

**Considering the Rights and Best Interests of a Child in a
Multi-cultural Civil Society with Special Reference to Nigeria**

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by

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Abstract

The emergence of the United Nations Convention on the Rights of the Child (UNCRC) 1989 is a welcome development in the international community. However, there is difficulty in understanding the extent to which some of the principles contained therein are manifested, especially where questions as to the universal application of these principles arise. One of such principles is the *best interests of the child (BIC)*. This thesis argues that the way this principle is interpreted and applied by various states will to a large extent, be influenced by pluralistic cultural conditions of those states despite the view that in interpreting the UNCRC consideration should be given to cultural relativism. The thesis shows how cultural, religious, economic and social factors affect the implementation of the BIC principle. It focuses on some factors which influence the definitional process and application of this major concept in the UNCRC with a view to establishing that there is no single meaning for the term 'best interests'. In the light of the foregoing, the thesis seeks to establish that the standard varies from societies thereby resulting in difficulties in ascertaining the universal definition of the BIC.

By way of analysis, the thesis draws examples from other jurisdictions with particular emphasis on Nigeria and demonstrates that the country's diverse ethnic, cultural and religious inclinations which conflict with the legislative provisions constitute impediments in effectively implementing children's rights. One of the problems is the domestication of international treaties into national law. The thesis concludes that there is need to strike a balance to ensure that the BIC is protected globally irrespective of the factors affecting its proper implementation across jurisdictions. This research is intended to provide the necessary insights that would assist policy makers to build children's best interests into national priorities and policies bearing in mind multi-culturalism.

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Dedication

To my beloved husband and our children

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Abbreviations

ACRWC	African Charter on the Rights and Welfare of the Child 1990
APRM	African Peer Review Mechanism
BIC	Best Interests of the Child
CEDC	Children in Especially Difficult Circumstances
CEDAW	Convention on the Elimination of All Forms of Discrimination against Women 1979
CO	Concluding Observations
CFRN	Constitution of the Federal Republic of Nigeria 1999
CRC	Committee on the Rights of the Child
CRA	Child Rights Act 2003
ILO	International Labour Organisation
IPEC	International Programme on the Elimination of Child Labour
LFN	Laws of the Federation of Nigeria
MA	Marriage Act
MCA	Matrimonial Causes Act
NEEDS	National Economic Empowerment Development Strategy
NEPAD	New Partnership for Africa Development
NPA	National Programme of Action for the Survival, Protection and Development of the Nigerian Child
UNCRC	United Nations Convention on the Rights of the Child 1989
UDHR	Universal Declaration on Human Rights 1948
UK	United Kingdom
USA	United States of America
US	United States

INTRODUCTION

The importance which the United Nations Committee on the Rights of Child (CRC) accords to the principle of the 'best interests of the child' (BIC) is embodied in Article 3 (1) of the United Nations Convention on the Rights of the Child (UNCRC) 1989 which provides that:

In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration.¹

It is also reflected in the UNCRC's general guidelines for initial and periodic reports which require considerations of the substantive provisions of the UNCRC.² Importantly, the BIC principle is 'the yardstick for measuring all actions, laws and policies of a state affecting children [worldwide].'³ However, it may be asked whether this is a universal possibility in all societies, in the light of multiculturalism and the level of economic development. The objective of this thesis is to consider the critical question whether children are right holders and also to examine the application of the BIC principle in a multicultural developing society, with particular emphasis on Nigeria, while making a comparative analysis with the position in other societies such as the United Kingdom and France. Furthermore, this thesis will examine whether the social situation of children in Nigeria affects or could affect the due application of the BIC principle.

The thesis contends that the notion of rights ought to be applied generally irrespective of the particular child but maintains that the application of the BIC principle would vary as a result of cultural diversity. Specifically, the thesis

¹ United Nations Convention on the Rights of the Child 1989, UN General Assembly Res 45/118 (1989) Art 3 (UNCRC).

² Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff 1999) 86.

³ Dejo Olowu, 'Protecting Children's Rights in Africa': A Critique of the African Charter on the Rights and Welfare of the Child (2000) *Int'l Journal of Children's Rights* 129.

argues that the application of the BIC principle in Nigeria faces enormous challenges as a result of socio-economic and religious factors as well as cultural diversity. In the end, the thesis proposes that action should be taken in reforming laws relating to children's needs, which hopefully will help to improve the application of the BIC principle in the country.

