng/publications/2009-07-03-153800_3901.doc
[22] De Mause, Lloyd (eds), '*The History of Childhood: The evolution of parent-child relationships as a factor in history* (Souvenir Press, 1976, first Published in 1974, Psychohistory press),Editor's preface'

of the concept of childhood and its evolution in the West.[23] Academic discussion on childhood in Nigeria is hardly as detailed and comprehensive with childhood often considered only in the context of a larger discourse on issues like culture and family relations. Nevertheless, the available material on childhood in general is useful in enabling one to draw inferences about the general societal attitude to children which will serve as a helpful background for further discussion of certain concepts examined in the thesis.[24]

This brief insight into the concept of childhood would be followed by a description of the historical development of child rights protection in Nigeria in Chapter 3. This will involve a detailed outline of the development of the Nigerian legal system to the extent that it deals with specific child rights issues. In the context of legislation, there was little activity in the Nigerian legal system prior to the enactment of the Children and Young Persons Act 1943[25] which regulated administration of juvenile justice. There will however be recourse in this project to legal as well as socio-legal developments in the area of child rights prior to that time. One will proceed to describe these events up till the enactment of the CRA and other vital post-enactment developments. The discussion in this chapter provides preliminary insight into the question regarding the influence of constitution and culture on the Nigerian child, building upon the factors discussed in the previous chapter.

Chapter 4 is an overview of the Child Rights Act 2003 (CRA). Given the voluminous nature of the CRA, the provisions of the CRA will be outlined in a thematic fashion for

[23] See De Mause, Lloyd (eds) 'The History of Childhood' (Ibid), Cunningham, Hugh, '*Children and Childhood in Western Society since 1500* (Longman Group Limited, 1995)',Aries, Phillip, *Centuries of Childhood* (translated from the French by Robert Baldick, Cape,1962)

[24] It is noted in this respect that even though there are some unique features of the Nigerian system as far as the concept of childhood, it shares very similar features with other African countries. Reference would therefore be made to childhood in the larger African to the extent it helps provide a better understanding of childhood in Nigeria.

[25] Cap 32, Laws of the Federation of Nigeria 1958.Regulation of matters relating to child rights was by English common law and statutes received from English law before 1900 e.g Custody of Infants Act 1873, Custody of Children Act 1891.

clarity. This chapter will also serve as a preliminary assessment of the current standards of child rights protection in Nigeria in terms of its compatibility with international standards of child rights protection. In terms of its relationship with the central theme of this thesis, it is believed that an examination of the Act is crucial in highlighting the impact of the Nigerian constitutional framework and cultural setting on law-making. It is possible that the CRA itself is not only compatible with international human rights standards but addresses some of the deficiencies identified in regional and international child rights instruments and thus establishes a comprehensive protection system for the Nigerian child.

Chapter 5 builds on the assessment of the CRA which commences in Chapter 4 and compares the CRA with international human rights instruments, with the CRC and African Charter on the Rights of the Welfare of the Child (African Charter) being the main foci of comparison. This comparative analysis is of particular relevance in discussing any possible reforms to the Nigerian child rights protection system. This comparison is not for the purpose of reaching a conclusion regarding the extent to which the provisions of the CRC have been incorporated into Nigerian law. The international rights instruments are not without their deficiencies which may or may not have been addressed in the CRA. Furthermore, there is the possibility that any difference in wording or interpretation of the CRA is no more than a law-making technicality designed to ensure adaptation to the Nigerian society, which technical difference is not necessarily in contravention of the spirit of the CRC. In comparing the CRA with international human rights law, reference will also be made to the provisions of other international human rights instruments which specifically deal with child rights.[26] Child rights in itself is a part of a larger human rights framework and recourse to other aspects of human rights law dealing with children is considered necessary for a holistic analysis, especially in matters that may deal with

[26] See for instance Art 18 (4) of the International Covenant on Civil and Political Rights (1966) which guarantees the rights of parents and, when applicable, legal guardians to ensure the religious and moral education of their children in conformity with their own convictions.

reform of the child rights framework in a particular jurisdiction. In Chapter 5, the provisions of the CRA will also be compared with the child rights laws of some of the states that have adopted the CRA.

The crux of the project is in the two chapters following. Chapter 6 will be an examination of the constitutional issues faced in the implementation of child rights. The Constitution is the supreme legal instrument in the Nigerian legal system and every other legislation passed in Nigeria are only valid if compatible with constitutional provisions, otherwise it is null and void to the extent of its inconsistency with the constitution.[27] The CRA is no exception. This therefore implies that any provision of the CRA incompatible with the Constitution cannot be regarded as valid under Nigerian law, even if in accordance with international standards of child rights protection.[28] This has been found to raise certain conceptual problems especially in recent times.[29] In addition, the Nigerian constitutional system is framed in such a manner as to give individual states limited prerogative both in terms of law-making and incorporation of legislation.[30] This has resulted in the failure by many of the states to implement the provisions of the CRA and as a result, developing a comprehensive child rights protection framework both in theoretical and practical terms has been made an uphill task.[31]

Chapter 7 examines cultural hindrances to effective child rights protection. The peculiarity of cultural practices in Nigeria is seen in the various sources of influence

[27] Section 1
[28] This is reminiscent of the age-long conflict between the universality of human rights and state sovereignty.
[29] In 2013, there were protests raised regarding a certain constitutional provision which appeared to potentially legalise child marriage. See http://www.aljazeera.com/indepth/features/2013/10/nigeria-urged-reduce-child-marriages-201310121051319133.html. It must however be said that the issue that gave rise to the protest in this instance was derived from technicalities surrounding statutory interpretation and there is little evidence to suggest that constitutional provisions in themselves create problems as far as child rights protection is concerned. See Taiwo Akinlami, 'Constitutional Amendments ,child rights and the rest of us' available at http://www.punchng.com/feature/the-law-you/constitution-amendment-child-rights-and-the-rest-of-us/ last accessed 12th January, 2015
[30] Similar to the system in the United States of America
[31] Child Rights activists have at various times called for constitutional review with respect to the areas in which states are granted discretion in making or incorporating laws.(See Taiwo Akinlami, 'Constitutional Amendments ,child rights and the rest of us' supra n.29)

including religion and economic upheaval. This is in contrast to the notion of cultural practice often discussed under international human rights law where cultural practice in certain countries is viewed through a 'barbaric lens'. Michael Freeman in commenting on Article 3 of the CRC also makes this point in stating that more often than not, culture is discussed in the context of human rights in terms of practices that tend to be prevalent in the developing world or in parts of it.[32] To this end, the discussion of culture in this chapter will not be limited to practices such as child marriage, but practices such as child labour which may have significant impact on child rights without necessarily symbolizing barbarism. It is important to understand the cultural opposition to child rights in its proper context to ensure that the supposed gains for children especially in terms of legislation/public policy are not just merely theoretical. Lyman, who conducted research into childhood patterns of the late Roman and early medieval periods, concluded that the deep-seated nature of folk-customs made repeated prohibitions by civil and religious authorities of little effect against grim acts inflicted upon children.[33] One would suggest that the position in contemporary times in terms of attitude to custom remains largely unchanged. It is therefore important to understand the cultural aspect of child rights discussion correctly to ensure the effectiveness of legal prohibitions on child rights abuses, especially in a heterogeneous community as Nigeria where there is no obvious transcendental notion of the child.

In this chapter, certain cultural practices and systems which arguably violate the rights of children will be examined. These practices and systems have particularly been chosen for two key reasons. First of all, they derive added legitimacy and protection from the rule of law, having been codified in one form or another. Secondly, these practices also highlight existent tensions between societal behaviour, law and rights, indicating that the implementation of certain child rights ideals may not necessarily be as fluid as advocates

[32] See Freeman, Micheal, *A Commentary on the United Nations Convention on the Rights of the Child, Article 3: The Best Interests of the Child* (Martinus Nijhoff Publishers, 2007)
[33] See Richard B. Lyman, Jr, 'Barbarism and Religion: Late Roman and Early Medieval Childhood' in De Mause supra n.23

may like it to be. As Freeman rightly observes, the practical meaning and application of children's rights is contested more or less everywhere.[34] This is not unconnected with the fact that value judgments made by societies differ as influenced by culture and constitution. The complexities created by the existence of these practices may prove highly significant, particularly in the context of any advocacy for law/societal reform.

This thesis is concluded by a discussion on possible ways by which the problems raised through constitution and culture could be addressed. The need for a holistic approach to resolve existing problems cannot be overemphasised, especially given that the set of norms incorporated into Nigerian law through the CRA[35] are heavily impacted by value judgments made across different communities.[36] One oft-discussed reform mechanism is the use of dialogue. Freeman believes such dialogue needs to seriously engage local perspectives for effectiveness.[37] These local perspectives are seen in the constitutional and cultural themes that run through the thesis. There is also a need for increased awareness of the special nature of child rights, which special nature is seen in the preliminary discussion concerning children and the concept of childhood in general in chapter 2. The depth to which cultural prejudice, institutionalized by constitutional protection, is ingrained in the Nigerian society is highly significant in terms of determining the child rights awareness mechanism(s) that may be developed in this respect. It is argued that child rights awareness in Nigeria is a gradual process, arguably more so than would be the case in 'developed countries' or other countries where the concept of rights has shaped (and is shaping) their contemporary notion of culture.

With respect to the substance of culture, there is also room for an argument that cultural practices need to undergo reform in line with the CRA and the CRC. It is nevertheless

[34] Freeman supra n.32
[35] i.e the norms outlined in the convention on the rights of the child
[36] Freeman supra n.32
[37] Ibid

crucial that such reform measures are developed in such a manner as to counter accusations of 'western impositions'. A valuable tool in achieving such an aim is an appeal to the concept of cultural dynamism.[38] This nevertheless assumes that culture is perceived as dynamic in the Nigerian society.[39] A successful establishment of the concept of dynamism in Nigerian culture creates more room for developing an approach to child rights where the norms outlined under child rights conventions are expressed in universal terms without losing the element of being responsive to the local context.[40] In the context of legal reform, there is the need to address certain issues regarding enforcement of child rights protection laws. One fundamental issue in this regard is the justiciability of child rights. Although procedures exist under the Nigerian legal system to provide redress for child rights violations, the vast majority of these procedures are not necessary child-sensitive except for areas such as juvenile justice. There is a need for the creation of justice administration mechanisms which recognize and understand the special nature of child rights.

Allied to the discussion under legal reform is the issue relating to state discretion in implementing the CRA. There is the possibility of amending the constitution for the purpose of eliminating this discretion by including child rights in the exclusive or concurrent legislative lists, in which case the CRA will be capable of being deemed of universal application. However, as will be highlighted in this thesis, the constitutional amendment process is not without its intricacies and complexities. This will also followed by reference to other reform measures including the development of mechanisms for the enforcement of existing laws in the society. The reform measures discussed in the conclusion of this thesis are however by no means exhaustive. It is also not expected

[38] The influence of external factors such as Christianity on the concept of cultural practice makes an argument for the dynamism of culture plausible.
[39] In Akinwunmi's view, even an assumption that cultural and religious beliefs are rooted in the history of the Nigerian people is not sufficient to neglect the fact of cultural dynamism. See Akinwumi, O.S "Legal Impediments on the Practical Implementation of the Child Right Act 2003," (2009) *International Journal of Legal Information*: Vol. 37 Iss. 3, Article 10,392
[40] Van Beuren, Geraldine, 'Balancing Traditional Values and Cultural Plurality' in Douglas and Sebba (eds) *Children's Rights and Traditional Values* (Ashgate Publishing, 1998), 16

that adherence to these measures by themselves will automatically ensure the eradication of every form of child rights violations existent in the Nigerian society. It is nevertheless expected that these suggestions and indeed this thesis in itself will serve as a useful starting point in addressing the underlying causes of the vast majority of these violations and in so doing create a better society for children.

CHAPTER 2: CHILDHOOD AS A CONSTRUCT: EFFECT OF SOCIETAL PRACTICE, RELIGIOUS CULTURE AND ECONOMIC DEVELOPMENT

The focus is in this chapter is on childhood as a concept especially in the Nigerian context. In developing a proper understanding of the concept of child rights, it is important to consider both historical and contemporary perceptions regarding the child especially for the purpose of assessing the impact of these perceptions on current societal behaviour as it relates to child rights protection. As is reasonably expected in a world comprising various social entities with diverse societal structures, one does not intend to develop a conception of childhood that represents the universal position. As noted by Jenks;

> Despite a long cultural commitment to the good of the child and a more recent intellectual engagement with the topic of childhood, what remains perpetually diffuse and ambiguous is the basic conceptualization of childhood as a social practice[41]

The aim of this chapter is to briefly discuss the existent notions relating to childhood with special focus on the impact of societal practice, religious beliefs and cultural practice on the child and childhood in the Nigerian setting. The first part of this chapter offers a brief discussion of the various notions of childhood in the Western world as discovered through sociological inquest after which there will be a consideration of childhood as a social construct in the Nigerian environment.

[41] See Jenks, Chris, *Childhood* (2nd edition,first published 1996, Routledge,2005),2

CHILDHOOD IN THE WESTERN WORLD

There has been extensive discussion among child sociologists relating to childhood in various parts of the developed world.[42] An examination of these accounts gives rise to varying conceptions of the child ranging from the view of the child as a depraved being in need of correction to one considering the child as an innocent being only corrupted by various life experiences. According to the famous Christian philosopher, Augustine of Hippo, the new-born child was not exempt from the sinful nature into which all men had been born. This is based on the Christian doctrine which makes it clear that all human beings that followed the first man, Adam, were born with a sinful nature.[43] The likes of Locke and Rousseau on the other hand rejected the concept of original sin with Locke portraying child development as a mental and physical process and emphasized the importance of a rational education.[44] Rousseau in his case regarded the child as being born innocent but at risk of being disfigured by prejudices, authority, necessity and example.[45] These conflicting concepts created some form of confusion as to the exact status of children, especially in subsequent eras. As recorded by Walzer, 17th and 18th century Americans regarded children as both inherently wicked and as totally innocent in that they had not been corrupted by the wickedness of the temporal world.[46] In line with this belief, the need for proper governance and instruction, especially by the use of the rod was deemed necessary to curb the tendency of the child to go wild was emphasized.[47]

[42] For anthropological discussion relating to childhood see Jenks, Chris, *Childhood* (2ndedition,first published 1996, Routledge,2005; Cunningham, Hugh, *Children and Childhood in Western Society since 1500* (Longman, 1995);Aries, Phillipe, *Centuries of Childhood* (translated from the French by Robert Baldick, Cape,1962);
[43] For more discussion on this concept see Bonaiuti, E. and La Piana, G, 'The Genesis of St. Augustine's idea of Original Sin' (1917) *Harvard Theological Review* Vol 10 No 2,159-175
[44] For more on this, See Locke, *Some Thoughts Concerning Education* available at http://legacy.fordham.edu/halsall/mod/1692locke-education.asp
[45] Rousseau, Jean Jacques, *Emile or On education* (translated by Alan Bloom (1979,first published 1762, Basic Books Publishing) 37
[46] See De Mause, Lloyd (ed)*The History of Childhood: The evolution of parent-child relationships as a factor in history* (Souvenir Press, 1976, first Published in 1974, Psychohistory press),364
[47] Ibid, 365

In some other contexts, childhood is discussed in light of the child as a future adult. Jenks, in discussing the function of childhood as a concept, concludes that childhood is spoken of as an 'essential and magnetic relation to an unexplicated but firmly established, rational adult world which is complete, recognizable and desirable'.[48] In other words, it is best, having regard to the status of the child within the social system, for the child to be treated as a 'proto-adult'.[49] Others considered the child as a 'being in the present' with James and Prout particularly summing it up as follows;

> *What we advocate is a theoretical perspective which can grasp childhood as a continually experienced and socially created phenomenon which has significance for its present as well as its past and the future…….it is vital to focus on children not only as adults or future beings but as beings in the present*[50]

While some authors suggest based on sociological inquiry that society did not regard the concept of childhood as being existent in terms of being aware of the 'particular nature of childhood' until the 16th and 17th century[51], others are of the opinion that parents were already 'unmistakably aware of the individuality of their offspring and their 'varying needs and dispositions' before that time.[52]

For the purpose of this thesis, one may just observe that these societal notions concerning the child reflect the fact that the understanding of childhood differs between cultures and as Heywood suggests, most people assume that their own ideas and practices concerning childhood are 'natural' and are shocked to discover that other

[48] See Jenks, *Childhood* supra n.41,8
[49] Ibid,19
[50] See James, Allison and Prout, Alan, 'Representing Childhood: Time and Transition in the Study of Childhood' in James and Prout(eds) *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (2nded,first published 1997, Falmer Press, 1997), 245
[51] Pollock, Jane, *Forgotten Children: Parent-Child Relations from 1500 to 1900* (CUP,1983),260-261
[52] Ibid

societies diverge from them.[53] As indicated above, there is little to suggest the existence of any period of history where a consensus is reached as to the way society perceived children and childhood in general. This may be attributed to the lack of historical material universally accepted as being representative of childhood in the Western world, especially in medieval times. The work of the likes of Philippe Aries who attempted to provide such material have been subject to various criticisms and described as unreliable.[54] Lloyd de Mause for instance, regarded certain theoretical conceptions developed by Aries as 'running counter to all evidence'.[55] Nevertheless, the various conceptions discussed above at the very least serve as indicators of societal thought regarding children in earlier times. It is the basic premise of this thesis that the prevalent notion regarding children in the society profoundly shapes the manner in which children are treated. The conflict in historical evidence makes support for this premise extremely difficult with respect to earlier stages of history such as the middle ages[56] and the early modern period.[57] This is the case both in Western and non-Western societies. Having said that, one also observes that the existence of incontrovertible historical evidence in itself may not necessary solve the greater problem of conflicting theories regarding the notion of childhood. It is nevertheless submitted as a preliminary argument to be further developed in subsequent chapters that there is an unquestionable link between the concept of child rights (which concept is the overarching theme of this thesis) and societal notions relating to children.

NIGERIA AND CHILDHOOD

Nigeria is a 'multiethnic nation' with over 250 ethnic groups and languages, each having a number of distinguishing characteristics. As a result, it is virtually impossible to

[53] Heywood, Colin, *A History of Childhood: Children and Childhood in the West from Medieval to Modern times* (Blackwell publishers, 2001), 12
[54] De Mause, Lloyd, 'The Evolution of Childhood' in De Mause (ed), *The History of Childhood* supra n.46
[55] Ibid
[56] The period between the 11th and 15th Century (http://www.bbc.co.uk/history/british/middle_ages/)
[57] The period between the 15th and 17th Century (Dewald, Jonathan,'The Early Modern Period' , available at http://library.uvm.edu/~pmardeus/theat/earlymodernperiod.pdf)

consider a 'Nigerian concept of childhood' as it may not exist. Having said this, one can identify certain characteristics of childhood permeating the vast majority of tribal groups. This will be useful in formulating a conception of childhood in the Nigerian context which can then serve as a basis for examining child rights protection in Nigeria in subsequent chapters. The first part of this section will examine the view of the Nigerian child as a member of the community. This will involve an analysis of the effect of the communal nature of pre-colonial Nigeria on the status of the child. This will be followed by a consideration of the Nigerian child as a wealth symbol. One would thereafter discuss the effect of various aspects of the development of the Nigerian society in a political, socio-economic and religious sense has influenced the collective thought concerning children.

THE CHILD AS A PART OF THE COMMUNITY

It is observed that the child for a greater part of the pre-colonial and colonial era was generally regarded in terms of being a member of the community from birth. As noted by Falola, the transition of the child from one stage of life to another was oriented towards making the child a responsible member of his kin group and his community.[58] As a result, it was commonplace to find for instance the child being sent away to relations from a very young age, not because the parents lacked the capacity to raise the child but because it was expected that raising the child is a communal function. Egodi in this respect states as follows;

> Socialization was a process that combined moral instruction with some degree of child work. Parents, older siblings, and members of the extended family jointly participated in the nurturing and socialization of a child. An old Igbo proverb, *nwabunkeoha—(the child belongs to all,)* was used to encourage every member of the society to play a part in a child's socialization process. A related proverb among the Yoruba says *Eni kanni o mbimo gbogbo ara ni onto—(the birthing*

[58] Falola, Toyin, *Culture and Customs of Nigeria* (Greenwood Publishing,2001), 131

process may be an individual task but the child's upbringing is a communal responsibility)[59]

Thus, relatives and to an extent other members of the community could exercise the function of training and discipline over the child with the approval of his or her parents. It was a common feature of many ethnic groups for the child to grow up in a large household and family, which fact required a rapid acceptance of the realities of extended families and kinship.[60] There was hardly any discussion as to the individual personality of the child as he was seen only through the community's eyes.

It is in line with this 'communal view' of the child that the birth of a child was often greeted with much 'pomp and pageantry'.[61] It was a celebration that brought the entire community and kinship together, celebrated with fanfare and merriment.[62] The child was perceived as a guarantee of continued existence of the lineage of the parents and an addition to the community. The child moved from one stage of life to another as the community directed and the extent to which his presence added value was determined by his usefulness to the community. One important aspect of this reality was the fact that children were 'socialized' to accept a number of values and practices as aspects of culture that should not be questioned.[63] The communal culture determined the choices of the children and the fact that they are being raised as members of the community requires that they adhere diligently to such cultural dictates. According to Fafunwa;

> In traditional Nigerian society all parents want their children to be upright, honest, kind and helpful to others, and will spare no pain to instil these qualities….All Nigerian parents, irrespective of ethnic group, prefer to remain

[59] Egodi, Uchendu, 'Historical patterns of child treatment in Nigeria: a perspective' available at http://www.researchgate.net/profile/Egodi_Uchendu/publication/273122830_HISTORICAL_PATTERNS_OF_CHILD_TREATMENT_IN_NIGERIA_A_PERSPECTIVE/links/54f76b1b0cf28d6dec9ea0ac.pdf
[60] Ibid,129
[61] Ibid
[62] Fafunwa, A.B, *History of Education in Nigeria* (Clark, Doble and Brenton, 1974), 18
[63] Ibid

> childless than to have children who will bring shame and dishonour to the family.[64]

Such shame and dishonour as described above is inevitably linked to commonly shared communal values. There was greater emphasis being laid on the contribution by the child to different levels of communal institutions with 'parents, siblings and other members of the community participating in the education of the child.[65]

The communal living also gave rise to the participation of children in 'adult events' such as work and attendance at funerals. Commenting on the traditional Ibo family structure, Okonjo states thus:

> Until the age of five, the mother is entirely responsible for the child's upbringing. About this age and as soon as the child is capable of walking long distances, it is taken everywhere and allowed to participate in all activities of grown-ups. Children are taken to the market, the farm, the various dance festivals and even to funerals……[66]

The common factor in the activities to which children were exposed at a very young age was the communal nature of such activities. There was an interaction with individuals other than their parents and the opportunity was given for the prevalent societal norms to shape the character of the children. The notion of childhood was nevertheless regarded and accounted for. Children raised in traditional Ibo culture for instance were said to have a 'world which is entirely theirs' where they listened to stories told to them

[64] Ibid
[65] Fafunwa, A.B, *History of Education in Nigeria* supra n.62
[66] See Okonjo, Unokanma, *The Impact of Urbanization on the Ibo Family Structure* (Gerhard Much Offsetdruck,1970),171

for their amusement and entertainment after the day's work.[67] Basden particularly describes the lot of the girl-child in Iboland in this light:

> It must not be assumed that the life of a small girl is an unhappy one…they have their own amusements and pastimes, and are quite capable of enjoying themselves. They are especially fond of a certain form of step-dancing. The partners face each other, beat time by clapping their hands……[68]

In addition, many ethnic groups had an 'age-grade' system wherein children were grouped into associations determined by age and interacted with other children, mostly through games and leisure activities.[69] The foregoing observations clearly imply the existence of a 'world of the child' where the childhood of the child finds free expression and the child is given the opportunity in a sense to exercise such rights and freedoms as expression, association and cultural life. This is however not tantamount to a recognition of the individuality of the child as the socialization process of the child was essentially centred around integrating the child into the community.

THE CHILD AS WEALTH

Another striking feature of childhood in the traditional Nigerian setting was the perception of the child as a measure of his parents' assets. As a matter of fact, not having children was said to be the worst form of invisibility and poverty that could affect an individual in the society.[70] This may be attributed to certain economic and social factors. First of all, the economic climate (especially at the beginning of the 20th century) required a heavy investment in human resources and a large family was highly essential

[67] Ibid
[68] Basden, G.T, *Among the Ibos of Nigeria* (Seeley, Service & Co Limited, 1921), 66
[69] The age-grade system of the Yorubas as far as children were concerned was a reliable source of labour on farms(See 'Age-grade system' in Falola and Genova, *A historical dictionary of Nigeria* (2009,Scarecrow Press),21
[70] See Ibisomi,L and Mudege N.N, *Childlessness in Nigeria: perceptions and acceptability* (2014) *Culture, Health and Sexuality* Vol. 16 No 1,67

to fulfilling that requirement. In his commentary on Igbo cultural practice, Njoku observes as follows:

> *The Igbo pre-colonial economy requires abundant labor to raise production for commercial purposes. Therefore, a larger nuclear family, the primary unit of production was an asset.*[71]

In pre-colonial Nigeria, child labour was hardly regarded as an issue which required regulation by any laws. The children raised in this environment were raised with an understanding that an involvement in the subsistence of the family was simply an aspect of their lives as children.[72] For instance, boys among the Kanuri[73] people helped with farming and horse-rearing activities from a young age with the girls helping their mothers in millet-grinding.[74] A similar observation could be made of the traditional Isoko society[75] where children assisted their parents on the farm all day.[76]

The involvement of children in economic activities during the pre-colonial era is reminiscent of the status of children in the West during the industrial revolution[77] where children were used as instruments of cheap labour. There is however a clear distinction which is found in the status accorded to working children in the Nigerian context. As rightly observed by Ityavyar, working children in pre-colonial Nigeria occupied a distinct position within the family and were perceived as 'the knees who would carry on the work

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[71] See Njoku, Rapheal Chijioke, *African Cultural Values: Igbo Political Leadership in Colonial Nigeria*, 1900-1966 (Routledge,2006),29

[72] As noted by Anugwom, the labour involvement of children at the time was not particularly tied to any economic consideration but a means of gradually exposing the child to work and instilling the dignity of labour in him (See Anugwom E.E ,'Child Labour in the context of globalisation in Nigeria'(2004) *The African Anthropologist* Vol. 2 No. 10 (2004) available at http://www.ajol.info/index.php/aa/article/view/23111) ,108

[73] A dominant tribe in Borno state of North-eastern Nigeria (See http://www.britannica.com/EBchecked/topic/311571/Kanuri)

[74] See Cohen, Ronald, *The Kanuri of Borno* (Waveland press,1987, first published 1967 by Holt, Rinehart and Winston),62-63

[75] Predominantly situate in the Niger-Delta Region of Southern Nigeria. For more on the traditional Isoko society see Welch, J.W, 'The Isoko Tribe' (1934) *Journal of the International African Institute* Volume 7 No. 2

[76] Ibid

[77] The Industrial Revolution, which took place from the 18th to 19th centuries, was a period during which predominantly agrarian, rural societies in Europe and America became industrial and urban (For more see http://www.history.com/topics/industrial-revolution)

and future existence of the lineage'.[78] More often than not, the involvement of children in work was limited to the subsistence of the nuclear family with children working alongside their parents as opposed to working for other individuals. Egodi particularly describes the work as being more educative than exploitative for children with children not toiling beyond their capacity in performing labour required of them.[79] In his discourse on children in Yorubaland, Bascom stated thus;

> When children are five or six years old they are encouraged to participate, to the extent that they are able, in whatever work the parent of the same sex is doing; no pressure is necessary because for children this is simply an extension of the games they have devised for themselves and it brings them close to the parent[80]

Basden alludes to the above view in stating as follows;

> In the season, boys accompany their elders to the farms, and get an insight into the business of raising produce, the amount of work actually done by them varying according to the disposition and circumstances of the parents…….They become useful whilst still extraordinarily young, assimilating a wonderful stock of practical knowledge'. Girls also take a share in household duties and farm work as well as accompanying elders to the market where they are 'initiated into the technicalities of trade.[81]

There was in addition a patriarchal aspect of the wealth status of children in which the usefulness of children is seeing only in fulfilling the 'ego trip' of the male head of the family.[82] Some child sociologists have observed that husbands in the traditional Yoruba setting placed a higher premium on having many children than their wives for the reason

[78] Ityavyar, Dennis, 'Capitalism and contemporary forms of child abuse' in Pearce and Falola (eds), *Child health in Nigeria*(1994,Ashgate Publishing), 36
[79] Egodi, 'Historical patterns of child treatment in Nigeria: a perspective' supra n.58
[80] Bascom, William, *The Yoruba of South-Western Nigeria* (1984, Waveland press, first published 1969 by Holt, Rinehart and Winston),58
[81] Basden, G.T, *Among The Ibos of Nigeria* (Seeley, Service & Co Limited, 1921),66
[82] Koster, Winny, *Secret Strategies, Women and Abortion in Yoruba Society, Nigeria* (Aksant Academic Publishers, 2003), 91

that the presence of numerous children enhanced a man's status and the prestige of his lineage.[83] Children were also considered blessings from God and childbearing was a proof of the fact that a woman was not barren, especially in polygamous homes where there was intense competition among wives for the attention of their husband.[84] This view of a link between the child and the supernatural realm is exemplified in the traditional customary practice of parents consulting diviners to predict the future of the child and anticipate problems so that appropriate sacrifices could be made to prevent them.[85]

RELIGION, RIGHTS AND MODERNIZATION: EFFECT ON THE NIGERIAN CHILD

The turn of the nineteenth century gave rise to an increase in foreign influence on Nigerian society. In terms of religious practice, Christianity gained a firm foothold in the South and Islam, which had made significant inroads in the North from the latter part of the first century[86], further cemented its grip.[87] One significant impact made by Christianity in the South was the introduction of formal Western education into the Nigerian system through schools established by various missions. In a summary of the relationship between formal education and the Nigerian populace, Fafunwa states as follows;

> Both parents and pupils saw education as a means of social emancipation and an avenue for economic improvement. School leavers who completed their course either stayed on with the mission as catechists or lay workers of the church or became teachers, clerks, priests and the like[88]

[83] Ibid
[84] See Sadiku, Matthew, 'The Yoruba' in Okehie-Offoha and Sadiku (eds), *Ethnic and Cultural Diversity in Nigeria* (African World Press, 1996),137
[85] See Falola, *Cultures and Customs of Nigeria* supra n.58, 126-127
[86] See Chronology in Falola and Genova (eds), *A historical dictionary of Nigeria*, supra n.69
[87] It was in the 19th century that Islam was said to have become a 'mass religion' (See Falola, *A history of Nigeria* (Geenwood Press,1999),28. Christianity also secured its first major breakthrough in influencing Southern Nigeria between the period of 1842 and 1892 (Falola, *A history of Nigeria* supra n.54, 41)
[88] Fafunwa supra n.62,90

However, this does not necessarily imply that the rights or interests of the child were the primary consideration. Considering Fafunwa's assertion:

> The early Christian schools in Nigeria were conceived by all the Christian denominations as the most important instrument for conversation. Indeed the school was incidental; if Christianity could have been implanted in Nigeria without the use of the school, most missionary groups would have tried to do so.[89]

Prior to the emergence of the mission schools, the system of educating a child was largely informal. In Ibo culture, the child observed the activity of the grown-ups with hardly any formal instruction as to the activities he is to execute.[90] In general, the main objectives of any form of education in this sense was to make the child conform to the society he belonged with skill promotion centred around suitable vocations, often the occupation of the parents.[91]

As mentioned earlier, value-system education took the form of stories and folklore which aimed at educating the child as to communal way of life as well as ancestral history. However, the introduction of formal education and educational institutions saw the emergence of another agent of instruction which overtime developed into the principal method, at least in the South. This on its own did not necessarily cause a radical change in the perception of children, at least in terms of their contribution in labour. Children still had to do housework before going to school and upon return from school.[92] Furthermore, parents did not show much interest in the progress and performance of the children at school which according to Okonjo was attributable to ignorance as opposed to ill-will on the part of the parents.[93] This however did not imply a total lack of support for the concept as parents generally saw education as a means of social emancipation and

[89] Ibid,91
[90] See Okonjo, Unoakama, *The Impact of Urbanization on the Ibo Family Structure* supra n.66 ,173.
[91] See Onokerhoraye, Andrew, *Social Services in Nigeria: An Introduction* (Kegan Paul International,1984),12
[92] Ibid,176
[93] Ibid,179

an avenue for economic improvement.[94] This therefore formed the basis for the rapid increase in the number of schools at the turn of the 20th century.[95]

The pursuit of the development of the child through education by the colonial government may not necessarily have been altruistic or based on a consideration of the interests of the child. According to Fafunwa, education was a means to the end of developing an administration manned by expatriates and Africans loyal to the colonial government.[96] There was great opposition to formal western education in Northern Nigeria with parents regarding western education as a danger to their religion and culture even up till the late 70's.[97] However, even as early as the 1950's, some leaders were willing to expose the child to western education but were presumably incapacitated for financial reasons.[98] This development in itself represented a crucial step in the change of orientation regarding child-rearing, particularly in the context of communal involvement. From the 1970's, there is observable a change in mindset even in the Northern provinces. As noted by Peshkin:

> No longer does a colonial government control education……..Independent, Muslim-controlled local governments are in power and they have become aware that survival in the modern world is irrevocably tied to Western education. Consequently, now it is Muslim leaders who forcibly urge Muslim parent to send their children to school.[99]

The era of colonialism, while having tremendous impact on the Nigerian society in a political and economic context, may be argued as being somewhat less significant with

[94] Onorkerhoraye supra n.91, 14
[95] Fafunwa supra n.62, 112
[96] Ibid
[97] See Csapo Marg, *Universal Primary Education in Nigeria : Its problems and implications* (1983) African Studies Review Vol 26 No.1
[98] Fafunwa supra n.62,174
[99] Peshkin, Alan , *Kanuri School children, Education and Social Mobilization in Nigeria* (Holt, Reinhart and Winston Inc, 1972) 149

respect to childhood in Nigeria. There was little relation between colonialism and children as economic and social upheaval during this era was mainly concerned with activities that predominantly involved adults.[100] This has been regarded as some as a missed opportunity in terms of active pursuit of child-centred societal reform.[101] Having said this, this era also introduced certain notable developments. For instance, the introduction of formal education gave children an opportunity to select occupations that best suited them and as a result, children no longer saw themselves merely in the light of their relevance to their community. Furthermore, there was a significant reduction in the number of children, even among traditional families.[102] This in part has been attributed to better medical facilities which enabled more children to survive and diminishing economic opportunities for agrarian families which is a by-product of industrialization.[103]

Religion also played a part in remoulding the conception of childhood in the Nigerian society. The rise in the practice of Christianity for instance saw the emergence of the monogamous family setting and a reduction in the number of polygamous unions. Christian principles were also substituted for traditional ideals relating to children such as consultation of diviners. The change in culture as a result of western religion must however not be overstated. For example, while the introduction of Christianity saw a change in marital practices, it did not have such an impact with children. It is conceivable that this results from the similarities between Christian doctrine (as adopted in the Nigerian context) and traditional practice. Children were still considered blessings from God. The duties of respect and honour imposed upon children by traditional morality were also upheld in Christianity and Islam. The system of age-grade association

[100] See Falola, supra n.58
[101] See Ogbuagu, Stella, 'Facilitating the empowerment of African Children for the Defence of their rights' in Pearce and Falola (eds),supra n.77,152
[102] See Falola, *Cultures and Customs of Nigeria*, supra n.58,133
[103] Ibid

which symbolized a demarcation between adulthood and childhood was also adopted, albeit in a differing manner.

One significant effect of modernization was the movement beyond the notion of regarding children as a symbol of economic wealth. Many individuals moved to urban areas and enrolled their children in formal schools, thus adopting a lifestyle not suited to having many wives and children. One may argue that the notion of children being important and special was only to the extent as they were useful economically.[104] On the other hand, it may also be the case that the shift from this notion is a function of necessity rather than choice. It is noteworthy that despite the move towards urbanization, many families remain family oriented, pray for children and spend resources within their means to raise their children.[105] Research also suggests that the perception of children as being sources of joy to their parents has also remained unchanged.[106] In Ibo tradition for example, relatively high fertility is still highly valued with children being regarded as the linkage between families, lineages and communities.[107]

Another area in which modernization arguably disrupts the cultural balance is seen in the nature of work undertaken by children. Because of the demands of the modern economy, many families have adopted various means of generating additional income for family consumption and as a result there was an increase in the use of children as hawkers and domestic servants for that purpose. Children involved in street hawking

[104] Thus, it is not unsurprising to find children being taken from their homes to work as domestic servants in urban areas with the permission of their parents. Some parents are even said to be party to their children being 'shunted' from one employer to another for additional financial gains (See Rwezaura, Bart, 'Competing 'Images' of Childhood in the Social and Legal Systems of Contemporary Sub-Saharan Africa' (1998) *International Journal of Law, Polity and the Family* Vol. 12 Iss.3, 253-278,259

[105] Ibid, 136

[106] Koster, Winny, *Secret Strategies, Women and Abortion in Yoruba Society, Nigeria*, supra n.82,90

[107] Smith, D.J, 'Legacies of Biafra: Marriage, 'Home People' and Reproduction among the Igbo of Nigeria' (2005) *Journal of the International African Institute* (2005) Vol. 75, No 1,30-45, 39

often spend a greater amount of time on the streets than with their families.[108] The form of labour undertaken in this instance differs from the work in pre-colonial times where the involvement of children in work was not necessarily due to economic considerations but a means of introducing the child to the concept of work and teaching him about the dignity of labour.[109] In some cases, the children are sent by parents to live with relatives or friends to access the advantages created by urbanization, which the parents may not be able to provide. As early as the 60's, it was already observed that children, especially those of poor parents were leaving their homes to become house maids and servants with certain people with relatives often acting as agents in this regard.[110] These guardians may either treat the children properly or with extreme cruelty.[111]

Even in cases where the parents have sufficient means to meet the welfare needs of the child, there has been suggested to be a rise in the uneven distribution of the child-rearing function among various institutions such as the school. As noted by Umobong:

> *Parents now push over the responsibility of caring for their children to the school. Many young children who would have been at home at about two years have been pushed over to the school.*[112]

This appears to be a generalist and far-reaching conclusion. However, it is arguably not without good reason. In the Northern part of Nigeria for example, there is great

[108] For a more expansive discussion on child labour in contemporary Nigerian society see Harma, Risto F, Nigeria Child Labor in Nigeria, and Aderinto A.A, 'Children in Street Trading in Nigeria' in Hindman, *The world of child labour: an historical and regional survey* (2009)
[109] See 18 above. Further study by Togunde et al showed 89% of respondent parents attributing the involvement of children in work as being a form of financial contribution to the consumption needs of the household
[110] This trend has continued even into the 21st century with statistics by the International Labour Organisation showing up to 14 million children aged 5-14 in one form of employment or the other (See *The Twin Challenges of child labour and educational marginalisation in the ECOWAS Region: An Overview* (2014)
[111] For a greater exposition on child fostering involving case studies see for instance Okunola, R.A and Ikuomola A.D, 'Child Labour in Fostering Practices: A study of Surulere Local Government Area Lagos State, Nigeria (2010) available at http://docsdrive.com/pdfs/medwelljournals/sscience/2010/493-506.pdf (last accessed 7th October, 2017)
[112] See Umobong,M.E, *Child Abuse and its Implications for the Educational Sector in Nigeria* (2010) available at http://www.ajol.info/index.php/og/article/view/57927/46293,108

emphasis on religious education of children from a very young age with children being taught to memorise the Quran before the age of five[113] as part of a continuous religious education which may well continue into adulthood. Last goes further in examining religious education among Muslims in Northern Nigeria to regard the school as the 'crucial site for the disciplining of Muslim children'.[114]

In non-Muslim areas where education is provided in the format introduced by colonialism, there is also great responsibility placed on the school in terms of forming the character of children. Many children enrol in formal educational institutions at a very young age and spend the greater part of their active day in this environment. For the children who are left at home for a later period, they are often in the care of domestic workers and older siblings as their parents are away at work most of the day.[115] The nuclear nature of many families in the urban areas also means that many children are often left without adult supervision. It may be for this reason that Rotimi argues that in modern family life, Nigerian parents have almost lost their place as agents of socialization with child minders, peer groups and schools serving as 'competitors for that role'.[116] It is acknowledged that there is little evidence to explicitly suggest that parents have deliberately placed the responsibility for training their children in the hands of the school as is submitted by Umobong. However, parental action, especially towards the educational development of their children may indicate a sub-conscious drift towards such a conclusion.

[113] See Cohen, Ronald and Goldman, Abe, 'The society and its environment' in Metz(ed), *Nigeria: a country study* (1992, Federal Research Division,Library of Congress), 140
[114] Last, M, 'Children and the Experience of Violence : Contrasting Cultures of Punishment in Northern Nigeria' (2002*) Journal of the International African Institute* Vol. 70 No. 3,359-393
[115] See Koster supra n.82,92
[116] See Adewale, R., *"Paradox of "Progress": The Role of Western Education in the Transformation of the Family in Nigeria* available at http://www.krepublishers.com/02-Journals/T-Anth/Anth-07-0-000-000-2005-Web/Anth-07-2-085-160-2005-Abst-PDF/Anth-07-2-137-147-2005-234-Rotimi-A/Anth-07-2-137-147-2005-234-Rotimi-A.pdf

This emergent trend in modern Nigeria may be interpreted as being a shift towards regarding children either as burdens to be disposed of or beings whose value is only regarded in terms of their economic contribution. However, the use of children as economic agents may be attributed to socio-economic changes as opposed to an outright alteration of societal perception of children. The greater percentage of children making financial contributions to their household are from poor families where the income of the parents might be insufficient to meet basic needs. It may be inferred especially with the traditional notions discussed above that children are not necessarily valued any less by such parents but are merely victims of changing circumstances.

In some circles, there is a view of the child as both a burden and an economic agent. Thus, Okonjo observes that education itself, which on its own does not generate parental concern, is viewed as an economic investment which in time should yield dividend. As highlighted above, the vast majority of children are either in formal educational institutions or engaged in one form of economic activity or another, as are adults. Many children in the 21st century start school from the age of two and it is expected that they go up to higher education level which continues well into the attainment of the age of majority.[117] During this period, the children spend time in boarding schools, some from as young as the age of nine. The form of socialization that seems to occur from childhood to adulthood is the one dictated by the school setting. One may consider this

[117] The formal education system in Nigeria has four major levels. The first level is pre-primary education which lasts for 2 to 3 years. Pre-primary schools are exclusively owned and managed by the private sector and community-based organizations; the entry age ranges from 3 to 5. Children attend pre-primary schools before admission to the primary schools. Primary education follows for six years for children between the ages of 6 and 11. The third level is secondary education for six years; this is split equally between junior and senior secondary schools. Secondary education is for children aged between 12 and 17. The final tier of formal education is tertiary education comprising universities, polytechnics and colleges of education and is designed for children aged 18 and above (See Olaniyan, O., T*he Determinants of child schooling in Nigeria* available at http://www.google.co.uk/url?sa=t&rct=j&q=&esrc=s&frm=1&source=web&cd=10&ved=0CF8QFjAJ&url=http%3A%2F%2Faercafrica.org%2Findex.php%2Fpublications%2Fdoc_download%2F5-the-determinants-of-child-schooling-in-nigeria&ei=IrABVbCxFoeZ7Aae-YHICg&usg=AFQjCNF4Dsb_bwLM3qYUpXb5Iymh6X6Nzw&sig2=ARz4ygVg2XgW1c6UqkyAmw&bvm=bv.87920726,d.ZGU)

as being merely a variation of the child development method of pre-colonial times with the only difference being a substitution of the agents responsible for the role of education and training. In other words, the function previously exercised by all members of the community has been restricted only to the immediate nuclear family and the school. In corroboration of this view, the attendance at formal schools has rendered elaborate initiation ceremonies unnecessary in the transition from childhood to adulthood[118] with associations such as Boys Scout and Girl's Brigade replacing the age-grade associations of old.[119] Notwithstanding contemporary developments, it remains striking that there has still been an increase in the number of out-of-school children in Nigeria between 1999 and 2010 with more than two-thirds of Northern children remaining illiterate at the end of primary school.[120]

CONCLUSION

In this chapter, various conceptions of childhood have been examined. Albeit with inconclusive evidence, it has been found that historical notions of childhood in the West centred on certain overarching themes including childhood innocence and childhood depravity. The available evidence also suggested that there was a conflict between the view of the child as a 'future adult' and as a 'being in the present'. With respect to Nigeria, concerned, cultural studies indicate that the communal nature of the traditional Nigerian society was translated to viewing the child only as a member of the community. The child is raised to be useful to the community and his choices are determined by communal values. The child was also perceived as being a gift from God useful to his parents by providing economic and emotional value.