The succeeding sections will provide an overview of the central principle under consideration in this thesis, i.e. the BIC principle, and proceed to set out the structure of the thesis and the research methodology.

The Best Interests of the Child

It is worth considering the meaning of the best interests of the child (BIC) at this stage. The BIC conceptually means that legislative bodies must consider whether laws being adopted or amended will benefit children in the best possible way. Also, courts and other judicial bodies settling conflicts of interest involving a child should base their decision on what is best for the child for instance when issues of custody or other child related matters arise. Furthermore, administrative authorities should safeguard children's best interests by paying special attention to child policies with emphasis on their impact on the lives of children, and finally, budgetary allocations should be adequate to implement child-related laws and policies.⁴ There is no certainty that one particular arm of government (legislature, executive and judiciary) considers the BIC more than the other as their roles do not overlap. However, the question that arises is why should they consider the BIC? In response, it can be attributed to the fact that it is the requirement of the international treaty which the State has ratified as such is binding upon the State to implement the provisions of the treaty.

Under the UNCRC, a child has a right to survival, development, participation and protection. This thesis will focus mainly on protection right as an example of how the BIC principle should be applied. The essence of doing so is to

⁴ UNCRC (n 1) art 3.

portray the importance of protection rights as they guard the child against abuses of power by individuals and the state. Even so, it should be noted that rights are equally important. As Fortin explains, “survival rights do not only include the right to life itself but goes further to include the right to all those rights which sustain life.”⁵ This includes the right to an adequate standard of living and to health care. Apparently, survival rights of children are of primary importance and they include far more than the rights necessary for only survival. However, the obligation which the UNCRC places on states to take positive steps to ensure that children enjoy a full life, with the potential to mature into healthy adults, comes under protection rights. Hence, it is arguable that if there are no protection rights the right to survival (right to life) will be inherently violated. In fact, it can be said that by placing obligations on states to protect children from all forms of abuse, including physical abuse, sexual abuse, ill-treatment, emotional abuse and neglect while they are in their parents care, the UNCRC seeks to specifically protect children from all forms of abuse and ensures this by providing a lengthy list of protection rights.⁶ In the end, however, it should be noted that although the UNCRC seeks to provide these protections for children globally, it fails to take into consideration what may constitute rights for a child in a multicultural developing society such as Nigeria. In terms, the UNCRC fails to take into consideration how the principle of the BIC can be applied in a society like Nigeria considering that its application cannot be universal. This is a critical issue which this thesis will attempt to address.

⁵ Jane Fortin, *Children's Rights and the Developing Law* (3rd edn CUP 2009) 41 (Fortin).

⁶ UNCRC 1989 arts 32-36; Fortin (n 5) 40.

Methodology

This research adopts a combination of socio-legal and comparative approach. The research involves studying law through a combination of theories and methods that are integrated and synthesised.⁷ The socio-legal methodology used in this research focuses on 'law in action' as against 'law in books'. While the latter refers to law as written down, the former means law in actual practice. By way of distinction, law as written down would refer to international law, and in this case, the UNCRC 1989 and its provision of the BIC Principle, whereas law in action (law in practice) looks at how this provision is actually implemented and the responses from States. By using this approach, the research addresses questions such as how, to what extent and in what circumstances legal rules are implemented in practice and the ways individuals and groups of institutions have used these rules to address specific problems.⁸

The second approach used in this research is comparative law. The reason for applying this approach as enunciated by legal scholars such as Kahn-Freud is to use international law model as instrument of social change.⁹ It will refer to foreign models with a view to provide adequate comparison on how the different models have protected the rights of the child and applied the BIC principle. By doing this, it illuminates the need for the application of the BIC principle in Nigeria that would bring about social and cultural change. In agreement with Kahn-Freud, although the institutions of one country could serve those of another only in the most exceptional cases,¹⁰ applying a comparative model has some positive effects which will be briefly discussed below.

⁷ Michael Salter and Julie Mason, *Writing Law Dissertations – An Introduction and Guide to the Conduct of Legal Research* (Pearson Education 2007) 133 (Salter).

⁸ Salter (n 7) 126.

⁹ Otto Kahn-Freund, 'On Uses and Misuses of comparative law' 2nd Charity Lecture delivered at the London School of Economics on June 26, 1973; 37 MLR 1-27 at 1 (Kahn-Freund).

¹⁰ Kahn-Freund (n 9) 6; *De l'Esprit des Lois (Des Lois Positives)* 1 (1758) Book 1 Chs 3, 6.

Firstly, comparative law aids in interpreting treaties and in understanding some concepts.¹¹ According to Hervey, it may be used to gain a better understanding of one's domestic legal system and sheds light on the mechanisms which bring about changes in legal systems and societies.¹² But most importantly, the present author agrees with Hervey that the purpose of using comparative method is because any study of foreign legal systems is legitimate if it results in proposals for the reform of domestic law¹³ which is what this research proposes. Thus, it is hoped that with the application of comparative law in this research, it will necessitate proposals for reforming domestic child law practices in Nigeria to comply with international human rights standards. Again, this is relevant because the research brings to the fore that the human rights of the child are inalienable. It also makes relevant the BIC principle which is a general principle of the UNCRC, an international instrument which governs children's rights globally.

By carrying out a comparative analysis of the legal position in Nigeria and other countries, the research looks at policy choices and current practice in Nigeria, and highlights the need for improvement. Thus, a comparative approach provides the research with a valuable framework through which differences between legal concepts can be explained and proffers common ground solutions. The legal concept in this case is the BIC principle and how it is to be implemented both internationally and nationally to ensure the protection of children's rights bearing in mind that its enforcement will vary across and within jurisdictions, thereby posing some difficulties especially in multi-cultural societies. Therefore, this research will suggest a yardstick for dealing with the application of the BIC and the protection of the rights of the child.

¹¹ Konrad Zweigert and Hein Kötz, *Introduction to Comparative Law* (3rd edn Clarendon Press 1998) 8.

¹² Tamara K Hervey, *Justifications for sex Discrimination in Employment in the EC (Current EC Legal Developments)* (Butterworths 1993) 9 (Hervey).

¹³ Hervey (n 12) 17.

The Structure of the Thesis

The thesis has been structured into four chapters and a concluding comment. Chapter one sets out the basic context and definitions necessary to provide a clearer and fuller analysis of subsequent chapters. Here, focus is on the definitions of a child, the major concepts of the rights of the child, the status of childhood and the extent to which children should enjoy rights. The chapter further looks at the concept of childhood and expounds on the question 'who is a child and when does childhood begin and end'? The chapter explores the theoretical and historical aspects of children's rights and its subsequent application in Nigeria. The relevance of a theoretical perspective is to interpret areas of conflict such as whether children's rights exist and if they do, what they are and who should ensure that these rights are protected. The argument whether children should be considered as rights holders is extensively discussed by looking at the different views of scholars. The chapter also examines the classification of children's rights under the UNCRC. Finally, the chapter examines the BIC principle and the various approaches to the principle.

The changing family context of traditional Nigeria is explored in chapter two. It critically examines the evolution from traditional family context in Nigeria to contemporary times and examines the initiatives the State party has taken to protect children. This is necessitated by the fact that there has been a transition from traditional to urban structure. Owing to the multiple laws in Nigeria, the thesis explores the applicable laws for resolving custodial disputes since this is necessary when determining questions on what is best for the child.

Chapter three notes that children face special problems of disadvantage, abuse, neglect, discrimination and exploitation resulting in high risk of survival and obstacles to their development. As a result, special protection measures are required to effectively address these problems. Special issues which are prevalent in Nigeria such as child labour, child abuse, harmful traditional practices, children in armed conflict situations, exploitation of children,

children living outside a family setting and the juvenile justice system is consequently highlighted. This chapter points out the provisions of the law and what the state party has done to ensure that the BIC is of paramount importance. However, bearing in mind that there are constraints inherent in implementing children's rights as a result of some influences, the thesis examines some of these difficulties which may hinder the implementation and domestication of international human rights law. The Chapter also examines the ways multi-cultural societies view international human rights law.