[118] Ibid
[119] Falola, *Cultures and Customs of Nigeria* supra n.58,131
[120] http://www.officialpublicationsonline.co.uk/publications/download/9780215094865

With the introduction of Western values and concepts to the Nigerian society especially in the economic context through colonialism, there is a possible argument that the notion of the child being useful in terms of providing economic value has been eroded. The emergence of formal educational institutions has for instance altered the arena of socialization of the child from the community to the school. Furthermore, many families no longer see children as wealth with economic upheavals generated by industrialization giving rise to families consisting of fewer children. Modernization has nevertheless not resulted in a complete obliteration of the communal ethos. Even in urban areas, communal child-rearing practices have been sustained to a reasonable extent and the perception of children as valued members of the community still persists to a large extent, even in the most developed parts of the Nigerian society.

The crucial question, especially in the context of this thesis, is the view of childhood emergent from the above discussion. The discussion on the perception of childhood in the Nigerian context suggests that there is recognition of childhood as a period needing protection through appropriate adult intervention, guidance and instruction. This function was exercised in previous times by members of the community to which the child belonged. The decline in communal living due to heavy rural-urban migration, especially for economic reasons has led to parents bearing the role of primary care-agents for the child. The increased economic demand on parents in turn has led to parents assigning this child-rearing function to other agents such as the school and domestic care-workers. This is often the case irrespective of the competence of the individuals to ensure proper care and development of the child. Such attitude by the parents may suggest that children have inadvertently become burdens to be disposed of, not necessarily by the deliberate choice of the parents but because the child rearing function has become subservient to the demand of an increasingly industrialist society.

The early involvement of the child in economic activity and labour arguably suggests that childhood being a sacrosanct period in which its members are free from responsibilities that accompany adult living is non-existent in the Nigerian context. This may give rise to an argument that parents do not understood childhood in light of the vulnerability of its members and inadequate preparedness for the travails that accompany adult life. While this may be the position in rural families as well as urban lower-class families, it would not necessarily reflect the understanding of childhood among the elite where children do not need to be involved in economic activity to provide the family with a means of subsistence. The emergence of capitalism seems to have had a different effect on child-rearing practice in the rural areas. Ironically, it is arguable that there is greater recognition of the autonomy of children in these areas and contrary to dominant theories regarding development, children actually become more restricted as they get older.[121]

It is extremely difficult to settle on a particular notion of childhood as representative of a particular society. Various ideologies concerning childhood may be in existence in the same society, no matter how small. One may however conclude at this point that every society operates on a specific albeit multi-faceted understanding of the concept of childhood. The prevalent understanding more often than not is reflected in societal practice and to a very large extent determines the nature of the institutions responsible for societal order. It may very well be the case that the idea of childhood itself as an existential state is dependent on a societal consensus that such a concept should emerge. One may therefore concur with Postman who concludes as follows:

> *Childhood is analogous to language learning. It has a biological basis but cannot be realized unless a social environment triggers and nurtures it, that is, has need*

[121] In relation to the Hausa system ,Robson observes that the majority of children are generally conceptualised as 'competent agents, workers and economic contributors' within the society with freedom of gender relations from a very young age. This freedom only becomes restricted after marriage, especially on the part of the female (See Robson E, 'Children at Work in rural Northern Nigeria: patterns of age, space and gender' (2004) *Journal of Rural Studies* Vol. 20 Iss. 2,193-210,201

of it. If a culture is dominated by a medium that requires the segregation of the young in order that they learn unnatural, specialized, and complex skills and attitudes, then childhood, in some form or another, will emerge, articulate and indispensable. If the communication needs of a culture do not require the long-term segregation of the young, then childhood remains mute.[122]

[122] See Postman, Neil, *The Disappearance of Childhood* (Vintage Books,1994)145

CHAPTER 3: HISTORY OF CHILD RIGHTS PROTECTION IN NIGERIA

The reference to 'child rights' in the Nigerian legal system is a relatively recent phenomenon with hardly any discussion arising on the subject until the late 1980's. This however should not be taken to imply that prior to the later part of the twentieth century, there was no reference to children as legal subjects. The focus in this chapter is to consider child rights protection under the law prior to the enactment of the Child Rights Act (CRA). This is especially relevant in terms of highlighting the influence of cultural notions of the child discussed in the previous chapter.

The first aspect of this chapter is an examination of the child rights protection framework from pre-colonial times with reference to various sources of law including religious and customary law. One will proceed to consider the influence of colonialism on legislation relating to the child with specific focus on areas relating to substantive child rights to be addressed in chapter 4. In doing so recourse will be made to both child-specific statutes as well statutes of general application to the extent as is necessary in highlighting the state of the law with respect to child rights protection. This will be followed by an analysis of existing legislation in the context of child rights and related concepts.

CHILD RIGHTS AND NIGERIAN LAW: THE PRE-COLONIAL ERA

The pre-colonial law in most African states was essentially rooted in the practices, traditions and customs of the people.[123] To a large extent, the Nigerian system is no exception and as noted by Obilade, long before the 19th century, regions which were later part of the state constituting Nigeria had justice administration systems with most parts of the North being governed by Islamic law and the South being governed by

[123] Ndulo M, 'African Customary Law, Customs, and Women's Rights' (2011) *Cornell Law Faculty Publications.*Paper 187. Available at http://scholarship.law.cornell.edu/facpub/187

unwritten customary law.[124] With respect for instance to the system of succession in the Benin cultural system, studies by the likes of Ugaigbe et al showed that the development of the law of primogeniture, which governs succession rights in traditional Benin family and monarchical system originated from the early part of the first century.[125]

Some features of pre-colonial society also reveal the existence of certain harmful practices, especially with respect to children. As observed by Ejidike:

> Igbo society itself was characterized by egregious violations of human rights and precepts which it deemed fit to grant some of its citizens. This can be seen in the *osu* caste system, slavery, the ritual murder of twins and human sacrifice…….Twins, children of multiple births and those born feet-first or *widiteedi* were generally killed. These births were "abnormalities" which signified, the Igbo believed, the gods' disaffection with the earthly scheme of things……..[126]

This however does not necessary imply that the African society was generally characterized by such harmful practices. In many ways, children were protected from many possible rights violations, not necessarily out of respect for individual rights but as a result of the huge socio-economic and political value provided by children.[127]

COLONIALISM, POST-COLONIALISM AND CHILD RIGHTS PROTECTION

Upon Lagos being made a British colony in 1862, the British established a Court there and through Ordinance No 3 of 1863, introduced English law into the colony.[128] While English law at the time was incorporated into the legal system by local legislation, the

[124] Obilade, Akintunde O, *The Nigerian Legal System* (Sweet and Maxwell, 1979),17
[125] Ugaigbe et al, 'An evaluation of the principles of primogeniture and Inheritance laws among the Benin people of Nigeria' (2007) *Journal of Family History* Vol. 32 No. 1, 90-101,96. It is under this system that the eldest son inherits the family house to the exclusion of other siblings.
[126] Ejidike, O.M, 'Human Rights in the Cultural Traditions and Social Practice of the Igbo of South-Eastern Nigeria' (1999) *Journal Of African Law* Volume 43 No 1,71-98,78
[127] For a greater discussion on this subject, consider the discussion on childhood in Nigeria in Chapter 2
[128] Obilade, Akintunde O, *The Nigerian Legal System*, supra n.124, 19

legislation was not passed by a body of indigenous people but by the British administration.[129] Local law and customs were preserved but were subjected to the tests of repugnancy to natural justice, equity and good conscience.[130] In recognition of this doctrine, a custom which permitted the brother of a deceased person to inherit his property to the exclusion of the female child has been invalidated by the Supreme Court.[131] The repugnancy test has also been applied to declare void a custom which attributed paternity of a child born within ten months of a divorce as belonging to a woman's former husband.[132]

Under traditional customary law, no child was regarded as illegitimate if conceived or born during the subsistence of his mother's valid marriage or conceived during his mother's widowhood provided that her marriage to her late husband had not been dissolved.[133] Obi states as follows with respect to Ibo customary law on legitimacy:

> A child is not illegitimate merely because he was born of a liason between his mother and a man who is not her husband. Provided the woman concerned was, at the time the child was conceived, the lawful wife of anyone, or a widow whose marriage consideration (bride price) has not been refunded, the child is a legitimate child of her husband, whether living or dead.[134]

Some customary law systems provided for legitimacy by acknowledgement in which case a man could acknowledge a child as his even though he is not the father. Thus, an illegitimate child under Yoruba customary law could be equally entitled with legitimate children of the natural father provided that the paternity is no longer in dispute.[135] In

[129] Ibid
[130] Ibid
[131] Mojekwu vs Mojekwu (1997) 7 NWLR (Pt 572), 283
[132] See Maryama vs SadikuEjo(1961) NRLNR 81
[133] Obi, C.S.N, *The Ibo Law of Property* (Butterworths,1963)
[134] Ibid
[135] Nwabueze, B.O, *Nigerian Land Law* (Nwanife Publishers,1972),384

terms of maintenance, customary law imposed a duty on the father to maintain his legitimate children. No such obligation exists in relation to illegitimate children. In any case, there was no legal means under customary law to enforce the maintenance obligations owed to legitimate children. In Islamic law, children of valid marriages were regarded as legitimate.[136] Children of void marriages were however regarded as illegitimate and could not claim any rights from their father even in cases were a biological relationship had been established.[137]

The interplay between customary and statutory law on the legitimacy of children was especially relevant in determining the inheritance and property rights of children. Many tribes operated a patrilineal succession system which favoured inheritance by male children over female children. Under Bini customary law, the eldest son was entitled to his father's land, provided that he had performed all the customary burial ceremonies of his father.[138] This is also said to be the principle of succession among the Ibos. In an instance where there is no male issue, the female children inherit property equally among themselves. The rules of inheritance under Yoruba customary law were outlined in the landmark case of *Lewis vs Bankole*[139] where it was stated that upon the death of the founder of a family, the eldest surviving son known as the 'Dawodu' is vested with the privileges of the head of the family. In the event of the death of the eldest surviving son, headship is transferred to the next surviving child, whether male or female.[140] Under Yoruba customary law, all legitimate children (whether directly or by acknowledgement) were entitled to a share in their father's property.[141] There are however slight variations with respect to each tribe. For instance, a case decided by the Ekiti[142] Divisional Court was to the effect that while female children had a right in their

[136] Mwalimu, Charles, *The Nigerian Legal System* (Volume 1, Peter Lang Publishing,2005), 612
[137] Ibid
[138] Nwabueze, Ben O, *Nigerian Land Law* supra n.135,393
[139] (1908) 1 N.L.R 81
[140] Some authors do not however recognise this privilege as being enjoyed by female children
[141] Alake vs Pratt (1955) 15 W.A.C.A
[142] A state in South-West Nigeria

father's property, these rights could not be transmitted to their issue(s).[143] However, the Ondo[144] District Court in the case of *Esther Adebobola vs Laguntoye*[145] reached a different conclusion and held that the descendants of both male and female children had equal rights in the land.

The Legitimacy Act of 1929[146] modified certain aspects of the existing customary law on legitimacy of children. Under the Act, children born out of wedlock could become legitimate children through a subsequent Christian marriage after which such children have the same rights and obligations as those born legitimate.[147] As a result, illegitimate children of individuals married under statutory law could not rely on acknowledgement as proof of legitimacy. Unsurprisingly, the introduction of the Legitimacy Act led to a conflict between statutory and customary law in cases where the children are regarded as legitimate under customary law but illegitimate under English law. In *The Estate of Herbert Macaulay*[148], the West African Court of Appeal held that the legitimacy of a child was to be determined by the law governing the jurisdiction where the child was domiciled which decision would be regarded as valid under English Law.[149] This can be contrasted with the decision in *Onwudijoh vs Onwudijoh*[150] where it was decided that children born pursuant to a marriage under native law and custom could not inherit any part of the estate of their natural father who had died intestate as the marriage was not valid under the Marriage Act. In *Cole vs Cole*[151], the estate of a native of Lagos who was married under English Law in Sierra Leone was claimed by his widow and her son under native law. The Court in rejecting the claim stated that a 'Christian marriage clothes the parties to such marriage and their offspring with a status unknown to customary law' and applying native law in that instance could be contrary to the principles of justice,

[143] Fatumo v Obatuyi Suit no 144/1950 (Unreported)
[144] A state in South-West Nigeria
[145] Suit No 37/1950 (Unreported)
[146] (1929) Chapter 63 Laws of the Federation of Nigeria 1990
[147] Section 8
[148] (1951) 13 W.A.C.A 304
[149] Ibid
[150] (1957) 1 E.N.L.R 1
[151] Nwabueze supra n.135,406

equity and good conscience.[152] In *Cole vs Akinyele*[153], the deceased, Albert Cole entered into a marriage under the Marriage Act twice. The first marriage was terminated by the death of the wife but the second wife survived him. During the subsistence of the first marriage the deceased had an irregular association with the mother of the two appellants but openly acknowledged the paternity of the two appellants. The appellants argued that the open acknowledgment of paternity by the deceased during his lifetime entitled them to a share in his estate under customary law. Their appeal was dismissed by the West African Court of Appeal. In dismissing the appeal, the Court stated as follows:

> When a man who might have married under native law and custom has voluntarily accepted the obligations imposed by a Marriage under the Marriage Ordinance it seems no undue hardship upon him to hold that in order to legitimate the children of an adulterous union he must follow the same as a person to whom a marriage under the Ordinance is the only form of lawful marriage open.[154]

This principle was affirmed by the Federal Supreme Court in *Abisogun vs Abisogun*[155]. There were however criticisms of this decision especially from in the context of individual rights. In commenting on this principle, Nwogogu concluded as follows:

> Primarily, the refusal to accord such children legitimate status derives from their parents' violation of the Ordinance. This reason is open to criticism. Obviously the children cannot be blamed for the circumstances of their birth. Moreover, to subject them to the hardships of illegitimacy will amount, in biblical language, to visiting the sins of the father on his children and grandchildren. Besides, as we

[152] Ibid
[153] (1960) SCNLR 192
[154] Ibid,197
[155] (1963) 2 SCNLR at 82

> pointed out earlier in this study, the question of the validity of the parents' marriage is quite distinct from the issue of the legitimacy of the children.[156]

The above observation highlighted the need for the Courts to consider the issue of legitimacy of children as a right accruing to children, stemming from the fundamental right to be protected from non-discrimination on the basis of the circumstances of birth. It must be noted that the fundamental rights of the represented parties were not specifically considered in the cases referred to above. One may argue that considering the issue of legitimacy from a child rights perspective could well have given rise to a different decision, especially bearing in mind the right of the child to freedom from discrimination.

CRIME AND JUVENILE JUSTICE

There is very little research information relating to the subject of criminal punishment of children in pre-colonial times. This has led to some authors suggesting that the concept of criminal and juvenile justice was designed by the British government to promote economic interests.[157] This view however fails to take into account that the concept of administration of justice pre-dates British rule, especially in Northern Nigeria where Islamic law had gained a firm foothold long before the advent of colonialism. The Children and Young Persons Act 1943 ('The Act')[158] which was the first legislative enactment directly specifically dealing with children in Nigeria, primarily addressed the subject of juvenile justice. Under the Act, a child was defined as a person under the age of fourteen years and a young person as one above the age of fourteen but below the age of seventeen.[159] The Act also prohibited the imposition of the death penalty on

[156] Nwogugu, E.I, 'Legitimacy in Nigerian Law' (1964) *Journal of African Law* Vol. 8 Issue 2, 91-105,101
[157]Otu, N, 'Colonialism and the Criminal Justice System in Nigeria' (2011) *International Journal of Comparative and Applied Criminal Justice* Vol 23 Iss.2,293-306
[158] Cap 19 Laws of Eastern Nigeria 1963, Cap 21, Laws of Northern Nigeria 1963
[159] Section 2

juveniles as well as a sentence of imprisonment for children.[160] Young persons could also not be imprisoned under the Act if in the opinion of the Court, they could be suitably dealt with in another way.[161] The child could however be subject to the payment of a fine[162] or whipping.[163]

The Act also addressed other areas of child rights that are unrelated to juvenile justice. For instance, Section 38 expressly prohibited the sale or trading of children.[164] It further outlawed the giving away of children to other individuals for pecuniary or non-pecuniary interests.[165] Section 32 of the Act considered the wilful assault, abandonment or neglect of children a punishable offence.[166] The interests of the child were further protected under subsidiary legislation. Section 3 of the Children and Young Persons (Street Trading) Regulations 1943 prohibited children from being engaged or employed in street trading.[167] Young females[168] were also barred under the regulations from engaging in street trading with the exception of those who have been so engaged by their parents.[169] The Children and Young Person (Remand Home) Rules which regulated approved institutions for the rehabilitation of juvenile offenders proscribed the administration of corporal punishment on girls and imposed separate restrictions on the general use of corporal punishment for discipline purposes.[170]

Other criminal law statutes enacted prior to the Child Rights Act also contained provisions directly affecting children. The Criminal Code (which regulates criminal

[160] Sections 11 and 12
[161] Section 11(2)
[162] Ibid
[163] Ibid
[164] Section 38(1)
[165] Ibid
[166] Section 32 (1)
[167] Section 3(1)
[168] i.e those between the ages of fourteen and seventeen
[169] Section 3(2)
[170] Section 20

offences in Southern Nigeria)[171] for instance exempted children under the age of seven from any form of criminal responsibility.[172] A child above the age of seven but under the age of twelve was also regarded as not criminally responsible for an act or omission unless it could be proven that he had capacity to know that he ought not to do the act or make the omission at the time he committed the act.[173] This was also the case under the Penal Code (which regulates criminal offences in Northern Nigeria)[174] save for the fact that under the Penal Code, capacity was described as a function of 'maturity of understanding'.[175] A male under the age of twelve was in addition regarded as being incapable of having carnal knowledge.[176] The arbitrary nature of the age of criminal responsibility led to calls for its reassessment from certain quarters. According to Adeyemi:

> It is clear from psychological evidence relating to moral realism and sense of justice that even children between ages 4 to 8 years are definitely capable of foreseeing consequences of their actions and acting with the desire that the consequences should occur….[177]

He also considered the presumption of lack of capability on the part of males under the age of twelve to have carnal knowledge as lacking scientific, logical or useful basis and

[171] Cap 77, Laws of the Federation of Nigeria 1990. Statutory law regulating criminal offences in Southern Nigeria.
[172] Section 30
[173] Ibid
[174] Statutory law regulating criminal offences in Northern Nigeria. Until the introduction of the Penal Code, the cruminal system operating in the North was dualist in nature with the existence of native Courts administering Muslim law of the Maliki school and magistrate Courts having a civil and criminal jurisdiction. It was only in 1958 that a panel of jurists recommended the adoption of a Penal Code regulating criminal law in Northern Nigeria which would be based on the existing Sudan Codes (See Ogbu, O.N, 'Punishments in Islamic Criminal Law as Antithetical to Human Dignity: The Nigerian Experience' (2005) *International Journal Of Human Rights* Vol.9 Iss.2, 165-182
[175] Section 50
[176] He can however be convicted of indecent assault as well as aiding, counselling or procuring the commission of the offence
[177] See Adeyemi A.A, 'Re-assessing the age of criminal responsibility in Nigeria' in Osinbajo and Awa Kalu (eds) 'Women and Children Under Nigerian Law' (1988) *Federal Ministry of Justice Law Review* Vol. 6,201

further recommended that the age(s) of criminal responsibility be abolished on grounds of arbitrariness and that all cases of juveniles be referred to juvenile Courts.[178]

One major problem with this line of reasoning is the fact that children develop the necessary capacity required for criminal intent at different stages. Therefore an abolition of exemptions from criminal responsibility could result in unfair punishments. In any case, assuming the premise of Adeyemi with respect to intent in very young children is well-founded, this does not necessarily imply that submitting the children to the formal judicial procedure is in the best interests of the child or society as a whole. It is one thing for the child to understand the meaning of an offence, another for the child to understand the nature of the criminal process in the manner necessary for the purposes of a fair trial. It is submitted that notwithstanding the arbitrariness involved in setting ages of criminal responsibility, it still operates to safeguard the interests of children who, for reasons related to capacity and competence, do not understand the concept of crime and punishment.

With respect to offences committed against children, a person who had 'unlawful carnal knowledge' of a child under the age of eleven was guilty of a felony punishable by life imprisonment.[179] It was also an offence for an individual to permit such an occurrence on his premises.[180] It was however a defence to prove that the accused person believed that the girl was above the age of thirteen years.[181] The age of thirteen could also be inferred as the minimum age of consent as the provisions on rape[182]did not set any separate age in this regard. Rape was an offence under the Criminal and Penal Code and the Penal Code in particular regarded a man as capable of raping his wife if she has not attained

[178] Ibid, 205
[179] Section 218
[180] Section 219
[181] Section 220
[182] described as unlawful carnal knowledge without consent

the age of puberty.[183] The abduction of unmarried girls under the age of sixteen was however an offence under the Criminal Code and for this purpose, the question of consent or belief that the abducted individual is above the age of sixteen was regarded as immaterial.[184] The Penal Code also contained similar provisions but made a distinction in terms of age for male and female victims.[185] It was also an offence under the Penal Code that to induce any girl under the age of eighteen to go from any place or perform an act, knowing that the girl would likely be forced or enticed into performing illicit sexual acts.[186]

Under the Criminal Code, it is an offence for an individual to forcibly detain a child for the purpose of depriving those in lawful care of the child of possession.[187] It is however a defence in that respect to prove a right to possession in good faith or the existence of a filial relationship in the case of an illegitimate child.[188] With respect to child care, the Penal Code prohibits the ill-treatment or neglect of a child under the age of fifteen years in such a way as to cause the child unnecessary suffering.[189] The abandonment of a child under the age of twelve, as is the case under the Children and Young Persons Act, is also an offence punishable by a term of imprisonment or fine.[190]

Another child rights subject addressed in the Criminal Code was physical/corporal punishment. In this regard, a father or mother could correct his or her legitimate or illegitimate child (less than the age of sixteen) for misconduct in so far as it did not constitute a 'wound or grievous bodily harm'.[191] This was essentially the same position under customary law save for the fact that customary law did not provide any legal

[183] Section 283 Penal Code
[184] Sections 362 and 363
[185] Section 271 prescribes an offence for whoever entices a person 'under fourteen years of age if a male or under sixteen years of age if a female'
[186] Section 275
[187] Section 371
[188] Ibid
[189] Section 238
[190] Section 237
[191] Section 395

sanction where the exercise of chastisement is excessive in kind or degree. This privilege was also extended to guardians and masters with respect to their wards or servants under the age of sixteen.[192] Under the Penal Code, no correction was deemed justifiable if it was unreasonable 'in kind or degree' having regard to the age and physical and mental condition on the person to whom it is inflicted.[193] To this end, no correction was justifiable with respect to a person who, 'by reason of tender years or otherwise' is incapable of understanding the purpose for which it is inflicted.[194] This may lead one to infer that a child under the age of seven years, which is the minimum age of criminal responsibility, may well be exempt from this form of correction. With respect to customary law and tradition, Elias states thus:

> There does not ever seem to have been conceded to the Nigerian father the powers of life and death……or even the later reduced but nevertheless absolute powers of the Roman paterfamilias……..Besides, there is the restraining hand of tradition which fosters a belief that children are the spiritual reincarnations of departed ancestors. They must therefore be treated with great care and endearment. However, parents do not on that account spare the rod and spoil the child. Very anxious are they that every child should grow up into an ideal pillar of the community……[195]

Under the concept of reasonable chastisement, parents could still enforce disciplinary methods necessary to enable their children become responsible members of the community but had no power to 'wilfully brutalize' the child. Therefore one may conclude that under customary and statutory law, there was an acknowledgement of the fact that children were not merely 'property' over which parents or guardians, as property-owners, could exercise unrestricted authority.

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[192]Section 395
[193] Section 55(2)
[194] Ibid
[195]Elias, Taslim Olawale, *Groundwork of Nigerian Law* (Routledge & Kegan Paul Ltd,1954), 299

For the offence of unlawful homicide, a child was described in the Criminal Code as a being who had 'completely proceeded in a living state from the body of its mother'.[196] For this purpose, the right to life of a child was deemed worthy of preservation from birth and not necessarily before.[197] The imposition of the death penalty on juveniles was also prohibited under the Criminal code with juvenile offenders found guilty of murder ordered to be detained 'during her Majesty's pleasure'.[198] Under the Penal Code, no sentence of imprisonment could be imposed on any person who 'in the opinion of the Court' is under the age of sixteen.[199] This may be due to the fact that juvenile offenders may well not have been registered at birth.

In 2000, Islamic criminal law was introduced into the legislation of Northern states through the Sharia Penal Code, a development particularly significant in the context of juvenile justice. This step may have been perceived as a political move designed to enhance support for the government among the predominantly Muslim population, not necessarily on grounds of problems with the existing Penal Code.[200] Some however described the step as being based on the desire to find a cure for the many social ills besetting the predominantly Muslim North.[201] The Zamfara State Sharia Penal code ascribed criminal responsibility to a 'mukallaf' that is an individual possessing full 'legal and religious' capacity.[202] As was the case under the existing Penal Code, a child under the age of seven could not be liable for criminal offences and for capital offences, an individual below the age of 'legal and religious' responsibility cannot be held liable.[203] There is no definition under the Zamfara State Sharia Penal Code of the age of legal and religious responsibility. The age of consent, presumably for sexual acts was however set

[196] Section 245
[197] Section 268 of the offence however makes it an offence to prevent a child from being born alive when a woman is about to be delivered of a child. The Penal Code also prohibits an individual from voluntarily causing a woman with child to suffer a miscarriage.
[198] Section 257(2)
[199] Adopted initially by Zamfara but has since been adopted by eleven other Northern states
[200] Ostien, Philip and Dekker, Albert, 'Sharia and national law in Nigeria' in Otto (ed), *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries in Past and Present* (Leiden University Press, 2010), 576-577
[201] Ibid
[202] Sharia Penal Code of Zamfara State (2000) Section 48
[203] Section 73

at fifteen years.[204] In addition, while the Zamfara State Sharia Penal Code defines a 'man' and 'woman' as being a male and female individual of any age, the reference to children and specific periods of criminal responsibility implies the existence of an age of majority, which may be as defined under the different Islamic schools of thought. It is nevertheless worth noting that Sharia Criminal Law is only applicable to Muslim indigenes in the different Northern States that have adopted a version of the Sharia Penal Code. Cases involving non-Muslims are still regulated by the Penal Code.

CHILD CUSTODY

Under most systems of customary law in Nigeria, the father had an absolute right to custody of his legitimate or legitimated children and custody is vested in the male head of the family upon the death of the father.[205] This was also the case under common law.[206] This absolute right is not enforceable where the child is of tender age and requires the care of the mother.[207] This rule has however been modified by statutory rules which make the infant's interest and welfare the paramount consideration in custody cases.[208] Thus in *Olayemi Kasebiye vs Adeyemi*,[209] it was deemed in the best interest of the child for the Jos High Court to award custody of the child to the mother. This was also the determining factor in the case of *Okafor vs Okafor*[210] despite recognition by the Court of the common and customary law right of the father. The principle of best interests has also been interpreted to affirm a general principle that children of tender ages are usually left in the care of their mothers.[211]

[204]Section 128
[205] Sagay, Itse, *Nigerian Family Law: Principles, Cases, Statutes and Commentaries* (Malthouse Press, 1999),341
[206] Ibid,333
[207] Ibid,341
[208] Ibid,333
[209] (1961) Suit No JD/229/60 (Unreported)
[210] Unreported
[211] Ibid

According to Section 71 of the Matrimonial Causes Act[212], the Court is to regard the interests of children as the paramount consideration in proceedings with respect to their custody, guardianship, welfare, advancement or education.[213] In decisions relating to award of custody, the conduct of either of the parties claiming custody cannot be the sole determinant of the award of custody.[214] Thus, the infidelity of a party for instance does not on its own constitute sufficient reason for depriving the said party of custody.[215] It is however taken into consideration, presumably as a factor in determining the best interest of the child.[216] In assessing the best interests of the child, various factors have been considered by the Courts including the degree of familiarity between the child and each of the parties, the amount of affection between the child and each of the parties, the respective income and position in life of the parties, the respective accommodation of the parties.[217]

Moral and religious considerations have also been regarded as relevant in determining the best interests of the child. In *Ihonde vs Ihonde*[218], it was not considered in the best interest of a five-year old child for custody to be awarded to the petitioner who had deserted him at the age of ten months and whose infidelity had been responsible for the dissolution of the marriage. In *Olajoko vs Olajoko* [219], the Court expressed its disappointment at the failure of the parents to state the arrangements made for the moral upbringing of the children and regarded the moral upbringing as being 'just as important as the financial aspect'. In *Adams vs Adams* [220], the plaintiff who had abandoned her husband for another person was refused custody of their two-year old child as it could not be said that 'the woman who so thoroughly enjoyed gallivanting about and leaving an infant child' was the sort of woman who would bring up a child in

[212] Cap 220, Laws of The Federation, 1990
[213] Section 71(1)
[214] See Williams vs Williams (1987) 2 NWLR at 67
[215] Ibid
[216] Ibid
[217] Ibid
[218] Suit no WD/85/70 (Unreported)
[219] (1974) Suit HOY/23/73
[220] (1971) 2 All N.L.R. 82

love and security of a home.[221] Under Section 57 of the Matrimonial Causes Act, in a marriage where there are children under the age of sixteen, a decree of dissolution made by order of Court could not become absolute until the Court was satisfied that 'proper arrangements in all the circumstances have been made for the welfare and, where appropriate, the advancement and education of those children'.[222] Pending such a decree, the mother has the same rights and authority as the law allows to the father and may be exercised equally.

The Infants Act 1958 also addressed certain issues relevant to the protection of the rights of the child. A significant aspect of the Infants Act was its description of children or infants as persons under the age of 21.[223] The Infants Act also regulated guardianship and custody of children, albeit in a limited capacity.[224] Under the Act, the Court is expected to take cognizance of the welfare of the children as well as the conduct of the parents in granting an application for child custody. In cases of child abandonment, the Court will not make an order granting custody of the child to the deserting parent except it is satisfied that such an individual is fit to take custody having regard to the welfare of the child.[225] The Infants Act also vests in the Court power to consult the wishes of the child in the process leading up to the award of custody.[226] In similar manner to the Matrimonial Causes Act, the best interest of the child is taken as the first and paramount consideration with questions as to the superiority of the claim of competing parties under any of heading deemed irrelevant.[227]

CONSTITUTIONAL DEVELOPMENT AND THE NIGERIAN CHILD

[221] Ibid
[222] Section 57 (1) (a)
[223] Section 2
[224] Part III of the Act regulating guardianship and custody of children was deemed inapplicable in the case of children who were subject to the customary law relating to guardianship of children.
[225] Section 18
[226] Section 20
[227] Section 24

In the context of the constitution, there is very little by way of explicit reference to children or child rights as a subject. The 1960 constitution provided general protection from violations of fundamental rights for 'every person' which presumably included children. For the purpose of the right to liberty, exception was made under the constitution for deprivation of liberty for the welfare or education of persons who had not attained the age of twenty-one years.[228] It was only in the 1979 constitution that children were specifically referred to with the state required to direct its policy towards ensuring that 'children, young persons and the aged are protected against any exploitation whatsoever, and from moral or material neglect……'.[229] The state was also required to take steps towards eradicating illiteracy by providing 'free, universal and compulsory primary education' as well as free higher and adult education.[230]

The 1979 constitution also effectively reduced the age of majority from 21 or 18 in relation to the deprivation of liberty for education or welfare.[231] The 'welfare of persons under the age of 18 years' was in addition regarded as a ground for derogation from the right to a public hearing in criminal matters.[232] More significantly, every citizen of Nigeria had the right to freedom from discrimination and as a result could not be subject to disabilities or restrictions by 'any law in force or any executive or administrative decision' on grounds of his or her ethnic group, place of origin, sex, political or religious opinion.[233] No citizen could also be subject to disability or deprivation by reason of the circumstances of his birth.[234] This would call into question the validity of existing customary and statutory law with practical effects inimical to the guarantee of freedom against discrimination. An examination of case-law subsequent to this constitutional development is to the effect that 'illegitimate' children are vested with rights accruing to

[228] Section 20
[229] Section 17(3)(f)
[230] Section 18(2)
[231] Section 32(1)(d)
[232] Section 33(4)(a)
[233] Section 39 (1)
[234] Section 39 (2)

children born within wedlock.[235] Under the 1979 constitution, anyone who alleged that the fundamental rights guaranteed under the Constitution had been violated could also seek judicial redress.[236]

The 1979 Constitution also contained a saving clause for existing laws and provided that existing laws still had effect and could be modified for the purpose of ensuring compatibility with the Constitution.[237] The reference of existing law to 'any law and any rule of law or any enactment or instrument whatsoever….' implies the preservation of legislation enacted prior to the time including laws enacted under the colonial era. However, the Constitution remained the *Grundnorm* with every other law in force inconsistent with constitutional provisions null and void to the extent of the inconsistency.[238] During the General Ibrahim Babangida military regime, the Constitution of the Federal Republic of Nigeria (Promulgation) Decree was enacted. In terms of child rights and related issues, there were no significant changes from the 1979 Constitution save for the provision requiring juveniles convicted of criminal offences to be kept in remand homes or reformatory centres with rehabilitation being the 'underlying principle' for their custody.[239]

The 1999 Constitution in many ways incorporated the vast majority of the provisions of the 1979 Constitution. There are however some marked differences especially in relation to child rights protection. Section 29(1) of the Constitution guarantees the right to renounce citizenship for every individual that is of 'full age' with 'full age' in this context defined as the age of eighteen years and above. However, a woman who is married is also said to be deemed 'of full age' for the purpose of the Section. This arguably suggests that the Constitution itself contemplates and protects the cultural practice of

[235] See Salubi vs Nwariaku (2003] 7 NWLR (Pt 819) 426
[236] Section 42
[237] Section 274
[238] Section 1
[239] Article 34(8)

child marriage. On the other hand, the reference to a 'woman who is married' may also be interpreted as a qualification in that an individual under the age of 18 could not be regarded as a woman for the purpose of the constitution.

The Constitution is regarded as the supreme source of law in the Nigerian legal system with judicial decisions affirming the supremacy of the constitution over all other existing laws.[240] As a result, certain customs which violate fundamental rights guaranteed by the constitution have been declared void. For instance, in *Anekwe vs Anekwe*,[241] the appellants relied on an aspect of their custom which prevents a woman from inheriting part of their husband's estate on the ground that she had no male children. The Supreme Court however described the custom as 'barbaric' and stated that any custom that 'disinherits a daughter from her husband's estate…..should be punitively and decisively dealt with'.[242] The Courts have declared similar customs as invalid on the basis of incompatibility with the constitution.[243]

NIGERIAN LAW AND CHILD RIGHTS: WHAT RELATIONSHIP?

There has been an increase, especially in developed nations, in a belief that children, especially teenagers should be provided with more opportunities for developing their decision-making capacities.[244] One way by which contemporary society aims to achieve this is by instituting a separate rights system for the protection of the rights of children. Thus, in 1924, the League of Nations adopted the Declaration on the Right of the Child[245] where children were formally acknowledged as right-holders. This was followed by another declaration to that effect in 1959 which set out in principle various rights

[240] See Chapter 6 for a more expansive discussion on the subject of constitutional supremacy
[241] Anekwe & Anor vs Nweke (2014) 4 SC (Pt III) 65
[242] Per Ogunbiyi J.S.C at 100
[243] Asika vs Atuanya (2013) 7 SC (Pt IV) 214, Ojiogu vs Ojiogu (2010) 3-5 SC(Pt II) 1
[244] Fortin, Jane, *Children and the Developing Law* (OUP,2009),7
[245] Also known as the Geneva Declaration on the Rights of the Child

accruing to the child.[246] It was not however until 1989 that the Convention on the Rights of the Child (CRC)[247] which sets out binding obligations on state parties was adopted by the United Nations General Assembly. Various instruments specifically protecting the rights of the child have also been created at the regional level.[248]

There is recognition of the need to protect the child's autonomy in a manner different from other human beings under international law and this notion permeates the aforementioned rights instruments. The Geneva Declaration for instance explicitly states that mankind owes the child 'the best it has to give' while the 1959 United Nations Declaration on the rights of the Child regards the child as being in need of 'special safeguards and care' by reason of its physical and mental immaturity.[249] Under the CRC, the 1959 declaration of childhood being in need of special care and assistance is reaffirmed.[250] Thus, there is a separate category of childhood recognised as requiring protection. The likes of Postman however seem to regard the child rights discourse as implying a 'tacit acceptance of a gathering new sense of loss or at least the blurring of the category of childhood'.[251] This is in contrast with the conclusion reached by Boyden who considers making childhood a carefree, safe, secure and happy phase of human existence as the major tenet of contemporary rights.[252]

The discussion in preceding sections suggests an awareness of the need to protect Nigerian children in the manner as envisaged under the international instruments

[246] See Declaration on the Rights of the Child G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19, U.N. Doc. A/4354 (1959) available at http://www1.umn.edu/humanrts/instree/k1drc.htm
[247] Adopted 20th November, 1989, entered into force 2nd September,1990 Available at http://www.ohchr.org/en/professionalinterest/pages/crc.aspx
[248] For example the African Charter on the Rights and Welfare of the Child (OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999.. The American Convention on Human Rights and European Social Charter also contain provisions specifically dealing with children (See Article 19 of the American Convention on Human Rights and Article 7 of the European Social Charter)
[249] *Geneva Declaration* supra n.4, Preamble
[250] *Convention on the Rights of the Child* supra n.6
[251] See Postman, Neil, *The Disappearance of Childhood* (Vintage Books,1994),120
[252] Boyden, J, 'Childhood and the Policy Makers: A Comparative Perspective on the Globalization of Childhood' in James and Prout (eds), *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (2nded,first published 1997, Falmer Press, 1997),191

referred to above. This is apparent in the specific criminal law provisions addressing relevant child rights issues.[253] On this basis, one may question the need for a separate child rights protection regime. However, the lack of a universal consensus in specific matters relating to child rights protection arguably makes such a distinct child rights protection framework necessary. An example of this existent disparity is with respect to the age of majority and criminal responsibility under the law. As seen above, age limits differs across legislation and this induces some form of arbitrariness and uncertainty in the law relating to children. This is a reflection of the difference in societal perceptions of the child in terms of rights and obligations. As observed in the Penal Code, maturity could be determined in the context of biological and physical changes while in other statutes, age is the determining factor. Thus, children may be treated differently under the law just by a mere change in location, a position which does not accord with the universality ethic of the rights concept.

Aside from this, there are some features of the legal system which highlight the need for a separate framework. It is apparent that legislation regarding children placed great emphasis on the protection of children from adults or in certain cases, other children. There was less focus on direct engagement with the views of children, especially with respect to decision-making which has an impact on the lives of children. For instance, an examination of existing case-law shows little consultation with children subject of custody proceedings despite several references being made to the importance of the child's 'best interests'. It could be argued that this reflects a societal notion of adults being in the best position to define a child's best interests with children being regarded as lacking the capacity to make such decisions. According to Ogbuabu,

> In much of the developed world, it can be argued that the child has attained a central position where most of the plans and programmes for the family are

[253] This is similar to the 'caretaker thesis' expounded by Archard which emphasises the fact that children need to be cared for and supported in their maturation (See Archard, David, *Children: Rights and Childhood* (2nd edition, first published 1993, Routledge,2004),79

> directed. In Africa, this is not the case. In fact the child is still kept in the background…….Thus, it is difficult to speak or talk about children's rights in socio-cultural settings where they are given very little opportunity to express their opinions on virtually anything, even the issues that affect them most.[254]

It can be argued that the law in relation to custody proceedings lends credence to this opinion. In custody cases, the petitioner is required to prove to the satisfaction of the Court that granting of custody is in the child's best interests[255] with no expected input from the child (ren) that has significant impact on the outcome of the decision. Having said this, many of the cases involved very young children (often between the ages of 2 and 10) who arguably lacked the mental capacity to comprehend certain complex issues fundam ental to the proceedings. Nevertheless, this approach, as observed by Campbell, 'neglects the significance of the experiences of children in their present situation, their present happiness and their current concerns'.[256]

In contemporary rights discourse, children are also perceived as independent actors with rights vis-à-vis their parents and vis-à-vis the state. To this end, the CRC emphasises the importance of preparing the child to live a fully individual life in society.[257] The various laws considered above could be said to reflect such an aim. For instance, the method of juvenile justice as outlined in the Children and Young Person's Act emphasized reform of the child offender and reintegration into society as opposed to outright punishment in a retributive manner for offences committed. The fact that parents could also be fined under the Act or made to enter into a recognizance to exercise proper care

[254] See Ogbuabu, S.C, 'Facilitating the empowerment of African Children for the defence of their Rights' in Pearce and Falola (eds), *Child Health in Nigeria* (Ashgate Publishing, 1994),150
[255] Williams vs Williams supra n.214
[256] Campbell, Tom, 'The Rights of the Minor: as Person, as Child, as Juvenile, as Future Adult' in Alston, Parker and Seymour (eds) *Children, Rights and the Law* (OUP, 1992),20
[257] See the Preamble to the CRC

and guardianship for a child exposed to 'moral danger'[258] shows a recognition on the part of the state to protect the child's interests. This may however also be interpreted as a failure by the state to recognize and respect the autonomy of children.

Various aspects of customary law have also been considered in this chapter. It is argued that developing a precise definition as to the nature of the relationship between customary law and child rights remains highly problematic. One of the main reasons for this is the fact that customary law itself is constantly evolving. According to Dioka,

> Culture is dynamic and not static. It changes continuously, shedding some features and acquiring new ones.[259]

Thus, there is the possibility of cultural practices developing at different times in ways that are either compatible or incompatible with human rights. For instance, the evolution of Yoruba customary law on inheritance rights showed a transition from a discriminatory to a non-discriminatory system even without any marked influence of the rights concept. On the other hand, the cultural practice recognised by law which gave the father of a child born out of wedlock the prerogative in terms of acknowledging the paternity of such a child may also be understood as being in itself indirectly discriminatory to the child in question.

In terms of the relationship between Nigerian law and the concept of child rights, it may be argued that the Nigerian legal system adopts a protectionist approach to child rights protection. It appears that the law relating to children lays greater emphasis on the behaviour of adults towards children, as opposed to regulating the conduct of children in

[258] Section14 (f) (h), 26 (2)
[259] Dioka, L.C, 'Forgotten aspects of Nigerian Culture' in Osuntokun and Olukoju (eds) *Nigerian Peoples and Cultures* (Davidson Press,1997),81

their capacity as intellectual and sentient beings capable of independent thought and actions. Hence, there is little emphasis on 'positive' rights such as freedom of expression, assembly and association. This may be attributed to certain factors including a perceived vulnerability and immaturity on the part of children which necessitates special protection on the part of the state. According to Oyajobe,

> Fundamentally, the child is deprived of all and total rights as the adults on grounds of immaturity and inexperience. His parents are therefore given the authority to act as trustees for him against the future….[260]

This is not necessarily a feature peculiar to the Nigerian system and even some contemporary writers have been said to be 'wary of claiming for children a moral right to autonomy identical with that of adults'.[261] As noted by Boyden, the beliefs of welfare and rights practitioners about the activities and experiences suitable for child life may differ radically from those of parents or children.[262]

It remains extremely difficult to make a firm conclusion on the compatibility of Nigerian legislation prior to the Child Rights Act with contemporary human rights principles. In terms of safeguarding and protecting children from rights violation, especially in terms of civil and political rights, there is evidence to show that even prior to the Child Rights Act, the law had offered a reasonable level of protection. However, there is little regard given to other positive rights as well as economic and social rights of children. The position with respect to economic and social rights (ESRs) is not necessarily peculiar to children as ESRs, while referred to in the Nigerian constitution[263], remain generally unenforceable in Nigeria. The need for a uniform, universal standard of child rights is however easily

[260] Oyajobe, Ayo, 'Better protection for Women and Children Under the Law' in Osinbajo and Awa Kalu (eds) 'Women and Children Under Nigerian Law' (1988) *Federal Ministry of Justice Law Review* Vol. 6,42
[261] Fortin, Jane, *Children and the Developing Law* supra n.244, 19
[262] Boyden. supra n.252,213
[263] Constitution of the Federal Republic of Nigeria 1999 (as amended),Section 16

observable given the uncertainty created through the diversity of sources of law in Nigeria.

CONCLUSION

This chapter has examined the history of child rights protection in Nigeria in various administrative dispensations. The lack of explicit reference to the concept of 'child rights' did not preclude children from being in focus under statutory and customary law. Pre-colonial times saw the existence of customs such as the killing of twins and 'abnormal children' which were detrimental to the most fundamental rights of children. Other practices such as the principle of primogeniture in the law of succession, while not physically harmful to children, violated other fundamental rights and freedoms such as freedom from discrimination.

The colonial era saw the introduction of statutes regulating certain aspects relating to the rights of children. Under statutory law, children born out of wedlock could by subsequent marriage acquire the status of 'legitimate children' especially for the purpose of property inheritance. This was in contrast to certain cultural practices where legitimacy could be obtained by acknowledgment of paternity by the father. The introduction of the Children and Young Persons Act was however the first significant step directly aimed at protecting the interests of children as well as regulating their behaviour under the law. Other statutes such as the Criminal and Penal Code also contained provisions protecting the interests of children.

The constitutional history of Nigeria has also been examined in relation to the protection of the rights of children. The 1963 constitution, while protecting certain fundamental rights of all citizens, contained no separate provisions regarding children, neither was there any express reference to children under the constitution. The 1979 constitution

required states to ensure that children are protected against exploitation and neglect but never provided any child-specific rights, as was the case with the 1989 and 1999 constitutions. There was however the introduction of sex as a prohibited ground of discrimination under the 1979 constitution, which would especially prove significant with respect to inheritance cases involving female children.

It has been argued in relation to child rights protection that the law on child rights prior to the Child Rights Act assumed a protectionist form. This has been attributed to a perception of children as being in need of special protection on account of their innocence and vulnerability to negative influence. Thus, children were only perceived as right-holders in the 'negative' context and the positive rights such as freedom of expression, association and assembly were not recognized. The failings of the law in this respect may lead to a conclusion that despite the protection afforded to children, especially in the context of criminal law, there remained a pertinent need to protect the interests of the child in a manner that respected the autonomy of the child, a requirement that had not been satisfied by existing legislation.

CHAPTER 4: THE CHILD RIGHTS ACT 2003: HISTORICAL DEVELOPMENT, SUBSTANTIVE PROVISIONS AND STATE IMPLEMENTATION.

As established in the previous chapter, the protection of children has been a subject of legislation in Nigeria since the colonial era.[264] However, it was only in 1943 that the Children and Young Person's Act (CYPA) was enacted to regulate the actions and protect the interests of children. Notwithstanding this development, discourse specifically relating to children as right holders did not arise in the Nigerian context until the late 1980's following the adoption by the United Nations General Assembly of the Convention on the Rights of the Child (CRC). This was followed by a series of events culminating in the promulgation of the Child Rights Act 2003(CRA or 'The Act').

In this chapter, the provisions of the Child Rights Act 2003 will be examined in some detail. Given the voluminous nature of the Child Rights Act, the overview of its provisions provided here will be conducted in a thematic fashion, with emphasis on aspects of child development that have a direct effect on existing laws affecting children. The provisions of the Child Rights Act will thereafter be compared with existing federal legislation relating to the rights of the child, with particular focus on the aspects of child rights discussed in the preceding chapter. The CRA will also be contrasted with the child rights laws of the states that have implemented the CRA for any disparities, as any existent disparities may be relevant in discussions relating to problems surrounding effective child rights protections in subsequent chapters. The chapter will be concluded with a brief outline of developments with respect to child rights protection that have emerged following the enactment of the CRA.

[264] Lagos became a colony of the British Empire in 1861

HISTORY OF THE CHILD RIGHTS ACT 2003

As stated above, existing legislation in various areas of criminal, family and property law made provisions for the protection of the interests of the child as did the Children and Young Persons Act. However, there was no legislation expressly describing children as right-holders, which is hardly surprising given the fact that the Convention on the Rights of the Child (CRC) was itself only introduced in 1989. It is notable that specific recognition and protection of the rights of the child had formed a part of academic discussion in Nigerian law even prior to the adoption of the CRC and the enactment of the CRA. In discussing the state of children under Nigerian law, Oyajobe stated as follows:

> Certainly the provisions of a legally binding convention on the rights of children as is being prepared by the UN Committee on Human Rights will go a long way in promoting the lot of children. Until then however, nothing precludes us as a nation from re-assessing our view of our children and the status we will give to them in order to work for their betterment.[265]

Further to the above, Esangbedo also observed the need for the federal government to regard the provision of free qualitative educational opportunities for all children and young persons as 'a child who studies up to a high level is less likely to want to be a street urchin'.[266] With respect to criminal justice, Okagbue recommended the abolition of the criminal jurisdiction of existent juvenile courts by raising the age of criminal responsibility to seventeen.[267] This in her view was to ensure that cases involving child offenders be decided by child welfare authorities whose responsibility 'would not be so much the determination of guilt or innocence' but 'the determination of the most

[265] Oyajobe, Ayo, 'Better Protection for Women and Children under the Law' in Osinbajo and Awa-Kalu (eds), 'Women and Children under Nigerian Law' (1988) *Federal Ministry of Justice Law Review* Vol 6
[266] Esangbedo, D.O, 'A memorandum prepared by the Medical Women Association of Nigeria on 'Better Protection for Women and Children under the Law' in Osinbajo and Awa-Kalu (eds), supra n.265, 250
[267] Okagbue, Isabella, 'Development in Criminal Law and Procedure' in Aguda, *The Challenge of the Nigerian Nation: An examination of its Legal Development 1960-1965* (Heinemann Educational Books (Nigeria) Ltd, 1985)

appropriate form of treatment in the best interests of the child'.[268] These statements clearly highlight the need for an effective framework for guaranteeing the interests of the child, not only in terms of protecting the child from rights violations as characterized much of the existing legislation at the time, but fulfilling the rights of the child in terms of ensuring greater access to means of empowerment.

This increased awareness gave rise to certain developments. In 1988, the Nigerian Chapter of The African Network for the Prevention and Protection against Child Abuse and Neglect organized three conferences with the Ministries of Justice, Health and Social Welfare in conjunction with UNICEF to produce new draft laws on Protecting Children in Nigeria.[269] This was prior to the ratification of the CRC by the Nigerian government in 1991. Following the ratification of the CRC, a major issue arose as to the implementation of the standards of child rights protection. As is the case in all of Commonwealth Africa, Nigeria follows the dualist theory of treaty implementation, which in essence required that an Act of Parliament incorporate any international law for such law to form part of domestic legislation.[270] Accordingly, Section 12 of the Constitution[271] explicitly states that "no treaty between the Federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly".[272]

As a result, the ratification of the CRC in 1991 was largely of no effect in the absence of domestic legislation implementing the provisions of the CRC. In 1991, the Nigerian government set up the National Child Welfare Committee to establish a framework for

[268] Ibid
[269] http://www.law.yale.edu/rcw/rcw/jurisdictions/afw/nigeria/frontpage.htm
[270] This follows the British legislative tradition under which the ratification of a treaty which binds the state at the international level remains a prerogative of the crown (Viljoen, Frans *International Human Rights Law in Africa* (2nd Ed) (first published 2007), OUP 2012), 522
[271] Constitution of The Federal Republic of Nigeria 1979 which was in operation at the time of ratification of the CRC. The position remains unchanged under the Constitution of the Federal Republic of Nigeria 1999
[272] Section 12(2)

implementing the goals of the World Summit for Children.[273] To this end, a first Bill on Children's rights was proposed in 1993, but could not be passed into law by the military government because of opposition from religious groups and traditionalists.[274] A special Committee was subsequently set up to "harmonize the Children's Bill with Nigerian religious and customary beliefs."[275] The year 1994 saw the inauguration of A National Child's Rights Implementation Committee for performing various functions derived from the need to enhance the status of the Nigerian child.[276] In 1996, Nigeria submitted its first report to the Committee on the Rights of the Child with respect to the implementation of child rights in Nigeria. The Committee in its concluding observations recommended that the government 'consider, on an urgent basis, the adoption of the children's decree, drafted in conformity with the principles and provisions of the Convention'.[277] The Committee in addition recommended that the state take into account the compatibility of the system of customary, regional and local laws with the articles of the convention'.[278]

This by implication necessitated a comprehensive review of existing legislation with profound implications. Pursuant to the recommendation of the Committee, the draft Bill was presented again before parliament in 2002 but was again rejected on grounds of incompatibility with Islamic values, traditions and culture.[279] The General Olusegun Obasanjo-led democratic government finally enacted the CRA in 2003. The Supreme Council for Sharia nevertheless protested the enactment of the CRA and regarded the law as unacceptable to Muslims for various reasons, including the ouster of the

[273] Ayua and Okagbue, *The Rights of the Child in Nigeria* (NIALS Publishing, 1996)
[274] See: 'Are the children protected yet? An article on the state of the ratification of the CRC in Nigeria' available at http://www.wbfafrica.org/press-releases/archive/112-an-article-state-of-the-crc-ratification-process-in-nigeria-are-the-children-protected-yet.html or http://www.cleen.org/nigeria_ngo_report_OMCT.pdf
[275] Ibid
[276] Ibid
[277] See *Concluding observations of the Committee on the Rights of the Child: Nigeria* (1996) CRC/C/15/Add 61, Paragraph 26
[278] Ibid
[279] See n.273 above

jurisdiction of Sharia courts in matters relating to children.[280] This, according to Nzarga serves as the basis for the refusal by majority of the Northern states to incorporate the CRA into domestic law.[281]

THE CHILD RIGHTS ACT

The Child Rights Act 2003 is divided into twenty-four parts. The first part addresses the best interests of the child to which end the best interest of the child is regarded as being the primary consideration in 'every action concerning a child' whether undertaken by an individual, public or private body, institution or service, court of law, or administrative or legislative authority.[282] This indicates a level of pre-eminence given to the interests of the child in a manner different from the CRC where the best interest of the child is deemed 'a primary consideration'.[283] A child is also entitled to 'protection and care as is necessary for his well-being' having regard to the rights and duties of individuals legally responsible for the child.[284] Part II outlines the rights and responsibilities of the child. The fundamental rights guaranteed under the Constitution of the Federal Republic of Nigeria are applicable to the child under this section 'as if those provisions were expressly stated in the Act'.[285] The child enjoys the right to survival and development as well as the right to a name which is to be given 'on his birth or at such other date' dictated by the culture of his parents or guardian.[286] Freedom of association, thought, conscience and religion is guaranteed in Part II in conformity with the law and as applicable, the guidance and direction of parents and guardians.[287] The child also has a right to private family life, freedom of movement, freedom from discrimination, dignity,

[280] Nzarga, Daniel Felix, 'Impediments to the Domestication of Nigerian Child Rights Act by States' (2016) *Journal of Culture, Society and Development* Vol. 19, 48-55, 51
[281] Ibid
[282] Section 1
[283] Ibid
[284] Section 2
[285] Section 3
[286] Sections 4 and 5
[287] Sections 6 and 7

leisure and recreation, health, parental care and free primary education.[288] Having said this, there are certain restrictions on the kind of activities the child can engage in and for this purpose, no child is permitted to enter into a contract with every contract entered into by a child (save for a contract for necessaries) regarded as null and void under the Act.[289]

The child is also not exempt from responsibilities under the CRA. He has responsibilities 'towards his family and society, the Federal Republic of Nigeria and other legally recognized communities, nationally and internationally'.[290] The child is expected to 'work towards the cohesion of his family and community; respect his parents and superiors as well as assist them in time of need; serve the Federal Republic of Nigeria, contribute to the moral well-being of the society; preserve social and national solidarity; relate with other members of the society in spirit of tolerance, contribute to the promotion of unity and the solidarity of the African people and the human race'. [291] Every individual responsible for the maintenance of the child has the duty to provide the necessary guidance, discipline, education and training necessary for the performance of these responsibilities.[292]

CHILD CUSTODY

Part VIII addresses legal issues relating to the possession and custody of children. The Family Court under this part may award (upon application by either parent) sole or joint custody where the father and mother of a child were not married to each other at the time of the birth of the child.[293] The Court may make orders as to custody or rights of access with regard to the welfare of the child and conduct of the parent(s) as well as the

[288] Sections 8-15
[289] Section 18
[290] Section 19
[291] Ibid
[292] Section 20
[293] Section 68

parents' wishes. This order may be varied or discharged by a subsequent order.[294] In cases of abandonment or desertion by either of the parent, the court will not grant custody to the deserting parent unless it is satisfied as to the fitness and propriety of such an individual to have custody.[295] The Court is not precluded in any way from consulting the wishes of the child, neither is the child prevented from exercising his free choice.[296] As regards the religion of the child, the Court is empowered where necessary to make an order for a child to be brought up in the religion in which the parent requires the child to be brought up.[297] Notwithstanding any customary law, the Minister responsible for the affairs of children may make custodial orders in accordance with regulations.[298] Custody shall not be given to an individual of any child for pecuniary benefit and where custody has been given to or acquired by an individual other than a family member, pecuniary benefit would be presumed unless it is proven that the custody is in accordance with customary law that is 'not repugnant to natural justice, morality or humanity or inconsistent with any written law'.[299] Anyone in breach of this requirement or any rules relating to custody commits an offence and is liable upon conviction to a fine and/or a term of imprisonment.[300]

CRIMES AGAINST CHILDREN/JUVENILE JUSTICE

Part III of the Act sets out other protective measures with respect to the child. Child marriage is prohibited in this section with every marriage contracted with an individual under the age of 18 deemed 'null, void and of no effect whatsoever'.[301] Anyone who marries or betrothes a child or promotes the marriage of a child commits an offence and is liable on conviction to a fine, imprisonment or both.[302] Furthermore, no tattoo or skin

[294] Section 69
[295] Section 72
[296] Section 75
[297] Section 76
[298] Section 79
[299] Section 80
[300] Section 81
[301] Section 21
[302] Section 23

mark is to be made on a child and individuals involved in such acts commit an offence punishable by a fine and/or imprisonment.[303] Child trafficking, abduction, exposure of a child to narcotic drug use and the use of children in other criminal activities are also criminal offences under the Act.[304] Child labour is prohibited under the Act and to this end no child is to engage in forced labour, employed work, heavy lifting or domestic service outside his home or family environment.[305] The buying, selling, hiring or otherwise dealing with children for the purpose of either hawking or begging for alms and prostitution are also offences punishable by a term of imprisonment under the Act.[306]

No individual is permitted under any circumstance to have sexual intercourse with a child and anyone who does so commits an offence of rape and is liable to life imprisonment.[307] For the purpose of sexual intercourse with a child, the consent of the child as well as a mistaken impression as to the age of the child is immaterial.[308] All other forms of sexual abuse are prohibited under the Act with offenders deemed liable to a term of imprisonment.[309] Interestingly, there have been calls from concerned non-governmental organisations for the imposition of stiffer penalties for child rights violations under the CRA, especially in relation to violent acts of abuse against children.[310] Exploitation of a child is in addition an offence punishable by fine and/or imprisonment under the Act.[311] Moreover, no child is to be recruited into any branch of the armed forces.[312] The Act under part III prohibits importation of harmful publications with any person importing, selling, publishing or possessing for selling or hiring any harmful publication deemed to

[303] Section 24
[304] Section 25-27
[305] Section 28
[306] Section 30
[307] Section 31
[308] Ibid
[309] Section 32
[310] https://www.today.ng/news/nigeria/209681/unicef-family-courts-check-child-abuse
[311] Section 33
[312] Section 34

have committed an offence punishable by fine and/or imprisonment.[313] It is immaterial to for the purpose of Part III that the individual was unaware of the fact that the publication was harmful.[314]

Part XX regulates child justice administration. Under this section, a child is only subjected to the justice system set out under the Act as opposed to any other criminal justice system.[315] The child's privacy rights are protected to which end the identity of the child shall remain unpublished.[316] Records of child offenders are confidential and shall not be used in adult proceedings involving the same child offender.[317] Every individual involved with the child justice system is required to undergo necessary training with judges with other judicial officers requiring training in sociology and behavioural sciences for this purpose.[318] A specialised children police unit is also established under the Act which consists of officers who frequently deal with children and are primarily engaged in the prevention of child offences.[319]

Prosecutors dealing with cases involving child offenders have powers under Part XX to dispose of the case without resorting to trial and encourage settlement where the offences are non-serious and there is a need for reconciliation or in instances where the case can be appropriately dealt with by other institutions.[320] The fundamental rights of the child are restated with particular reference to presumption of innocence, right to be notified of charges, right to remain silent, right to presence of a parent or guardian and

[313] Section 35. Harmful publication is defined under the Act as 'any book magazine, film, picture, video or audio tape or other medium targeted or likely to fall into the hands of children and contains infomation relating to 'the commission of crimes, acts of violence, repulsive incidents, immoral acts or words or obscene representation' which has the tendency to corrupt or deprave a child into whose hands it may fall
[314] Section 36
[315] Section 204
[316] Section 205
[317] Ibid
[318] Section 206
[319] Section 207
[320] Section 209

right to legal representation.[321] Where a child is apprehended, his parents shall be immediately informed and the contact between the police and the child shall be to avoid harm and promote his best interests with respect being paid to his legal status.[322] Detention pending trial is used only as a measure of last resort and shall be for the shortest possible period.[323] There is no reference to the terms 'conviction' and 'sentence' in the trial process.[324] The right of the child to fair hearing remains protected during trial and the proceedings of the trial shall be in a manner conducive to the best interests of the child.[325] The action taken by the court is with regard to the circumstances and needs of the child as well as the circumstances and gravity of the offence.[326] The child is not deprived of liberty unless found guilty of a serious offence involving violence against another or the child persists in committing other serious offences.[327] The parents or guardians are also required to attend court proceedings where the offence committed is a criminal offence.[328]

No child shall be subjected to imprisonment, corporal punishment or the death penalty under the Act.[329] Pregnant and nursing mothers are also exempt from the death penalty under the Act.[330] The child offender found guilty may be dealt with in various ways including a dismissal of the charge or discharge upon recognizance.[331] The child may also be placed under a supervision order or ordered to pay a fine.[332] In the alternative, the parents may be ordered to pay the fine or enter recognizance for the good behaviour of the child.[333] Other forms of orders include binding over of a parent or guardian and

[321] Section 210
[322] Section 211
[323] Section 212
[324] Section 213
[325] Section 214
[326] Section 215
[327] Ibid
[328] Section 216
[329] Section 221
[330] Ibid
[331] Section 223
[332] Ibid
[333] Ibid

corrective orders.[334] Non-institutional orders are to be implemented by federal or state director in charge of child matters.[335] Periodic research is required under this Part into the causes of child delinquency and crime as well as other needs of children in the society.[336] This would involve collection and analysis of relevant data.[337]

It is worth stating under this section that the extensive provisions of the CRA on juvenile justice may not reflect an effective rights protection framework in practice. According to Abdul-Raheem Mustapha, there is little evidence of any unit in law enforcement agencies specifically dealing with child offenders.[338] Studies have also indicated a strong disagreement by the majority of respondents with any notion that special cells exist for children in Nigeria.[339] Considering the fact that such respondents are representatives of civil society, one would consider such general disagreement as a strong indictment on the executive arm of the Nigerian government. In addition, there is also evidence of juvenile offenders being held in custody together with adult offenders.[340] One would consider separation of juveniles from adult offenders in criminal justice proceedings as one of the most fundamental aspects of child justice especially given the fact that, as recognized by the CRA itself, detention of juvenile offenders is in itself is regarded as a measure of last resort and is by no means encouraged in juvenile justice proceedings. Any findings of juvenile offenders being detained with adults is in the strictest of terms condemnable and an indication that the detailed provisions on the protection of the rights of the child offenders under the CRA are merely theoretical with little or no effect on law enforcement in the public sphere.

[334] Section 226
[335] Section 233
[336] Section 238
[337] Ibid
[338]Abdul Raheem Mustapha, M, 'Child Justice Administration in the Nigerian Child Rights Act: Lessons From South Africa' (2016*) African Human Rights Law Journal* Vol. 16 No 2, 435-457
[339]Ibid
[340]A prison audit exercise by the National Human Rights Commission in 2014 revealed detention of juvenile and adult inmates at the Sokoto, Kebbi and Bauchi State Prisons (See 'Annual Report 2014: National Human Rights Commission')

IMPLEMENTATION

Part XIII establishes the Family Court, which is responsible for hearing and determining matters relating to children.[341] The Court would have exclusive and unlimited jurisdiction to hear and determine civil and criminal proceedings with respect to the rights and interests of children under the act.[342] The Court is guided by the principle of 'concillation' in any proceedings affecting a child or a family and would encourage amicable settlement between parties.[343] The High Court would have jurisdiction with respect to matters punishable by death or terms of imprisonment of ten years and above.[344] Divorce and custody cases as well as appeals from the magistrate court are also dealt with by the High Court.[345] The right of a child to representation by a legal practitioner is guaranteed.[346] Court proceedings are private and as a result only court officers, parents (or guardians), parties (with counsel) and persons directly concerned shall be allowed to attend court.[347] The identities of children involved in judicial proceedings are private[348] with proceedings conducted in a manner 'conducive to the best interest of the child'.[349] Children may give evidence unsworn and deposition of sworn evidence by a child shall be treated as though the statement had been on oath.[350]

Part XXIII establishes a national child rights implementation committee comprising of the permanent secretary of federal ministry of women's affairs and youth development (as chairman) and one representative from selected federal ministries and governmental bodies.[351] The Committee among other functions, is to review the state of implementation of child rights and make recommendations to the government at all

[341] Section 149
[342] Section 151
[343] Ibid
[344] Section 152
[345] Ibid
[346] Section 155
[347] Section 156
[348] Section 157
[349] Section 158
[350] Section 160
[351] Section 260

levels with regard to projects enhancing implementation of child rights.[352] A similar committee with similar functions is also established at state and local government level.[353] Part XXIV deals with miscellaneous matters and under this part, the provisions of the act are regarded as superceding existing provisions relating to children with the provisions of the act prevailing in the event of any conflict.[354]

THE CRA AND EXISITING LAWS: ANY IMPROVEMENT?

CRIMES AGAINST CHILDREN/JUVENILE JUSTICE

There are many similarities between the Child Rights Act and the Children and Young Persons Law(CYPA) which prior to the enactment of the CRA was the only legislation expressly addressing the interests of children. Both pieces of legislation prohibit the imposition of the death penalty and terms of imprisonment on children.[355] The CYPA does not however prohibit corporal punishment as a judicial sanction, which is prohibited under the CRA.[356] The prohibition of judicial corporal punishment also distinguishes the provisions of the CRA from the Criminal and Penal Code Acts, which both provide for the infliction of corporal punishment as a judicial sanction.[357]

There is also no distinction between children and young persons under the CRA whereas under the CYPA, children are distinguished from young persons.[358] This is extremely important in terms of the imposition of a sentence of imprisonment. Whereas under the CYPA, a 'young person' may be imprisoned under certain conditions, such young persons

[352] Section 261
[353] Section 264 and 265
[354] Section 274
[355] Section 225 CRA, Section 12 CYPA. It is however worth noting that the CYPA governing the Northern Region does not expressly prohibit the imposition of the death penalty. It however prescribes detention as punishment for serious crimes of murder, manslaughter and wounding with intent (Section 12 CYPA (Northern Region)
[356] Section 221(b)
[357] See Section 18 Criminal Code
[358] Under the CYPA (Southern Region), a child is defined as a 'person who has not yet attained the age of fourteen years'. A 'young person' is any person between the ages of fourteen and sixteen years. The CYPA of the Northern Region however defines a young person as one between the ages of fourteen and eighteen(Section 2) Both children and young persons are however regarded as 'juveniles' (See CYPA Section 2)

are exempt from imprisonment under the CRA. This is also relevant in terms of imprisonment under the Penal Code, where only individuals under the age of fourteen are exempt from imprisonment.[359] As is the case under the CYPA, a child may be brought before the court if there are reasonable grounds for believing the child is in need of care and protection. The position remains unchanged under the CRA.

Under the CRA, existing provisions protecting the child are applicable though not expressly provided for under the Act. The provisions of the Act however supercede the provisions of all enactments relating to children including existing Criminal and Penal Codes as far as they are applicable to children.[360] Simultaneously, sexual offences and violent offences have been assigned the same meaning under the CRA as in the Criminal and Penal codes.[361] The failure to provide a more child-specific definition of these offences may prove extremely crucial, especially with respect to abuse. For instance, while there is a prohibition on subjecting the child to physical abuse under the CRA, the failure to define 'abuse' in the context of the Act arguably implies the preservation of 'reasonable chastisement', which is excluded from the ambit of assault under the Criminal code as a defence to an offence to physical abuse.[362]

A significant area in which the CRA differs from existing criminal law is in the uniform age of majority for the purpose of all actions involving children. The Penal Code prescribes various ages for various offences which arguably creates an uncertainty in the law, an uncertainty eliminated by the provisions of the CRA. The abolition of corporal punishment under the act is contrary to Section 55 of the Penal Code which allows infliction of hurt by parents, guardians and schoolmasters for the purpose of correcting a child or ward under sixteen years of age or schoolmasters. Under the CRA, an individual

[359] Section 69
[360] Section 274
[361] Section 277
[362] See Section 295 Criminal Code, Section 55 Penal Code

below the age of eighteen cannot be taken out of lawful custody without the consent of his parent or guardian[363] whereas the age is set at sixteen and fourteen for male and female children respectively under the Penal Code (twelve for female children under the criminal code).[364] The criminalisation of sexual intercourse with a child has significant implications with respect to criminal law in the north where sexual intercourse between a man and his wife does not amount to rape where the 'wife has attained puberty'.[365]

The Nigerian Criminal Code provides that prosecution for the rape of a girl under the age of thirteen must have begun within two months after the offence is committed.[366] There is no such provision under the CRA which implies that prosecution for such an offence can be commenced at any time. As is the case under the CRA, it is immaterial for the purpose of criminal proceedings that the offender believed that the girl was above the age of sixteen or that the individual had been taken 'with her own consent or at her own suggestion'.[367] Under the Criminal Code however, it may be a defence to certain sexual offences to prove that the accused person believed on reasonable grounds that the girl was of or above the age of sixteen years[368] whereas no such defence exists under the CRA.

Unlike the Criminal and Penal Codes, there is no minimum age of responsibility explicitly set out under the CRA. Section 204 of the CRA however provides that a 'child alleged to have committed an act which would constitute a criminal offence if he were an adult' would still be subject to the child justice system. The question then arises as to whether this applies to all children or to children above the minimum age of responsibility. This is especially given the fact that a child is regarded as any individual under the age of

[363] Section 27
[364] Section 271 Penal Code
[365] Section 282(2) Penal Code
[366] Section 221
[367] Section 363
[368] Sections 220, 221, 222, 222C

eighteen years.[369] The CRA expressly provides that no child should be subject to the criminal justice process, thus indicating the absence of a minimum age of criminal responsibility. As a result, an individual can only be criminally responsible, especially for the purpose of adjudication, upon attaining the age of majority. Furthermore, the priority accorded to the best interests of the child under the Act is also applicable to actions involving a court of law. It would appear contrary to the purpose and intent of the Act for criminal responsibility, (which would imply an adjudication process similar to the adult process) as being imputable to a child at any age.

In addition to the inadequacies discussed above, the CRA also fails to address some peculiar problems particularly affecting the Nigerian child. For instance, there is a lack of clarity in the CRA concerning the legal prohibition of witchcraft accusations against children and while there is a prohibition of the abuses that arise from such accusations[370], there is no express prohibition of the act itself unlike the Criminal Code.[371] To this end, one may consider the prohibition existent in the Criminal Code as sufficient for the purpose of child protection, especially given the fact that such accusations are to a large extent only prevalent in the Southern region of Nigeria. Nevertheless, it is an aspect of child rights protection for which universal protection under federal legislation may be more effective.

CHILD CUSTODY

As noted in the previous section, the provisions of the CRA supercede all other instruments relating to children. This may be applicable to matters relating to child custody in which case the CRA prevails in the event of any inconsistency between the CRA and other enactments relating to child custody. This creates very few problems

[369] Section 277
[370] Section 11
[371] Section 210

given that under the Matrimonial Causes Act (MCA), the best interests of the children are regarded as the paramount consideration in proceedings 'with respect to the custody, guardianship, welfare, advancement or education' of the children of the marriage.[372] It is pertinent to note that for the purpose of child maintenance, a 'child of the marriage' is regarded as an individual under the age of twenty-one, which is in contrast to the age of eighteen set under the CRA.[373] The MCA significantly makes no reference to consulting the child with the court retaining a large part of the discretion in terms of the nature of the decision to be taken in proceedings involving children.

INHERITANCE RIGHTS

The CRA prohibits any form of discrimination against a child on grounds of his ethnic group, place of origin, sex, religion or political opinion.[374] In addition, no child is to be subjected to any disability or deprivation merely because of the circumstances of his birth. This has profound implications on existing laws relating to inheritance, especially under customary law. This for instance invalidates any custom that distinguishes between 'legitimate' and 'illegitimate' children for the purpose of inheritance rights.[375] The same position is applicable to any conclusion that favours the male child in inheritance, especially to the exclusion of female children. The issue however assumes a certain complexity where the issue of inheritance arises after the child has attained the age of majority in which case recourse can only be made to constitutional provisions prohibiting discrimination.

CHILD RIGHTS IN NIGERIA POST CRA: IMPLEMENTATION IN THE STATES

[372] See Section 71(1) Matrimonial Causes Act
[373] Ibid
[374] Discrimination on these grounds is also prohibited under Section 42 of the Constitution of the Federal Republic of Nigeria 1999(as amended)
[375] For a greater discussion on legitimacy and child rights, see Chapter 3

Since the enactment of the CRA, 24 states in Nigeria have incorporated the provisions of the CRA into domestic legislation.[376] This development has been particularly commended by the Committee on the Rights of the Child with the Committee further recommending that the state 'ensure that those states that have not yet adopted the Child Rights Act do so within the shortest period possible'. [377] This in itself is not tantamount to implementation of the provisions of the CRA. In making concluding observations on the 2010 report submitted by Nigeria, the Committee on the Rights of the Child observed that many of its recommendations especially on matters relating to crime and juvenile justice had not been implemented. To that end, it particularly observed as follows:

> The Committee urges the State party to take all measures to address those recommendations contained in the concluding observations on the second periodic report that have not yet been implemented and to provide adequate follow-up to the recommendations regarding, inter alia, data-collection systems, the harmonization of minimum ages and definitions, the death penalty, juvenile justice, corporal punishment, and children with disabilities, contained in the present concluding observations on its combined third and fourth periodic report.[378]

In another part of its report, the Committee makes reference to the need for harmonization of state laws with federal legislation.[379] It was further observed by the Committee 'with serious concern' that certain states defined the child in a manner different from the CRA.[380] In light of the foregoing, one will proceed to examine the CRA in the light of state legislation in order to highlight any relevant disparities.

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[376] The Katsina State government has also announced its plans to domesticate the Act. See Danjuma, Micheal, 'Katsina State to domesticate the Child Rights Act' available at https://guardian.ng/news/katsina-state-to-domesticate-child-rights-act/ (last accessed 13th May, 2017)
[377] *Consideration of Reports Submitted by States Parties under Article 44 of the Convention, Concluding observations: Nigeria* Doc No; CRC/C/NGA/CO/3-4
[378] Ibid
[379] Ibid
[380] Ibid

As stated above, 24 states have implemented the Child Rights Act, albeit with some modifications. For instance while the CRA prescribes sanctions including a term of imprisonment and/or a fine for the failure of parents to fulfil their obligations with respect to the child's right to education, the Lagos State Child Rights Law(CRL) prescribes no such sanctions. Ogun state[381]Child Rights Law prescribes sanctions for causing a child to be betrothed, causing a tattoo or skin mark to be made on a child or subjecting a child to female genital mutilation.[382] It further goes on to define female genital mutilation, a definition absent in the CRA.[383] Unlike the CRA, a reasonable belief that the child was eighteen years or older at the time the act was committed is a defence to unlawful sexual intercourse with a child under the Ogun State Child Rights Law.[384] This is notwithstanding an exclusion of the defence of reasonable belief as to age and consent contained in the section.[385] This is also the position under the Child Rights Law of Cross River State.[386] No such defence however exists under the Child Rights Laws of Rivers, Plateau and Ondo states.

This inconsistency is extended to the severity of sanctions for rights violations. Under the CRA, an individual who has sexual intercourse with a child commits an offence and is liable upon conviction to life imprisonment. The Child Rights Laws of Cross River and Imo States prescribes life imprisonment as maximum punishment for the offence.[387] However, the Ogun state Child Rights Law imposes a term of 21 years as a maximum term of imprisonment[388] with the Rivers State Law prescribes as punishment a term of 14 years. With further regard to sexual behaviour, the Ogun state Child Rights Law considers 10 years as a minimum term of imprisonment for sexual exploitation other than rape as opposed to 14 years under the CRA and other state laws. With respect to

[381] Located in South-West Nigeria
[382] Child Rights Law of Ogun State(2006) Laws of Ogun State of Nigeria, Sections 23-25
[383] Ibid, Section 25
[384] Section 32
[385] Ibid
[386] Child Rights Law of Cross River state, Sections 32 (3) and 32 (4)
[387] Section 32(1) Laws of Cross River State No 10 of 2011, Section 32(1) Laws of Imo State No 6. Of 2004
[388] Child Rights Law of Ogun State supra n.119

child marriage and betrothal, while the CRA imposes a fine of 500,000 naira as punishment for being involved in child marriage or betrothal, Cross River state Child Rights Law prescribe a monetary punishment of 50,000 naira. An interesting question arises as to the particular motive behind the disparities in sanctions, especially as is relating to unlawful sexual intercourse. While such disparities cannot be categorically be linked to some cultural outlook, there are some notions relating to societal behaviour that may be relevant in establishing such disparities which would be considered in later chapters of this thesis.

Another area of difference between the Child Rights Act and the laws of the states is with respect to the age of majority stipulated. While the CRA sets the age of majority at 18, the Child Rights Law in Akwa-Ibom State sets the age of majority at 16 years with the child rights law in Jigawa state defining majority as a function of biological changes as opposed to age. [389] This distinction is particularly relevant in relation to criminal responsibility, contractual rights and marital obligations. It is to this end that the Committee on the Rights of the Child recommended a dialogue between government of various states and various stakeholders for the purpose of conceptualizing the child under 18 as being one with special rights and needs requiring protection. [390] Notwithstanding the incorporation of the CRA into the domestic law of states, it has hardly been used as a basis for litigation but merely referred to in a limited number of custody cases at High Court level.[391]

In the context of legislative protection of child rights, the CRA heralded the enactment of other legislation prohibiting different forms of right violations. In 2003, the Trafficking in

[389] *Concluding observations: Nigeria* supra n.276. It is however noted that in 2012, Jigawa State re-enacted a revised version of the Children and Young Persons Act (CYPA) incorporating some of the provisions of the CRA. The status of the Child Rights Law in Jigawa therefore remains unclear.
[390] Ibid
[391] See Adediran vs Adediran (2009) 7 LLR at 1, Oladapo vs Oladapo (2013) 11 LLR at 73, Nwabuoku vs Nwabuoku (2010) 7 LLR at 1. In these cases, it was only referred to for the purpose of affirming that in custody cases, the best interest of the child should be the primary consideration

Persons (Prohibition) Law Enforcement and Administration Act was enacted, establishing the National Agency for Prohibition of Traffic in Persons and Other Related Matters (NAPTIP) to eliminating the practice of child trafficking. In 2004, the Universal Basic Education Bill was also signed into law making provision for elementary and junior secondary education.[392] States have also passed various laws implementing protecting specific child rights outlined in the CRA.[393] Significantly, there is also as provided under federal legislation an express prohibition of the practice of female genital mutilation under the Violence Against Persons (Prohibition) Act 2015.[394]

With respect to practical enforcement of the CRA, more than ten states have established family courts to enforcing the provisions of the CRA and to this end drafted rules guiding the procedure in the family courts.[395] Under the Akwa-Ibom state civil procedure rules, a child is regarded as an applicant for the purpose of enforcing the rights of the child.[396] It is pertinent to note that the CRA never refers to the standing of the child to bring an action before the court. With respect to the family court structure, certain constraints still hinder the protection of the rights of children even in the family courts. Studies conducted by Ogunniran and Nwanna revealed that children's cases involving adult offenders were being heard in regular courts as opposed to the family courts supposedly established under the CRA.[397] This is in contravention of the unlimited jurisdiction vested in the family courts to hear all cases involving the child under the CRA. This is a serious problem especially given the fact that many violations of the rights of the child are committed by adults. It is to this end that Ogunniran and Nwanna have recommended

[392] A copy of the Universal basic Education Act is available at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/87623/99979/.../NGA87623.pdf (last accessed 4th August, 2017)
[393] See *Concluding Observations: Nigeria* supra n.276
[394] *Nigeria: Violence Against Persons (Prohibition) Act, 2015 (VAPP)* [Nigeria], 25 May 2015, available at: http://www.refworld.org/docid/556d5eb14.html [accessed 14 October 2017], Section 7.Some of the state child rights law contain provisions expressly prohibiting FGM (See for instance
[395] Ogunniran, I, 'A Centurial Legal History of Child Justice Reforms in Nigeria 1914-2014' (2015) *Law, Crime and History* Vol.2,44-68,65
[396] Akwa Ibom State Family Court (Civil Procedure) Rules (2009), Order 1
[397] Ogunniran, Iyabode and Nwanna, Chinwe, *Child Justice Administration under the Child Rights Law of Lagos* State (University of Lagos Press, 2016), 112

the need for clarification with respect to cases involving child victims and adult offenders.[398]

There are certain reasons adduced for the challenges encountered in practical implementation of the provisions of the CRA. According to Jones:

> Although the Nigerian federal government has passed a comprehensive Child Rights Act (2003), a number of state governments have not implemented it at state level and overall financial and human resourcing has been very limited, hampering its effectiveness. Along with often poor enforcement and insufficient documentation on rights violations, this means the principle of the child's best interests is often not embedded in government institutions and society.[399]

A lot more will be said concerning 'government insincerity' and ethnic diversity in relation to the implementation of the law in subsequent chapters. A few points are however worth stating at this point. First, there is currently no specific provision for children in budgetary allocation under the Federal Appropriation Act.[400] This arguably stems from the absence of any government parastatal that deals exclusively with children. Under the CRC, states are required to take steps at all levels of government to ensure that budgetary decisions are taken with the best interests of children as a primary consideration.[401] Considering the fact that the CRA has been enacted since 2003, the absence of any government ministry dealing with issues specifically related to children reflects a flagrant disregard for the best interests of children in the political sphere.

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[398] Ibid
[399] Jones, Nicola, 'Strengthening linkages between child rights protection and social protection systems in Nigeria' (2011) available at https://www.unicef.org/nigeria/NG_resources_62strengthlinkschildsocialprotection.pdf (last accessed 10th October, 2017), 2
[400] A copy of the 2017 Appropriation Act is available at http://www.budgetoffice.gov.ng/index.php/component/edocman/2017-appropriation-act (last accessed 4th August 2017)
[401] UN Committee on the Rights of the Child (CRC), *General comment no. 5 (2003): General measures of implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5, available at: http://www.refworld.org/docid/4538834f11.html [accessed 3 April 2017, para 51

Moderate advancements have nevertheless been made in the implementation of the CRA. At the very least, there is a consensus among the majority of states on a need to protect the rights of the child in form of legislation. An examination of state legislation implementing the CRA also shows a recognition of the CRA as the primary standard setting mechanism in this respect, a fact evidenced by a substantial incorporation of the provisions of the CRA into state law. Furthermore, there is indication in certain states of certain practical steps being taken by law enforcement agencies pursuant to the CRA. For instance, specialised police units in relation to children have been created in Lagos state, one of which units specifically handles cases of children involved in conflict with the law.[402] However, officers in these units remain largely untrained and ill-equipped to deal with matters relating to children.[403] Such lack of training is not limited to law enforcement agencies, as certain state governments appear to lack a proper understanding of the intent of the CRA. The Edo state government for example, in purported implementation of the CRA has in recent times reiterated an intention to sanction street traders and hawkers who are often children.[404] This is contrary to the aim of the CRA which aims to protect the rights and interests of the Nigerian child.[405] Notwithstanding its misdirected approach, the apparent effort by the said government to take steps towards protecting the interests of the child is commendable.

In concluding this section, it is important to reiterate the fact that the existence of legislation in itself does not necessarily guarantee the effective protection or implementation of the standards set out in the CRA. Notwithstanding the domestication of the CRA in 24 states of the federation, a sizeable percentage of children in Nigeria still remain at risk of rights violations in Nigeria.[406] There is an emergent consensus among

[402] Ogunniran, Iyabode and Nwanna, Chinwe, *Child Justice Administration under the Child Rights Law of Lagos State* supra n.397, 44
[403] Ibid
[404] Edo government to support child rights law implementation' available at http://universalreporters247.com/2017/01/edo-government-to-support-child-rights-law-implementation/
[405] See Preamble to the CRA
[406] In a survey conducted as recently as 2014 , Among 13 to 17 year old females, 47.6% experienced one or more forms of violence between 2013-2014. One in 3 females (31.4%) experienced one form of violence (sexual, physical, or emotional), 13.2% experienced two forms of violence and 3.1% experienced all three (See 'National Population Commission of Nigeria, UNICEF Nigeria, and the U.S. Centers for Disease Control

scholars and commentators alike that successive Nigerian governments have done far more in theory to protect Nigerian children than in practice.[407] In addition, there are possible influences of other social systems upon the content of legal communication which cannot be discountenanced.[408] The influences of these social systems upon the applicability and enforcement of the CRA would be examined in greater detail in later parts of this thesis.

CONCLUSION

In this chapter, the Child Rights Act has been examined having regard to the existing state of the law on the rights of the child. The relationship between the CRA and existing laws has also been considered, especially in the context of harmonization of child rights protection standards. While its status as federal legislation deems it representative of the position of the Nigerian government on child rights, the fact that states retain discretion as to its incorporation into domestic law creates a possibility of certain disparities between national and state law. These disparities have had a profound effect on crucial areas relating to the rights of the child including criminal responsibility, marital and contractual rights.

More importantly, the existence of state discretion has led to a situation where certain states, for various political and socio-cultural reasons, have refused to implement the provisions of the act in domestic state law. Moreover, there remains the problem of implementation of the standard of protection set out in CRA even in states where the CRA has been domesticated. Nevertheless, it is also noted that other legislation necessary to bring into effect the substantive rights set out in the CRA have also been enacted by both federal and state governments.