In view of the structures put in place by the state party and the obligations placed on it by the international community, chapter four looks at the mechanisms in place for implementing children's rights in Nigeria, the state party's role, government policies as well as implementation challenges. It examines the mechanisms for implementing children's rights and the extent to which the rights of children are being implemented particularly in Nigeria. The thesis draws inferences from a combination of international and regional instruments such as the African Charter on the Rights and Welfare of the Child (ACRWC) 1990 and other national legislations. The chapter further provides an analysis of the responsibilities of states parties in ensuring that the BIC is protected and enforced, and identifies the constraints faced by the state party in fulfilling its international obligations relating to children.

Finally, in its concluding comments the thesis proposes a way forward in improving the welfare of the child in Nigeria in order to ensure compliance with international human rights law and standards and proposes a 'balancing approach' that ensures the protection of the best interests of every child globally. This approach is taken because the BIC principle varies from child to child as what may be best for a particular child may not be best for another child although arguably, each child's most basic interest is the right to life and someone has a duty to protect that right as well as the child. That is why having identified the different notions of children's rights the thesis identifies moral right as the notion of children's rights that can feature positively in the multicultural society of Nigeria.

CHAPTER ONE

Defining the Child – A Jurisprudential and Historical Perspective on Children's Rights and the Best Interests of the Child Principle

1.0 Introduction

In this chapter I shall first be considering the notion and definition of childhood in an international context. The chapter will offer a comparison of how different eras arrive at the concept of childhood. It will also cover questions about the phenomenon of 'childhood' and explore the historical and theoretical questions on childhood. Although there are child-advocate groups and policy reforms which have been established over the years, the chapter will not concern itself with these but will look at the theories of childhood, the beginning and end of childhood and subsequently examine the BIC principle and how it has been applied by various jurisdictions. This approach is taken on the basis that the notion of childhood varies from instrument to instrument, so also is the definition of the child in Nigeria variable. This is also backed by the United Nations Convention on the Rights of the Child (UNCRC) which allows for this variation.¹⁴ Whereas the UNCRC sets the standard at eighteen years but recognises an earlier age where majority is attained under the age of eighteen, the African Charter on the Rights and Welfare of the Child (ACRWC) defines a child as every human being below the age of eighteen. Even though a universal definition of childhood may not be achievable owing to its inflexibility, Bueren rightly opines that a more coherent approach is long overdue.¹⁵ It is against this background that the various definitions and theories of childhood will be closely examined below.

Subsequently, the chapter will put the concept of the rights of the child and the hallowed principle of BIC in a theoretical and historical context.

¹⁴ United Nations Convention on the Rights of the Child 1989 art 1 GA Res 44/25 of 20 November 1989 adopted on 2 September 1990.

¹⁵ Geraldine Van Bueren, *The International Law on the Rights of the Child* (Fordham International Law Journal 1995) xix.

Contextually, since these two issues appear to be closely related, there is need to show first that there are disagreements on the issue of children's rights: specifically, the question whether or not children are right holders.¹⁶ This chapter will therefore seek to present the contending views on the issue. Furthermore, given that children's rights or concerns are universal, and not merely restricted to national borders, the chapter will also explore the emergence and development of children's rights at the international level and the subsequent development of children's rights at the national level. To effectively achieve this, the chapter adopts a descriptive approach. Although there are various normative frameworks and institutional mechanisms established to protect children's rights globally, the chapter will briefly focus on one of such normative framework, UNCRC 1989. This is because of its remarkable role in the development of children's rights. Despite the theoretical disagreement as to whether or not children are rights holders, this chapter will present a classification of children's rights, as contained in the UNCRC as well as the views of some writers and organisations. The thesis will now discuss the definition of a child as contained in various international, regional and national legislations in the following subsection. The aim is to show that although there appears to be a common acceptance on the age of a child, there seems to be no single and same definition of a child.

1.1 Who is a Child?

At this stage, it is imperative to ask who is a child? Is there a universally acceptable definition? The answer to this question becomes glaring in light of the divergent opinions on this issue.

The varying definitions of a child show to an extent the lack of uniformity on the beginning and end of childhood. For instance, while the ACRWC 1999 defines a child as 'every human being below the age of eighteen years',¹⁷ the

¹⁶ Katherine H Federle, 'Constructing Rights for Children: An Introduction' (1993) 27 Fam LQ 301-306 at 301.