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and Prevention. Violence Against Children in Nigeria: Findings from a National Survey, 2014. Abuja, Nigeria: UNICEF, 2016'available athttps://www.unicef.org/nigeria/NIGERIA_VACS_FULL_REPORT_PUBLISHED.pdf (last accessed 17th October, 2017)

[407] Jones supra n.399, Nzarga supra n.277.

[408] Ibid

CHAPTER 5: REGIONAL AND INTERNATIONAL CHILD PROTECTION STANDARDS: THE CRA IN CONTEXT

> Member States of the Organization of African Unity Parties to the present Charter shall recognize the rights, freedoms and duties enshrined in this Charter and shall undertake to take the necessary steps, in accordance with their constitutional processes and with the provisions of the present Charter, to adopt such legislative or other measures as may be necessary to give effect to the provisions of this Charter.
>
> **-**Article 1 African Charter on the Rights and Welfare of the Child[409]

> States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention. With regard to economic, social and cultural rights, States Parties shall undertake such measures to the maximum extent of their available resources and, where needed, within the framework of international co-operation
>
> -Article 4 Convention on the Rights of the Child[410]

One of the most significant methods of assessing a country's child rights protection framework is the extent to which the child is specifically recognized as a rights holder under its domestic laws. Having outlined the provisions of the Child Rights Act (CRA) in the previous chapter, it is important to undertake an assessment of the CRA in the context of global and international child rights protection standards. For this purpose, one will examine the CRA in the context of both the Convention on the Rights of the Child (CRC) and the African Charter on the Rights and Welfare of the Child (African

[409] OAU Doc. CAB/LEG/24.9/49 (1990)
[410] UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989, United Nations, Treaty Series, vol. 1577, p. 3, available at: http://www.refworld.org/docid/3ae6b38f0.html [accessed 27 November 2015]

Charter). In the first aspect of this chapter, the provisions of the CRA will be compared with the rights provisions outlined under the CRC. This is necessary in order to assess the compatibility of the rights protection standards set out in both pieces of legislation and lay a proper foundation for the prospect of harmonization of the CRA and the CRC. The CRA will thereafter be examined in the context of the African Charter on the Rights and Welfare of the Child (African Charter).

The CRC and the CRA

Adopted by the United Nations General Assembly on 20th November,1989, the CRC 'recalls that, in the Universal Declaration of Human Rights, the United Nations has proclaimed that childhood is entitled to special care and assistance'.[411] It also regards the family as being the fundamental group of society and the natural environment for the growth of children.[412] There is in addition a recognition of the need for the child to grow up in a family environment to enhance the 'full and harmonious development of his or her personality'.[413] The child is also expected to be fully prepared to live an individual life in society.[414] At the onset, this 'child-centred' approach developed under the CRC seems to conflict with the understanding in the African societal setting where the child is viewed in the context of society as opposed to his or her individual status.[415] The CRC 'presumes to take account of the traditions and cultural values of each people for the protection and harmonious development of the child' which while not necessarily representing an accession to cultural dictates regarding the child represents an

[411] Preamble. It is noted that prior to the enactment of the CRC, separate non-binding declarations had been adopted in recognition of the need for children to be protected as right holders. The Declaration on the Rights of the Child (1924) recognized that 'mankind owes to the child the best it has to give' (*See Declaration on the Rights of the Child 1924* available at http://www.un-documents.net/gdrc1924.htm) set out as non- binding principles many of the provisions contained in the CRC (See D*eclaration of the Rights of the Child* (1959) G.A. res. 1386 (XIV), 14 U.N. GAOR Supp. (No. 16) at 19,U.N. Doc. A/4354.)
[412] Ibid
[413] Ibid
[414] Ibid
[415] See Chapter 2 for a more expansive discussion on the conception of childhood in the African setting

acknowledgment of different cultural notions as far as the status of the child in society is concerned.[416]

Pursuant to Section 12(1) of the Nigerian Constitution, no treaty entered into by the Nigerian government is applicable in Nigeria except to the extent as incorporated into Nigerian law by an express Act of the National Assembly. This implies therefore that the provisions of the CRC are only enforceable in Nigeria where a particular legislation incorporates such provisions. The particular implication of Section 12(1) on international treaties to which Nigeria is a party is difficult to decipher, as acknowledged by certain legal scholars.[417] It is nevertheless stated at this point that pursuant to this section, the accession of the Nigerian government to the African Charter and the CRC is of limited practical significance as far as Nigerian law is concerned unless similar provisions can be found in domestic law. There is the question of whether the CRA is an incorporating Act under Section 12(1). While the CRA takes into account the provisions of the CRC, the incorporation of the CRC into domestic law by the CRA is however not explicitly stated under the CRA. The lack of clarity in relation to the specific nature of the CRA itself presents a problem in the light of Section 12(1), an issue which would be further considered in Chapter 6 of this thesis.

Under the CRC, a child is defined as 'every human being below the age of eighteen years unless under the law applicable to the child, majority is attained earlier'. This in itself appears to serve as a compromise between different conceptions of the beginning and end of childhood. For as observed by Van Beuren:

[416] See Preamble to the CRC
[417] Egede, E, 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties' (2007*) Journal of African Law* Vol 51 No 2, 249-284

> Different but equally fundamental considerations apply to the end of childhood or the attainment of adulthood. There are enormous differences between societies and cultures as to the role of children within the family and the community, leading to inevitable differences in how communities view the duration of childhood. Nevertheless, there are a number of factors which are commonly applied to determine the end of childhood: the attainment of a particular age, the ability to perform specific functions. The minimum ages are inevitably arbitrary, as they cannot reflect the speed of development of each individual child.[418]

The CRA does not however give room for such a distinction. Under the CRA, a child is described as every individual below the age of eighteen years.[419] This is irrespective of the child's biological, mental or societal development. This approach arguably fails to reflect the respect for cultural and societal diversity evidenced under Article 1 of the CRC which is peculiar to say the least given the fact that Nigeria is, as noted in Chapter 2, a state comprising of over 250 ethnic groups with often contrasting notions on the determinants of childhood. Having said this, the respect for cultural diversity under Article 1 of the CRC may be deemed as a concession permitted for the purpose of respecting and protecting values of a people which comprise a member state, not necessarily each individual societal group in a member state. Thus, while the CRC may give room for cultural diversity, it does so in the context of each member state. This is evident in the Committee on the Rights of the Child's consideration of the state report on child rights protection submitted by the Nigerian government in 2010.The Committee in its Concluding Observations on the said report stated as follows:

> While noting that the Child Rights Act defines the child in accordance with the Convention and establishes the legal minimum age of marriage at 18 years, the Committee notes with serious concern that the definition of the child in

[418] Van Beuren, Geraldine, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, 1998),36
[419] Section 274

> some legislation domesticating the Child Rights Act at state level sets the age at 16 years (Akwa-Ibom state) or defines the child not by age but by "puberty" (Jigawa state), reportedly for the purposes of early marriages……..The Committee urges the State party to ensure that the definition of the child in legislation domesticating the Child Rights Act at state level is in full compliance with that of the Convention, including by amending the recently adopted Child Rights Laws in Akwa-Ibom and Jigwa states.[420]

In effect, while the Committee may have been willing to accept national legislation prescribing an age of majority below eighteen, it does not express similar sentiment with respect to subsidiary legislation within a member state. On the basis of the foregoing, the lack of exception in relation to the age of majority under the CRA for all intents and purposes is compatible with Convention standards. It is worth noting that at present, the above recommendation of the Committee with respect to legislative amendments in these states is yet to be implemented.

Under the CRC, the rights of the child are to be respected and ensured 'without discrimination of any kind'.[421] In incorporating this principle, the CRA provides that the child is not to be subjected to any form of discrimination on grounds of origin, sex, religion, political opinion or ethnicity. [422] However, there is no reference to such prohibition with respect to a child's parents or legal guardians whereas in the CRC, the characteristics of a child's parents or legal guardians are also prohibited grounds of discrimination. This is presumably on the ground that Section 42(1) of the Nigerian Constitution which prohibits discrimination on these grounds to individuals is recognized

[420] *Consideration of Reports Submitted by States Parties under Article 44 of the Convention; Concluding observations: Nigeria* (2010) CRC/C/NGA/CO/3-4, 26-27
[421] Article 2
[422] Section 10

as being applicable to children under the Act.[423] Such a presumption does not however imply compatibility of the CRA with the CRC with regard to non-discrimination. For instance, where a child is of a different ethnic group from his legal guardian, such a child may not be protected from discrimination where the ground in question is the ethnic identity of his or her parents or legal guardians. An example of such an outcome is reflected in an existent educational policy prevalent in the educational system where candidates from schools in the Northern part of Nigeria are admitted into federal unity schools with lower examination scores than is expected of their counterparts in the Southern part of Nigeria.[424] This, while presumably justified on the grounds of pupils in the North being educationally disadvantaged can be perceived as discriminatory towards pupils in the Southern part. It is possible to argue that children are being discriminated against on grounds of their ethnicity which in itself is explicitly prohibited under the CRA, especially bearing in mind the fact that the rights of the children are to be ensured without 'any kind' of discrimination.

Article 3 of the Convention regards the best interest of the child as being 'a primary consideration' in all actions concerning children.[425] The concept of best interest of the child has been extensively examined by various scholars with authors like Freeman regarding it as a 'paternalistic concept'.[426] In contrast with the CRC, the best interest of the child is 'the primary consideration' under the CRA.[427] In commenting on the drafting history of Article 3, Detrick observes the objective of the CRC drafters in opting for the word 'a' as ensuring there is sufficient flexibility, at least in certain extreme cases to

[423] Constitution of the Federal Republic of Nigeria (1999) available at http://nass.gov.ng/document/download/5820
[424] Joshua S, Loromeke, R.E and Olanrewaju, I; 'Quota System, Federal Character Principle and Admission to Federal Unity Schools: Barriers to Learning in Nigeria' (2014) *International Journal of Interdisciplinary and Multidisciplinary Studies* Vol 2 No 2, 1-10,6
[425] Article 3(1)
[426] M. Freeman, 'Article 3, The Best Interest of the Child' in A.Alen,J. VandeLanotte, E. Verhellen, F.Ang, E.Berghmans and M. Verheyde (Eds), *A commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden, 2007),50
[427] Section 1

enable the interest of people other than the child or children to prevail.[428] This may well imply ironically that giving priority to the interest of others other than children in extreme cases protects the child's best interest in a larger context. The use of the defining word 'the' in the CRA on the other hand implies that in all instances, the best interest of children must supercede all other interests. It remains to be seen whether such an approach is feasible in the practical realities of actions that involve children.

Article 4 imposes an obligation on the part of member states to ensure that all appropriate legislative, administrative and other measures for the implementation of Convention Rights are undertaken. To this end, the CRA also regards existing legislation on children as being superceded by the CRA.[429] It also sets up administrative bodies responsible for the implementation of child rights and establishes societal structures specifically aimed at protecting the rights of the child.[430] Article 5 of the CRC imposes upon state parties an obligation to respect the responsibilities, rights and duties of parents and extended family as the case may be to provide appropriate direction and guidance in the exercise of Convention rights. This function is exercised in a manner 'consistent with the evolving capacities' of the child. This provision does not constitute a comprehensive recognition of parental rights, neither does it impose specific duties on parents and other non-state actors.[431]

No general provision recognizing parental rights exists under the CRA except in relation to the responsibilities of children under the Act in which case parents and legal guardians are to provide the necessary 'guidance, discipline, education and training' for the fulfillment of the child's responsibilities.[432] However, the notion of parental obligations with respect to the enjoyment of substantive rights is a recurring theme throughout the

[428] Deitrick, Shannon, *A commentary of the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, 1999),91
[429] Section 274
[430] Sections 260-271
[431] Deitrick supra n.428, 119
[432] Section 20

CRA.[433] With respect to the child's enjoyment of freedom of thought, conscience and religion, there is a specific obligation on the part of all authorities to respect the duty of parents to provide guidance and direction in the exercise of such freedom.[434] This disparity between the CRA and the CRC can be attributed to the difference in backgrounds of the Nigerian and international community as represented by the United Nations. While modern rights discourse largely derives from principles promoted by secularist and non-religious philosophy, this is not the case in contemporary Nigerian society.[435] Research conducted by the Pew Research Center in 2012 showed the Nigerian population as being divided along religious lines between Christianity and Islam with 49.3% of its population being Christian and 48.8% being Muslim and only about 0.1% of its population having no religious affiliation.[436] This suggests that there is no overwhelming religious majority. As a result, incorporating the CRC through the CRA into a multi-ethnic, bi-religious society would have to incorporate certain compromises in order to ensure that its provisions are applicable in practice.

The child has an inherent right to life in both the CRA and the CRC. Under the CRC, states are to ensure 'to the maximum extent possible' the survival and development of the child.[437] Although there is no corresponding obligation explicitly stated under the CRA, the affirmation of the child's right to survival and development[438] implicitly imposes such an obligation. The CRA in addition further provides that the child has a right to bring an action for damages caused to the child 'willfully, recklessly, negligently or through neglect before, during or after the birth of that child'.[439] This provision serves to protect an unborn child from harm, a form of protection not recognized under the CRC. There is notably some lack of clarity even in the CRA with respect to this right. The CRA

[433] See particularly Sections 14 and 52
[434] Section 7(2)
[435] For more on the Philosophic foundations of human rights see Shestack, Jerome, 'The Philosophic Foundations of Human Rights (1998) *Human Rights Quarterly*,20 in McCorquodale (ed) *Human Rights* (Ashgate Publishing,2003) pp 3-37
[436] 'Religious Composition by Country' available at http://www.pewforum.org/files/2012/12/globalReligion-tables.pdf
[437]Article 6(2)
[438]Section 4
[439] Section 17

defines a child as being a 'person under the age of eighteen years'.[440] A 'person' is however not defined under the CRA in which case it remains unclear whether an unborn baby can be regarded as a 'person' for the protection under the CRA. A literal reading of the provisions of the CRA as well as reference to existing criminal laws suggests that this is the case. The Penal Code[441] for instance describes as an offence an individual 'causing a woman with child to miscarry' if not caused 'in good faith for the purpose of saving the life of the woman'.[442] This may either be perceived as a protection of the woman's right to life or an indirect protection of the right of the unborn foetus to develop naturally in the womb into a full human being.

The child is also recognized in the CRC as having the right to a name and nationality further to a right to know and be cared for by his or her parents 'as far as possible'.[443] Again, there is no mention of the latter right in the CRA, such right presumably encapsulated in other substantive rights guaranteed under the CRA.[444] The child's identity is respected under the CRC with state parties obliged to provide assistance and direction where a child is illegally deprived of some or all elements of his or her identity.[445] Furthermore, a child is not to be separated from his or her parents against their will except 'when competent authorities subject to judicial review determine, in accordance with applicable law and procedures' that such separation is necessary in the best interest of the child.[446] Similar provisions exist under the CRA in relation to alternative child protection measures such as fostering, adoption and state protection.[447] Pursuant to Article 11 of the CRC, states are to take measures to combat illicit transfer of children abroad. Such transfer of children is explicitly prohibited under the CRA and as

[440] Section 274
[441] (1959) Cap 89 Laws of Northern Nigeria 1963
[442] Section 234
[443] Article 7
[444] See for example Section 14
[445] Article 8
[446] Article 9(1)
[447] Sections 69, 84, 94 and 102

such no person is expected to remove a child out of the custody of his parents against his or her will.[448] This excludes the lawful removal of a child from parental custody.[449]

Article 12 guarantees the participatory rights of a child in judicial and administrative proceedings affecting the child. Thus the child has a right to express his or her views freely in all matters affecting the child, with his views given due weight in accordance with the age and maturity of the child. There is no substantive right guaranteed to the child in this respect under the CRA. However, Section 75 of the Act gives the Court power to consult the wishes of a child in custody proceedings before reaching a decision where the interests of the child is affected by the outcome of such proceedings. The child may also give unsworn evidence in civil proceedings[450] as well as cross-examine witness in juvenile justice proceedings.[451] Furthermore, children above the age of sixteen have the power under the CRA to give consent to scientific samples being taken from their body which 'shall be as effective as it would be if he had attained the age of majority'.[452] The participation of the child in decisions affecting the child under the CRA is in addition to the establishment of children's parliaments in all 36 states of the Federation.[453] Having regard to the foregoing, one would argue that the failure to explicitly state the right of children to be heard under the CRA does not automatically imply non-recognition of children as being capable of forming and expressing their own views.

Article 13 guarantees the right of the child to freedom of expression which would include the freedom to seek, receive and impart information and ideas of all kinds. The CRA does not however make any explicit provision for the expression of this right. It is suggested that pursuant to Section 3 of the CRA, one would assume that the child is guaranteed

[448] Section 27
[449] Article 27(1)
[450] Pursuant to an order of court to that effect
[451] Section 217
[452] Section 64
[453] *Concluding observations: Nigeria* supra n.276, para. 34

freedom of expression pursuant to constitutional provisions.[454] Section 39 of the Constitution regards every person as being entitled to freedom of expression, including freedom to hold opinions and impart ideas and information without interference.[455] This right, as is the case under the CRC, is however qualified to which end reasonably justifiable laws necessary for preventing the disclosure of confidential information, maintaining judicial independence and restricting public officers are still regarded as valid.[456]

Under the CRC, any limitations on the child's freedom of expression must be prescribed by law.[457] In addition, such limitations must be necessary for the protection and rights or reputation of others as well as the protection of national security, public order or of public health.[458] The reference to 'information and ideas of all kinds' implies a broad scope of the right to freedom of expression, which is not contemplated either under the CRA or the Constitution. The outright failure of the CRA to mention the right to freedom of expression is questionable to say the least, especially as is related to the conception of childhood. It appears to be the case that the child is not regarded as being an active citizen for the purpose of the freedom of expression. Section 39 of the Nigerian Constitution guarantees the right of 'every person' to hold opinions and to receive information which would certainly include children further to Section 3 of the CRA. Thus, notwithstanding the lack of explicit recognition of the freedom of expression under the CRA, it is indirectly protected and guaranteed as a constitutional provision. It is also worth noting that states have an obligation under the CRC to promote dissemination of material of social and cultural benefit to children, an obligation not explicitly recognized under the CRA.

[454] Under Section 3, fundamental rights provisions set out in the Constitution are deemed applicable to the child as though set out expressly in the CRA
[455] Section 39(1)
[456] Ibid
[457] Article 13(2)
[458] Ibid

Article 14 of the CRC respects the right of the child to freedom of thought, conscience and religion. It proceeds to 'respect the right and duties of parents or legal guardian to provide direction to the child in the exercise of this right.[459] There is no express duty imposed on parents in this regard. Furthermore, the freedom of religion is subject to lawful restrictions determined by factors such as public safety and the fundamental rights of others.[460] No such restrictions exist under the CRA. Apart from guaranteeing the right of the child to freedom of thought, conscience and religion,[461] the CRA imposes a duty on parents to provide appropriate guidance and direction in the exercise of this right by the child.[462] In effect, the parents have a duty to instruct the child in a particular manner. This position may lead to a conclusion of the family becoming a 'major testing ground for the success or failure of international human rights law'[463] at least as far as religious freedom is concerned. Article 15 recognizes, as does the CRA, the rights of the child to freedom of association and freedom of assembly. These rights are however subject to lawful restrictions and without prejudice to the right of parents to provide appropriate guidance.[464]

The problem of violence against children is also addressed under the CRA and CRC. Article 19 requires the state to take all appropriate legislative, administrative, social and educational measures to protect the child from all forms of physical or mental violence while in the care of parents or legal guardians. Such measures under the CRC include establishment of social support programmes and where appropriate, judicial intervention.[465] Section 11 of the CRA prohibits the subjection of a child to physical, mental or emotional injury, abuse, neglect or maltreatment while in the care of a parent or legal guardian. In instances where a child has been subject to abuse or ill-treatment

[459] Article 14(2)
[460] Article 14(3)
[461] Section 7(1)
[462] Section 7(2)
[463] Van Beuren, Geraldine, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers, 1998),163
[464] Articles 5 and 15(2) CRC, Section 6 CRA
[465] Article 19(2)

by parents or guardians, interested parties may bring a child before the court as one in need of care and protection.[466]

Socio-economic rights[467] of children are protected under the CRC in addition to their civil and political rights.[468] Article 24 of the CRC recognizes the right of the child to the enjoyment of the highest attainable standard of health to which end no child is to be deprived of his or her right of access to health care services. Under the CRA, the child is entitled to 'enjoy the best attainable state of physical, mental and spiritual health'[469] with every level of government and institution responsible for a child required to provide the highest attainable standard of health.[470] Notwithstanding the fact that the CRC makes no reference to the forms of health under Article 24, an examination of the CRC arguably indicates a holistic approach to child health incorporating various forms of health.[471] Article 28 recognizes the right of the child to education and states are to provide free basic primary education to all children.[472] Secondary, higher and vocational education is also to be made available and accessible to all.[473] The CRA guarantees the right to education in a similar context and proceeds to state that a female child who is pregnant before completing her education retains the opportunity to complete her education after delivery.[474] Furthermore, it is regarded as compulsory under the CRA that the child completes primary and junior secondary education[475] with parents or guardians being liable to community service, a fine or imprisonment for failing to fulfill their duties in this regard.[476] There is nothing under the CRC to suggest the criminalization of a failure to ensure that the child completes education at these stages. The CRC however requires

[466] Section 41
[467] Rights guaranteed under the International Convention on Economic, Social and Cultural Rights (ICESCR). A copy of the ICESCR is available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx
[468] Rights guaranteed under the International Covenant on Civil and Political Rights (ICCPR). A copy of the ICCPR is available at http://www.ohchr.org/en/professionalinterest/pages/ccpr.aspx
[469]Section 13(1)
[470] Section 13(2)
[471] For instance the prohibition on torture as well as inhuman or degrading treatment may be regarded as being in furtherance of a child's emotional health with the guarantee of the freedom of thought, conscience and religion aiding spiritual health.
[472] Article 28(1a)
[473] Article 28 (1b)
[474] Section 15(5)
[475] Section 15(2)
[476] Section 15(6)

that states 'take measures to encourage regular attendance at school and the reduction of dropout rates'.[477] The propriety of criminal prosecution for a failure to provide junior secondary education, which is not even regarded as compulsory under the CRC remains to be seen.

Child work is not explicitly prohibited under the CRC. The child is however protected from 'any work that is likely to be hazardous or to interfere with the child's education'.[478] Labour 'likely to harm the child's health or physical, mental, spiritual, moral or social development' is also prohibited under the CRC.[479] The CRA while prohibiting the latter form of labour makes no reference to work 'likely to interfere with the child's education'. It nevertheless states that a child is not to be used for any purpose that deprives the child of the opportunity to attend and remain in school.[480] There is a possible argument that a focus on attendance may exclude other aspects of labour with a negative impact on overall educational development for example time consuming domestic work. The CRA contemplates the employment of a child in 'light work of an agricultural, horticultural or domestic character'.[481]

It is possible that in certain contexts, such work as is contemplated under the CRA can negatively impact the overall educational development of the child while not restricting the formal attendance of the child in school. A joint reading of the provisions of the CRA prohibiting exploitative labour likely indicates that the CRA does not envisage such labour.[482] For as noted by Omoike, a child undertaking domestic activities within his or her home is common place and acceptable in many parts of the world.[483] Nevertheless, such work is open to exploitation and abuse when undertaken in third party homes, a

[477] Article 28(1e)
[478] Article 32(1)
[479] Ibid
[480] Section 30
[481] Section 28(1b)
[482] Sections 28 and 30
[483] Omoike, Evelyn,'In the best interest of the child: 'The case of child domestic workers in Ghana and Nigeria' in Ansell and Imoh (eds) *Children's Lives in an Era of Children's Rights: The progress of the Convention on the Rights of the Child in Africa* (Routledge,2013),125

distinct possibility in cases where for instance children are sent to live with relatives.[484] There is no definition of 'family environment' in the act and the definition of 'family' under the CRA is in relation to 'children in need' in which context family is defined as 'including a person who has parental responsibility for the child and a person with whom the child is living or has been living'.[485] It is submitted that this definition remains unclear and as a result, the question of whether a child functioning as a 'domestic help' while in the care of a relative is a violation of the prohibition of exploitative labour under Section 28 of the CRA remains a function of interpretation.[486]

In similar manner to the CRA, the CRC calls for the prohibition of the use of children in the illicit use of narcotic drugs and substances.[487] Children are also protected from all forms of sexual exploitation and abuse as well as the abduction or trafficking of children.[488] Article 37 imposes upon states an obligation to ensure that no child is subjected to torture or other cruel, inhuman or degrading treatment. To this end, there is a prohibition of capital punishment or life imprisonment without possibility of release for offences committed by persons below eighteen years of age.[489] For the purpose of criminal sanction, a child remains an individual below the age of eighteen years without exception to the age of majority prescribed by the law of the state. The CRA also makes similar prohibitions and in addition states that corporal punishment is not to be inflicted upon a child pursuant to a criminal sanction.[490] Although there is no explicit prohibition on corporal punishment either as a means of criminal punishment or discipline in domestic settings under the CRC, the Committee on the Rights of the Child considers the

[484] Ibid
[485] Section 277
[486] More information on child labour may be found in the International Labour Organisation (ILO) Conventions such as the Minimum Age Convention 1973 available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO::P12100_ILO_CODE:C138 (last accessed 21st April 2017) and the Worst Forms of Child Labour Convention 1999 available at http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:12100:0::NO:12100:P12100_INSTRUMENT_ID:312327:NO (last accessed 21st April 2017)
[487] Section 25 CRA, Article 33 CRC
[488] Section 28 CRA, Article 34 CRC
[489] Article 37(a)
[490] Section 221 (1b)

inflicting of corporal punishment in any context as constituting abuse and inhuman treatment which is prohibited under Article 39 of the CRC.[491]

Article 40 addresses juvenile justice and recognizes that children accused of infringing the law have a right 'to be treated in a manner consistent with the promotion of the child's sense of dignity and worth'.[492] Due process rights such as non-retrospectivity of the law, presumption of innocence, prompt information of charges, impartiality of the judiciary and right of appeal are also guaranteed under the CRC.[493] Similar provisions exist under the CRA with respect to juvenile justice.[494] There is however no minimum age of criminal responsibility prescribed under the CRA, a fundamental aspect of juvenile justice under the CRC.[495] The provisions of the CRA in this respect is ambiguous at the very least. Section 204 provides that 'no child shall be subjected to the criminal justice or to criminal sanctions'. Given that a child under the CRA refers to an individual below the age of eighteen years, this should imply that the criminal justice process is inapplicable to an individual below the age of eighteen years. Notwithstanding, a child who allegedly performs an act 'which would constitute a criminal offence if he were an adult' may be subject to the child justice system further to Section 204 of the CRA.

Thus while the CRA categorically excludes individuals under the age of eighteen from the adult judicial process, it makes no provision for any category of children that may be exempted from the justice system altogether. There may be reasons for this. A fundamental problem with setting an age of minimum criminal responsibility is the basis upon which such an age is determined. The variation in development among children

[491] UN Committee on the Rights of the Child (CRC), *General comment No. 8 (2006): The Right of the Child to Protection from Corporal Punishment and Other Cruel or Degrading Forms of Punishment (Arts. 19; 28, Para. 2; and 37, inter alia)*, 2 March 2007, CRC/C/GC/8, available at: http://www.refworld.org/docid/460bc7772.html [accessed 23 November 2015]
[492] Article 40(1)
[493] Article 40(2)
[494] Section 200. See also Sections 210 and 215 CRA
[495] Article 40(3a) of the CRC directs states to 'promote establishment of laws applicable to children with particular emphasis on the establishment of a minimum age below which children are presumed as lacking capacity to infringe the penal law

implies that to an extent, any minimum age developed in this context would never be representative of the mental and physical condition of all children to whom it applies. Another problem may relate to a lack of consensus and a 'reluctance to impose on the religious and cultural traditions that may have influenced the setting of the age.[496] In commenting on the existing age of minimum criminal responsibility under the Criminal Code, Adeyemi observes as follows:

> The truth of the matter is that the argument that a child below seven years of age lacks discretion to form the mens rea is false….It is clear from psychological evidence relating to moral realism and sense of justice that even children between ages 4 to 8 years are definitely capable of foreseeing consequences of their actions and acting with the desire that these consequences should occur……..the age of seven years is definitely arbitrary, as it does not connote any rationality or acceptability in line with considerations of psychological growth, emotional maturation process, mental growth, socialization process…..[497]

One may question the accuracy of the above statement in terms of the lack of connection between the minimum age referred to and rationality or acceptability. There is a difference between the awareness of a child as to the consequences of his or her actions and the capacity of the child to understand the nature of the consequences and the implications of such consequences on his or her actions. The former is a function of mental development while the latter, as ironically observed by Adeyemi himself incorporates other considerations such as social interaction and emotional maturation. Thus, a child below the age of five for example may understand the fact that his or her actions carry consequences and still be unprepared to handle such consequences based on a lack of an all-round understanding of the action itself. In any case, even the

[496] Van Beuren, G, "Article 40: Child Criminal Justice", in: A.Alen, J.VandeLanotte, E. Verhellen, F.Ang, E.Berghmans and M.Verheyde (eds) *A commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers, Leiden,2006),23

[497] Adeyemi, A.A, 'Re-assessing the age of criminal responsibility in Nigeria' in Osinbajo and Awa-Kalu (eds) Women and Children under Nigerian Law (1988) *Federal Ministry of Justice Law Review Series* Vol 6, 201-202

Committee on the Rights of the Child recognizes the fact that very young children have the capacity to infringe the penal law.[498] The development of a minimum age is therefore not necessarily based on lack of capacity to commit a crime but simply to establish, presumably on 'humanitarian grounds'[499] and an irrefutable presumption that children cannot be formally charged and held responsible in a penal law procedure.

Nevertheless, it is not in question that any age of minimum criminal responsibility under existing laws, and indeed any other prescribed minimum age would possess to an extent a certain degree of arbitrariness. It is submitted that even the age of eighteen is in itself largely arbitrary considering the assumptions implied about an individual's physical, mental and social development at such an age. The CRA seems to have incorporated Adeyemi's recommendation that the ages of criminal responsibility be abolished and all cases of juveniles be referred to juvenile courts for appropriate action. While this may seem to eliminate the prospect of a minimum age of criminal responsibility, it also implies a 'non-discriminatory full application of juvenile justice rules to all persons under the age of 18 years' as envisaged by the Committee.[500]

Having considered the provisions of the CRC in the context of the CRA, it is recognized that provisions of the law of a member state may be more favorable to the realization of the rights of the child to which end Article 41 states that the CRC does not invalidate any provisions in state law which are more conducive to the realization of the rights of a child. Thus any gaps existent in the CRC may be filled by the CRA without such provisions being contrary to the CRC as long as such provisions operate to promote the interest of the child in a manner superior to the standards set out in the CRC.

[498] UN Committee on the Rights of the Child (CRC), *General comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007, CRC/C/GC/10, available at: http://www.refworld.org/docid/4670fca12.html [accessed 23 November 2015]
[499] Adeyemi supra n.497
[500] Ibid

The African Charter and the CRA

The African Charter was adopted by the Organization of African Unity (now known as the African Union) on 11th July,1990. One of the reasons as noted by Viljoen for the adoption of the African Charter was the limited involvement of African States in the drafting of the CRC.[501] This is reinforced by the fact that as at 1989, only nine African states were involved in the activities of the working group responsible for drafting the CRC.[502] In view of the limited involvement of African states along with the fact that certain peculiarities of the African society were apparently omitted in the CRC[503], there was the need for the adoption of a regional instrument specifically addressing the needs of African children. Nigeria is a party to the African Charter, having ratified the Charter on 23rd June, 2001.[504] Thus the CRA may also be compared with the African Charter in order to assess the compatibility of the Act with regional standards of child rights protection. At the very least, it is unlikely that accusations of 'eurocentrism' which may bedevil the CRC can be deemed applicable to the African Charter. In addition, the African Charter can be observed as being more culturally sensitive to the peculiarities of the Nigerian society in a socio-economic and cultural context.

The African Charter considers human rights as paramount and also recognizes pursuant to the Declaration on the Rights and Welfare of the child[505] the need to take appropriate measures to promote and protect the rights and welfare of the African Child.[506] It especially notes with concern the critical situation of most African children due to the

[501] Viljoen, Frans, *International Human Rights law in Africa* (2nded first published 2007, OUP, 2012),392
[502] Ibid
[503] Ibid
[504] 'Ratification of International Human Rights Treaties: Nigeria' available at https://www1.umn.edu/humanrts/research/ratification-nigeria.html
[505] The Declaration on the Rights and Welfare of the African Child was adopted by the member states of the Organization of African Unity (Now African Union) at its sixteenth ordinary session held between 17th and 20th July 1979. A copy of the document is available at http://www.au.int/en/sites/default/files/decisions/9526-assembly_en_17_20_july_1979_assembly_heads_state_government_sixteenth_ordinary_session.pdf (last accessed 24th November,2015)
[506] African Charter on the Rights and Welfare of the Child, OAU Doc. CAB/LEG/24.9/49 (1990), *entered into force* Nov. 29, 1999 available at https://www1.umn.edu/humanrts/africa/afchild.htm (last accessed 24th November,2015) Preamble

unique socio-economic, cultural, traditional and developmental circumstances.[507] The African Charter further takes into account the virtues of the African cultural heritage and historical background of the African Society and notes the CRC as a particular influence on the adoption of the Charter.[508] Under the Charter, a child is referred to as every human being below the age of 18 years which is also the definition provided under the CRA.[509]

Unlike the CRC, there is no exception for national law setting an earlier age of majority under the African Charter. The child under the African Charter enjoys the rights set out under the charter with no discrimination based on any of the following grounds: race, ethnic group, colour, sex, language, religion, political or other opinion, national and social origin, fortune, birth or 'other status'.[510] In doing so, it refers to additional grounds not contemplated under the CRC or the CRA. The best interest of the child is 'the primary consideration' as is the case under the CRA.[511] The complexity of the concept is also well-recognized and in the African context, it is said to assume a greater degree of complexity in the lives of a 'disadvantaged group of children such as domestic workers.[512] However, the African Charter expressly provides for the child's right to be heard in judicial or administrative proceedings subject to the condition that such a child is 'capable of communicating his/her own views'.[513] Unlike the African Charter, the CRA does not make explicit provision for the right of the child to communicate his/her views in 'all judicial or administrative proceedings'. Under the CRA, the Court has the right to consult the child with respect to orders made for the production of the child by a parent

[507] Ibid
[508] Ibid
[509] Article 2
[510] Article 3
[511] Article 4
[512] Omoike supra n.483
[513] Article 4(2)

in custodial proceedings.[514] The child may also give evidence in criminal or civil proceedings[515], even in juvenile justice proceedings where the child is a defendant.[516]

Under Article 5 of the African Charter, the child is guaranteed the right to life, a right that must be protected by law. As a result, the death penalty cannot be imposed for crimes committed by children.[517] The child in addition has the right to a name, acquisition of nationality and registration.[518] Article 7 guarantees to every child capable of communicating his or her own views the right to express opinion freely 'in all matters' with the right only subject to restrictions prescribed by law. There is no mention as in the CRC of any factors necessitating the enactment of laws restricting such freedom under the African Charter. It nevertheless guarantees the right to freedom of expression, a right omitted under the CRA. With respect to the freedom of thought, conscience and religion, it imposes upon parents an obligation to provide guidance and direction to the child with regard to the evolving capacities and best interest of the child.[519] This obligation, as discussed above, is existent in the CRA but absent in the CRC. The child further enjoys the right to free association 'in conformity with the law' and protection from 'arbitrary or unlawful interference with his privacy, family home or correspondence'.[520]

A striking difference between the CRA and the African Charter is in the nature of the right to education guaranteed in both documents. While the African Charter specifically sets out the aims of education which include promotion and development of child's personality, fostering respect for human rights, preserving positive African morals and

[514] Section 75
[515] Section 160
[516] Section 217
[517] Article 5(3)
[518] Article 6
[519] Article 9
[520] Article 10

preparation of the child for a responsible life in a free society,[521] the CRA sets out no explicit aims of education. In fact, the CRA only prescribes as fundamental the right of the child to free, compulsory and universal basic education.[522] It appears to be the case that under the CRA, there is greater focus on ensuring a formal attendance at an educational institution than the nature and quality of instruction received.

As may be observed under the African Charter and the CRC, the right to education under human rights law is directed at achieving a particular aim. This distinguishes the right to education in a human rights context and education in the context of a mere social service. This is not the case under the CRA. It is submitted that while there is supposedly a right to education under the CRA, it is not defined in the context of the promotion of fundamental rights unlike other human rights instruments. Having said that, in outlining the nature of a child's responsibilities, Section 19 of the CRA also imposes a duty upon parents and institutions responsible for the education of the child to provide such education as is necessary to ensure that the child performs his responsibilities as outlined under the CRA.[523] Among others, these responsibilities include respect for the ideals of democracy, freedom, equality, humaneness, honesty and justice for all persons.[524] These ideals are in consonance with general considerations grounding the concept of human rights.

Article 12 guarantees the right of the child to leisure, recreation and cultural activities while Article 13 ensures that every child who is mentally or physically disabled has the right to special measures of protection. Article 14 guarantees the right to health with states required to take measures to among other things reduce child mortality rate, provide adequate nutrition and safe drinking water. The child is also shielded from 'all forms of economic exploitation and from performing work likely to be hazardous or

[521] Article 11
[522] Section 15(1)
[523] Section 20
[524] Section 19

interfere with child's physical, mental, spiritual, moral and social development.[525] Unlike the CRC and the African Charter, the CRA does not generally prohibit all forms of labour hazardous or likely to interfere with development. There is a prohibition under the CRA on allowing a child to 'lift, carry or move anything so heavy as to be likely to adversely affect his physical, mental, spiritual, moral or social development'.[526] There is a notable omission of the word 'interfere' in this context. This may be attributed to the potential of the inclusion of the word 'interfere' to broaden the application of the provision to domestic work (in a non-commercial, family context) which, while not necessarily so significant as to be considered hazardous, may limit to an extent the enjoyment of rights such as leisure and education. Moreover, the omission of the word 'interfere' does not necessarily suggest that the CRA contradicts either the CRC or the African Charter. Section 30 of the CRA prohibits the use of children for actions such as begging for alms, guiding beggars, prostitution, slavery, hawking of goods on highways or in brothels and for purposes depriving the child of the opportunity to attend and remain in school.[527] This is irrespective of the agent responsible for such an action in which case even parents or legal guardians cannot use their children for such purposes.

States are required under Article 16 to protect the child from all forms of torture, inhuman or degrading treatment in like manner with the CRA and CRC. The child is also protected under Article 16 from physical or mental injury or abuse including sexual abuse. Article 17 regulates the administration of juvenile justice. Under Article 17, states are required to protect the child's due process rights as well as his right to be treated in a manner consistent with his dignity and worth.[528] It is also worth noting that the African Charter, like the CRC, also explicitly provides that 'there shall be a minimum age below which children shall not be presumed to have the capacity to infringe the penal law'.[529]

[525] Article 15
[526] Section 28(b)
[527] Sections 30
[528] Article 17(1) and (2)
[529] Article 17(4)

The deliberate exclusion of a minimum age of criminal responsibility under the CRA is therefore neither in consonance with the provisions of the CRC or the African Charter.

The family is the basis of society under the African Charter and the family is to enjoy the protection and support of states for its establishment and development.[530] Every child is entitled to the enjoyment of parental care and protection and no child shall be separated from his parents against his will, except when a judicial authority determines in accordance with the appropriate law that such separation is in the best interest of the child.[531] Parents responsible for the child are primarily responsible for the upbringing and development of the child and are to ensure that the best interest of the child are their basic concern at all times and have to secure within their abilities and financial capacities, conditions of living necessary to the child's development.[532] Significantly, parents are to ensure that 'domestic discipline is administered with humanity and in a manner consistent with the inherent dignity of the child'.[533] This raises issues as to the compatibility of corporal punishment with the African Charter. While there is no express prohibition in that regard (as is the case under the CRC), one may interpret the above provision as implying such prohibition bearing in mind General Comment 8 of the CRC which regards corporal punishment as being degrading punishment which should be prohibited and eliminated in all its forms.[534] Under the CRA, there is a general prohibition on physical, mental or emotional abuse.[535] Corporal punishment is prohibited only in the context of judicial sanctions[536] with the CRA silent on discipline in other contexts. One may infer from this a general recognition of the fact that while the method of discipline of a child remains largely at the discretion of the family and educational institutions as the case may be, there is no room for the exercise of discipline in such a manner as to

[530] Article 18(1)
[531] Article 19(2)
[532] Article 20
[533] Section 20(1a)
[534] See *General comment no 8 on the right of the child to protection from corporal punishment and other cruel or degrading forms of punishment* (2006) CRC/C/GC/8
[535] Section 11
[536] Section 221

cause bodily harm to the child. Thus the question of corporal punishment in the domestic setting being prohibited may be a function of the degree of physical or emotional harm caused by the infliction of corporal punishment.

Article 21 of the Charter protects the child from harmful social and cultural practices and as such imposes an obligation upon states to eliminate practices which affect the 'welfare, dignity, normal growth and development of the child'. Customary practices prejudicial to the health or life of the child as well as discriminatory practices are to be prohibited by member states.[537] There is in addition an express prohibition of child marriage and betrothal with states required to take action as would establish the minimum age of marriage at 18 years.[538] The CRA provides that 'no person under the age of 18 years is capable of contracting a valid marriage, and accordingly a marriage so contracted is null and void and of no effect whatsoever'.[539] One questions the validity of such provision as a prohibition on child marriage. The intent to criminalize the practice of child marriage is evident in Section 23 of the CRA which provides that any person who 'marries a child' commits an offence and is liable on conviction to a fine or a term of imprisonment. However, given that a child is incapable of contracting a marriage under the CRA, it may be argued that no marriage that may serve as the basis of criminal prosecution is in existence and an individual penalized under this section is being punished for a non-existent offence. There remains in addition the question as to the appropriateness of the criminalization of the act of child marriage especially given the fact that other individual rights may also be in issue especially having regard to the religious and cultural notions grounding the said practice. In the CRA and African Charter, children are protected from taking a direct part in hostilities and as a result children are not to be recruited into the armed forces. In addition, children are protected

[537] Article 21(1) (a) (b)
[538] Article 21(2)
[539] Article 21(2)

under the charter from sexual exploitation,[540]drug abuse[541], sale[542], trafficking[543] and abduction.[544]

As with the CRA, the African charter explicitly sets out responsibilities expected of the child towards his family, society, the state, other legally recognized communities and the international community.[545] The child in particular has a duty to respect parents,[546]serve his national community, [547] preserve national solidarity, [548] strengthen African cultural values, preserve the independence of his country and contribute to the promotion of African Unity. In the rights context, the existence of duties under the African Charter may appear contradictory and controversial. In addressing such possibilities, Viljoen states as follows:

> Duties, even the extreme duty of obeying a parent 'at all times' must not be read out of context. These duties are made subject to the 'age and ability' of the child and are further subject to such limitations as may be contained in the present charter……These duties cannot be enforced against children…..[549]

Viljoen further highlights the best interest of children as being the overriding consideration even in the context of duties and responsibilities. [550] This reasoning is applicable in the context of the CRA, which incorporates the provisions of the African Charter in this context. The CRA in addition imposes a duty upon parents and institutions involved in the care and maintenance to provide the 'necessary guidance, discipline, education and training' for observing these responsibilities. [551] In applying Viljoen's

[540] Article 27
[541] Article 28
[542] Article 29 (a)
[543] Ibid
[544] Ibid
[545] Article 31
[546] Article 31(a)
[547] Article 31(b)
[548] Article 31(c)
[549] Viljoen, supra n.452,394
[550] Ibid
[551] Section 20

analysis, it is argued that the responsibilities of parents and other relevant institutions in this instance is not a license to violate the rights of children as the responsibilities of the child are subject to limitations contained in the Act and any other law, presumably such laws as protect the interest of children. In any case, there is no sanction specifically prescribed under the Act for a failure by children to fulfill these responsibilities except to the extent as may be prescribed under the law relating to juvenile justice.