¹⁷ African Charter on the Rights and Welfare of the Child (ACRWC) 1999 art 2.

Nigeria Child Rights Act (CRA) defines a child as a person under the age of eighteen¹⁸ whereas the UK Children Act 1989 defines a child as 'a person below the age of eighteen years'. However, we find a more accommodating definition of a child in the UNCRC which provides that 'a child means every human being below the age of eighteen years unless, under the law applicable to the child, majority is attained earlier'.¹⁹ In spite of the above differing definitions, Bainham is of the view that although there seems to be a common ground on the age of a child, there are disagreements over when childhood begins and ends.²⁰ Thus, this definition by the UNCRC appears to be more acceptable as it allows different national legislations to determine when childhood begins and ends in accordance with the law applicable to the child. This is done owing to the difficulty in understanding the concept of childhood. Also, the definition given by the UNCRC can be said to create room for a more accommodating definition of childhood especially because it takes into consideration the variation across societies. In effect, what the UNCRC has done is to allow for flexibility so that multicultural societies such as Nigeria can capitalise on in its law-making process. As noted above, the CRA uses the age of eighteen years like some other instruments,²¹ however, other existing legislations in the country have various ages for a child. For instance, the Children and Young Persons Law (CYPL) (still applicable in the States) defines a child as a person under the age of fourteen years, and a young person as a person who has attained the age of fourteen years and is under the age of eighteen years.²² Arguably, this is an older law which will require re-enacting by the various states legislatures. However, more recent laws seem to take into consideration the position of the UNCRC. For instance, the Trafficking in Persons Act of 2003 sets the limit at eighteen years where any person who exports from Nigeria or into Nigeria any person under the age of eighteen years with intent that such a person will be forced or seduced into prostitution.²³ To control these variations, it would be ideal to

¹⁸ CRA 2003 s 277.

¹⁹ UNCRC 1989 art 1.

²⁰ Andrew Bainham, *Children: The Modern Law* (2nd edn Fam.Law Bristol 1998) 70 (Bainham).

²¹ CRA 2003 First Schedule.

²² CYPL of Lagos State 1945 s 2.

²³ Trafficking in Persons (Prohibition) Law Enforcement and Administration Act (NAPTIP) 2003 (No 24) Pt 1 ss 11- 14.

have one single uniform definition of a child that would be applicable to all children.

1.2 Definition and Theories of Childhood

A definite and acceptable definition of the concept of childhood remains a contested issue. As such, various scholars have suggested different definitions. One of such scholars is Archard who sees Childhood as 'a stage or state of incompetence relative to adulthood. He defines childhood as 'that which lacks the capacities, skills and powers of adulthood'. To explicate this, he states that 'to be a child is to be not yet an adult'. In other words, according to him, 'adulthood is something which is gained, and although there may be losses in leaving childhood behind what is lost tends to be construed as that which could never possibly serve the adult in an adult world. If childhood has virtues they are such only because of their inappropriateness to adult life...'²⁴ He states further that 'it is good to be an innocent in an innocent world'.²⁵ Clearly, Archard's view on modern childhood supports that childhood is distinct from adulthood and whatever experiences left from childhood would not serve in an adult world. But this does not appear to be a true position when it comes to a child's experiences as we see an emerging number of court decisions basing their judgment in favour of the child with sufficient understanding and intelligence to determine decisions affecting the life of the particular child. One of such landmark cases is the Gillick case which shall be discussed later in this thesis.

Other scholars such as Thomas see childhood as a contested phenomenon.²⁶ According to him, there seems to be no single answer to the term 'childhood' which arguably has led to the various theories of childhood.²⁷ Thus, in an attempt to discuss the theories of childhood, Thomas looks at some

²⁴ David Archard, *Children: Rights and Childhood* (Routledge 1993) 30 (Archard).

²⁵ Archard (n 24) 31.

²⁶ Nigel Thomas, *Children, Family and the State: Decision-making and Child Participation* (The Policy Press 2002) 5 (Thomas).