In concluding this section, it is worth noting that other African countries have also made the CRC and the African Charter of domestic effect. While a comparative analysis of the CRA with child rights protection legislation in these countries is beyond the scope of this thesis, it is worth noting for instance that the best interests of the child under the Children's Act of Ghana is regarded as 'the primary consideration' in similar manner to the CRA and the African Charter.[552] It however makes no reference to the notion of child responsibility, instead limiting the concept of responsibility to the parents.[553] The Child Rights Act of Sierra Leone also makes no explicit reference to child responsibility but directs as a focus of parental guidance 'fostering the development of a sense of responsibility' into a child.[554] The Children's Act of South Africa considers the child as having responsibilities towards the state, community and family as 'appropriate for his age and ability'.[555] This highlights the different approaches to the concepts considered under the CRC and further calls into question any supposed notion of a distinctly 'African' perspective of child rights, an issue which would be examined in greater detail in other parts of this thesis.

[552] Children's Act 1998 Act no 560 available at http://www.unesco.org/education/edurights/media/docs/f7a7a002205e07fbf119bc00c8bd3208a438b37f.pdf (last accessed 13th December, 2016),Section 2
[553] Ibid, Section 6
[554] Child Right Act 2007 available at http://www.sierra-leone.org/Laws/2007-7p.pdf (last accessed 13th December, 2016),Section 43
[555] Children's Act no 38 of 2005 (as amended by Children's Amendment Act 41 of 2007) available at http://www.justice.gov.za/legislation/acts/2005-038%20childrensact.pdf (last accessed 13th December, 2016) Section 16

THE CRA, AFRICAN CHARTER AND CRC: AN OVERALL ANALYSIS

In this chapter, the relationship between the CRA and international standards of child rights protection has been examined through a comparative analysis of the CRA with the CRC and the African Charter. Regional standards of child rights protection have also been compared with the CRA with the African Charter serving as the focus of comparison. The disparities between these instruments, while not necessarily negligible, are not so significant as to give rise to any conclusions of outright incompatibility. For instance, the best interest of the child, while regarded as 'a primary consideration' under the CRC, can in every sense of its interpretation and practical implementation be regarded as 'the primary consideration' in all actions concerning the child under the CRC, which is the case under the CRA and African Charter.

The tension between the best interest concept and the right of the child to be heard is also well-documented for which purpose Freeman recognizes the need for children to be assured of their views being heard and given due weight. [556] However, such a consideration may itself give rise to practical difficulties, especially in the African/Nigerian context. There is the possibility that children's views as to what is in their best interest may conflict with one right while simultaneously promoting another. An example is with respect to the case of domestic workers interviewed by Omoike who considered domestic work outside the family environment as being more suitable in the circumstances than being with their family, given the increased opportunities to fulfill other rights such as education.[557] On this basis she concludes that while it is not feasible to solely use the views of children to determine their best interests, it is possible to consider their views in relation to the particular intervention measure in cases where their rights are being violated or interfered with.[558]

[556] Freeman , Micheal, *The Moral status of children: Essays on the Rights of the Child* (Martinus Nijhoff Publishers,1997), 57
[557] Omoike supra n.483,135
[558] Ibid

The CRA does not adequately provide for the right of children to be heard in the manner envisaged by Article 12 of the CRC. In contrast with the various protectionist measures existent in the CRA, there is little by way of explicit reference to the participatory rights of children in all actions taken concerning them. This outcome is especially significant given the all-encompassing definition of children as being individuals below the age of 18 in which case there is little room for older children to participate. The limited participatory rights of children can be linked with the responsibilities of children outlined under both the African Charter and the CRA. Children are expected to 'respect their parents and elders'[559] and according to research conducted into participation of children in the Niger-Delta Region, there is an impression that children being able to voice their own opinion may lead to questioning or contradicting adults which could be deemed disrespect.[560] It is difficult to assess at this point the legitimacy of such a concern, especially given the sparse nature of research relating to the general behavior of the contemporary Nigerian child. As discussed in chapter 2, traditional values are still noticeable even in the urban family where children have a 'greater voice' in the family and enjoy greater interaction with their parents.[561] Assuming a suitable balance between greater parent-child interaction and retention of traditional values relating to respect of authority is established, the concern highlighted above may well be unfounded.

Another significant area of distinction between the CRA and the CRC is in the role assigned to parents in terms of providing instruction and guidance, in particular to the exercise of the child's freedom of thought, conscience and religion. The CRC imposes no specific obligations in this regard but the CRA and the African Charter foists upon parents the said obligation having regard to the evolving capacities and best interest of the child.[562] The CRA in particular provides that the right of the child 'to be brought up in and practice his religion' shall be a paramount consideration where custody or guardianship

[559] Okyere, Samuel and Imoh, Afua Twum-Danso, 'Making the case for a broader definition of child participation' in Ansell and Imoh (eds)supra n.483, 215-216
[560] Ibid
[561] See Chapter 2 for more discussion on the Nigerian child in the 21st Century
[562] Section 7 CRA, Article 9 *African Charter* supra n.505

is in issue.[563] It is unclear in this aspect what is determined as the religion of a child, especially with the limited participatory rights provided to the child under the CRA. An examination of the religious setting of the Nigerian society leads to a conclusion that the religion envisaged in this context is such as the child has been brought up in by his parents. It appears from the foregoing that the religious background of a child's parents is the object of protection as opposed to a child's independent religious views. However, the reference to the best interest and the evolving capacities of the child with the use of the words 'guidance' and 'direction' may also imply a greater recognition of the child's involvement in the choice of religious and conscientious beliefs as permitted by the level of his emotional, mental and psychological development.

It is stated at this point that a comparative analysis of the CRA with the CRC or African Charter is not tantamount to an assessment of the inferiority or superiority of any of the instruments. The CRC, while representing the fundamental standard-setting instrument in the global community, is not itself without errors and inconsistencies. As observed by Fortin, 'it would be foolish to deny the existence of compromises and internal inconsistencies within the convention'.[564] One of such compromises is in the age of majority being subject to the law of a member state. In addition, the CRC has especially in the African context, been described as omitting some issues 'of particular interest and importance' to children in Africa such as the situation of children living in apartheid, practices prevalent in African society, socio-economic disadvantages and the African conception of communal responsibility and duty.[565]

This criticism may be appropriate to an extent. It is possible to argue that these issues are topical components of general rights and freedoms addressed under the CRC. In any event, it is unrealistic to assume that the CRC, which is in essence a political agreement

[563] Section 7(4)
[564] Fortin, Jane, *Children's rights and the developing law* (3rd ed, first published 1998, OUP, 2009),44
[565] Viljoen supra n.265, 392

of various sovereign states can consider every particular issue relating to each member state. Notwithstanding, the criticism as to lack of specific engagement of the CRC with predominantly 'African' issues retains some validity. Having said that, the African Charter itself is not without its weaknesses. The Charter fails to provide for the right to social security and makes no reference to the child's right to receive information as envisaged in the CRC.[566] Viljoen also particularly observes as disconcerting the potential of 'lawful restriction' clauses eroding the enjoyment of rights under the African Charter.[567]

The fundamental question arising at this point is the extent to which the CRA may have addressed these concerns observable in the CRC and African Charter. An examination of the CRA reveals a specific and extensive engagement with matters related and incidental to the substantive rights guaranteed under both the African Charter and the CRC. A notable limitation is however with respect to the participatory rights of children guaranteed under the CRC. There is a conspicuous lack of interaction with the participatory rights of the child. This may be connected to the cultural perceptions regarding childhood and the status of the child as one who is merely 'seen and not heard' in an adult environment. Having said this, the beliefs of welfare and rights practitioners about the activities and experiences suitable for child life may differ radically from those of parents and children.[568] As discussed in Chapter 2, various notions of childhood exist across societies and historical periods. Some underlying conceptions also served as the basis of the adoption and drafting of the CRC. A near-universal ratification of the CRC may not imply a universal agreement with the conceptions that underlie the CRC. This is especially noted in the 'sweeping reservations' to the CRC by Islamic states[569] and the initial opposition on religious basis to the

[566] Ibid,395
[567] Ibid
[568] Boyden Jo, 'Childhood and the Policy Makers: A Comparative Perspective on the Globalization of Childhood' in James and Prout (eds) *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (Falmer Press,1997), 205.
[569] Fortin supra n.563

enactment of the CRA itself in Nigeria.[570] It is therefore not inconceivable that the limited participatory rights afforded to the child under the CRA reflect an attempt to ensure the CRA 'keeps with African traditions and values……whilst at the same time maintaining its universalist outlook'.[571]

Another possible criticism of the CRA is the inappropriate nature of the child protection measures adopted under the act to the Nigerian society. There has been over the course of the last century a reliance on imported procedures such as juvenile courts, probation services, approved institutions and reformatories 'guided by non-African philosophy' as a means of regulating the interests of children.[572] The CRA, while incorporating many of these procedures, is deficient in terms of proffering measures grounded in proper understanding of the African societal setting. It is acknowledged that reference is made under the CRA to the use of the extended family setting in enforcing 'imported measures' such as adoption, wardship and guardianship.[573] Nevertheless, this does not detract from the lack of cultural sensitivity in matters affecting the child under the CRA. For instance, in determining a child in need of care and protection, there is little consideration given to the possibility of other individuals aside from the parents or guardians having the opportunity to resolve the situation before resorting to the court process.[574] It is submitted that such an approach is not only culturally insensitive but antithetical to the interest of the child, especially very young children given the nature of the court process in itself.

[570] Alemika, E.E.O ; Chukwuma, I ; Lafratta, D ; Messerli, D and Souckova ,J,'Rights of the Child in Nigeria: 'Report on the Implementation of the Convention of the Rights of the Child in Nigeria' (2004) (available at http://www.cleen.org/nigeria_ngo_report_OMCT.pdf (accessed November 27,2015)
[571] Freeman supra n.426
[572] These methods, according to Igbinovia and supported by Boyden, have proved ineffective in the control and treatment of juvenile offenders in Nigeria (Boyden Jo, 'Childhood and the Policy Makers: A Comparative Perspective on the Globalization of Childhood' in James and Prout (eds) *Constructing and Reconstructing Childhood: Contemporary Issues in the Sociological Study of Childhood* (Falmer Press,1997), 205
[573] See for example Section 50
[574] Ibid

CONCLUSION

This chapter has examined the CRA in the context of international and regional child rights protection instruments with the CRC and the African Charter being the focus in each respect. The differences and similarities between these instruments have also been considered in-depth. It is impossible to exhaust in one chapter the defects of the child rights protection instruments examined above, which in any case is not the aim sought to be achieved in this chapter. It is however noted at this point that while there are reasons for concern in the content of each instrument, they represent a solid foundation upon which an effective child rights framework can be built in the Nigerian, African and international community. Thus, the key issue remains as to the effective implementation of the standards set out in these instruments and the problems involved in this context.

CHAPTER 6: CHILD RIGHTS PROTECTION IN NIGERIA: THE PROBLEM OF THE CONSTITUTION

> ***1****. (1) This Constitution is supreme and its provisions shall have binding force on the authorities and persons throughout the Federal Republic of Nigeria.*
>
> *(2) The Federal Republic of Nigeria shall not be governed, nor shall any persons or group of persons take control of the Government of Nigeria or any part thereof, except in accordance with the provisions of this Constitution.*
>
> *(3) If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall, to the extent of the inconsistency, be void.*
>
> -Section 1 Constitution of the Federal Republic of Nigeria 1999

The principle of constitutional supremacy is firmly entrenched in the Nigerian legal system. The supremacy of the Constitution implies that 'without it, no other law can independently exist' that is other laws in force in Nigeria or governing the federal republic of Nigeria.[575] This principle is also applicable to international law incorporated into domestic legislation pursuant to international obligations.[576] While statements by international treaty monitoring bodies suggest superiority of international conventions in the event of conflict between domestic standards and international law,[577] these statements are not binding on states. Thus, building an effective child rights framework in Nigeria especially in the legal context is highly dependent on the nature and effect of constitutional recognition/protection afforded to the protection of children. Having compared the Child Rights Act with regional and international child rights protection instruments in the previous chapter, this chapter will examine the relationship between

[575] Attorney General, Abia State vs Attorney-General of the Federation (2003) 4 N.W.LR Pt 809 at 124
[576] See Abacha vs Fawehinmi(2000) 6 N.W.L.R Pt 660 at 228
[577] See for instance *Convention on Rights of the Child General comment no 5: General measures of Implementation of the Convention on the Rights of the Child (arts. 4, 42 and 44, para. 6) (2003) CRC/GC/2003/5, Para 20*.

child rights and the Nigerian Constitution. The first and second parts of this chapter will provide a brief outline of constitutional development in Nigeria with particular emphasis on the relationship between constitutional development and fundamental rights. This will be followed by an analysis of constitutional provisions affecting the child, with particular focus on substantive rights of the child vis-à-vis the Constitution.

CONSTITUTIONAL DEVELOPMENT IN NIGERIA

Constitutional development in Nigeria can be described as having a highly convoluted history characterized by various political and social compromises. The first attempt at developing a constitutional government was made by the British colonial administration in 1922 through the enactment of the 1922 Constitution.[578] Further changes were made to the Constitution in 1946, 1951, 1954 and 1960 by the colonial government which changes were directed towards the following: establishing a federal government, setting up representative institutions and the development of responsible government.[579] Most notably with respect to the establishment of a federal system, the 1954 system was the first Constitution dividing legislative powers between the central and regional legislatures[580] as a response of the colonial government. While the central legislative house had exclusive legislative powers over matters contained in the 'exclusive legislative lists', its powers were shared with the regional legislative houses with respect to matters contained in the 'concurrent legislative list'.[581] Matters not contained in either of the lists were exclusively left to the regional houses. [582]

None of the Constitutions that operated in Nigeria prior to independence was specifically directed at the recognition of the rights of the individual, instead considering as priority

[578] Also known as the Clifford Constitution.
[579] Eweluka D.I.O, 'Constitutional Law' in Okonkwo, C.O (ed), *Introduction to Nigerian Law* (Sweet and Maxwell, 1980),194
[580] Ibid
[581] Ibid
[582] Ibid

the fulfilment of other specific political objectives of the colonial government. The 1946 Constitution for instance was essentially enacted with the aim of centralizing legislative jurisdiction with the 1951 Constitution directed towards representative democracy in the Nigerian government.[583] This does not however presuppose a total disregard of any concept relating to fundamental rights. For instance, Ajomo considered the introduction of representative governance in the 1951 Constitution as being possibly linked to a recognition of the right to self-determination[584] before further regarding the development as being attributable to nationalist agitation and a shift in global politics towards self-determination.[585] It is worth noting in this respect that the colonial government prior to independence had continuously kicked against the incorporation of fundamental rights notwithstanding the proclamation of the Universal Declaration of Human Rights.[586] At the 1953 Constitutional conference, agitations by the Action group (AG) and National Council of Nigeria and the Cameroons (NCNC) for the Constitutional protection of fundamental rights were 'flippantly rejected by the colonial administration'.[587]

In summarising the pre-independence position on fundamental rights, Abayomi observes as follows:

> Throughout the colonial period, except in compliance with established procedural rules for the administration of justice, the right to private property, and natural justice for the criminally accused-no guarantees of fundamental human rights, now common in most written Constitutions, inured to the benefit of the "natives" against the colonial overlords. The rights to fundamental liberties were largely inconsistent with colonial occupation at the time.[588]

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[583] Ajomo, M.A, 'Human Rights Under the Nigerian Constitutions' In Osinbajo and Awa-Kalu (eds) 'Democracy and the Law' (1991) *Federal Ministry of Justice Law Review Series*,107
[584] Ibid
[585] Ibid
[586] Falana, Femi, *Fundamental Rights Enforcement* (First edition, Legal Text Publishing Company Limited, 2004),3
[587] Ibid
[588] Abayomi, T, 'Continuities and Changes in the Development of Civil Liberties Litigation in Nigeria' (1991) *University of Toledo Law Review*, Vol 22, Iss.4, 1035,1043

There was however a change in position in 1957 with a proposal for the incorporation of a bill of rights in the Nigerian Constitution at the 1957 Constitutional conference receiving unanimous support from all delegates. [589] According to the Minorities Commission, human rights provided a standard to which appeal may be made by those whose rights are infringed and were of great value in preventing steady deterioration in standards of freedom and the unobtrusive encroachment of a government on individual rights.[590] The inclusion of fundamental rights pursuant to this development was not an altruistic action with Falana regarding the same development as being due to a desire not to frustrate the struggle for independence.[591] This view is hardly startling considering the following statement by representatives of the colonial government at the 1953 constitutional conference:

> Nigeria, as your Lordships know, is the largest territory in the Colonial Empire. It is the size of Great Britain, France and Belgium put together, and has a population of 31,000,000—the largest population of any State in Africa. It is of vital economic importance, and, therefore, its future, in this restless modern age, must be worthy of our close attention. The proposed Constitutional changes in Nigeria cover a wide field and are complicated by tribal jealousies and fears and suspicions—to say nothing of evidence of the old fallacy that the interests of this or that section of a community to-day can be, as it were, frozen by safeguards throughout a future in which both the interest and the safeguards will be rendered obsolete in the mere passage of time.[592]

Irrespective of the political considerations, the 1960 independence Constitution saw for the first time the constitutional protection of fundamental rights. Various rights and

[589] Ibid
[590] Eghosa, E.O, 'Human Rights and Ethnic Conflict Management: The Case of Nigeria' (1996) *Journal of Peace Research* Vol. 33 No.2, 171-188, 180
[591]Falana, Femi, *Fundamental Rights Enforcement* (First edition, LegalText Publishing Company Limited, 2004),3
[592]Constitutional Developments in Nigeria (1953) available at http://hansard.millbanksystems.com/lords/1953/oct/21/Constitutional-developments-in-nigeria

freedoms including the right to life,[593] freedom from inhuman treatment[594] and right to personal liberty,[595] freedom of conscience,[596] freedom of expression,[597] freedom of movement[598] and freedom from discrimination became constitutionally guaranteed.[599] These rights were however subject to certain qualifications and could be derogated from in times of emergency.[600] In addition, the scope and nature of these rights were rendered ambiguous by existing laws preserved under the Constitution. For instance, while there was the prohibition under the 1960 Constitution of an offence for which its penalty was not prescribed under a written law[601], the prohibition on torture did not invalidate lawful punishments under existing customary laws.[602] Such a position may suggest to an observer an unstable and uncertain approach by the Constitution to rights protection. This uncertainty and ambiguity makes it difficult to disagree with scholarly opinion describing independence treaties in Commonwealth Africa as being more of 'the product of *ad hoc* bargaining in London than the reflection of popular demands and manifestations of indigenous political culture'.[603] For reasons relating to national sovereignty including the retention of the British Privy Council as the supreme appellate judicial authority as opposed to the Nigerian federal Supreme Court, the 'republican Constitution' was enacted in 1963.[604] The 1963 Constitution established a presidential system of government and designated the Federal Supreme Court as the final appellate authority. The fundamental rights provisions however remained essentially unchanged.

One notable feature of these Constitutions was the fact that they involved, to a large extent, little or no consultation with representative members of the populace. The 1922

[593] Section 17
[594] Section 18
[595] Section 20
[596] Section 23
[597] Section 24
[598] Section 26
[599] Section 27
[600] The right to life as guaranteed in the Constitution excluded from its ambit lawful killings resulting from acts of war (Section 17 (2))
[601] Section 21(10)
[602] Section 18
[603] Paul,J.C.N, 'Some observations on Constitutionalism, Judicial Review and Rule of Law in Africa' (1974) *Ohio State Law Journal* Vol 35, Issue 4,851,855
[604] Alao, A, 'The Republican Constitution of 1963: The Supreme Court and Federalism in Nigeria (2015) *10 U. Miami Int'l and Comp. L. Rev 91*, 91-107,91

and 1946 Constitutions had been basically imposed upon the populace by the governor general and while the subsequent Constitutions involved consultation through constitutional conferences, the emergence of political parties representative of Nigeria's diversity had a negative effect on the prospects of a truly representative Constitution.[605] This is not to suggest that the Constitutions were totally devoid of considerations regarded as vital by the populace. As noted by Utton, the 1963 Constitution and the independence Constitution represented 'numerous compromises between the divergent interests of tribe, region and nation' with the use of a federal structure being 'a major compromise between those who wanted a strong central government and those who wanted regional autonomy'.[606] Notwithstanding, none of the Constitutions had been made by elected representatives of the people. This, as understood by Ogunwewo, undermined the legitimacy of these Constitutions.[607]

The process leading to the enactment of the 1979 Constitution however suggested a departure from this trend. In 1975, a committee entrusted with the function of preparing a draft Constitution was set up by the military administration.[608] This committee included two members from each state in the Nigerian federation and was regarded as widely representative, notwithstanding the fact that it had been established by the military government.[609] The draft Constitution was then sent to an elected legislative assembly for amendment and ratification.[610] Memoranda from the general public was also considered in the drafting of the Constitution.[611] The 1979 Constitution on the basis of its enactment process could therefore be considered a broad agreement between the

[605] See 'Nigeria: Constitution Development History' available at http://www.lawnigeria.com/CONSTITUTIONHUB/1960-1999ConstitutionofNigeria.html (last accessed 17th October,2017)
[606] Utton, A.E, 'Nigeria and the United States: Some Constitutional Comparisons' (1965) *Journal of African Law* Vol 9, Iss.1, 40,
[607] Ogowewo, T, 'Why the Judicial Annulment of the Constitution of 1999 is Imperative for the Survival of Nigeria's Democracy' (1999) *Journal of African Law* Vol 44 No 2, 135-166
[608] Read, J.S, 'The New Constitution of Nigeria,1979: "The Washington Model"?' (1979) *Journal of African Law* Vol 23 Iss. 2, 131,134
[609] Ibid
[610] Ibid
[611] Ibid

Nigerian people.[612] With respect to fundamental rights, significant changes to existing law were also introduced by the 1979 Constitution. For instance, a person's sex was included as a prohibited ground of discrimination under the 1979 Constitution.[613] In addition, protection of economic and social interests were also contemplated and included in the Constitution as 'fundamental objectives' of state policy.[614] One of these objectives in particular was the protection of children, young persons and the aged from any form of exploitation as well as moral and material neglect.[615] Furthermore, there were no savings provisions with respect to lawful punishments under customary law as had been the case under the 1960 and 1963 Constitutions.

Following the death of the military dictator General Sani Abacha in 1998, the transition military government set up a twenty-five member Constitution debate committee to review the 1979 Constitution with a view to changing the Constitution.[616] This eventually led to the enactment of the 1999 Constitution. Prior to its enactment, there had been two previous failed attempts by the military governments to impose Constitutions in 1989 and 1995. To a large extent, the 1999 Constitution duplicates the provisions of the 1979 Constitution, especially with respect to fundamental rights for which reason Elaigwu regards the 1999 Constitution as been a mere 'dusting off and renovation' of the 1979 Constitution. [617] This Constitution was notably enacted without adequate consultations and was only seen by elected officials after political elections had been conducted.[618] Akinrinade comments as follows in relation to the 1999 Constitution:

> In the particular case of the 1999 Constitution, while it must be conceded that the whole transition programme was carried out within a short period, it still has

[612] Ayua and Dakes, 'Federal Republic of Nigeria' available at http://www.thomasfleiner.ch/files/categories/IntensivkursII/nigeriag1.pdf
[613] Section 39
[614] Chapter 2
[615] Section 17(3f). Interestingly, the enactment of the 1979 Constitution coincided with the International year of the child which supposedly signalled increased recognition of the need to protection of the interests of the child.
[616] Elaigwu, J.I, 'The Federal Republic of Nigeria' available at http://www.forumfed.org/libdocs/Global_Dialogue/Book_2/BK2-C08-ng-Elaigwu-en.htm
[617] Ibid
[618] Ibid

> to be pointed out that the Constitution handed over was one to which the people made absolutely no contribution. A Constitution Debate Coordinating Committee (CDCC) was set up by the departing military government solely to organise nationwide consultations on the unpopular 1995 Constitution….It was clear that the average Nigerian did not feel part of the Constitution making process and most have dismissed the 1999 Constitution as irrelevant to the political process and the unfolding situation in the country[619]

Unsurprisingly, it is regarded as lacking constitutional legitimacy by various scholars. Nevertheless, it remains supreme over all other legislative enactments, including international treaties enacted into domestic law.[620]

The discussion above reveals constitutional development in the Nigerian law as being replete with various social and political intricacies. From nationalist struggles for self-determination and representative government to the establishment of an 'American-style' federalist system, various political interests and innovations have characterized constitutional enactments. In relation to this thesis, the crucial question is the effect of these developments on the concept of fundamental rights, especially as is applicable to children, under the Constitution. This will be examined in greater detail in subsequent sections. However, it is submitted at this point that notwithstanding a notably sporadic reference to children under the Constitution, these constitutional developments may play a bigger role in shaping the interests of children under the law than may have been contemplated.

[619] Akinrinade,S, 'Constitutionalism and the resolution of conflicts in Nigeria,' (2003) *The Round Table*, 92:368, 41-52
[620] See Abacha v Fawehinmi (2000) S.C 45

FUNDAMENTAL RIGHTS AND THE CONSTITUTION

Since the incorporation of fundamental rights provisions into the Nigerian Constitution of 1960, Nigerian courts have been faced with the extremely delicate task of providing appropriate contextual interpretation to these entrenched rights. This was by no means an easy task and to a certain extent, beyond the capability of the courts, especially given the fragile nature of the political and socio-economic system at the time.[621] According to Abayomi:

> In the case of Nigeria, between independence and the first military take-over in 1966, a catastrophic social, economic, and political dislocation heralded the impending danger of military take-over. In the calamitous social disorder and political disintegration, the courts were unduly stretched and were largely unable to cope with the increasing duty to protect the fundamental guarantees in the Constitution.[622]

A consideration of certain fundamental rights cases at the time may lend credence to this view. In the case of *Director of Public Prosecutions vs Obi*[623], the defendant was charged with seditious publications and the question for determination was the compatibility of Sections 50 and 51 [624] of the Criminal Code with Constitutional provisions. In defining the freedom of expression, it was held that the scope of the said freedom did not did not cover 'malignant criticism of the government which by its very nature disturbs public peace'.[625] This finding by the Supreme Court leaves room for ambiguity and suggests an attempt by the court to balance various political interests in its use of 'flowery language' as opposed to protecting the rights of the individual. In

[621] Abayomi supra n.588
[622] Ibid
[623] (1961) N.S.C.C, 104
[624] Section 50 defines a 'seditious publication' as a publication having a seditious intention (Section 50(1b) . A 'seditious intention' is among others an 'intention to raise discontent or disaffection or promote feelings of ill-will and hostility' among citizens of Nigeria (Section 50 (2)). Section 51 prescribes as an offence the doing of any act with a seditious intention.
[625] Ibid

Amalgamated Press vs The Queen,[626] it was also decided that freedom of expression could not be used as a licence to spread news 'likely to cause fear and harm to the public'. [627] In a strict interpretative context, this probably also prevented the dissemination of information to serve the public interest even if the facts were of a disturbing nature. Nonetheless, the Courts laid down certain important principles with regard to fundamental rights, including the supremacy of established judicial bodies in the function of interpreting the scope of limitations on the exercise on fundamental rights.[628]

Interpreting relatively straightforward individual rights was by no means an easier task for the Courts. In *Egri vs Uperi*[629], the plaintiff's wife was detained by her father and the plaintiff had brought a claim in customary law for the return of his wife. The High Court had on appeal from the Customary Court found the marriage to be valid under customary law and ordered that the wife be returned to the appellant within 30 days. It was decided on appeal that the right to freedom of association may be contravened by a court order compelling a wife to return to her husband.[630] In *Awolowo vs Sarki*[631], the plaintiff had engaged a counsel from England for his defence in a criminal case. The said counsel was enrolled as a legal practitioner but was not a citizen of Nigeria and his entry into Nigeria was refused by the Foreign Minister. In appealing the decision of the lower Court upholding the refusal order, the accused argued that the failure by the minister of internal affairs to allow a foreign national gain entry into the country was a breach of his fundamental right to a counsel of his choice. The Federal Supreme Court in dismissing his appeal held that the said fundamental right could not be interpreted in such a manner as it would give rise to an absurdity.[632] An assessment of the nature of the interpretation given by the Courts must also be undertaken in the context of the political

[626] (1961) N.S.C.C,101
[627] Ibid
[628] See Director of Public Prosecutions vs Obi (supra)
[629] (1973) N.S.C.C, 584
[630] Ibid
[631] (1966) N.S.C.C,209
[632] Ibid

state of affairs at the time. Between an unstable political climate characterized by military interventions at different times and the Nigerian civil war stemming from agitations by supposedly marginalized sections of the populations, the preservation of statehood over and above the protection of individual rights was a characteristic feature of judicial decisions.[633]

The return to civilian government and the conduct of democratic elections in 1979 coincided with the enactment of the 1979 Constitution which is agreed by many scholars as the one Constitution truly incorporating democratic ideals such as people participation and effective consultation.[634] Following the enactment of the 1979 Constitution, the Supreme Court in *Ukegbu vs Attorney General, Imo State*[635] had to decide on the right to establish an educational institution. The plaintiff had challenged the right of the defendant to establish a private university and had been successful at the lower courts.[636] In a decision significant with respect to socio-economic rights, the Supreme Court recognised the 'right to adequate, unalloyed and balanced education'.[637] It further considered the freedom from receiving 'unsavoury and diabolical instructions and teachings' as a fundamental right.[638] In *Ransome Kuti vs Attorney-General of the Federation*,[639] soldiers gathered around the house of the claimant and following the assault of an employee of the claimant, the property of the claimant was set ablaze. His claim for loss of property, assault and battery was dismissed at the trial Court and the Court of Appeal affirmed the decision. In dismissing his appeal, the Supreme Court stated as follows:

[633] Abayomi supra n.588
[634] Elaigwu. Supra n. 616, Dakas supra n., Ogowewo, Tunde, 'Why the Judicial Annulment of the Constitution of 1999 is Imperative for the Survival of Nigeria's Democracy' (1999) *Journal of African Law* Vol 44 No 2, 135-166
[635] (1983) N.S.C.C,160
[636] Ibid
[637] Ibid
[638] Ibid
[639] (1985) 2 N.W.L.R (Pt 5), 211

> Fundamental rights in the Constitution do not override all laws. The effect of entrenchment of rights is to save it from subsequent legislative interference and enable its assertion against arbitrary and oppressive executive action.[640]

This statement contradicts the action of the Supreme Court in dismissing the appeal, which dismissal was based on a principle that no action could lie against the government for fundamental rights enforcement.[641] Such a finding may be considered incongruous to say the least, especially given the recognition by the Court of constitutional protection of rights being a defence against oppressive governmental action. However, one must also note the fact that this was a case decided under the military dispensation in Nigeria characterized by suspensions of constitutional provisions and the supremacy of military decrees and edicts over unsuspended provisions of the Constitution.[642] Recognition of fundamental rights also operated to nullify an order compelling the registration of a trade union in exercise of the freedom of association.[643]

In *Agbai vs Okogbue*,[644] the constitutionality of an existing custom allowing for the seizure of the goods of a citizen for refusing to join a particular association was raised at the Supreme Court. The respondent had refused to join or pay levies to the said association on religious grounds further to which his property had been seized by the appellants. The appellants' claim had been granted at both the Magistrate and High Courts but the Court of Appeal had reversed the decision and held the custom to be unconstitutional. The Supreme Court in dismissing the appeal held that while the custom of association by age-grade was not contrary to the Constitution, any purported drafting

[640] Per Karibi Whyte JSC, 247
[641] Ibid
[642] Military decrees suspending the provisions of the Constitution have been issued at different times (1966,1984,1993). See for example The Constitution (Supension and Modification) Decree no 107 of 1993 available at http://resources.lawscopeonline.com/LFN/CONSTITUTION_(SUSPENSION_AND_MODIFICATION)_DECREE_NO._107_OF_1993.htm (last accessed 6th October,2017)
[643] Osawe vs Registrar of Trade Unions (1985) 1 NWLR Pt 4, 755
[644] (19910 7 N.W.L.R Pt 204 at 391

of any person into an association against his will was in conflict with constitutional provisions even if valid under customary law.[645] Customary law which also made every member of any age-grade 'proprio vigore' a member of an association was also incompatible with the Constitution. In *Mojekwu vs Mojekwu*,[646] the 'oli-ekpe' custom[647] was considered in the context of constitutional prohibitions on discrimination on grounds of sex. The custom was deemed compatible with existing law at the trial court and on appeal, the Court of Appeal stated as follows:

> All human beings – male and female – are born into a free world, and are expected to participate freely, without any inhibition on grounds of sex; and that is Constitutional. Any form of societal discrimination on grounds of sex, apart from being unconstitutional, is antithesis (sic) to a society built on the tenets of democracy which we have freely chosen as a people. We need not travel all the way to Beijing to know that some of our customs, including the Nnewi 'oli-ekpe' custom relied upon by the appellant, are not consistent with our civilised world in which we all live today, 'including the appellant. ……. Accordingly, for a custom or customary law to discriminate against a particular sex is to say the least an affront on the Almighty God Himself. Let nobody do such a thing. On my part, I have no difficulty in holding that the 'oli-ekpe' custom of Nnewi, is repugnant to natural justice, equity and good conscience."[648]

Nevertheless, the majority at the appellate Court dismissed the appeal. The Supreme Court most notably refused to address the question of constitutionality and as stated by

[645] Ibid
[646] (1997) 7 N.W.L.R Pt 512,283
[647] A local custom in the Nnewi tribe of which prohibits the inheritance rights of females and provides that only the eldest male child can inherit the property of a deceased person who dies intestate (See http://www.equalrightstrust.org/ertdocumentbank/Mojekwu%20v%20Mojekwu.pdf
[648] Ibid

Ukhun, 'watered down' the pronouncement of the Court of Appeal on the question of discrimination.[649] Instead the Court held as follows:

> This case has really nothing to do with the discrimination against women but rather on the avarice displayed by the appellant to deprive the respondent and her sister of their due rights. The issue or principle of repugnancy test is of no relevance in this case as the matter before the court is as to whom should devolve the kola tenancy of the property. Of course the answer to that is that the respondent and her sister are the obvious beneficiaries in the absence of any male issue surviving'.[650]

This approach appears contrary to the 'judicial activism' that should be expected of the courts, especially with respect to fundamental human rights. Some consider this as a missed opportunity by the Court to make a definite pronouncement on fundamental rights, which though not directly relevant to the actual outcome of the case, may have served as useful precedent in deciding subsequent cases.[651]

Over the years, the status of fundamental rights under the Constitution has been considered by the Courts. In *Uzokwu vs Ezeonu (II)*[652], the Court of Appeal made a distinction between human rights and fundamental rights in stating as follows:

> Human rights are …rights which every civilized society must accept as belonging to each person as a human being irrespective of citizenship, race, religion and so on….Fundamental rights, on the other hand…..are fundamental because they

[649] Ukhun, C.E and Inegbedion N.A, Christopher, 'Cultural authoritarianism, Women and human Rights issues among the Esan people of Nigeria'(2005) *African Human Rights Law Journal* Vol 5 No 1, 129-147
[650] A copy of the decision is available at http://lawaspire.com.ng/2014/07/augustine-nwafor-mojekwu-v-mrs-theresa-iwuchukwu/
[651] Ukhun and Inegbedion supra n.649
[652] (1991) 6 N.W.LR Pt 200,708

have been guaranteed by the fundamental law of the country, that is, the Constitution[653]

This supposedly implies that a society must accept human rights as belonging to every individual though not constitutionally guaranteed. However, a crucial question arises in relation to the protection of such rights. The failure to guarantee a particular right under the Constitution greatly undermines the prospect of effective protection notwithstanding the recognition of the right under international law. This is especially the case in a legal system governed by the principle of constitutional supremacy, as is the case in Nigeria. This could arguably be said of the status of socio-economic rights in Nigeria. As stated earlier, the protection of socio-economic interests is regarded as a 'fundamental objective of state policy' in contrast with the civil and political rights guaranteed under Chapter IV of the Constitution. It is the case under Nigerian law that questions relating to matters falling under fundamental objectives of state policy cannot be decided upon by a court of law, making socio-economic rights, in so far as they fall within the ambit of these objectives are non-justiciable. [654] In *University of Ilorin vs Oluwadare,* [655] the appellant was expelled from the University on grounds of examination misconduct and his application to enforce his fundamental rights under the Fundamental Rights (Enforcement Procedure) Rules 1979 had been dismissed by the lower courts. The Supreme Court, in dismissing the appeal held as such that the right to studentship, which is to all intents and purposes an offshoot of the right to education was not a right guaranteed by the Constitution.[656]

Following the return to democracy, there was a shift towards increased recognition of the fundamental nature of constitutionally guaranteed rights With respect to constitutionally guaranteed rights, the Supreme Court in *Jim-Jaja vs Commissioner of Police, Rivers*

[653] Ibid. In Ndoma-Egba vs Chukwuogor (2004) 17 N.C.Q.S.R, the Court also described as 'inherent in an individual certain rights that must be protected by the state' (Per Pats-Acholonu)
[654] Archbishop Olubunmi Okogie v Attorney-General of Lagos State (1981) 2 N.C.L.R 337
[655] (20006) 14 N.W.L.R Pt 1000 at 751
[656] Ibid

State[657] stated that claims involving the enforcement of Constitutionally-guaranteed rights are also placed on a higher pedestal than civil claims.[658] In addition, the Supreme Court has recognized a duty on the part of the judiciary to 'assume an activist role on issues that touch or concern the rights of the individual' and 'ensure that the rights of individuals guaranteed by the fundamental rights provisions in the Constitution are never trampled upon'.[659] Such activist function however remains subject to Constitutional limitations. As noted in *Lafia Local Government vs Governor of Nassarawa State*, the courts still have a duty to 'jealously guard the supremacy of the Constitution in its interpretation'.[660] The Constitution also remains supreme over all other enacted laws, presumably including laws enacted to give effect to 'fundamental or human rights'. Thus even though the Constitution was formulated to protect the rights of the citizen, interpretation of the Constitution may not serve that end where the constitutional provision is so 'clear, unequivocal, unambiguous and compelling in favour of a contrary view'.[661] This in itself raises certain conceptual ambiguities.

Assuming the Constitution exists to protect the rights of the citizens, it seems contradictory to envisage a situation that does not serve that end in constitutional interpretation. Having said that, it must also be understood that the Constitution does not exist solely to protect fundamental rights as opposed to an international human rights instrument such as the Convention on the Rights of the Child. Thus, in the case of *D.S.S vs Agbakoba*,[662] the Supreme Court was of the opinion that an interpretation of fundamental rights provisions must not operate to nullify the Constitution notwithstanding their fundamental nature.[663] This approach seems to suggest the possibility of conflict between safeguarding Constitutional supremacy and protecting

[657] (2013) 6 N.W.L.R Pt 1350 at 225
[658] Ibid
[659] Per Rhodes Vivour JSC in Lafia Local Government v Governor of Nassarawa State (2012) 17 N.W.L.R Pt 1328 at 107
[660] Per Adekeye J.S.C in Lafia Local Government (Supra)
[661] Aqua Limited vs Ondo State Sports Council (1988) 4 N.W.L.R Pt 91 at 622
[662] (1999) 3 N.W.L.R Pt 595 at 314
[663] Ibid

individual rights especially as is related to the child. For as noted by Udogu, 'there is a paradox arising from the whole matter of Constitutions because although they might be indispensable for the peaceful governance of a society, theoretically speaking, they can also be problematic in their operation especially in developing countries.[664] This shall serve as the focus of discussion in the next section.

THE NIGERIAN CONSTITUTION AND CHILD RIGHTS

Further to Section 17(3) of the Constitution, the state is to direct its policy towards ensuring that 'children, young persons and the aged are protected against any exploitation whatsoever, and against moral and material neglect. Section 18 also describes the eradication of illiteracy as an objective of state policy to which end the government is obliged to provide free primary, secondary and university education as and when practicable. As noted above, no constitutional provision is to be read in isolation but in consonance with other provisions of the Constitution. Thus, in defining the scope of applicability and enforceability of these policies, section 6 of the Constitution provides as follows:

> (6) The judicial powers vested in accordance with the foregoing provisions of this section –
>
> c) shall not except as otherwise provided by this Constitution, extend to any issue or question as to whether any act of omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution;

[664] Udogu, E.I, 'National Constitutions and Human Rights Issues in Nigeria' (2003) *African and Asian Studies* Vol 2 Iss.2,

The lack of jurisdiction of the Court in relation to such matters was also affirmed in the case of *Okogie vs Attorney General of Lagos State*,[665] where the issue for determination was whether or not the provision of educational services by a private citizen or organisation fell within the ambit of the fundamental objectives protected by the state. The plaintiff in this case had sought an order declaring that private school owners could provide educational services with individuals having the right to send their children to private schools. The High Court expressly declared itself as being void of jurisdiction in determining whether the government or its organs acted in line with constitutional fundamental objectives in abolishing fee-paying private primary schools in Lagos State.[666] Although the question in this case was the provision of educational services by private citizens, Section 6(6c) of the 199 Constitution however seems to regard the right to education as being non-justiciable in that no action may lie against the government for the failure to perform this duty.

With respect to the right to education, Section 15 of the CRA considers the provision of 'free, compulsory and universal basic education' as a governmental duty. The jurisdiction of the Court with respect to fundamental objectives of government policy and the violation of the right to education was in focus in *Adelusi vs Governor of Lagos State*[667] where the respondents had driven earthmoving machines into a school and demolished the secondary school building while the appellants were writing their West African School Certificate (WASSCE) examinations. The appellants brought an action against the government for a violation of their right to education under the Child Rights Law of Lagos State and the CRA among other laws. The High Court had struck out the case for lack of *locus standi* on the part of the appellants. The Court of Appeal re-affirmed its lack of jurisdiction with respect to provisions under Chapter II of the Constitution pursuant to

[665] supra
[666] Ibid. This decision was pursuant to Section 6(6c) of the 1979 Constitution and taken prior to the enactment of the CRA
[667] (2015) All Federation Weekly Law Reports (Pt.821), 1

Section 6(6c) of the Constitution. Nevertheless the Court of Appeal reversed the decision of the High Court on the question of *locus standi* and particularly stated as follows:

> The man-power or labour force of a nation is sources from the education acquired by the employee or workers, making education a lynchpin of human endeavour. So the appellants have sufficient interest to ensure that their educational pursuit in Lagos State is not hampered, or impaired, or does not come to grief.[668]

Notwithstanding the commendable effort by the Court to pursue 'judicial activism' with respect to the right of education in this case, it is submitted that the approach of the Court leaves room for ambiguity and confusion. The Court of Appeal upheld the right of the respondents to protect their educational pursuit under 'extant laws' of the state while simultaneously affirming the lack of jurisdiction on the part of the Court to enforce the right to education under the Constitution. Furthermore, the Court of Appeal did not discuss the question of the violation of the right to education in detail or consider the relevance of the Child Rights Law of Lagos State and the CRA in deciding this question, instead laying emphasis on the question of *locus standi*. An affirmation in greater detail by the Court of the fundamental nature of the access to education and greater recognition of education as an actual enforceable right as opposed to being merely a 'useful endeavour' may have been more useful not necessarily in determining the outcome of the case but for the protection of ESRs and child rights in general. An obligation on the part of the Court to protect the supremacy of Section 6(6c) of the Constitution does not preclude an affirmation of the right to education as a right that should be judicially enforceable.

[668] Ibid, 14-15

The decision in *Adelusi* serves as useful precedent in ensuring that individuals whose right to education has been violated can bring an action under the CRA or the Child Rights Law of the state. It is however noted that Section 6(6c) of the Constitution remains in effect and as a result, bringing an action against the government for a violation of the right to education may still be unsuccessful notwithstanding the decision in *Adelusi.*

Section 6(6c) by itself may also imply that the Court lacks jurisdiction in determining whether the state has fulfilled its duty in protecting children from all forms of exploitation and all forms of moral or material neglect. This is especially relevant in determining the applicability of the provisions of the Child Rights Act (CRA) to such issues. Section 28 of the CRA for instance prohibits the subjection of the child to any 'forced or exploitative labour'.[669] Section 11 of the CRA also considers the child as having the right to protection from 'physical, mental or emotional' neglect.[670] Although there is no express mention under the CRA of government having a duty to ensure the guarantee of these rights, Section 45 imposes a duty upon the government to make investigations and make appropriate orders where it is suspected that a child who lives in the state is suffering or is likely to suffer significant harm.[671] It would seem as though to the extent as is related to 'exploitation as well as moral and material neglect, the duty placed on the government under Section 45 cannot be enforced by the courts under the Constitution.

Notwithstanding, this does not necessarily imply that the fundamental objectives may still not be guaranteed or enforced. It is argued that such objectives to the extent as may be related to the fundamental rights listed under Chapter IV of the Constitution may

[669] Section 28 (1a)
[670] Section 11(a)
[671] Section 45(1)

still be enforced in the Courts. The Child Rights Act guarantees the possibility of such protection in making provisions for the applicability of Chapter IV rights to children. Furthermore, as noted by Ibe, the ouster of court's jurisdiction only operates 'except as otherwise provided in the Constitution'.[672] This implies that Section 6(6c) does not oust the jurisdiction of the court where any constitutional provision vests jurisdiction in the Courts with respect to matters incidental to the fundamental objectives under Section 17(3). In addition, fundamental objectives may be enforced where they are related to laws made by the national Assembly for the purpose of enforcing fundamental objectives under Chapter II of the Constitution.[673]

As stated above, all the fundamental rights listed in Chapter IV of the Constitution are applicable to children under the CRA.[674] In protecting the right to life, the CRA expressly prohibits the imposition of the death sentence or corporal punishment on a child.[675] Section 33 of the Constitution however qualifies the right to life in providing that 'no one shall be deprived intentionally of his life, save in execution of the sentence of a court in respect of a criminal offence of which he has been found guilty in Nigeria'.[676] This may create difficulties in cases where the child has committed a serious offence punishable with death such as treason or murder. Constitutional provisions permit the imposition of the death penalty and its constitutionality has been affirmed in a number of cases.[677] In *Sunday Modupe vs The State*[678], the Supreme Court decided on the validity of death penalty for juveniles and stated that individuals under the age of 17 would not be subjected to the death penalty, a position which remains unchanged under existing

[672]Ibe, S. 'Implementing Economic, Social and Cultural rights in Nigeria: Challenges and Opportunities' (2010).*African Human Rights Law Journal*, Volume. 10, No. 1, p. 197-211.
[673] Duru, O, 'The Justiciability of the Fundamental Objectives and Directive Principles of State Policy under Nigerian Law' available at http://www.academia.edu/5185441/THE_JUSTICIABILITY_OF_THE_FUNDAMENTAL_OBJECTIVES_AND_DIRECTIVE_PRINCIPLES_OF_STATE_POLICY_UNDER_NIGERIAN_LAW_By (last accessed 24th October,2017)
[674] Section 3
[675] Section 221(1)
[676] Section 33(1)
[677] See Kalu vs The State (1998) 13 N.W.LR Pt 583 at 581, Ogugu vs State (1994) 9 N.W.R Pt 366
[678](1988) NWLR (Pt.87) 130

criminal legislation.[679] The question which nevertheless remains unresolved is whether by incorporating Chapter IV rights into the CRA, the enjoyment of such rights are circumscribed by the provisions of Chapter IV or the CRA. This is especially considering the fact that under the CRA, the application of Chapter IV rights is 'as if those provisions are expressly stated in this Act'.[680] This would most likely imply that the exercise of such rights would be in the context of the CRA and not the Constitution from which the said rights were incorporated. This portends interpretative difficulties especially in resolving conflict between 'adult-centric' constitutional rights and 'child-centred' rights provisions contained in the CRA.

A crucial aspect of fundamental rights provisions, especially as is related to children is the permitted derogations under Section 45 of certain fundamental rights. Under Section 45, fundamental rights provisions do not invalidate any law that is reasonably justifiable in a democratic society 'in the interest of defence, public safety, public order, public morality or public health'.[681] Nwabueze has criticised this qualification as failing to 'strike the balance in favour of liberty' as it fails to emphasize liberty as the rule and government interference the exception.[682] The wide range of restrictive powers granted to the government, if deemed applicable to child rights through the incorporation of Chapter IV into the CRA, while seemingly insignificant presently in a society where children are as yet 'seen and not heard', may potentially limit the right to the child to freedom of expression and association.

[679] It is however noted that the Sharia Penal Code which determines the imposition of the death sentence according to the 'age of responsibility' which may imply the death sentence being applicable to younger individuals.
[680] Section 4 CRA
[681] Section 45(1a)
[682] Nwabueze, B.O, *Constitutional Democracy in Africa (Volume 1) :Structures, Powers and Organising Principles of Government* (Spectrum Books, 2003), 389

The Constitution, without explicitly recognizing children as right holders describes fundamental rights as accruing to every person.[683] Section 25 defines as citizens of Nigeria 'every person born in Nigeria either before or after the date of independence either of whose parents or any of whose grandparents is a citizen of Nigeria'. Thus, constitutionally guaranteed rights are applicable to every individual of Nigerian heritage born in Nigeria. Section 29 of the Constitution provides as follows

> 1) Any citizen of Nigeria of full age who wishes to renounce his Nigerian citizenship shall make a declaration in the prescribed manner for the renunciation
>
> …….
>
> (4) For the purposes of subsection (1) of this section
>
> (a) 'full age' means the age of eighteen years and above
>
> (b) any woman who is married shall be deemed to be of full age

A literal reading of this section suggests that individuals who have not attained the age of 18 may be regarded as being of full age by marriage, which in effect supposedly provides constitutional legitimacy to the practice of child marriage. However, as noted earlier, a constitutional provision is not interpreted in isolation but with regard to the tenor of the whole Constitution.[684] Thus the reference to the word 'woman' in this section may be argued as excluding children from its ambit. In addition, the section deals with renunciation of citizenship. Sections 26 and 27 which also address matters of citizenship make distinctions of between non-indigenous women married to Nigerians and Nigerians of full age. It would also seem that the same distinction applies in this section, making the provision applicable to non-Nigerian women who are registered citizens by reason of marriage as opposed to children.

[683] Chapter IV
[684] Attorney General, Abia State vs Attorney General of the Federation (supra)

A more significant problem with respect to the Constitution and child rights is the manner in which legislative competence is divided between the federal and state legislative houses. Under Section 4 of the Constitution, the National Assembly is empowered to make laws 'for the peace, order and good government of the Federation or any part thereof' with respect to any matter included in the exclusive legislative list and the concurrent legislative list.[685] These powers, to the extent as is related to the exclusive lists are not exercisable by State Houses of Assembly.[686] State houses of assembly may however exercise legislative powers with respect to matters not included in the exclusive legislative list as well as matters contained in the 'concurrent legislative list'.[687] Laws enacted by the National Assembly prevail over state laws in the event of inconsistencies, with the state law being made void to the extent of such inconsistency.[688]

Legislative competence also exists for both houses in instances where such powers are provided by the Constitution.[689] None of the houses can enact laws ousting the jurisdiction of the court or a tribunal established by law and the exercise of the legislative powers are subject to the court's jurisdiction.[690] There is no explicit recognition of fundamental rights as an area of legislative competence under either of the legislative list. Matters not contained in an area of legislative competence are regarded as residual legislative matters.[691] Legislative competence in these matters was originally vested in regional legislative houses under the 1954 Constitution.[692] It is noteworthy that the subsequent creation of states following independence did not automatically translate into legislative competence being vested exclusively in states for matters falling in the residual category with the present position being that national laws

[685] Section 4(2)
[686] Section 4(3)
[687] Section 4(7)
[688] Section 4(5)
[689] Section 4(4b), Section 4(7c)
[690] Section 4(8)
[691] Eweluka supra n.579
[692] Ibid

enacted in these areas are not applicable in states except as is made applicable to the state through incorporation.[693]

Given the fact that constitutional recognition of fundamental rights had been a feature of the Nigerian Constitution since 1960, its exclusion from matters of legislative competence is surprising to say the least. There is a possible argument that such an outcome is the function of a drafting oversight. This is however unlikely given the importance of the subject and its detailed presence in the Constitution. Another possible reason is the need to protect the federal system of government in operation which 'appears the most suitable form of administration in an ethnically and politically diverse system'.[694] This may not however provide an adequate explanation as inclusion of fundamental rights in the concurrent legislative list would still recognize fundamental rights as a legislative cause without undermining the principle of federalism. A more appropriate explanation may be a latent disregard for the development of an effective rights framework. This is supported by the fact that alterations to the Constitution (a total of three in less than two decades)[695] have failed to consider the need for such alteration as may be effective in ensuring certainty in legislative functions related to fundamental rights. Such disregard, it is further submitted, may not be unconnected with the political and religious setting of the Nigerian society.

This does not however indicate that matters affecting the enjoyment of fundamental rights cannot be identified under the legislative lists. For instance, 'the formation, annulment and dissolution of marriages other than marriages under Islamic law and customary law including matrimonial causes relating thereto' is a subject under the

[693] Nwabueze supra n.682
[694] Nwabueze, B.O, *Federalism in Nigeria under the Presidential Constitution* (Sweet & Maxwell, 1983), 382
[695]The Constitution was altered twice in 2010 and once in 2011

exclusive legislative lists.[696] Marriages under Islamic and customary law do not also fall within the concurrent list, meaning federal legislation in this area may not be applicable unless incorporated by states. This is without prejudice to the supremacy of federal legislation in cases of conflict between federal law and Islamic law, where such law forms part of the law of the state. The crucial question that arises in this instance is the position of the law with respect to rights violations that may occur in cases related to matrimonial causes where no state law exists. The applicability of national law in such areas remains at the discretion of states. It would therefore seem as though no redress may be obtained, except such as is existent under Islamic and customary law. This however does not take into consideration the fact that such rights violations may be a direct result of the application of Islamic/customary law. With respect to marriage for instance, Ogunniran states as follows:

> Obviously, there is Quranic backing for child marriages. Indeed, it was reported that one of Prophet Mohammed's wife Aisha, got married to him when she was 12 years old. Hence, all the four Sunni schools unanimously agree that there is no age limit as to when a girl can marry. Consequently, in Northern Nigeria and by implication the Sharia implementing states, child marriages are prevalent'.[697]

It is submitted that marriages under Islamic and customary law are not necessarily beyond the legislative competence of the National Assembly. For instance, state law regulating Islamic and customary marriage, to the extent as is inconsistent with national law is presumably void pursuant to Section 4(5) of the Constitution. This however is not tantamount to the invalidity of such state legislation. It however remains unclear whether this provision applies to state law enacted with respect to residual legislative matters. Section 4(7) may be interpreted to support such a view. States enjoy legislative powers with respect to matters not included in the exclusive legislative list. These

[696] Second Schedule to the Constitution of the Federal Republic of Nigeria 1999 (as amended), Item 61
[697] Ogunniran, I, 'Child Rights Act versus Sharia Law in Nigeria: Issues, Challenges and Way forward' available at http://www.lawrights.asn.au/files/OGUNNIRAN,%20IYABODE%20full%20paper.pdf

powers are however not exercised to the exclusion of the National Assembly. A joint reading of Section 4(5) and 4(7) may lead to a conclusion that in cases where there is state law regulating marriages contracted under Islamic and customary law, such state law remains subservient to national legislation. Moreover, the National assembly also has exclusive legislative competence under the Constitution with respect to 'any matter incidental or supplementary to any matter mentioned elsewhere on the exclusive legislative lists.[698] On this basis, exclusive legislative competence is vested in the National Assembly to address such matters through validly enacted law where individual rights are violated in these areas. According to Nwabueze, this provision exists to include by implication all such other powers as are 'reasonably incidental thereto and not expressly excluded'.[699] This may for instance extend to laws protecting children who are victims of abuse in statutory marriages.

The Nigerian Constitution also designates the implementation of treaties relating to matters on the exclusive legislative list as a matter within exclusive legislative competence.[700] This would seem to include the enactment of acts specifically aimed at implementing treaty provisions with respect to these matters such as the CRA. The absence of any specific reference to children under the exclusive legislative list suggests that the CRA, though arguably an implementation of an international treaty, is not considered under the said provision. However, there are matters such as citizenship and marriage for which as is contemplated under the CRA, the rights of the child may be affected. The question is whether child rights can be considered 'incidental or supplementary' to these matters for the purpose of assessing legislative competence. Applying Nwabueze's 'reasonableness' test in the context of other constitutional provisions,[701] it is difficult to see how this is the case with respect to citizenship. The constitutional provisions on citizenship, as established above, do not consider children.

[698] Second Schedule of the Constitution, Part 1, Item 68
[699] Nwabueze supra n.694, 40
[700] Second Schedule to the Constitution, Part 1, Section 31
[701] Ibid

Matrimonial causes, while not discussed in the Constitution, is referred to in the second schedule to the constitution merely in the context of formation, annulment or dissolution. This may with respect to child custody suggest the prevalence of the CRA over every other law. The exclusion however of Islamic and customary marriages nevertheless limits the applicability of the CRA.

Another significant constitutional development in the context of child rights is in relation to the preservation of existing law, which law includes Islamic and customary law. Under Section 315, an existing law 'shall have effect with such modifications as may be necessary to bring it into conformity with the provisions of the Constitution.[702] In addition, courts are vested with powers to make declarations of invalidity with regard to existing laws on grounds of inconsistency with other existing laws, Constitutional provisions or subsequently enacted laws of the National/State House of Assembly.[703] However, this provision only applies to existing written law[704] and would in effect exclude existing customary law. The Constitution establishes the Sharia Court of Appeal[705] which exercises jurisdiction over any question of Islamic law including the validity or dissolution of marriages under Islamic law.[706] This is in addition to the jurisdiction conferred upon it by the law of the state.[707] The Constitution also establishes the Customary Court of Appeal which exercises jurisdiction as provided by the law of the state.[708] The Sharia Court of Appeal exercises jurisdiction over marriages contracted under Islamic law and although not expressly provided by the Constitution, matrimonial causes under customary law are within the jurisdiction of the customary court of Appeal.[709]

[702] Section 315 (1)
[703] Section 315 (3)
[704] Section 315(1)
[705] Section 260,275
[706] Section 262,277
[707] Section 277
[708] Section 265,280
[709] Sections 267,282

The pluralist nature of the Constitution is not without its implications with respect to child rights protection and the unwritten nature of customary law gives little or no room for modification or declarations of incompatibility by the Courts. Having said that, Section 1(3) declares 'any other law' which presumably includes unwritten law void for inconsistency with the provisions of the Constitution.[710] Thus, it may be argued that to the extent that Sharia and customary law violate fundamental rights under Chapter IV of the Constitution, they are void for inconsistency. In discussing the constitutionality of Sharia law, Nmehielle states as follows:

> Some supporters of the criminal Sharia implementation agree that Islamic law *per se* is not "written law" in Nigeria and would not constitutionally qualify as indicated above, but argue that all the Northern states of Nigeria need to do is to enact an Islamic code of crimes under their legislative powers to comply with the Constitutional provision on crime. This means that the Sharia codes enacted by the various Northern States meet the above constitutional requirement. However, the federalism question is not as easily answered as suggested above, as a state must constitutionally check its laws to ensure that the offenses that it enacts do not come into direct conflict with the provisions of the Constitution. An Islamic code of crimes in Northern Nigeria cannot ensure this, because the offenses would be derived from religion, which is not the basic law of the country or any of its component parts.[711]

One would concur with the above assertion and state in addition that the provisions made under the Constitution for the preservation of Sharia Courts do not protect Sharia law in itself, at least in the context of criminal law. The introduction of Sharia law

[710] Under the interpretation act, 'law' means any law enacted or having effect as if enacted by the legislature of a State and includes any instrument having the force of law which is made under a law.(*Interpretation Act Chapter 192, Laws of the Federation of Nigeria 1990, Section 18*) An interpretation that gives effect to the doctrine of Constitutional supremacy, it is argued, would include unwritten customary and

[711] Nmehielle, V.O, 'Sharia Law in the Northern States of Nigeria: To Implement or Not To Implement, the Constitutionality is the Question' (2004) *Human Rights Quarterly* Vol. 26 Iss 3,743

alongside the Penal code of states has serious implications with respect to child rights, not least of which is the possibility of imposing death sentences on juvenile offenders. The presence of Sharia criminal law as a separate Penal Code in the criminal law of Northern states however implies that such law is 'written law' for the purpose of Section 315 of the Constitution in which case it must be modified for the purpose of compatibility with the Constitution. Having said this, the Constitution does not preclude the imposition of the death penalty in furtherance of a conviction of a criminal offence by a court of law.[712] Thus, death sentences being imposed on juveniles under Sharia law may not necessarily contravene constitutional provisions.

Aside from the above, the preservation of the jurisdiction of Sharia Courts with respect to marriage is highly significant, given the fact that as noted by Ogunniran, the practice of child marriage which is itself considered a violation of child rights is an existent component of Islamic law for which jurisdiction is vested in the courts.[713] With this in mind, it is hardly surprising that the Supreme Council of Sharia has stated as follows:

> The posture of the Supreme Council of Sharia in Nigeria is that "CRA will demolish the very basis and essence of Sharia and Islamic culture", citing instances of the CRAs provision giving equal rights to male and female children in inheritance and establishment of a Family Court that ousts the jurisdiction of Sharia Courts inall matters relating to children. It is submitted that the pluralist position of the Constitution, especially in the context of Islamic law, serves as a major impediment to the universal application of the CRA.[714]

The relationship between the Constitution and child rights protection in Nigeria is highly complex and complicated. The exact position of children under the Constitution remains largely undefined notwithstanding the enactment of the CRA. Factors responsible for this

[712] Section 33(1)
[713] Ogunniran, supra n.697
[714] Ibid

include the Constitutional protection of legal pluralism and the failure by the Constitution to describe in precise detail the exact position of fundamental rights, especially as is related to children under the law. This leaves the law in a highly confusing state.

CONCLUSION

In diverse ways, the Nigerian Constitution has been shown as having tremendous impact on the prospect of building an effective child rights framework in Nigeria. First of all, while children are not directly and specifically recognized as right holders under the constitution, safeguarding the interests of children is discussed under the Constitution as context of fundamental objectives of government policy. This may not in itself be regarded as a fundamental problem if children fall within the ambit of 'persons' regarded as fundamental right holders under Chapter IV of the Nigerian Constitution. A more significant problem is the separation of legislative powers under the Constitution in pursuance of the federal system of government developed under previous constitutional regimes. This separation in particular has the effect of ensuring that the Child Rights Act is not universally applicable in Nigeria, thereby giving rise to a situation where a change in geographical location could have a great impact on the nature of protection enjoyed by the child. Furthermore, the pluralist nature of the Nigerian legal system, enshrined in the Constitution has also been examined in the context of child rights with the effect that religious and traditional laws detrimental to the interest of the child may have been preserved, albeit not expressly, by the Constitution.

CHAPTER 7: ENTRENCHING CHILD RIGHTS IN NIGERIA: THE PROBLEM OF CULTURE

> The notion of culture is everywhere invoked and virtually nowhere explained. Culture can mean so many things:……Law at first glance, appears easier to grasp if considered in opposition to culture- as the articulated rules and rights set forth in constitutions, statutes, judicial opinions, the formality of dispute resolution and the foundation of social order…..When law and culture are thought of together, they are conceptualized as distinct realms of action and only marginally related to one another[715]

A significant aspect of contemporary human rights scholarship is the relationship between human rights law and 'culture' with concepts such as 'cultural relativism' and cultural pluralism given due consideration in human rights discourse.[716] Child rights as a subject matter is no exception. Having examined child rights protection in the context of the Nigerian constitution in the previous chapter, this chapter will assess the relationship between child rights and culture in the Nigerian society. This assessment would be undertaken in the context of cultural influence on the Nigerian legal system. For this purpose, reference would be made to the legal systems developed in the Nigerian society which derive content from religion, existing customary ethics and other associated factors.

WHAT IS CULTURE?

Culture as a concept is not one that is easily defined. As noted by the Committee on Economic, Social and Cultural Rights (CESCR), various definitions of culture have been postulated in the past and others may arise in the future.[717] There is a view of culture as

[715] Mezey, N, 'Law as Culture' (2001) *Yale Journal of Law and the Humanities* Vol 13, 35-67, 35
[716] See for instance Teson, F.R, 'International Human Rights and Cultural Relativism', (1985) *Virginia Journal of International Law* 25, pp 869-98.
[717] *CESCR General Comment No 21: Right of everyone to take part in Cultural Life* (2009) E/C.12/GC/21, Paragraph 10

'the set of shared characteristics of a particular community or nation'.[718] It may also refer to 'everything enabling man to be successful and active in his universality and more freely to turn to good account all forms of expression in the interest of human contacts'.[719] Alternatively, it may be seen as 'a sum of human activities, the totality of values, knowledge and practices'.[720] Culture is regarded as being 'closely connected with the diverse ways in which social groups construct their lives ideologically, economically, socially, legally and politically'.[721] The various approaches to culture according to Szabo reveal culture as a constituent of 'social man'.[722] Bearing this in mind, it may be inferred that perceptions and practices derived from the cultural outlook form an integral part of societal identity.

Anthropological discussions establish certain features of culture which include a self-reproducing, unchanging set of defined characteristics shared by homogenous individuals. [723] However, contemporary notions of culture suggest an element of dynamism and evolution in these set of characteristics to which end culture is viewed in a political context as principles established by the consensus of the individuals of a society [724] rather than a pre-existent, transcendental ideology. In Zechenter's view, culture is 'far more effectively characterized as an ongoing adaptation to a changing environment rather than as a static supraorganic entity'.[725] With reference to cultural rights, CESCR particularly describes culture as encompassing 'ways of life….religion or belief systems, rites and ceremonies….customs and traditions through which individuals, groups of individuals and communities express their humanity and meaning they give to

[718] Hotlmaat and Naber, *Women's Human Rights and Culture: From deadlock to dialogue* (2011, Intersentia publishing), 52
[719] Szabo, Imre, *Cultural Rights* (Aw Sijthoff-Leiden, 1974)
[720] Symonides, J, 'Cultural Rights, a neglected category of human rights' (1998) *International Science Journal* Vol 50, Iss. 158, 559-572,559
[721] Hotlmaat and Naber, *Women's Human Rights and Culture: From deadlock to dialogue* (2011, Intersentia publishing), 53
[722] Szabo, supra n.719
[723] Wright, S, 'The politicization of culture' (1998) *Anthropology Today* Vol 14 No 1, pp 7-15,8
[724] Ibid,10
[725] Zechenter,E.M, 'In the Name of Culture: Cultural Relativism and the Abuse of the Individual (1997) *Journal of Anthropological Research* Vol. 53 No 3,319-347,332-333

their existence.[726] According to the United Nations Educational, Scientific and Cultural Organization (UNESCO) , culture should be regarded as the set of distinctive spiritual, material, intellectual and emotional features of society or a social group which encompasses, in addition to art and literature, lifestyles, ways of living together, value systems, traditions and beliefs.[727] The foregoing definitions establish culture as an all-encompassing and multi-faceted concept which unsurprisingly makes the task of providing a definite and precise definition of culture difficult. This difficulty arguably arises from an understanding of culture as an ideological notion inextricably linked to the essence of a particular group of people as opposed to a concept merely incidental to humans or groups of society and clearly distinguishable from a set of practices.

The representation of culture as both an ideological stance and a set of practices makes it difficult to assess the precise nature of its relationship with child rights. There is the danger of obscuring the legal significance of child rights in the face of ideological conflicts that may arise in trying to place a cultural practice for instance in the right context.[728] For this reason, it is argued that an effective appraisal of the relationship between human rights and culture requires a proper understanding of the aspect of culture that forms the subject matter of such an appraisal. This would involve making a distinction between a societal practice and the ideological basis of such a practice. The historical development of the notion of culture, especially from a Western perspective arguably reflects a failure to make this distinction. As observed by the American Anthropological Association,

> Rationalized in terms of ascribing cultural inferiority to these peoples, or in conceptions of their backwardness in development of their 'primitive mentality', that justified their being held in the tutelage of their superiors, the history of the

[726] See *CESCR General Comment no 21* supra n.717
[727] UNESCO Universal Declaration on Cultural Diversity (2001) available at http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html (last accessed 26th October,2001)
[728]

> expansion of the western world has been marked by demoralization of human personality and the disintegration of human rights among the peoples over whom hegemony has been established. The values of the ways of life of these peoples have been consistently misunderstood and decried. Religious beliefs that for untold ages have carried convictions and permitted adjustment to the Universe have been attacked as superstitious, immoral, untrue.[729]

Holtmaat and Naber make particular reference to the orientalisation of culture wherein culture of non-western societies is seen in an essentialistic, monolithic and static manner that implies such culture as being backward, pre-modern and repressive.[730] This arguably derives from the discussion of culture solely in the context of long-standing practices as opposed to the dominant socio-political stance of an ethnic group. It may well be the case that while 'culture' in the context of a practice may be regarded as being inimical to the protection of rights, its ideological basis may not necessarily have such an effect. Alternatively, culture in such instances could represent an 'uneasy compromise between conflicting needs and wants of various groups and classes within the society' with a dominant group using certain perceptions of societal values as a tool to protect self-interest.[731] These possibilities would be examined in later aspects of this chapter relating to subject-specific human rights issues.

In this chapter, culture will mainly be examined in the context of customs and practices as well as belief systems and values. This enables an extensive discussion of culture both as a set of practices and as an ideological notion. The reason for adopting this approach is summed up by McGoldrick:

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[729] American Anthropological Association, Statement on human rights (49 American Anthropologist No 4(1947) in Alston and Goodman (eds) *International Human Rights: The Successor to International Human Rights In Context* (OUP,2013),542-543

[730] Holtmaat and Naber supra n.721. For Further discussion on the 'orientalisation' of culture, See Tay, S.S.C, 'Human Rights, Culture and the Singapore Example' (1996) 41 *McGill Law Journal* 743

[731] Zechenter supra n.725

> A claim for a protection of culture can appear very persuasive. However, the claim can cover a wide variety of social and institutional practices. It is difficult to determine an ethical, moral or legal response to such a claim without disaggregating the individual component practices. Some of them may be evidently worthy of support. Others may mask oppression, injustice and powerlessness.[732]

While there may be conceptual differences (at least in the context of scholarship) as to the precise definition of culture, any definition adopted would most likely reveal culture as having some form of influence on societal behaviour. For the purpose of effective interaction with the issues subject of discussion in this chapter, one will consider culture in its static, essentialist sense. A consideration of culture as dynamic and evolving, it is argued, represents the 'ideal notion of culture' espoused by contemporary anthropologists, especially in relation to human rights which, as may be observed from 'culture-based' violations of human rights , does not necessarily reflect societal realities, even in the 21st century. It is noted that analysis from a static view of culture is not in itself a perfect depiction of social realities. For as noted by Nyamu,

> General statements often present cultural norms in a rigid manner, as immutable, inflexible, and applicable in all situations. Yet these assertions, presented for the purpose of political debate and Court-based arguments, often overlook variations and the conflicts inherent within actual practice[733]

CULTURE AND THE NIGERIAN SOCIETY: MULTI-CULTURALISM CONSIDERED

In the context of human rights, there is a need for protection of culture especially in terms of promoting cultural diversity. UNESCO states:

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[732] McGoldrick, D, 'Multiculturalism and its discontents' (2005) 5 *Human Rights Law Review* 27, 34
[733] Nyamu, C.I, 'How should Human Rights and Development Respond to Cultural Legitimization of Gender Hierarchy in Developing Countries' (2000) *Harvard International Law Journal* Vol 43 No 2, 381-418,405

> In our increasingly diverse societies, it is essential to ensure harmonious interaction among people and groups with plural, varied and dynamic cultural identities as well as their willingness to live together. Policies for the inclusion and participation of all citizens are guarantees of social cohesion, the vitality of civil society and peace. Thus defined, cultural pluralism gives policy expression to the reality of cultural diversity. Indissociable from a democratic framework, cultural pluralism is conducive to cultural exchange and to the flourishing of creative capacities that sustain public life.[734]

The respect of cultural diversity is nevertheless subservient to the protection of individual rights. According to UNESCO;

> The defence of cultural diversity is an ethical imperative, inseparable from respect for human dignity. It implies a commitment to human rights and fundamental freedoms, in particular the rights of persons belonging to minorities and those of indigenous peoples. No one may invoke cultural diversity to infringe upon human rights guaranteed by international law, nor to limit their scope.[735]

Nigeria is a multi-ethnic nation with over 250 ethnic groups with each group presumably having the right to respect of their individual cultural identity. A manifestly challenging task is the protection of these identities and the development of a societal framework where all cultural identities are given equal recognition, especially under the law. This is given the existence of certain sociological factors which give rise to the division of the population between an overwhelming majority and minority. For instance, as far back as the beginning of the 20th century, there was already a steep division along religious lines. In the North, Christianity was described as negligible which in itself was connected

[734] UNESCO Universal Declaration on Cultural Diversity (2001) available at http://portal.unesco.org/en/ev.php-URL_ID=13179&URL_DO=DO_TOPIC&URL_SECTION=201.html (last accessed 26thSeptember,2017)
[735] Ibid

with the treaties signed with northern rulers by the colonial government as to non-interference with the existing religion.[736] The Southern part of the country on the other hand was heavily influenced by Christian missionaries and as a result the number of Muslims was described as negligible with religious adherences shared equally between Christianity and 'animism'.[737]

This animist approach representative of cultural behaviour in pre-colonial Southern Nigeria culture gave rise to certain tribal beliefs with significant implications on the sanctity of human life and dignity. Some tribes considered the birth of twins to be lucky while other tribes killed both the twins and the mother.[738] Some cultural beliefs espoused the ability of certain men to change themselves into animals while others sacrificed human beings to their gods.[739] Male and female circumcision was practiced in some groups with circumcision only limited to males in others.[740] Burns also further observed as a feature of early Nigeria the existence of societies, claiming religious sanction, whose object was the intimidation of the women and the aggrandisement of the male sex.[741]

Societal development through industrialization in the colonial era also had its effect on culture in Nigeria, not least the rise of Christianity and Islam as dominant forces in shaping cultural behaviour. The 1920's saw the establishment by voluntary groups of mission schools predominantly in the Southern region. An increase in attendance at formal schools rendered the process of initiation ceremonies marking transition from childhood to adulthood unnecessary.[742] The Criminal and Penal Codes were also enacted

[736] Royal Institute of International Affairs, *NIGERIA: The political and economic background (OUP,1960)*,22
[737] the belief that all natural thing, such as plants, animals, rocks and thunder, have spirits and can influence human events (Cambridge English dictionary)
[738] Partridge, Charles, *Cross River Natives* (Hutchinson & Co, 1905),258
[739] See generally Talbot, P.A, *The peoples of Southern Nigeria* (OUP,1926)
[740] Ibid
[741] Burns, Alan, *History of Nigeria* (Seventh edition, first published 1929, George Allen & Unwin Ltd,1969),263
[742] Falola, *Cultures and Customs of Nigeria* supra n.57

in order to regulate crime and punishment in the Southern and Northern Regions.[743]This however did not result in the abolition of long-established cultural practices, many of which are in furtherance of a family-oriented view of most Nigerians in terms of developing societal arrangements. As summarised by Ostien,

> Except for these few restrictions, however, the English Criminal Code, Islamic criminal law, the native criminal laws and customs of many different ethnic groups, and amalgams of all of the above, were all being applied in the many various Courts all over the North right up to Independence Day (1 October 1960). Which law was applied to the facts of a particular case depended on which Court – in which province, city or town, or even on which side of the street in the same town – the accused was tried in, and further, sometimes, on the wide discretion of the judge sitting in that Court on that particular day.[744]

This lack of uniformity in the law could be attributed to a desire to protect various competing interests, an expected outcome of the pluralistic nature of the Nigerian state. This state of 'legal pluralism' continued still exists in contemporary Nigerian law and derives added legitimacy from existent constitutional safeguards. Some consider this legal framework antithetical to legal development in Nigeria. According to Zahn:

> Nigeria's system, although it may seem "strong" on the surface, is in essence "weak……. customary law is considered 'law' because the Nigerian Constitution, which largely adopted the framework of the system instituted by British colonial rule, considers it to be law. The same can be said of Islamic law. The maintenance of the personal law systems in customary and Islamic law following independence seems to act as a compromise between the construction of a

[743] See Chapter 3 for further discussion on the enactment of the Criminal and Penal Codes.
[744] Ostien, Philip, 'Nigeria's Sharia Penal Codes (August 24, 2009)' in Philip Ostien, (ed*) Sharia Implementation in Northern Nigeria*, 1999-2006 A SOURCEBOOK, Vol. IV, Chapter 4, pp. 3-21 (Spectrum Books Ltd., 2007),4

'modern' state and the social reality as perceived by a large majority of the population.[745]

From the above, a major problem is highlighted, one which would be brought to the fore in later parts of this chapter. It seems to be the case that what exists in the form of customary law is neither a holistic protection of cultural beliefs nor totally representative of social reality. Thus, any subsequent discourse on the relationship between culture and rights in the legal context is subject to the caveat that the content of customary law may not be a true reflection of cultural beliefs. In any case, a determination of true 'customary law' universally representative of the Nigerian society is made highly improbable by the inherent cultural and ethnic diversities. Nevertheless, while contemporary customary law may be inadequate in establishing true 'culture', this is not equivalent to an absolute contradiction of its content with established cultural practices, mores and beliefs. This is notwithstanding Zahn's observation of customary law as recognized in customary Courts lacking similarity to the nature of customary law as practised by 'indigenous' Nigerians before the arrival of the British.[746] At best, Nigerian customary law represents a 'hybrid of European and traditional African indigenous cultural practices'.[747]

CULTURE AND THE LAW

ISLAMIC LAW (Sharia)

Sharia law or Islamic Law existed in Nigeria prior to the advent of colonialism and under the legal system, Muslims in civil matters could choose to be governed by Islamic law

[745] Zahn, R, 'Human Rights in the Plural Legal System of Nigeria' (2009) *Edinburgh Student Law Review* Vol 1 Iss 1, 66-90, 78
[746] Ibid,70
[747] Shaka, F.O, (2005) *The colonial legacy*, Third Text, 19:3, 297-305

with relation to civil matters.[748] This privilege was preserved by the colonial government subject to the fact that laws implemented must not be repugnant to natural justice, equity and good conscience.[749] Subsequent developments saw the gradual takeover by the established Native Courts of matters relating to Islamic personal law.[750] Until the introduction of the Penal Code, the criminal system operating in the North was dualist in nature with the existence of Native Courts administering Muslim law of the Maliki school and magistrate Courts having a civil and criminal jurisdiction.[751] It was only in 1958 that a panel of jurists recommended the adoption of a Penal Code regulating criminal law in Northern Nigeria which would be based on the existing Codes in Sudanese criminal Law.[752] During the colonial era, Islamic law was classified as customary law with jurisdiction in Islamic personal and civil law being vested in the Native Courts and appeals being transmitted to the Sharia Court of Appeal.[753] According to Oba, this step was taken by the colonial government for the furtherance of imperialist motives by the imposition of separate values and customs on the populace with the ultimate aim being the complete displacement of Islamic law as the law of the Northern Region.[754] It is however noteworthy that this remained the state of affairs following independence under the laws of the Northern Region[755] and continued till 1978 when the jurisdiction of Muslim Courts to finally and autonomously decide all issues of Islamic personal law was lost given the failure by the constitution to establish the federal Sharia Court of Appeal.[756] This legal development had differing responses from political stakeholders

[748] Ostien, Philip and Dekker, Albert, 'Sharia and National law in Nigeria' in Otto (ed) *Sharia Incorporated: A Comparative Overview of the Legal Systems of Twelve Muslim Countries* (2010, Leiden University Press), 559
[749] Ibid
[750] Ibid,567
[751] Ogbu, O.N, 'Punishments in Islamic Criminal Law as Antithetical to Human Dignity: The Nigerian Experience' (2005) *International Journal Of Human Rights* Vol.9 Iss.2, 165-182. For a more detailed explanation, see also Okonkwo and Naish (eds) *Criminal Law in Nigeria* (1980, Sweet and Maxwell), 1-9
[752] Ostien supra n.748
[753] See S. 2, Native Courts Ordinance, Cap. 142, Revised Edition of the Laws of Nigeria, 1948 and AEW Park, *The Sources of Nigerian Law* (London: Sweet & Maxwell, 1963), 65. There is however controversy on whether Islamic law may be classed as customary law given that it is a law imposed from outside Nigeria (Salamone, F.A, 'The clash between Indigenous, Islamic, Colonial and Post-colonial law in Nigeria' (1983) 21 *Journal of Legal Pluralism* 15 1983,29
[754] Oba, A.A, 'Islamic Law as Customary Law : The Changing Perspective in Nigeria' (2002) *International and Comparative Law Quarterly* Vol.51 Iss.4, 817-850, 827
[755] See Christelow, A, Islamic Law and Judicial Practice in Nigeria: An Historical Perspective (2002) *Journal of Muslim Minority Affairs* Vol. 24 No 1, 185-204, 196
[756] Ibid, 571-572

with the constitutional preservation of the existing Sharia Court of Appeal in the states representing a compromise between the various political interests.[757]

Following the return to democracy in 1999, there was a notable development in the Northern Region, beginning with Zamfara state. The Sharia Penal Code was introduced to regulate criminal law alongside the State Penal Code through the exercise of constitutional powers given to states to legislate on criminal matters.[758] By 2002, twelve states had adopted some form of Sharia criminal law into their criminal legislation with Sharia criminal Courts being established with jurisdiction over criminal matters.[759]. This development heralded the creation of certain institutions such as the Sharia Commissions and Councils of Ulama which exercise advisory functions and the hisbah organisations enforcing compliance with Sharia criminal law.[760]

In determining the influence of culture as manifested through Sharia law, the following features of the Zamfara State Sharia Penal code are instructive. First of all, it is a criminal offence for anyone to perform an obscene or indecent act in a private or public place or wear 'indecent or immoral clothing' which causes annoyance to others.[761] It also prohibits all forms of drunkenness and voluntary consumption of alcoholic drink whether in public or private.[762] There is also the prescription of certain punishments including flogging and amputation which are applicable to children.[763] Thus, one may deduce even in the legal context a heavy reliance on what is perceived as offensive to members of the community and this is the case whether an act is conducted in public or in private. It is

[757] Ojielo, M. O 'Human Rights and Sharia'h Justice in Nigeria' (2003) *Annual Survey of International & Comparative Law*: Vol. 9: Iss. 1, Article 7, 135-161,136
[758] The Sharia Penal Code is applicable to Muslims while the State Penal Code regulates criminal law in relation to non-Muslims.
[759] Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto, Yobe and Zamfara(Nigeria "political Shari'a"? Human Rights and Islamic Law in Northern Nigeria (2004) available at https://www.hrw.org/reports/2004/nigeria0904/ (last accessed 9th October, 2017)
[760]Ibid
[761] Sharia Penal Code of Zamfara State (2000), Section 370
[762] Ibid, Sections 149-151
[763] I.e those who have attained the age of criminal responsibility but are below the age of 18.

nevertheless noteworthy that even among Muslims, there was a certain discontent, especially at the early stages of implementation which stemmed from differing views as to what kind of culture was established by Sharia law.[764] According to Weimann,

> Northern Nigeria is not a homogeneous entity and populations in different parts of the region have shown varying levels of dedication to the project heralded by Zamfara State, a fact which also seems to have influenced judicial practice in criminal cases in Sharia Courts……. In the Hausa states of the North West, such as Zamfara, Kebbi, Sokoto, Katsina, Jigawa and Kano, where identification with the historic precedent of the Sokoto Caliphate is strongest, the number of ICL cases identified is high……. By contrast, in the North-Eastern states, such as Borno, Yobe and Gombe, where the majority of the population belongs to the Kanuri ethno-linguistic group, the introduction of Sharia in the Zamfara style was widely perceived as a Hausa project.[765]

Section 277 of the Constitution vests in the Sharia Court of Appeal appellate and supervisory jurisdiction in civil proceedings 'in addition to such other jurisdiction as may be conferred upon it by the law of the state'. Given the fact that the administration of criminal justice is within the legislative purview of each state, this gave an opportunity for the re-introduction of Sharia criminal law into the penal code. While the constitutionality of Sharia criminal law remains a controversial subject provoking different responses from different scholars[766], Sharia criminal law remains a part of state law in the core Northern states. As to the status of Sharia law in general under Nigerian law, while certain scholars consider Sharia law as being separate from customary law,[767]

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[764] Ladan, M.T and League of Democratic Women, *A handbook on Sharia Implementation in Northern Nigeria: Women and Children's Rights Focus* (2005) available at http://leads-nigeria.org/uploads/2479_File_SHARIA%20IMPLEMENTATION%20IN%20NORTHERN%20NIGERIA.pdf (last accessed 15th April, 2016)

[765] Weimann, Gunnar J, *Islamic Criminal law in Northern Nigeria: Politics, Religion, Judicial Practice* (Amsterdam University Press, 2010), 51

[766] Section 10 of the Constitution expressly prohibits the adoption of a religion as a 'state religion' which if applied in the context of Sharia law, appears to suggest legislative recognition of religious law.

[767] See Oba, A.A supra n.754

such a position is not regarded as trite. In any case, such a distinction does not necessarily affect the fact that it is an offshoot of pre-existing cultural behaviour, even if introduced into society in a religious context.

CHILD LABOUR

The concept of child labour is one which highlights certain cultural complexities especially as is related to human rights. In examining child labour from a legal standpoint, it is important to make certain observations. First of all, the culture of child labour may not in itself stem from a desire by parents or guardians to violate the rights or dignity of children. As stated by Bonnet:

> Parents in Africa, like parents all over the world, are concerned with two things when it comes to their children: to give them the best they can and to equip them as well as possible to face the future; in other words, to educate them. In Africa, perhaps more than anywhere else, the child is looked upon as a continuation of its ancestors. Anything that affects the child is the responsibility not only of its parents, but also of the extended family, sometimes so extended as to comprise an entire clan, tribe or village. This form of education was traditionally thought of as an initiation into a way of life and work, into a social history and structure.[768]

Secondly, it is not necessarily the case that the involvement of children in labour is in its strictest sense an abrogation of rights. On the contrary, it may augur well for the rights of children, especially in the context of participatory rights and freedoms. For instance, it is not inconceivable for the child to view labour, especially in the informal sector as being 'a way of avoiding too sudden a plunge into a wholly different world, while at the same

[768] Bonnet, M; Child Labour in Africa (1993) *International Labour Review* Vol. 132 No 3, 371-391,377

time bidding farewell to a way of life perceived as fossilized'.[769] Coupled with the socialization effect of early labour, one may argue that a culture promoting early labour may protect the development of the child in the manner envisaged by child rights, especially in its contemporary context. Studies conducted with regard to labour by children in Nigeria show that children perceived labour as a means of providing income for themselves, helping their parents and developing the necessary skills needed for responsible adulthood.[770] The question as to whether this satisfies the 'child-centred' approach required of the child rights protection framework is not necessarily resolved by this outcome notwithstanding the fact that more children supported rather than opposed child labour.[771]

The Child Rights Act prohibits 'forced or exploitative labour' and a child is only allowed to work where employed by a member of his family of an agricultural, horticultural or domestic character.[772] The Labour Act[773]outlines certain provisions with respect to work undertaken by children. Under the Act, no person shall be employed in any employment which is injurious to his health, dangerous or immoral.[774] For instance children under the age of sixteen are not permitted to work for longer than eight hours in a particular day.[775] Furthermore, children under the age of fourteen may only be employed in circumstances where they can return each night to the place of residence of parents or guardians or persons approved by parents or guardians.[776] This indicates the protection of children not necessarily from all forms of labour but from unhealthy, dangerous or immoral labour. The Child Rights Act makes reference to labour that may adversely

[769] Ibid, 380
[770] Omokhodion F.O, Omokhodion S.I and Odusote, T.O, 'Perceptions of Child labour among working children in Ibadan, Nigeria' available at http://www.streetchildrenresources.org/wp-content/uploads/2013/02/perceptions-child-labour-nigeria.pdf
[771] *Ibid*
[772] Section 28(1)
[773] Chap 198 Laws of the Federation of Nigeria 1990
[774] Section 59(6)
[775] Section 59(8)
[776] Section 59(3c)

affect the 'physical, mental, spiritual, moral or social development' of the child.[777] In this context alone, it is submitted that culture does not necessarily contradict this position. As stated by Anugwom:

> In purely cultural or traditional settings, children were exposed to labour that was not injurious to their psycho-mental health and social development under the auspices of the family. This sort of labour involvement was not readily tied to any significant economic considerations, rather the family saw it as a process of exposing the child gradually to the demands of work and instilling the dignity of labour in him[778]

This has however been eroded by economic considerations, with what is regarded as 'exploitative labour' being attributed to the 'inability of parents in the light of the crushing economic scenario of the globalisation era to make ends meet' as opposed to a mere desire to simply treat children as commodities to be used for economic gain.[779]

An important issue in this regard is the precise definition of such labour, especially as is related to culturally-permitted labour activities. This is especially with respect to domestic service rendered by the child at home with parents or guardians. Okafor describes domestic labour in this context as follows:

> Another type of domestic service that can be rendered by a child at home is whereby the child stays with his/her parents or guardian, though he/she is not paid wages like the domestic servant, but he/she is born or socialized into the family to help the household by doing most of the work. This is most common among all the labour done by the child, which may be beneficial and give the child a sense of self-worth and esteem in the family**.** But the fact that the labor is

[777] Section 28 (1c)
[778] Anugwom, E.E, 'Child labour in the context of globalisation in Nigeria' (2003) *The African Anthropologist* Vol 10 No 2,109
[779] Ibid,118-119

not paid for and that the labour deprives the child of needed rest and recreation, constitutes as child labour.[780]

The involvement of the child in domestic labour cannot be dissociated from pre-colonial and colonial arrangements with respect to the family system in Nigeria. However, it has been observed in preceding discussion on the Nigerian child how the involvement of the child in labour did not exclude the child from recreational activities in the manner suggested above.[781] It is further argued that the involvement of the child in labour, while having its roots in cultural perceptions relating to the socialization of the child and development in a communal setting has assumed dimensions inimical to the all-round development of the child due to prevailing socio-economic factors. An apparent problem in this regard is developing an appropriate distinction between legitimate and illegitimate activities as any criteria developed for making such a distinction are subject to changes and variations in line with changing conceptions of childhood and culture. Thus, child work perceived as developmental, integrative and educational (in the informal sense) in a particular setting may be viewed as exploitative, detrimental and hazardous in other societies.

CHILD MARRIAGE

According to the 2016 world report on state of the children, 17% of women in Nigeria are married by the age of 15 with 43% already married by the age of 18.[782] Although expressly prohibited by the Child Rights Act, it is still deemed acceptable in a significant portion of Nigerian society, going by the aforementioned statistics. The reasons given for this are many. According to Braimah:

[780] Okafor E.E, 'Child labor dynamics and implications for sustainable development in Nigeria' (2010) *Journal of Sustainable Development in Africa* Vol. 12 No 5, 8-21,12
[781] See Chapter 2 for a more expansive discussion on this subject
[782] The State of the World's Children 2016: Full Report available at https://www.unicef.org/publications/files/UNICEF_SOWC_2016.pdf (last accessed 20th September 2017), 151

> In Northern Nigeria child marriage is seen and used as a method for the preservation of the virtue of girls. The rationale for the practice of child marriage in Northern Nigeria is to ensure the preservation of virginity of women and, also, that women do not become pregnant out of wedlock. Based on these reasons, it is not uncommon to find children married at the age of 10 in Northern Nigeria. Additionally, other than the rationale that child marriage protects girls from social ills, such as promiscuity, it is also carried out for the preservation of family honour. Therefore, in order to avoid dishonour and the shame attached to pre-marital sex, girls are married off before reaching puberty.[783]

Aderinto further states as follows:

> Existing notions of morality and honour are important influences on decisions of parents to marry off daughters very early to ensure that a girl's virginity is preserved at marriage, as culturally expected in order to purchase the highly valued virtue for the girl and honour for her family. In the absence of viable options, early marriage is seen as a way of protecting girls from unwanted pregnancies. When such marriages are to older men, they are also considered as necessary guardians against possible immoral and inappropriate behavior on the part of the young wives.[784]

There is a continuous reference to the preservation of certain values and perceived virtues such as virginity and family honour. Assessing the importance of these values especially for the purpose of determining rights is a challenging task especially given the fact that such differs from person to person. It becomes more challenging where such assessment is undertaken having regard to western notions of morality, which may

[783] Braimah T.S, 'Child Marriage in Northern Nigeria; Section 61 of Part 1 of the 1999 Constitution and the protection of children against child marriage' (2014) 14 *African Human Rights Law Journal* 474-488, 484
[784] Aderinto, Saheed, *When Sex Threatened the State: Illicit Sexuality, Nationalism, and Politics in Colonial Nigeria, 1900–1958*.(University of Illinois Press, 2015)

transmit an imperialist message to the Nigerian society. On the one hand, there is a perspective of the child as a rights holder who should be free to exercise the right to marry without the imposition of the community and another perspective which subordinates individual interests to communal norms. This clash of perspectives is especially evident in matters relating to child marriage. Bascom also notes with respect to the Yoruba culture the general betrothal of girls before puberty in former times even though the girls only became marriageable the third year after puberty with girls normally being married at the age of twenty.[785] Bearing this in mind, it is unsurprising that all the states in the Western Region (including all Yoruba states) have had little problems incorporating the Child Rights Act into domestic legislation.

These are considerations for which provision is also made under the law. Under the Marriage Act[786], the age of marriage is set as twenty-one years with any individual below that age regarded as a 'minor'.[787] However, such individuals may still enter into valid marriage agreements with the written consent of the father. The Child Rights Act on the other hand sets the marriage age at eighteen years of age.[788] The Penal Code (which regulated criminal law in the Northern Region prior to the re-introduction of Sharia criminal law) had set the age of consent to sexual intercourse at eighteen years with sexual intercourse with a minor not unlawful where such intercourse took place within the confines of marriage subject to the 'attainment of puberty'.[789] An examination of the historical development of the Penal Code gives a clear insight as to the impact of culture in this regard.[790] There is a manifest lack of uniformity in the age of marriage which arguably has its roots in constitutional provisions in that regard. As noted in the previous chapter, Item 61 of the second schedule to the Nigerian constitution lists as a matter

[785] Bascom, William, *The Yoruba of South-Western Nigeria* (Waveland Press,1984),64
[786] Chapter 218, Laws of The Federation of Nigeria 1990
[787] Section 18
[788] Section 21
[789] Penal Code Law of Northern Nigeria 1959, Section 282(2)
[790] Discussed in earlier chapters (See Chapter 3). The Penal Code was essentially a compromise brokered by by the colonial administration with the Northern political elite to accommodate non-Muslim minorities living in Northern Nigeria before Nigeria was granted independence. Though based on English codes embodied in India and Sudan, it included provisions based on Sharia Criminal Law.

under the exclusive legislative list the 'formation, annulment and dissolution of marriages other than Islamic or customary marriages' as a subject under the exclusive legislative list. Thus the provisions of the Marriage Act and Child Rights Act are deemed inapplicable to Islamic and customary law marriages. This also implies that disputes in these forms of marriages are resolved by Sharia and Customary Courts respectively.

CULTURE, LAW AND RIGHTS: THE NIGERIAN EXAMPLE

An added legitimacy is vested in cultural practices when entrenched in existing laws as it implies the institutionalization of such a practice. This seems to be the case with respect to Islamic personal law and possibly other parts of customary law, albeit to a lesser extent. Having discussed the impact of custom/tradition on the development of Nigerian law, focus will be shifted to an examination of the relationship between culture and rights from a legal standpoint. The evolution of fundamental rights under the Nigerian constitution has been discussed in the previous chapter. It is however noted at this point that the emergence of fundamental rights in a sense operated to an extent as a replacement of native law and custom, especially in terms of criminal punishment. In affirming this position, it is observed thus;

> In part to replace it, the Eastern and Western Regions, supported by the British, were demanding inclusion in the Federation's new Independence Constitution of an enforceable chapter on fundamental human rights, which would, among other things, require that all criminal law be enacted as written law in which all criminal offences were defined and the penalties therefore prescribed (in short, all criminal law to be codified); that no person be discriminated against by any agency of government solely on the basis of his or her religion or ethnic affiliation

among others; and that no person be subjected to torture or to inhuman or degrading punishment or other treatment.[791]

This led to the abolition of existing customary criminal law and by implication, eradication of certain customary law punishments deemed contrary to the notion of fundamental rights. The preservation of customary law provisions on civil law matters was however not without its implications, especially as regards established marital practices such as child marriage.

The conflict that may exist between culture and fundamental rights in the Nigerian society is reminiscent of the legal situation created by the introduction of the repugnancy doctrine in the colonial era, a doctrine still recognized in relation to customary law. Under the Evidence Act, a custom is not enforceable by law where such custom is not in accordance with natural justice, equity and good conscience.[792] This repugnancy test had been applied at various times to invalidate certain 'barbarous customs' including the killing of twins, banishment of social outcasts, slave owning and customary burial practices. In *Eshugbayi Eleko vs Government of Nigeria*,[793] it was stated as follows:

> Their Lordships entertain no doubt that the more barbarous customs of earlier days may under the influences of civilization become milder without losing their essential character of custom. It would, however, appear to be necessary to show that in their milder form they are still recognized in the native community as custom, so as in that form to regulate the relations of the native community inter se. In other words, the Court cannot itself transform a barbarous custom into a milder one. If it still stands in its barbarous character it must be rejected as repugnant to "natural justice, equity and good conscience." It is the assent of the

[791] Ostien, Philip, *Sharia implementation in Northern Nigeria* supra n.742, 4-5
[792] *Nigeria: Evidence Act, 2011* [Nigeria], 3 June 2011, available at: http://www.refworld.org/docid/54f86b844.html [accessed 4 September 2017], Section 14
[793] (1931) AC 662

> native community that gives a custom its validity, and, therefore, barbarous or mild, it must be shown to be recognized by the native community whose conduct it is supposed to regulate.[794]

A significant problem with the application of this doctrine was the difficulty in determining the standards by which the concepts fundamental to the repugnancy test were to be assessed. Given the fact that it was part of received English law, it was hardly surprising that customs were assessed based on English standards of morality. The statements made in this regard by the Court indicated that even where there is communal assent to a particular custom, a finding of 'repugnancy' by the Courts would still lead to its invalidation. This led to accusations by certain scholars of the repugnancy doctrine affirming the non-existence of equity and justice in customary laws. Commenting on the effect of the repugnancy doctrine on Sharia law, Ladan states thus:

> The repugnancy test requires that no rule of Islamic Law or Customary Law shall be applicable if it is 'repugnant to Natural Justice, equity and good conscience'. This requirement is untenable to a primarily divine system of Justice of Islamic Law to be subjected to the test of human values that are always conflicting and liable to err. It is not permissible for the Justice of Islamic Law which plays a significant role in providing virtue by crushing vice; which strikes at the very root of the evil and obviates the causes which give rise to it, to be subjected to contradictory human values solely based on reason.[795]

From the above, certain issues regarding the relationship between law and culture may be deduced. It is extremely challenging in the first instance for the law to regulate societal behaviour where such behaviour has metaphysical origins. It becomes

[794] Ibid
[795] Ladan, M.T, *The Development and Application of Sharia Law in Northern Nigeria: Issues and Challenges* available at http://library.fes.de/pdf-files/bueros/nigeria/50282.pdf (last accessed 15th April,2016), 9

increasingly complicated where culture assumes legal status in form of written law as is the case with Islamic personal law. It is submitted that the effectiveness of supranational jurisprudence in the form of international law in the face of such complications faces the possibility of being reduced to being at best 'advisory documents' in the state to which such may apply as opposed to having the force of law.

The case of *Mohammed vs Knott* serves as a typical example. In the instant case, a twenty-six year old man had married a young girl who was between the age of 11 and 13 in Northern Nigeria before coming to England.[796] He had contracted a venereal disease and took his wife to a doctor for her to be fitted with a contraceptive appliance.[797] The hospital reported to the police and the matter was brought before a Juvenile Court stating that the girl was being exposed to moral danger.[798] The Juvenile Court in committing the girl to the care of a local authority stated that the 'continuance of such an association, notwithstanding the marriage, would be repugnant to any decent-minded English man or woman'.[799]In reversing the decision, the Divisional Court stated as follows:

> When they say that "a continuance of such an association notwithstanding the marriage would be repugnant to any decent-minded English man or woman", they are I think, and can only be, considering the view of an English man or woman in relation to an English girl and our Western way of life.[800]

This decision, as may be expected, led to different reactions from activists and legal scholars in the same manner as would be expected in any decision which has a standard-setting effect on individual morality especially in cases of differing cultural

[796] (1969) 1 Q.B 1.
[797] Ibid
[798] Ibid
[799] Ibid
[800] Ibid, 15-16

backgrounds.[801] With reference to the evaluation of culture in the context of the repugnancy doctrine, it has been recommended as follows:

> In evaluating the customs, the Courts are urged to consider among others, the place of the custom in the community, its value and influence, and whether its application is in accordance with the rule of law and the spirit of the constitution. In this way, the Courts will not be saddled with the problem of determining different standards of natural justice, equity, and good conscience to be applied to the various communities, and whether the custom violates their notion of public policy.[802]

The concept of fundamental rights and child rights in particular, also raises issues similar to those raised in the case discussed above none more relevant in a cultural context as an underlying presumption of the concept of rights being a western imposition on the Nigerian society. This creates the following problem as summarised by Harris-Short:

> Culture is not being raised, as is suggested by Pollis, to challenge the basic legitimacy of international human rights norms. In other words, the state is not generally contending that the various articles of the child Convention are not applicable to or relevant to the particular cultural context of non-Western states. To the contrary, the state is keen to be seen to be embracing human rights as the best way forward. The argument focuses instead on the difficulties the state faces in implementing the norms of the Convention against a background of entrenched cultural difference at the local level. The difficulty is thus presented as one of implementation: of how best to convince the local population to accept human rights as relevant and appropriate to their particular situation and to

[801] Ibid
[802] Asiedu-Akrofi, D, 'Judicial Recognition and Adoption of Customary Law in Nigeria' (1989) *American Journal of Comparative Law* Vol. 37 No 3, 571-593, 592

> persuade them to adhere to the standards that the state has willingly accepted.[803]

However, the human rights movement differs in certain respects. The first point of distinction is in the existence of regional and international rights instruments. Unlike the repugnancy doctrine which seemed to assess custom only in the context of the British society, child rights in Nigeria takes cognizance of the African Charter on the Rights and Welfare of the Child[804], a document which can arguably be described as being a product of an 'African conception of rights'. Thus, it may be easier to convey the notion of rights as being a concept compatible with the African system when suggested as being the agreement of countries with similar cultural systems. Without explicitly engaging with specific cultural practices, the African Charter requires state parties to take appropriate measures to 'eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child' with particular reference to discriminatory customs as well as customs prejudicial to the health or life of the child.[805] The African Charter however specifically prohibits child marriage and betrothal, as does the Child Rights Act.[806] The prohibition of these practices under national and regional law strengthens a notion that the concept of rights is no longer a 'western concept'.

These developments may nevertheless fail to convince cultural relativists who do not subscribe to the prevalence of any conception of the good which the African Charter by its very existence and scope of application suggests. For as stated by Freeman:

> Relativists regard all values as the products of the customs, practices and beliefs which have as a matter of fact developed within a particular tradition. They deny that any value has any authority, epistemological or moral, outside of this

[803] Harris- Short, S, 'International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child' (2003) *Human Rights Quarterly* Vol 25,Iss 1, 130-181,164
[804] OAU Doc. CAB/LEG/24.9/49 (1990). Nigeria
[805] Article 21
[806] Ibid

> cultural context. They deny that conflict between values belonging to different traditions can be settled in a reasonable way, because, so they argue, what is reasonable is itself a product of particular cultures. And so they demand of us that we ask not whether social practices like child marriage or female circumcision…..are justified by the moral considerations that we find cogent, but rather whether they are sanctioned by the relevant social understandings of the cultures within which they are practised.[807]

A core relativist view in this instance may reject the cultural legitimacy of the African Charter and consider it a mere product of western influence, citing the fact that the Charter 'reaffirms adherence to the principles of the rights and welfare of the child contained in the…..United Nations Convention on the Rights of the Child'.[808]

A major problem with respect to effective rights protection in Nigeria has been the attempt to sustain a multi-cultural, 'relativist friendly' legal culture while espousing universal ideals protected by the rights philosophy. This has led for instance to variations in the implementation of child rights protection provisions by states.[809] One may therefore question the notion of constitutional supremacy as there is a possibility that the existence of constitutional provisions especially with respect to the preservation of existing customary laws arguably enslaves the constitution to culture as opposed to culture being regulated by the constitution. A reading of the constitutional provisions suggests the likelihood of such a scenario. In qualifying fundamental rights provisions, Section 45 states as follows:

> Nothing in sections 37,38,39,40 and 41 of this Constitution shall invalidate any law that is reasonably justifiable in a democratic society

[807] Freeman, Micheal, *The moral status of children: Essays on Children's Rights* (Martinus Nijhoff publishers, 1997),138
[808] African Charter supra n.504, Preamble
[809] See Chapter 4 for a more detailed discussion on this subject

a) In the interest of defence, public safety, public order, public morality or public health

The judicial recognition of rules of customary law has been outlined above. This implies that where a particular law is recognized as being representative of what is 'public morality' and can be justified in a democratic society, it may be constitutionally protected even if in violation of certain fundamental rights. Moreover, there is a certain vagueness in these terms which ultimately renders these provisions uncertain and clumsy especially in terms of providing an effective yardstick against which culture and cultural practice may be measured. This failing in the law is regrettable especially in cases where as considered by Freeman, the social understandings within a cultural setting reveal either a total lack of or conflict in social understandings[810], a situation which could ordinarily be resolved by the rule of law.

Perhaps these failings are a reflection of the limitations of law in effecting certain changes on social behaviour particularly in the context of public morals. This is especially the case where such behaviour is based on factors with transcendental characteristics such as religious beliefs and myths. In a general commentary on law and social change, Vago states thus:

> A variety of social, psychological, cultural and economic forces may provide direct or indirect resistance to change efforts. The social factors include vested interests, social class, moral sentiments and organized opposition……cultural barriers to change include fatalism, ethnocentrism, notions of incompatibility and superstition.[811]

[810] Freeman supra n.807
[811] Vago, Stephen, *Law and Society* (9th Edition, first published 1981, Pearson, 2009), 363

A practical illustration of the above conclusion is noticeable both in the initial opposition to the enactment of the Child Rights and the continued resistance by states in the Northern Region of Nigeria to the universal application of the Act through domestic implementation.[812] With particular reference to child marriage in Nigeria, a serving senator from the North, who incidentally re-introduced Sharia Law into state law as governor allegedly got married to a girl who was 13 years of age at the time of marriage without any major implications.[813] In 2013, there were widespread protests with regard to the failure by the Senate to remove a controversial clause in the constitution which seemed to preserve child marriage.[814] It is not unlikely that the protection of 'cultural tenets' by the law in instances is rooted in political vested interests as opposed to an underlying desire to protect the rights of the child. This lends credence to An-Naim's assertion in relation to reform of Islamic law:

> Nevertheless, the proposed reform will probably be resisted because it challenges the vested interests of powerful forces in the Muslim world and may upset male-dominated traditional political and social institutions.[815]

This becomes more pertinent where the cultural defense is raised with respect to a tradition which, although not yet extinct, is under attack in the country of origin.[816]

Of all the problems that may arise in the relationship between rights and culture, none seems more significant than any disparities that may exist in terms of the theoretical perspectives from which both matters are considered. Child rights in Nigeria, especially

[812] See Chapter 3 for a more detailed discussion on this subject
[813] Nigerian senator marries girl of 13 http://www.aljazeera.com/news/africa/2010/05/2010518858453672.html (accessed 15th April, 2016). Even though the said governor denied the allegation and refused to state the age of the girl in question, evidence at the time suggested that she was below the age of majority (Nigerian senator Sani denies marrying girl of 13 http://news.bbc.co.uk/1/hi/world/africa/8651043.stm (last accessed 15th April, 2016)
[814] Baiyewu, Leke, 'Nigerians knock Senate over 'child marriage' law' available at http://odili.net/news/source/2013/jul/21/861.html (last accessed 15th April, 2016)
[815] An-Na'im,A.A, 'Human Rights in the Muslim World: Socio-Political Conditions and Scriptural Imperatives' (1990) *Harvard Human Rights Journal*, 3, 13-52,50
[816] Renteln, Alison Dundes, 'The use and abuse of the cultural defense' (2005*) Canadian Journal of Law and Society* Vol. 20 No 1, 47-67, 64

following the ratification of the CRC and the enactment of the CRA is viewed strictly from a legal perspective as opposed to custom which is best understood from a socio-legal perspective.[817] As is related to Sharia, An-Naim summarises this problem as follows:

> As a theoretical matter, the concept of human rights as rights to which every human being is entitled by virtue of being human was unknown to Islamic jurisprudence or social philosophy until the last few decades and does not exist in Sharia.[818]

With respect, there may be a difference in opinion with respect to the above assertion, especially where reference is made to parts of Islamic law with protectionist features for the vulnerable population such as women and children. Nevertheless such a conclusion is not inconceivable considering the nature of opposition to the notion of rights, particularly where such seems to contradict 'divine law'. Others may not therefore go as far as describing rights as being 'unknown' and view its earliest relationship with Islamic law in the context of subservience to divine law. One may also consider the above statement as being similarly applicable to customary law, especially in terms of contrasting the individualism underlying the concept of rights with the communal nature of societies and institutions governed by customary law.

Certain scholars regard Islamic culture as being protective of rights in the Nigerian context. Ladan insists for instance that Sharia law protects the child's right to freedom of religion, right to life, freedom of association, right to maintenance and right to property.[819] The Emir of Kano, a foremost traditional ruler in Nigeria has particularly

[817] i.e in terms of customary/Sharia law and entrenched cultural practices

[818] An-Na'im supra n.815, 22

[819] Ladan, M.T and League of Democratic Women, *A handbook on Sharia Implementation in Northern Nigeria: Women and Children's Rights Focus* (2005) available at http://leads-nigeria.org/uploads/2479_File_SHARIA%20IMPLEMENTATION%20IN%20NORTHERN%20NIGERIA.pdf (last accessed 15th April, 2016), 70-76

denounced the notion of Islam being resistant to the education of the girl child in stating as follows:

> We have adopted a version of our religion that is rooted in the 13th century mindset that refuses to accept the fact that the rest of the Muslim world has moved on…….other Muslim nations have pushed forward girl-child education……we have this myth in Northern Nigeria of building an Islamic nation….Islam is not univocal…there are many interpretations and we have for too long allowed the most conservative interpretation to be in ascendancy…… what is our attitude towards educating our girls?[820]

Nonetheless, the 'fundamental inconsistencies between Sharia as practiced in parts of Northern Nigeria and current standards of human rights' especially with respect to the age of childhood remains notable and arguably irreconcilable. An example is with respect to the Child Rights Law in Jigawa State of Northern Nigeria (which has subsequently been replaced with an amended version of the Children and Young Persons Law on grounds of incompatibility with Islamic beliefs) which prohibits child marriage but defines a child as a person below the age of puberty with adulthood considered in the context of being able to 'physically and physiologically' consummate a marriage.[821] The influence of Sharia law is thus evident even where the CRA is purportedly being implemented. Furthermore, Ladan's claim on the relationship between Islamic law and child rights does not necessarily reflect the position in contemporary Northern Nigeria (at least in terms of legislative recognition of the concept of child rights) and as the Emir rightly explains, the view in ascendancy remains a view that is largely opposed to the concept of child rights.

[820] Emir of Kano, Sanusi Lamido Sanusi Full Keynote Speech at the Kaduna State Investment Summit available at https://www.youtube.com/watch?v=k5HZUfPOZiw (last accessed 20th September 2017)
[821] *Concluding observations: Nigeria* supra n.907, para.26

In closing this section, one notes the following observations made by Ajayi and Torimoro with respect to African cultural realities and global rights ideals. First of all, both systems recognize the need to protect children against hazard and dangers.[822] There is also emphasis by both systems on the access of children to basic needs and education (even if not necessarily of a formal nature).[823] There is in addition a joint agreement of the division of responsibilities between children and adults.[824] Notwithstanding, there is a difference in perspectives regarding the process of realising these expectations in the Nigerian context in areas such as education. There is also a difference in perception as to what amounts to 'danger and hazards'. For instance, infliction of pain in the course of discipline by Nigerian parts, as stated by Uzodike, is considered a 'recipe for proper training' as opposed to child abuse or maltreatment.[825] Furthermore, as far as provision of basic needs are concerned, economic realities compel children to join the labour force at an age that may be considered inappropriate in the context of global rights. This is in addition to pre-existent cultural notions of children being assets to safeguard and enhance communal interests as opposed to being individual rights holders.

CONCLUSION

This chapter has examined the nature of the relationship between culture and the rights of the child. With particular reference to the Nigerian legal system, it has been submitted that the deduction of a universal cultural perspective for the purpose of making comparisons with human rights remains virtually impossible in Nigeria. Furthermore, it is noted that customary law, especially from a legal perspective has assumed a different dimension in contemporary times with the advent of colonialism and various law reforms associated with the foray into modernisation. Nevertheless, the reintroduction of Sharia law into the Nigerian legal system and the preservation of existing customary law

[822]Ajayi ,A.O and Torimoro, D.O, 'Perspectives on child abuse and labour: global ethical ideals versus African cultural realities' (2004) *Early Child Development and Care*, Volume 174, Issue 2,183-191,190
[823] Ibid
[824] Ibid
[825]Uzodike, E, Child abuse and Neglect in Nigeria: Socio-Legal Aspects (1990) *International Journal of Law and the Family* Vol. 4, 83-96,87

adjudication bodies under the Nigerian constitution still suggests a great influence on law-making in Nigeria exerted by established customary practices. Some specific practices and culture-based systems considered inimical to the interests of the child have also been considered. An assessment of culture in the context of law and the rights discourse has also been undertaken. It has been argued that the main issues with respect to developing an effective rights framework do not have to do with the practices representing culture but other political interests and disparities in theoretical underpinnings relating to custom-made law and child rights.

CHAPTER 8: EFFECTIVE CHILD'S PROTECTION: WHITHER NIGERIA?

> The ambiguities which dog the definition of the concept of children's rights…have numerous implications for any effort to enforce them. Where do children's rights begin and end? What about where children's rights conflict with the rights of other people[826]

As is the case with many other jurisdictions, the notion of children being rights holders is a concept difficult to embrace in Nigeria. As a result, any advocacy for effective enforcement remains a highly challenging task. Nevertheless, the complexity of a task does not detract from its necessity and as may be inferred from the existence of child rights specific legislation under international law, building an effective framework for the protection of children is a global responsibility.

In previous chapters, problems relating to the establishment of an effective child rights framework in Nigeria have been considered with particular focus on constitutional complexities and systemic complications rooted in the cultural outlook of the Nigerian society. The aim of this chapter is to examine methods by which child rights protection as a subject may assume greater relevance in Nigeria, especially bearing in mind the problems of constitution and culture discussed in Chapters 6 and 7. In doing so, one will highlight existing legislation and policy documents implemented pursuant to the Child Rights Act and thereafter examine relevant measures that may be adopted in establishing an effective rights framework in Nigeria.

[826] Nelken, David, 'Afterword: Choosing Rights for Children' in Douglas and Sebba (eds), *Children's Rights and Traditional Values* (Ashgate, 1998),326

WHAT HAS BEEN DONE?

Apart from the enactment of the CRA, other steps have been taken with respect to the protection of the rights of the child. In 2004, the Universal Basic Education Act was enacted which reaffirmed the right of the child to free and compulsory basic education.[827] In similar manner to the CRA, it also considers the failure by parents to ensure that children completed primary and junior secondary education a punishable offence.[828] The year 2005 saw the enactment of the Trafficking in Persons (Prohibition) Law Enforcement and Administration (Amendment) Act which prohibits the procurement of persons under 18 for sexual activity in a commercial context.[829] A more significant legislative step was the enactment of the Violence against Persons (Prohibition) Act 2015 which explicitly prohibits the practice of female genital mutilation under federal legislation.[830] Governmental policies and action plans have also been drafted with respect to child rights protection including the National Plan of Action on the Convention of the Rights of the Child, the National Child Policy, National Child Health Policy of 2007 and National Plan of Action on Orphans and Vulnerable Children.[831] These steps have been particularly noted and commended by the Committee on the Rights of the Child.[832]

It is however stated that these documents do not by themselves reflect a 'political will to ensure their effective implementation'[833] even if useful in terms of assessing the commitment to rights protection on a theoretical level. This is hardly surprising for certain reasons. First of all, as is the case with many countries, successive governments have differing agenda and focus. Thus, while one government for instance considers the

[827] Universal Basic Education Act (2004) available at https://www.ilo.org/dyn/natlex/docs/ELECTRONIC/87623/99979/F606926563/NGA87623.pdf ,Section 2(1)
[828] Ibid, Section 2(4)
[829] Available at http://placng.org/new/laws/T23.pdf , Sections 16 and 17
[830] Section 6(1). Some states had prohibited the practice prior to the enactment of this legislation (See Nigeria: Report on Female Genital Mutilation (FGM) or Female Genital Cutting (FGC) http://2001-2009.state.gov/g/wi/rls/rep/crfgm/10106.htm)
[831] *Concluding observations; Nigeria supra n.280, para 3.*
[832] Ibid
[833] See Musbau, Razak, 'Child abuse and Rights Protection' available at https://www.thisdaylive.com/index.php/2017/03/27/child-abuse-and-rights-protection-system/ (last accessed 16th May, 2018)

implementation of convention rights a fundamental objective, another may focus on ensuring economic stability and development. While an argument as to a complementary relationship between rights and economic development may be regarded as valid in an academic context, there is no guarantee that this viewpoint would be supported by administrative decision-makers. With particular respect to the rights of the child, the CRC in its most recent concluding observation on the state report submitted by the Nigerian government recommended the consultation of children in budgetary allocation as well as the utilization of a child rights approach in the elaboration of the state budget.[834] As it currently stands, the protection of child rights as a political agenda does not appear to have attained such a level of significance.

Secondly, the protection of the rights of the child is to an extent dependent on the level of awareness with regard to its importance in the political setting. Since the enactment of the CRA, there has been little or no explicit reference to the interests of the child as an area of focus for the government. The seven-point plan developed under the Umaru Musa Yar'Adua (Rtd)[835] democratic administration and the 'transformation agenda' of President Goodluck Jonathan[836]while considering issues relating to the education and health of the child did not reflect a holistic approach to issues relevant to the Nigerian child notwithstanding the existence of the CRA.[837] Furthermore, national conferences convened to resolve critical issues in relation to the Nigerian political and socio-economic system have made limited references at best to child rights issues. At the most recent national conference in 2014, a recommendation of child benefits being transferred to the child from his mother pending the attainment of the age of 16 was rejected with the

[834] Ibid
[835] Democratically elected President of Nigeria in 2007. Died in office May 5th 2010. For more on the seven-point agenda, see http://www.nigeriahc.org.uk/pdf/seven_point_agenda.pdf
[836]Took over from Shehu Musa Yar'Adua in 2010 and was in office till May 29,2015 . For more on the transformation agenda, see http://eujournal.org/index.php/esj/article/viewFile/249/279
[837] The seven-point agenda mentioned as an objective the reform of the educational sector for the purpose of 'ensuring the minimum acceptable international standards for all'. There was however no indication of reform being specifically directed towards the development of the child. SeeGadzama, I.U, 'Effects of President Umaru Musa Yar'Adua's 7-point Agenda on Agricultural Development and Food Security in Nigeria' (2013) *European Scientific Journal* Vol 9. No 32, 448-462,456

convenors specifically stating that 'benefits not accruing to mothers in the first place cannot be transferred to children'.[838] One may therefore summarize the reform process in Nigeria in its current state as being to a large extent cosmetic in nature which unsurprisingly has little impact on societal behaviour.

HOW HELPFUL IS THE AFRICAN CHARTER ON THE RIGHTS AND WELFARE OF THE CHILD (AFRICAN CHARTER)?

Reference was made in preceding chapters of this thesis to an 'afrocentric conception of rights'.[839] Irrespective of the accuracy of such description to the African Charter, the African Charter symbolizes an attempt to apply the concept of rights effectively to the African system with due regard being given to the 'cultural heritage, historical background and values of African civilization'.[840] One may therefore make reference to the Charter in examining the prospect of child rights integration and implementation in the Nigerian system. With reference to culture for instance, the African Charter enjoins states to take all appropriate measures to eliminate harmful social and cultural practices affecting the growth and development of the child.[841] This includes customs prejudicial and/or discriminatory to the child on grounds of sex or other status.[842]

A major area where the African Charter may prove useful is in relation to the definition of a child. Unlike the CRC, the African Charter specifically defines a child as one under the age of eighteen years in similar manner to the CRA. In doing so, the Charter provides no room for state parties to set a different age of majority, a development in

[838] For a full report of the 2014 National Conference, see http://media.premiumtimesng.com/national-conference/wp-content/uploads/National-Conference-2014-Report-August-2014-Table-of-Contents-Chapters-1-7.pdf
[839] See Chapter 5
[840] Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990), available at: http://www.refworld.org/docid/3ae6b38c18.html [accessed 8 July 2016], Preamble
[841] Article 21
[842] Article 21(1b)

itself ironic given the fact that adulthood under the traditional African setting is more dependent on factors such as the ability to perform certain feats and undergoing certain initiation ceremonies (which admittedly is dwindling in importance in Nigeria).[843] From a legal perspective, setting a particular age defining the duration of childhood enhances the prospect of uniformity and certainty in the law which in itself may prove useful in enforcing the rights of the child. This however represents an attempt by the law to influence the cultural outlook of the society, an outcome which is often met with serious opposition.

The influence of the African Charter is dependent in large part on the status of the CRA under domestic law. Under Section 12 of the Constitution, ratified treaties are only enforceable to the extent to which such treaties have been incorporated into domestic law by an Act of the National Assembly.[844] Assuming the CRA operates as an incorporation of the CRC and the African Charter, the provisions contained therein apply to all parts of the Federation, resolving the dilemma created by the different legislative lists discussed in previous Chapters. However, as it currently stands, the wording of the CRA suggests that it is at best heavily influenced by the African Charter and the CRC. As a matter of fact, the provisions of the CRA bear a greater similarity with the English Children's Act 1989 than either of the two human rights instruments. On this basis, it would appear unlikely that the African Charter provides useful assistance in ensuring the universal applicability of the CRA.

As with the CRC, the African Charter also appoints a Committee of experts for the purpose of its implementation.[845] In its concluding observations on Nigeria, the Committee also observes the need for certain steps to be taken including the

[843] For more on this discussion, See Chapter 2
[844] Section 12(1)
[845] Article 32

harmonization of legislation relating to the child across different states. An examination of the work of the Committee in relation to Nigeria reflects a lack of extensive engagement with prevalent issues in relation to child rights.[846] The concluding observations by the Committee on Nigeria makes reference to certain violations of child rights such as Female Genital Mutilation, child labour and child trafficking.[847] There is however little else by way of discussion on the problems or concrete reform measures with respect to Nigeria or indeed the African continent in general. This may be attributed in part to the scarcity of information provided by the Nigerian government in relation to key areas such as education. As a matter of speculation, one may also suggest that the African Committee considers work done by the CRC as effectively covering the relevant issues in which case any further recommendations may simply amount to a repetition. Notwithstanding, it is submitted that the approach of the Committee as a standard-setting body in relation to child rights protection remains inadequate with excessive deference being given to the state. This corroborates Viljoen's view of the Committee often leaning 'too far towards deferring to the state' in trying to find a balance between providing specific guidance to reporting states in order to ensuring accountability and allowing a measure of discretion to the state.[848] More specific and selective recommendations are necessary for the increased effectiveness of the Committee.[849] This should be the case notwithstanding evident problems relating to support from the parent institutional body (the African Union).

With regard to implementation of the provisions of the Charter and by implication the CRC, the African Committee is in a unique position. Its status as an advisory body gives the opportunity to issue extensive recommendations engaging with the peculiarities and sensitivities of the African society without being unduly concerned with technicalities

[846] *Concluding Recommendations by the African Committee of Experts on the Rights and Welfare of the Child on the Nigeria Report of the Status of Implementation of the African Charter on the Rights and Welfare of the Child* available at http://www.acerwc.org/download/concluding_observations_nigeria/?wpdmdl=8751
[847] Ibid
[848] Viljoen, Frans, *International human rights in Africa* (first published 2007,OUP,2012),402
[849] Ibid

associated with judicial bodies. Furthermore, given the fact that the enforcement and interpretation of the CRA is at an embryonic stage, the recommendations of the Committee may prove useful in terms of providing persuasive interpretation of the provisions of the CRA which may subsequently be made binding by the Nigerian courts. This may serve as a stepping stone for the entrenchment of child rights protection as an area of substantive law.

PROTECTING THE NIGERIAN CHILD: REFORM MEASURES

CONSTITUTIONAL AMENDMENT?

Constitutional limitations to effective child rights protection in Nigeria have been discussed in Chapter 6. It is noteworthy that the legitimacy of the constitution is not by itself without controversy with radical calls being issued from certain quarters for the annulment of the current Nigerian constitution. [850] According to Ogowewo, the constitution is founded on an illegality and a conceptual impossibility which affects its legitimacy.[851] A new constitution may not necessarily be feasible in view of the fragile nature of the Nigerian democratic system and the volatility of the Nigerian society in general. Nevertheless, this does not preclude significant changes in the structural and substantive content of the constitution, especially given the fundamental nature of the constitution and its importance to governance in a democratic setting. Ofo in this respect states thus:

> In view of the fundamental nature of the constitution and the dynamic nature of society, it is not difficult to imagine that situations would arise requiring some provisions of the constitution to be amended. Several reasons can be adduced for this. It could be because new situations not contemplated by the constitution have arisen which needed to be accommodated. It could also be due to

[850] Ogowewo, T, 'Why the Judicial Annulment of the Constitution of 1999 is Imperative for the Survival of Nigeria's Democracy' (1999) *Journal of African Law* Vol. 44 No 2, 135-166
[851] Ibid, 135

challenges encountered in the implementation of the constitution which were not envisaged by the drafters of the constitution. Constitutional amendment could become necessary as a result of other societal dynamism: changes in technology, changes in the administrative structure of the country, the need to accommodate the interest of some segments of the society, etc.[852]

In this context, a significant development with implications for constitutional structure is the rise in the human rights movement and the increasing influence of international law on national sovereignty. In relation to the domestication of international law, the likes of Egede have recommended that the dualist mode of treaty incorporation be discarded.[853] According to him, there is no reason why Nigeria should not discard the dualist model under section 12(1) of the constitution, being 'a relic inherited from its colonial past'.[854] An adherence to such a recommendation would effectively lead to the automatic incorporation of the CRC into Nigerian law and render justiciable under Nigerian law all the rights listed therein given the fact that the CRC has been ratified in Nigeria.[855] It is however argued that such an approach, while generally enhancing the prospect of effective rights protection in general, may not be of much assistance with respect to the rights of the child. To the extent that it provides for substantive rights, the CRA can be said to have achieved the aim of treaty incorporation. The problem in this instance is not the absence of child rights in Nigerian law, but institutional factors limiting their application and enforcement. Even if a monist approach to treaty incorporation is adopted, the continued existence of these factors reduces the potential effect of such a change.

[852] Ofo, N, 'Amending the Constitution of the Federal Republic of Nigeria 1999' (2010). Available at SSRN: https://ssrn.com/abstract=1649703 (last accessed 20th September, 2017)
[853]Egede, E, 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties' (2007*) Journal of African Law* Vol 51 No 2, 249-284
[854] Ibid,280
[855]Ratification of the CRC took place on 19th July, 1991. See http://lib.ohchr.org/HRBodies/UPR/Documents/Session4/NG/NHRC_NGA_UPR_S4_2009anx_RatifiedHumanRightsInstruments.pdf (last accessed 5th October,2017)

There is a greater possibility for the monist system solving such problems created by the dualist approach in a more general context as it obviates the need for separate legislative action in relation to the justiciability of rights. It is however observed that international law remains hardly used as a basis for litigation even where it has been automatically incorporated into domestic legislation.[856] In support of this assertion is the fact the CRA despite having been passed into law since 2003 has been scarcely referred to or directly applied by Nigerian courts, even in states that have domesticated the CRA.[857] It is submitted that a change in method of treaty incorporation does not imply in practical terms that rights guaranteed pursuant to such treaties would be enforced in domestic courts. In view of the foregoing, one could argue that both the monist and dualist approaches in their distinct contexts should be discarded in favour of an approach identifying treaty provisions as being self-executing in which case treaties can be relied upon directly for independent legal action in the absence of domestic legislation grounding the relevant treaty.[858] This approach in itself may however give rise to certain complications arising from conflicting legislation particularly in an instance where, as is the case with the CRA, the problem is not necessarily one of a lack of domestic legislation but universal enforcement of incorporated provisions.

There have also been calls for amendments to the constitution for the purpose of ensuring the justiciability of economic and social rights (ESRs).[859] In Ibe's view:

> Whilst one would not argue for exclusive and/or first-hand recourse to litigation in cases involving violations of economic, social and cultural rights, it is imperative that one resorts to the judiciary in a country like Nigeria where there exists a sufficiently gross failure to uphold basic economic, social and cultural rights.

[856] Viljoen, Frans, *International Human Rights Law in Africa* (OUP, 2012), 554
[857] i.e referred to in a limited number of Matrimonial causes cases. Only one case specifically relating to the implementation of the Child Rights Act has been decided by the Appeal Court. See Chapter 4 for a more detailed discussion on case law relating to the rights of the child
[858] Ibid
[859] E.g right to health, right to education, right to social security

> Where the other two branches have failed to fulfil their responsibilities, the judiciary has a duty to intervene.[860]

With particular respect to children, Nolan considers children as being in a significantly different position from adults[861] as the physical and psychological effects of socio-economic rights violations are greater on children than adults.[862] This in effect arguably translates into a greater argument for the justiciability of these rights particularly in relation to children. There is good reason to align with this position. The ratification of various treaties protecting ESRs denotes recognition on the part of the executive of such rights while the enactment of domestic legislation guaranteeing the said rights also indicates legislative intent to protect these rights.[863] A constitutional amendment guaranteeing such rights may therefore be in order. Having said this, such an amendment may also give rise to issues relating to resource allocation in order to protect such rights. An age-old argument portrays socio-economic rights being inevitably resource-dependent and as a result, incapable of being satisfied where there is a scarcity of resources. As summarised by Nolan:

> Another frequently-made objection to the courts dealing with socio-economic rights is that socio-economic rights differ from civil and political rights on the grounds that the former require the use of resources by the state, while the latter do not.[864]

In responding to this argument, Nolan particularly attributes the effect of rights protection on resources as being dependent on the obligation established by the right as

[860] Ibe, S, Implementing economic, social and cultural rights in Nigeria: Challenges and opportunities (2010) 1 *African Human Rights Law Journal* 197-211,207
[861] Nolan, Aoife, *Children's Socio-Economic Rights, Democracy and the Courts* (Hart Publishing, 2011), 14
[862] Ibid
[863] Nigeria is a party to the International Convention on Economic, Social and Cultural Rights (ICESCR) having acceded to same on 29th July 1993(See http://hrlibrary.umn.edu/research/ratification-nigeria.html).
[864] Nolan supra n.861, 28

opposed to its particular classification.[865] In any case, an assumption that socio-economic rights are not realisable in a specific society at a given time does not mean that they are merely aspirational goals.[866] Furthermore, the possibility of justiciability leading to a possible confrontation between the executive and the judiciary in Nigeria has been described by the likes of Odumosu as a 'healthy confrontation' and as such should not be viewed with trepidation.[867] In aligning with this view, one will further state that 'judicial activism' (theoretically speaking) in regulating executive action is hardly a recent phenomenon in the Nigerian legal system and is necessary for an effective reform process.

A more relevant point in this regard is the fact that inclusion of ESRs as 'fundamental objectives of government policy' suggests that such rights are crucial towards ensuring the well-being of the people and constitute a yardstick for good governance. Justiciability in this regard only reinforces the fact that fulfilment of obligations created by ESRs is a governmental duty which is in consonance with the spirit of the constitutional provisions to that effect. Furthermore, establishment of structures required for the protection of ESRs also enhances the protection of other rights pertaining to the child in line with the universal view of rights being 'interrelated, interconnected and interdependent'.[868] While there is no guarantee that judicial orders made in this respect would be implemented, access to judicial remedies at the very least serve as a mechanism for ensuring governmental accountability and in effect a departure from the current state of affairs. In view of the importance of access to judicial remedies especially given the increasing gap between the elite and the masses as well as the problem of wealth concentration in a few hands, the likes of Akinsanya regard the non-justiciability of these fundamental

[865] Ibid
[866] Ibid
[867] Odumosu, Olakunle, 'Social Implications of the 1999 Constitution' in Ajakaiye and Benjamin (eds), *Issues in the Review of the 1999 Constitution of the Federal Republic of Nigeria* (NISER,1999)
[868] Ibe, S, 'Beyond Justiciability: Realising the promise of Socio-economic rights in Nigeria' (2007) *African Human Rights Law Journal* Vol. 7 No. 1, 225-248

objectives as disappointing.[869] Based on these arguments, there is no longer any real basis for the continued existence of a constitutional provision rendering economic and social rights non-justiciable, particularly in relation to children. Nevertheless, this remains the current position under both federal and state law.

A significant aspect of the call for constitutional amendment is with respect to the legislative lists. The Committee on the Rights of the Child in particular has recommended the inclusion of child rights in the concurrent legislative list in which case the CRA would be applicable in all parts of the federation.[870] This in itself does not undermine the legislative competence of states as legislative powers would not be vested exclusively in the federal body. As explained by Nwabueze, the primacy of federal legislation in concurrent matters simply implies the suspension of a state law inconsistent with a federal law in force, but that state law remains in formal existence throughout the period.[871] Nevertheless, there is a possibility of such an amendment 'opening the floodgates' in which case subsequent legislation affecting the child would be applicable in all parts of the federation, thus undermining the legislative powers of constituent states. Under Nigerian law, it is not open to the federal republic of Nigeria to enact any legislation that undermines the legislative authority of the states unless such an action was 'inevitable in the overall interest of the nation' and has constitutional backing.[872]

Certain scholars have considered the amendment of legislative lists unnecessary for the purpose of the CRA. Egede and Coetzee have contended that notwithstanding the legislative arrangement under Nigerian law, the CRA should be regarded as being

[869] See Akinsanya, Adeoye, The 'Founding Fathers' of the 1979 Nigerian Constitution, Fundamental Objectives and Directive Principles of State Policy' in Akinsanya and Ayoade (eds) *An Introduction to Political Science in Nigeria* (University Press of America, 2013),363
[870] *Concluding observations : Nigeria (2010) CRC/C/NGA/CO/3-4*, Para 8
[871] Nwabueze, Ben O., *Federalism in Nigeria under the Presidential Constitution* (Sweet & Maxwell, 1983),41
[872] Attorney-General, Ondo State vs Attorney General of the Federation (2002) 9 NWLR Pt 772 at 222

universally applicable.[873] Coetzee further argues that the CRA prevails over all other legislation having an effect on the rights of the child pursuant to Section 4(5) of the Nigerian constitution.[874] The validity of these arguments do not serve as the focus of this chapter given the fact that as it currently stands, child rights protection is generally regarded as a residual legislative matter. An advocacy for an amendment that will firmly establish the CRA as being of universal effect and resolve any constitutional law controversies is a more pragmatic approach which resolves the academic dilemma created by the current constitutional position.

It is argued that the likelihood of a constitutional amendment with respect to the legislative lists would largely depend on the relevance of child rights protection in the law-making process. It is noted that despite the review process having been purportedly undertaken since 2010, the position remains unchanged. This is largely as a result of the fact that matters relating to child rights are not necessarily a priority in the political process. Unfortunately, there is little to suggest the existence of any pressure from relevant stakeholders such as the mass media for a change in circumstances.[875] This may be attributed to a prevalent lack of awareness as to the nature of child rights among the populace with discussion on child rights being more academic than political. It is noted that rights protection as a general subject is not included in either of the lists with rights protection only considered to the extent as provided under Chapter IV of the Nigerian constitution.[876] This position is hardly in consonance with the global importance assumed by the concept of human rights in contemporary academic and political discourse. A constitutional amendment of the nature suggested by the Committee on the rights of the child could prove highly relevant in generating some form of awareness as to the importance of the subject.

[873] See Egede, E, 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties' supra n.852, Coetzee, Suzanne, 'Discipline in Nigerian schools within a human rights framework' (2010) *African Human Rights Law Journal* Vol.10 No. 2, 478-501
[874] Ibid
[875] Nwodu, C.L and Ezeoke, C.B, *An Evaluation of Press Coverage of Children's and Women's Rights in Nigeria*
[876] *Constitution of the Federal Republic of Nigeria 1999,* Sections 33-44

The amendment of constitutional provisions is hardly a straightforward process. Under Section 9 of the Constitution, provisions of the constitution may be amended by an Act of the National Assembly which is passed after a proposal for the enactment of such Act is supported by the votes of not less than two-thirds majority of all the members of the National Assembly and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States.[877] An amendment of fundamental rights provisions entails a similar process with a four-fifths majority approval being required from each legislative arm for amending Chapter IV provisions under the constitution.[878] This process, while theoretically simple, is less so in practice. The ethnic and constitutional diversity of the Nigerian state implies that a proposal for constitutional amendment may require the support of houses in regions opposed to child rights protection. Nevertheless, there remains as yet cause for optimism in this regard. The adoption of the CRA by 24 states of the federation implies support for the protection of child rights in about two-thirds of the federation. Given that the necessary constitutional amendment in this regard is not in relation to fundamental rights, a two-thirds majority support in this regard is at the very least feasible.

It is particular noteworthy that the constitution has been amended twice in the space of 17 years, none of which amendments were with consideration to the recommendation of the CRC stated above.[879] This arguably suggests a marked lack of commitment to constitutional reform in the context of rights protection. This, unsurprisingly, sets a tone for general apathy in the implementation of existing legislation. In Okyere's view:

> However, while the passage of the Child Rights Act is a milestone for Nigeria's children and represents the country's commitment to the UNCRC, implementation is weak. Overall, key informant interviews highlighted that child protection is not

[877] *Constitution of the Federal Republic of Nigeria,1999*, Section 9(1)
[878] Ibid, Section 9(2)
[879] This however does not imply a lack of regard for rights in the constitutional process. For pursuant to the 3rd Alteration to the Constitution, the National Industrial Court has jurisdiction to deal with matters regarding international conventions ratified by Nigeria in the context of labour rights (See Section 254 (C) of the 1999 Constitution (as amended)

> prioritised in Nigeria. Government agencies charged with these objectives are among the most marginalised. There are very few professional personnel, such as social workers, particularly at local levels[880]

While a constitutional amendment in itself by no means represents the only measure necessary for developing an effective child rights framework, such a process appropriately applied gives at the very least a legitimacy to the notion of child rights protection invaluable to the overall interest of the child.

HUMAN RIGHTS RESOCIALIZATION

In examining the relationship between the cultural setting in African societies and rights protection in general, Ibhawoh stated as follows:

> Constitutional and legal forms for recognizing and protecting human rights manifest shortcomings that result from the continuing conflicts with "traditional" cultural definitions and practices. One possible explanation for this may be that the development of national human rights regimes in Africa have not often been grounded on cultural traditions.[881]

Tradition remains a 'formidable force' to contend with in the eradication of harmful practices especially where majority of its practitioners regarding the practice as a good custom inherited from past generations to be transmitted to future generations.[882] A

[880] Okyere supra n.559
[881] Ibhawoh, B, 'Between Culture and Constitution: Evaluating the Cultural Legitimacy of Human Rights in the African State' (2000) *Human Rights Quarterly* Vol. 22 Iss.3,845
[882] Ayenigbara, G.O, Aina, S.I and Famakin,T.D, 'Female Genital Mutilation: Types, Consequences and Constraints of Its Eradication in Nigeria' (2013) *IOSR Journal of Medical and Dental Sciences* Vol.3 Iss.5 available at http://www.intact-network.net/intact/cp/files/1385899751_Female%20Genital%20Mutilation%20Types,%20Consequences%20and%20Constraints%20of%20Its%20Eradication%20in%20Nigeria.pdf (accessed 10th September,2015). For more on the importance of culture, see Chapter 7

resocialization process must therefore be accompanied by an understanding that certain practices by their very nature reach down into the heart of a community as important in defining that community's cultural identity[883]; an identity protected under international human rights law.[884] This approach is particularly necessary in cases where tradition has undergone various social, economic and political processes which have duly ascribed such traditional notion with some form of legitimacy.[885]

The prospects for practical implementation of a given regime of human rights as a normative system are related to the degree of its legitimacy in the context of the culture where it is supposed to be interpreted and implemented in practice.[886] Acknowledging the necessity for cultural legitimacy is a useful first step in the fight to eliminate the practices that may have been established as harmful to the individual.[887] This is not however without its difficulties. The cultural identity of a community view differs from the cultural identities of each individual members of the community.[888] The existence of multiculturalism within a community 'makes it hard to determine which part of the cultural identity deserves protection'.[889] One may consider such a view as apposite to the practice of child marriage for instance which is especially prevalent in the Northern part of Nigeria but less so in the Southern part. The harmonization of beliefs in such an instance in order to create an environment characterized by the universal applicability of child rights would most likely lead to questions being raised about the legitimacy of such a practice with differing opinions from the Northern and Southern protectorate.

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[883] Van Beuren, Geraldine, 'Balancing Traditional Values and Cultural Plurality' in Douglas and Sebba (eds) *Children's Rights and Traditional Values* (Ashgate Publishing, 1998), 17
[884] See Article 16 of The International Convention on Economic, Social and Cultural Rights (ICESCR) (1966) available at http://www.ohchr.org/EN/ProfessionalInterest/Pages/CESCR.aspx
[885] Okeke, Phil.E, 'Reconfiguring Tradition: Women's Right and Social Status in Contemporary Nigeria' (2000) *Africa Today* Vol. 47 No 1, 47-63, 55
[886] Cerna, Christina M. and Wallace, Jennifer, 'Women and Culture' in Askin and Koenig (eds), *Women and International Human Rights Law (Vol. 2)* (Transnational Publishers, 2000), 648
[887] Ibid
[888]Donders, Yvonne M, *Towards a right to cultural identity?* (Intersentia,2002),46
[889] Ibid

Determining the cultural legitimacy of a practice becomes slightly more complex if such a practice is integral to the maintenance of societal order in which case its eradication could lead to a disintegration of societal structures in a manner bordering on anarchy. Admittedly, the accuracy of such a notion may not be easy to assess especially in the absence of concrete empirical evidence. Thus, rights advocates are not given much room to advocate a view which balances the competing views of rights and culture. Nevertheless, it is argued that a systematic engagement with these entrenched practices and appreciation of the socio-cultural context in which their legitimacy is rooted is a useful first step in resolving such a dilemma.

The question that may arise in this instance therefore is whether a 'rights culture' consistent with the concept of cultural pluralism can be established. In making an argument in the affirmative, Ibhawoh is of the view that discussions about the concept of human rights must be construed as something that has been developed, struggled for and won by people in all societies.[890] To this end, he considers an 'afrocentric conception of rights' as a valid worldview.[891] This notion is alluded to by Mutua who, in examining the pre-colonial African society, considers as existent an African view of human rights 'centred on the primacy of the community' and characterized by a 'blend of specific values resulting from the harmonious combination of the fundamental values of the group and the autonomous recognition and protection of the individual'.[892] This implies some sort of symbiotic relationship between community values and individual rights. The individual in this case is under an obligation to protect community values and the community reciprocates by protecting the rights of individuals within the community

[890] Ibhawoh, B, *Imperialism and Human Rights : Colonial Discourses of Rights and Liberties in African History* (State University of New York, 2007),27
[891] Ibid
[892]Mutua M.W, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties', (1995) *Virginia Journal of International Law* 35,pp 339-380

Establishing an 'afrocentric conception of rights' in the Nigerian system, especially in relation to children is not without its challenges. First of all, the contemporary understanding of rights can hardly be said to recognize an 'afrocentric conception' especially in view of the limited involvement of the African society in the drafting of rights instruments.[893] This limited involvement arguably lends credence to the view of rights being a 'western imposition', a view which appears to be unchanged by the adoption of regional instruments such as the African Charter.[894] Furthermore, the ratification of the CRC and the African Charter were political decisions devoid of the consensus of the Nigerian populace. The CRC was ratified for instance in 1991 when Nigeria was ironically under military dictatorship and decisions were taken on the basis of military decrees as opposed to democratic consultations. The African Charter was ratified in 1999 under the civilian government led by General Olusegun Obasanjo (Rtd). This was nevertheless an executive decision with no evidence of prior consultation with representatives of the citizenry. The CRA, though enacted in a supposedly democratic setting, cannot also be reconciled with the will of the people, a fact reflected in the struggle to secure universal domestication of the CRA by states in the Nigerian federation. The concept of an 'afrocentric conception of rights' may therefore still be regarded as unfamiliar to the Nigerian society, not for any other reason other than its reference to the 'rights language'.

There is an alternative view of human rights resocialization which requires relevant stakeholders to refrain from an 'excessive rhetoric of rights' which could be 'counterproductive and harmful to interpersonal relationships'. As stated by Osiatynski:

> An excessive rhetoric of rights can be counterproductive and harmful to interpersonal relationships. Nevertheless, in cases of abuse, violence or drastic

[893] Viljoen supra n.264

[894] Lone notes difficulties relating to the acceptance of the African Charter of Human and People rights among radical post and anti-colonialists, particularly in relation to the proclaimed status of the Charter as an 'offspring' of the Universal Declaration on Human Rights (Lindholt, Lone, *Questioning the Universality of Human Rights: The African Charter on Human and Peoples' Rights in Botswana, Malawi and Mozambique* (Ashgate Publishing, 1997),20

> neglect, children should be protected even within their own family. But such protection should be assured by family law and penal law alone, without the need to invoke the concept of rights.[895]

This should not be taken to imply that the concept of rights cannot be directly invoked, especially as a basis for obtain legal redress in certain circumstances. For as he rightly observes:

> However, when the law does not offer such protection-or when the law exists but is neglected-the assertion of rights can protect victims and compel state authorities to issue and enforce proper laws.[896]

An increased awareness of the negative effects of certain harmful practices, especially those prejudicial to children created by increased sociological engagement with these practices, as evidenced in research conducted by Ibekwe et al has not necessarily resulted in their eradication.[897] It is therefore submitted that in certain instances, legal prohibitions derived from a 'rights concept' may be necessary to legitimize growing societal intolerance of certain behaviour evidenced as inimical to the development of its members. Nevertheless, such legal prohibitions are arguably most effective where an 'enabling environment' has been created through effective education and establishment of social conventions opposing those practices sought to be prohibited under the CRA. For as rightly observed by Freeman, un-implemented, partially implemented or badly implemented laws may actually do children more harm than good.[898] In addition, interference by the courts under the pretext of rights may also give rise to an interpretation of rights 'insensitive to the contextual realities and power-relationships in

[895] Osiatynski, Wiktor, *Human Rights and Their Limits* (CUP,2009), 202-203
[896] Ibid
[897] Ibekwe P.C., Onoh R.C, Onyebuchi A.K., Ezeonu P.O. and Ibekwe R.O, 'Female genital mutilation in Southeast Nigeria: A survey on the current knowledge and practice' (2012) *Journal of Public Health and Epidemiology* Vol. 4(5), pp. 117-122
[898] Freeman, Micheal, *The Moral status of children, Essays on the Rights of the Child* (Martinus Nijhoff, 1997),29

which various groups experience rights violations'.[899] To this end, Liebenberg considers as highly important the ability of courts to foster a participative atmosphere in decision making which could aid the courts in working out the concrete implications of the 'rights norms' in different circumstances.[900]

A notorious criticism of children's rights documents is the fact that such documents are based on Western perspectives and fail to reflect other cultures.[901] In an ethnically diverse country such as Nigeria, a universalist perspective of rights in the manner espoused by the CRA or CRC may give rise to such criticisms especially where cultural values clash with rights protection standards. Building an effective rights framework must therefore entail some form of interaction between rights and culture as opposed to an outright imposition of rights on culture. Having said this, there is the need to consider the possibility of culture being used as an instrument to protect selfish political interests. It is hardly inconceivable that the main proponents of the 'cultural defence' to the influence of human rights are the political elite who are by no means directly involved in the 'cultural practices' serving as the basis for their justification.[902] With respect to Nigeria, there is a palpable disconnect between the political elite and the individuals whose interests they claim to protect particularly as is related to children. It is therefore difficult to argue that the 'culture' defence which serves as a hindrance in the universal applicability of the CRA is specifically directed towards protection of children. This is especially given the fact that as shown by empirical research, children are relatively unaware of their status as rights holders.[903] In a sense, one could therefore argue that the cultural defence in the Nigerian context is more symbolic of a paternalistic and elitist view of the best interests of children.

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[899] Nolan supra n.861
[900] Liebenberg. Sandra, 'Engaging the paradoxes of the universal and particular in human rights adjudication: The possibilities and pitfalls of 'meaningful engagement' (2012) 1 *African Human Rights Law Journal* 1-29
[901] Harris-Short supra n.799
[902] Kaime, Thoko, 'The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections (2005) 2 *African Human Rights Law Journal* 221-238
[903] See Ejeih, M.U.C and Akinola, O.B, 'Children's Rights and Participation in Schools : Exploring the Awareness Level and Views of Nigerian Primary School Children (2009) *Elementary Education Online* 8 (1), 176-182

A major difficulty with respect to the harmonization of culture with rights is highlighted by McGoldrick in his discourse on culture as rights. He states thus:

> More generally, there is the difficulty of determining 'what pertains to religion, what pertains to culture, and what is the political use of both……second, modern understandings of culture present it as complex, contingent and constantly evolving. The idea of attaching rights to it runs the risk of essentializing or reifying culture…..Another aspect of the difficulty is that culture has a strong group or communitarian aspect whereas most human rights have an individualist perspective.[904]

In response to this, one could argue that the existence of such difficulties are dependent on the definition of culture under the legal system. While acknowledging the complexity of the task referred to by McGoldrick, the law operates as a standard-setting mechanism and as such it would appear that the brightest prospect of certainty in terms of defining culture lies in the law. Thus, it is important for the various arms of government to provide and develop a working concept of culture which would be subject to protection under the concept of rights. The CRA for instance affirms the right of the Nigerian child to 'participate fully' in the cultural and artistic activities in Nigeria[905] but also prohibits deep-rooted cultural practices such as child marriage and inscription of marks on a child.[906] In this case, the promotion of cultural life is circumscribed by the interests of the child with cultural practices only being protected under legislation to the extent as is not contrary to the rights of the child. The development of a rights-based culture would also serve as a response to the second risk highlighted by McGoldrick as culture in this case will be protected as a right as opposed to rights being sacrificed in the interest of

[904] McGoldrick, D, 'Culture, Cultures and Cultural Rights' in Baderin and McCorquodale (eds), *Economic, Social and Cultural Rights in Action* (OUP, 2007),450
[905] Section 12
[906] See Sections 21-24

culture. This for instance would imply the protection of non-hazardous agricultural labour by the child in terms of the child's right to a family life or enhancing the participatory rights of the child.

Notwithstanding the above analysis, the existence of such provisions under the CRA does not imply that a working relationship has been established between rights and culture. For instance, there is a possibility that a child insists on participating in a cultural activity or festival which may be regarded as hazardous or exploitative labour under the CRA. The denial of the child such participation in that instance may not only hinder the exercise of his cultural rights but may be regarded as being contrary to his best interests in the overall context of the child's place in the community. The consideration of culture, it is further added, may create a 'positive framework for addressing the increasingly difficult tensions that arises from states' multicultural and pluralist policies, some of which have been discussed in earlier chapters.

Having regard to the foregoing, an evolution of the concept of rights may also be necessary in terms of being considered both in a communitarian and individualistic context. In any case, the group aspect of culture cannot be isolated from individual rights. In the view of Osiatynski:

> Society needs to be based not just on rights but also on bonds, mutual responsibilities and the duties undertaken by its members…… there exists a much richer network of duties, imposed by religion and morals, tradition and customs, common standard and individual expectations. In fact, society's very growth is based on mutual obligations and the people's shared responsibility for the common good[907]

[907] Osiatynski supra n.895,197

For instance, the manner in which a child exercises his freedom of association or religion is determined by his religious affiliation or age-group, which condition is voluntarily acceded to by the child. The influence of the community cannot therefore be disregarded in furtherance of individual identities. However, there is the need to ensure an effective balance even in the degree of deference given to 'culture' in the exercise of rights. To this end, it may be helpful to make recourse to standards of rights protection highlighted in other instruments such as 'minimum core'[908] for economic and social rights or 'non-derogable rights' with respect to civil and political rights.[909] As it stands, there is no explicit reference to non-derogable rights in the Nigerian constitution. In reality, the existence of certain rights do not invalidate 'any law that is reasonably justifiable in a democratic society' in the interest of defence, public safety, public morality or public health as well as protecting the rights and freedom or other persons.[910]

Another aspect of effective child rights protection that involves interaction with culture is with respect to the right of the child to be heard. According to the Committee on the Rights of the Child with respect to protecting the best interests of the child:

> A vital element of the process is communicating with children to facilitate meaningful child participation and identify their best interests……where the child wishes to express his or her views and where this right is fulfilled through a representative, the latter's obligation is to communicate accurately the views of the child.[911]

In the Nigerian society, there is a view of the child being 'merely seen and not heard', a notion challenged to an extent by the CRC guaranteeing the right of the child to be

[908] According to the Committee on Economic, Social and Cultural Rights(CESCR), states have a 'minimum core obligation' to ensure satisfaction of, 'at the very least, minimum essential levels of each of the rights contained in the International Covenant on Economic, Social and Cultural Rights (See *CESCR General comment No 3; The Nature of State Parties Obligations (1990)*, Para 10)
[909] See Article 4(2) Of the International Covenant on Civil and Political Rights (1966)
[910] Section 45 (1)
[911] *CRC General Comment No. 14 on the right of the child to have his or her best interests taken as a primary consideration* (2013) CRC/C/GC/14, para. 89

heard.[912] Guaranteeing the participatory rights of the child therefore may be viewed in the context of challenge to parental authority and as such could face intense opposition. The prevalence of such a perception may however depend on the nature of implementing such rights.

The establishment of a rights culture is a multi-faceted responsibility necessitating the involvement of other members of civil society. The Committee on the Rights of the Child recognises this fact and strongly recommends that the state party identifies strategies to formally engage traditional and religious leaders in ensuring implementation of the Convention rights at the local level.[913] Such engagement is fundamental in ensuring an increased awareness of the nature of child rights as applicable in civil society. A useful starting point in this regard is the establishment of a link between established cultural notions and human rights given the fact at the basic level, culture itself is neither for nor against the notion of rights. As stated by Pupavac;

> The positions of advocates of the Convention and those making cultural relativist critiques are not necessarily as opposed as protagonists imagine. The championing of children's rights is in fact related to the importance given to the recognition of difference today and parallels the championing of other rights based on identity.[914]

The preamble of the CRC also alludes to this assertion in 'taking due account of the importance of the traditions and cultural values of each people for the protection and harmonious development of the child'. [915] Such account must involve a thorough engagement with culture in its various aspects and an understanding of the critical role it

[912] Article 12
[913] See *Concluding observations : Nigeria* (2010) CRC/C/NGA/CO/3-4,11
[914] Pupavac, Vanessa, 'The International Children's Rights Regime in Chandler (ed) *Rethinking Human Rights: Critical Approaches to International Politics* (Palgrave Macmillan,2002), 74
[915] *Convention on the Rights of the Child (1989)*

plays in shaping the development of the child. There is a close connection between abstract ideals of human dignity or distributive justice which is espoused (albeit in different contexts) by various cultures and human rights.[916] There is a possibility that the distinction between 'culture ideals' and 'rights ideals' is merely a function of relativist views of human dignity.[917] Human dignity, it is submitted, remains a common factor and a point of mutual agreement and as such it is helpful for interaction between culture and child rights in Nigeria to proceed from this common ground. According to Peters, accusations of a lack of moral standing levelled against western countries are devoid of substance since the 'whole idea surrounding human rights is nothing short of respect by an individual for a fellow human being'.[918] The current framework of human rights assumes a multi-faceted dimension involving the respect, protection and fulfilment of human rights in a manner distinct from this simplistic view proferred by Peters. Nevertheless, this does not deviate from the common factor of human dignity existent in both African and Western conceptions of rights.

It may also involve deference on occasion to certain aspects of culture which, while not necessarily promoting child rights, cannot be described as fundamentally damaging to the development of the child. In this regard, one particularly notes that the child rights protection framework under international law is by no means without its imperfections. There is an 'authoritarian' dimension to the regime that the likes of Pupavac have regarded as requiring confrontation.[919] This confrontation is especially relevant in matters relating to the nature and degree of interference by the state in family affairs. It is argued that recourse to state-provided services in relation to the protection of the rights of the child even under the CRA may not necessarily enhance the prospect of effective rights protection as it overlooks a critical aspect of child-rearing in Nigeria

[916] Ibhawoh, Bonny, *Imperialism and Human Rights :Colonial Discourses of Rights and Liberties in African History* (State University of New York, 2007)
[917] Ibid
[918] Peters, D, 'The Domestication of International Human Rights Instruments and Constitutional Litigation in Nigeria' (2000) 18 *Netherlands Quarterly of Human Rights* 357-378, 376
[919] Pupavac supra n.914

which is the involvement of the 'community'. Admittedly, there has been a 'rapid breakdown' in the old family ties and the family unit.[920] This does not however detract from the fact that the family system remains to a large extent far more influential in protecting the child and particularly the prevention of crime among juvenile offenders than state-run social services, which for all practical purposes remain non-existent even in contemporary Nigerian society.[921] The possibility of some aspects of culture providing such needful confrontation cannot be easily discarded.

ENFORCEMENT OF EXISTING LAWS

Another important aspect of guaranteeing the protection of the Nigerian child is the enforcement of existing laws. Due to the nature of the rights granted under the CRA, it is hardly surprising to find that certain offences prescribed under the CRA are contained in criminal legislation existing prior to the CRA. For instance, the offence of rape is punishable under the Criminal and Penal code with a term of life imprisonment.[922] Other offences such as sexual assault, child abandonment and deprivation of liberty are also covered under the Criminal and Penal Code. The CRA also makes reference to provisions under Chapter IV of the Constitution[923] as well as the Labour Act[924] as being applicable to the child.[925] In certain cases, especially in states where the CRA has not been incorporated into domestic law, recourse might be made to existing criminal laws. An example is with respect to the case of a 14-year old supposedly abducted by an 18-year old man from her native Bayelsa state and taken to Kano state, neither of which states had implemented the CRA at the time of the alleged abduction. Her alleged abductor was nevertheless charged on a five-count charge of abduction, kidnapping, unlawful carnal

[920] Karibi-Whyte, A.G, *Criminal Policy: Traditional & Modern Trends* (Nigerian Law Publications Limited, 1998), 125
[921] Ibid
[922] Section 299 Criminal Code, Section 283 Penal Code
[923] Section 3(1) CRA
[924] Chapter 198 Laws of the Federation 1990
[925] See Chapter IV

knowledge and sexual exploitation under the existing Criminal Code applicable in Bayelsa.[926]

The question then arises as to the degree of enforcement of these laws, especially under criminal law. One major problem in this area has been a dearth of law enforcement officers especially in comparison with the population. This is not a recent problem. According to official figures released in 2006, there were 2,545 policemen for 1 million inhabitants in Lagos and even less in number in other parts of the country.[927] There is currently an estimated number of 375,800 policemen for the whole of the federation which is less than 3,000 per million.[928] This arguably reduces the potential for efficiency on the part of the officers. A more fundamental problem however is the failure to report crimes on the part of victims. According to a survey conducted in 2012, only 2 of 10 victims of crime reported such crime to the police with less than half of the individuals being satisfied with the manner of investigation and prosecution.[929] The greater majority of those recorded as being dissatisfied cited police ineffectiveness as an underlying factor behind the dissatisfaction.[930] Furthermore, law enforcement agents have also been accused of corruption and brutality in their manner of law enforcement.[931] As noted by Elechi,

> Victims of crime feel doubly victimized by the Police. Their rights are routinely violated. Victims are regularly harassed, hounded and made to pay a ransom before their cases receive attention by the police.[932]

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[926] Julius Osahon, 'Ese Oruru pregnant for me: Yunusa' available at http://guardian.ng/news/ese-oruru-pregnant-for-me-says-yunusa/ (last accessed 23rd June 2017)
[927] Nigeria Watch: Third Report on Violence in Nigeria; 2006-2011 available at http://www.nigeriawatch.org/media/html/NGA-Watch-Report11(1).pdf (last accessed 5th November, 2015)

[928] *Nigeria to recruit 10,000 extra officers* BBC News 18th August 2015 available at http://www.bbc.co.uk/news/world-africa-33973939 (last accessed 11th November,2015)
[929] Summary of Findings of 2012 National Crime and Safety Survey available at http://cleenfoundation.blogspot.co.uk/2012/07/summary-of-findings-of-2012-national.html (last accessed 5th November,2015)
[930] Ibid
[931] Ibid
[932] Elechi, O.O, *Doing justice without the state: The Afikpo (Ehugbo) Nigeria Model* (Routledge, 2006), 83

Even when cases are reported, the majority are not swiftly dealt under the criminal justice process. Studies conducted in 2008 showed that even though more than half of individuals arrested on suspicion of having committed criminal offences had been prosecuted, a greater percentage were still awaiting trial, most likely remaining in detention.[933] This may not be unconnected with allegations of corruptions among police officers responsible for the prosecution of the majority of criminal offences under Nigerian law.[934]

A greater problem in relation to law enforcement is the attitude towards crime reporting for victims of offences under the law especially in cases where such offences bear significant cultural connotations for which victims may not readily subject themselves to the process of criminal justice. In relation to rape for instance, a survey conducted across the various geo-political zones in 2013 cited fear of stigmatisation and disgrace as predominant factors behind the low report of rape incidents.[935] These factors are not necessarily addressed by criminal legislation with the majority of respondents citing an increase in societal awareness as the most effective measure for the purpose of reducing the incidence of rape. A significant number however also made reference to the enforcement of existing laws on rape, a measure which for the factors discussed above, has not been adequately enforced.[936]

CONCLUSION

The prospect of reform of the child rights protection with respect to the problems created by the constitution and culture has been considered in this chapter. Constitutional amendments have been considered with suggestions made as to the justiciability of economic and social rights as well as the inclusion of child rights as a

[933] Ibid
[934] Ibid
[935] Ibid.
[936] Ibid

subject on the legislative lists. An amendment of the constitution however is not without its complexities, some of which have also been examined in this chapter. The primary focus in the context of this chapter has been assessing the possibility of balancing the interests of various institutions regulating societal order for the purpose of establishing a society characterized by effective rights protection. In the words of Mutua:

> Is it possible to introduce in the modern African state grassroots democracy, deepening it in neighbourhood communities and villages in the tradition of the pre-colonial council of elders? Can the family reclaim its status as the basic organizational political unit in this re-democratization process? Is it possible to create a state of laws-where elected officials are bound by checks and balances? Can the state and the family devise a 'social security system in which the burden of caring for the aged and needy can be shared?[937]

This on the surface appears to constitute an 'overly optimistic musing' which is not necessarily in touch with current realities. However, the prospect of harmonizing the best of pre-colonial, colonial and post-colonial societal arrangements in ensuring a holistic approach to rights protection cannot be easily dismissed as irrelevant to this discourse. Such an approach, if considered in the political context, can result in increased interaction between the state and the individual, exemplified by constitutional amendments to reflect societal realities. It can also enhance the prospect of a shift in cultural perspective towards renewed interest in the protection and emancipation of the child with society considering same as a collective duty.

Nevertheless, such hopes remain largely dependent on the existence of a 'collective societal will', from the political elite down to the rest of the populace. Furthermore,

[937] Mutua M.W, 'The Banjul Charter and the African Cultural Fingerprint: An Evaluation of the Language of Duties', (1995) *Virginia Journal of International Law* 35,pp 339-380, 378-379

conflict between a highly communal ethos of rights protection and the individualistic view espoused under contemporary international human rights law may be inevitable. An ideal approach to reform in the context of child rights protection in Nigeria would be the balance of the 'individualistic' and 'communal' views to the extent that each view contributes positively to the mental, physical and social development of the child. It is submitted that a more suitable approach in the interim may be the harmonization of legislation in such a manner as to ensure universality of the standards of protection provided for under the CRA especially given the fact that the CRA represents an attempt to strike the necessary balance between local, regional and international standards of child rights protection. Other measures such as cultural re-orientation towards rights protection as well as enforcement of other existing laws are also necessary in order to ensure the successful transition of child rights protection from mere rhetoric to reality.

SUMMARY/CONCLUSIONS

This thesis has examined child rights protection in the Nigerian context with particular focus on constitutional and cultural hindrances to the overall development of an effective child rights protection system. These constitutional and cultural hindrances are by no means the only relevant obstacles and overcoming these challenges does not equate to the creation of a 'utopian' atmosphere for the Nigerian child. Nevertheless, it is believed that addressing these issues at the very least serve as a useful starting point in the journey towards implementing international standards of child rights protection and enabling the child becoming a well-rounded member of civil society.

In chapter 2, various conceptions of childhood were examined. Albeit with inconclusive evidence, it has been found that historical notions of childhood in the West centred on certain overarching themes including childhood innocence and childhood depravity. The available evidence also suggested that there was a conflict between the view of the child as a 'future adult' and as a 'being in the present'. With respect to Nigeria, cultural studies indicate that the communal nature of the traditional Nigerian society was translated to viewing the child to a large extent only as a member of the community. The child is raised to be useful to the community and his choices are determined by communal values. The child was also perceived as being a gift from God who is useful to his parents by providing economic and emotional value.

With the introduction of Western values and concepts to the Nigerian society especially in the economic context through colonialism, there is a possible argument that the notion of the child being useful in terms of providing economic value has been eroded. It was however submitted that modernization has not resulted in a complete obliteration of the communal ethos with communal child-rearing practices being sustained to a

reasonable extent even in urban areas. Furthermore, children are still regarded as valuable members of society even in the most developed parts of the Nigerian society.

The discussion on the perception of childhood in the Nigerian context suggests that there is a recognition of childhood as a period needing protection through appropriate adult intervention, guidance and instruction. This function was exercised in previous times by members of the community to which the child belonged. The decline in communal living due to heavy rural-urban migration (especially for economic reasons) has led to parents bearing the role of primary care-agents for the child. The increased economic demand on parents in turn has arguably led to parents assigning this child-rearing function to other agents such as the school and domestic care-workers. This is often the case irrespective of the competence of the individuals to ensure proper care and development of the child.

It is extremely difficult to settle on a particular notion of childhood as representative of a particular society. Various ideologies concerning childhood may be in existence in the same society, no matter how small. It was nevertheless concluded that every society operates on a particular but multi-faceted and contradictory understanding of the concept of childhood. The prevalent understanding more often than not is reflected in societal practice and to a very large extent determines the nature of the institutions responsible for societal order.

Chapter 3 examined the history of child rights protection in Nigeria in various administrative dispensations. Pre-colonial times saw the existence of customs such as the killing of twins and 'abnormal children' which were detrimental to the most fundamental rights of children.. Other practices such as the principle of primogeniture in the law of succession, while not physically harmful to children, violated other

fundamental rights and freedoms such as freedom from discrimination. While some of these customs have since been abolished for various reasons mostly related to the introduction of Western religious beliefs such as Christianity, others have been modified by statutory law.

The colonial era saw the introduction of statutes regulating certain aspects relating to the rights of children. Under statutory law, children born out of wedlock could by subsequent marriage acquire the status of 'legitimate children' especially for the purpose of property inheritance. This was in contrast to certain cultural practices where legitimacy could be obtained by acknowledgment of paternity by the father. The introduction of the Children and Young Persons Act was however the first significant legislation directly aimed at protecting the interests of children as well as regulating their behaviour under the law. Other statutes such as the Criminal and Penal Code also contained provisions protecting the interests of children.

The constitutional history of Nigeria was also examined in relation to the protection of the rights of children. The 1963 constitution, while protecting certain fundamental rights of all citizens, contained no separate provisions regarding children, neither was there any express reference to children under the constitution. The 1979 constitution required states to ensure that children are protected against exploitation and neglect but never provided any child-specific rights, as was the case with the 1989 and 1999 constitutions. There was however the introduction of sex as a prohibited ground of discrimination under the 1979 constitution, which would especially prove significant with respect to inheritance cases involving female children.

It has been argued in relation to child rights protection that the law on child rights prior to the Child Rights Act assumed a protectionist form. This has been attributed to a perception of children as being in need of special protection on account of their innocence and vulnerability to negative influence. Thus, children were only perceived as

right-holders in the 'negative' context and the positive rights such as freedom of expression, association and assembly were not recognized. The failings of the law in this respect may lead to a conclusion that despite the protection afforded to children, especially in the context of criminal law, there remained a pertinent need to protect the interests of the child in a manner that respected the autonomy of the child, a requirement that had not been satisfied by existing legislation.

In chapter 4, the Child Rights Act was examined in the context of existing laws on the rights of the child. The effects of its provision on existing rights was also examined, especially in terms of harmonizing crucial aspects of child rights including the age at which a child is regarded to have attained majority. While its status as federal legislation deems it representative of the position of the Nigerian government on child rights, the fact that states retain discretion as to its incorporation into domestic law creates a possibility of certain disparities between national and state law. These disparities have a profound effect on crucial areas relating to the rights of the child including criminal responsibility, marital relationships and contractual rights. In order to address these disparities, there is the need to take steps to harmonize legislation relating to child rights.

More importantly, the existence of state discretion has led to a situation where certain states, for reasons not unconnected with the initial opposition to the enactment of the CRA, have refused to implement the provisions of the act in domestic state law. Moreover, there remains the problem of implementation of the standard of protection set out in CRA even in states where the Act has been domesticated. Nevertheless, it was also noted that other legislation necessary to bring into effect the substantive rights set out in the CRA have also been enacted by both federal and state governments. The disparities between the CRA and the child rights law of the various states were also examined with certain

Chapter 5 examined the CRA in the context of international and regional child rights protection instruments with the CRC and the African Charter being the focus in each respect. The differences and similarities between these instruments were also considered in-depth. The impossibility of exhaustively examining every possible defect of the existing child rights protection instruments was particularly highlighted. It was however concluded that notwithstanding the reasons for concern in the content of each instrument, they represent a solid foundation upon which an effective child rights framework can be built in the Nigerian, African and international community. Thus, the key issue remains as to the effective implementation of the standards set out in these instruments and the problems involved in this context.

In diverse ways, the Nigerian constitutional framework has tremendous impact on the prospect of building an effective child rights framework in Nigeria. The problem of the constitution in relation to child rights protection was examined in chapter 6. Under the constitution, safeguarding the interests of children is described as a fundamental objective of government policy, as opposed to an outright recognition of children as right holders. This may not in itself be regarded as a fundamental problem assuming children fall within the ambit of 'persons' regarded as fundamental right holders under Chapter IV of the Nigerian constitution. A more significant problem is the separation of legislative powers under the Constitution in pursuance of the federalist system of government developed under previous constitutional regimes. This separation in particular has the effect of ensuring that the Child Rights Act is not universally applicable in Nigeria, thereby giving rise to a situation where a simple change in geographical location could have a great impact on the nature of protection enjoyed by the child. Furthermore, the pluralist nature of the Nigerian legal system, enshrined in the constitution has also been examined in the context of child rights with the effect that religious and traditional laws detrimental to the interest of the child may have been preserved by the constitution.

The nature of the relationship between culture and the rights of the child was examined in Chapter 7. With particular reference to the Nigerian legal system, it is almost impossible to deduce of a universal cultural perspective for the purpose of making comparisons with human rights standards. Furthermore, customary law, especially from a legal perspective has assumed a different dimension in contemporary times with the advent of colonialism and various law reforms associated with the foray into modernisation. Nevertheless, the reintroduction of Sharia law into the Nigerian legal system and the preservation of existing customary law adjudication bodies under the Nigerian constitution still suggests a great influence on law-making in Nigeria exerted by established customary practices. Some specific practices and culture-based systems considered inimical to the interests of the child were also considered in this chapter. In the context of this assessment, it was argued that the main issues with respect to developing an effective rights framework were not specifically with the practices representing culture but other political interests and disparities in theoretical underpinnings relating to custom-made law and child rights.

The prospect of reform of the child rights protection with respect to the problems created by the constitution and culture was examined in chapter 8. It was suggested that the constitution of the Federal Republic of Nigeria be amended, particularly in relation to the justiciability of economic and social rights as well as the inclusion of child rights as a subject on the legislative lists. Although there are procedural complexities surrounding this process, it is hardly an impossible task especially considering the fact that constitutional amendments have taken place on separate occasions between 2011 and 2017. However, it remains to be seen whether any 'political will' exists to undertake such a process particularly in relation to child rights. While an explicit recognition of child rights as a specific legislative subject may not necessarily be tenable in the interim, there is very little justification for the non-inclusion of human rights in the legislative lists under the second schedule of the Constitution.

The primary focus in the context of this chapter was assessing the possibility of balancing the interests of various institutions regulating societal order for the purpose of establishing a society characterized by effective rights protection. The prospect of harmonizing the best of pre-colonial, colonial and post-colonial societal arrangements in ensuring a holistic approach to rights protection cannot be easily dismissed as irrelevant to this discourse. Such an approach, if considered in the political context, can result in increased interaction between the state and the individual, exemplified by constitutional amendments to reflect societal realities. It can also enhance the prospect of a shift in cultural perspective towards renewed interest in the protection and emancipation of the child with society considering same as a collective duty. Nevertheless, such hopes remain largely dependent on the existence of a 'collective societal will', from the political elite down to the rest of the populace.

Furthermore, conflict between a highly communal ethos of rights protection and the individualistic view espoused under contemporary international human rights law may be inevitable. An ideal approach to reform in the context of child rights protection in Nigeria would be the balance of the 'individualistic' and 'communal' views to the extent that each view contributes positively to the mental, physical and social development of the child. It was submitted that a more suitable approach in the interim may be the harmonization of legislation in such a manner as to ensure universality of the standards of protection provided for under the CRA especially given the fact that the CRA represents an attempt to strike the necessary balance between local, regional and international standards of child rights protection. Other measures such as cultural re-orientation towards rights protection as well as enforcement of other existing laws are also necessary in order to ensure the successful transition of child rights protection from mere rhetoric to reality.

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