²⁷ *ibid.*

fundamental questions. One of such questions which he elucidates is 'what is childhood'? Others include, 'what sort of phenomenon is childhood?' 'what are children like?'; 'how are they different from adults?'; and finally whether childhood is a social construct or something natural?.²⁸ In his view, such unanswered questions may lead us to conclude that childhood is a contested phenomenon. Thus the concept of childhood remains contested and varies because of the different answers that emerge from the questions.

The discourse on childhood seems to be incomplete without making any reference to the historical development of the theory. Even Thomas agrees with this view when he states that discussions on the nature of childhood usually commence with history. In his discussion on childhood, he referred in particular to Philippe Ariès' account of the transition from medieval to modern childhood while stressing that Ariès himself was influential in establishing the view that childhood should be analysed as a *social construct*.²⁹ Thomas notes that in medieval times the idea did not exist, but adds that "this is not to suggest that children were neglected, forsaken or despised. The idea of childhood is not to be confused with affection for children: it corresponds to an awareness of the particular nature of childhood, that particular nature which distinguishes the child from the adult..."³⁰ Thus, although the medieval period did not recognise the idea of childhood the present author agrees with Ariès and Thomas to the extent that childhood is distinct from adulthood. Most importantly, children at that time were not despised nor neglected as compared to the modern age which has generated the rights-talk for children. Thomas proffers some reasons for this which will be discussed below.

According to him, Ariès's argument suggests that children although distinguished from adults were not fundamentally different from them until the modern period.³¹ He based his arguments on the following grounds - Firstly, childhood was not categorised beyond infancy until the seventeenth or eighteenth century; secondly, children were not realistically shown in paintings

²⁸ Bainham (n 20) 69.

²⁹ *ibid.*

³⁰ Thomas (n 26) 6.

³¹ Thomas (n 26) 5.

until the fifteenth century; thirdly, children had no special dress beyond infancy until the sixteenth or seventeenth century; fourthly, the schooling period was not clearly related to age until the seventeenth or eighteenth century. The above reasons in his view would suggest that the family was not of much importance to people.³²

While these arguments by Ariès may be applauded, it has also received some criticisms about the medieval era. One of such is the inconsistency and imprecision in the words used to refer to children.³³ Secondly, he was criticised on the basis that special dress for children is a fashion of the eighteenth and nineteenth centuries which is already disappearing. In any case, he is of the opinion that there seems be no good reason why the concept of childhood as distinct from adulthood should imply different styles of dress.³⁴ Thirdly, he was criticised on his statements about the medieval era on grounds that his book is not really about that period. Lastly, Thomas finds Ariès pronouncements as partly contradictory and confusing for failing to clarify what he means by childhood and for not explaining that the French '*enfance*' is equivalent to both 'infancy' and 'childhood' in English but acknowledges that Ariès's work has led to the need for research into the history of childhood and the conception of childhood in different periods in history.³⁵ Having established that childhood and adulthood are distinct, it is also important to note that the application of the concept of childhood would vary according to societies. The following sub-section will discuss this, albeit briefly.

1.2.1 The varying concept of childhood

The concept of childhood would vary according to cultures and values in particular societies. Thomas agrees with this view by acknowledging that

³²Thomas (n 26) 6-7; Stainton Rogers, Rex and Wendy, *Stories of Childhood: Shifting agendas of child concern* (Harvester, 1992) 58.

³³Thomas (n 26) 7.

³⁴ibid.

³⁵ibid.

there is a wealth of variation in the shape of childhood in different cultures.³⁶ This variation also extends to societal beliefs about childhood, its purpose and its character. It has also been noted that the levels of responsibility taken by children at different ages also vary enormously.³⁷

As noted earlier, because the issue of childhood is contested, attempts to define it would also vary. Some definitions have however been proffered. For instance, Bainham sees childhood as a stage of life, from which children normally emerge and they are helped and urged to emerge from this stage by those who have the most power over them.³⁸ What this means is that being incapable of emerging from the stage of childhood, children are aided by adults. This brings about the question of implementation of children's rights and whether children have rights which must be enforced by adults or whether what they have are obligations.

Therefore, it is apt to say that since the concept of childhood changes over time, following Bainham, who may be regarded as a child by a society can also be revised and re-evaluated. For instance, in England in 1969, the status of childhood or minority was redefined with the age of majority reduced from 21 to eighteen.³⁹ The consequence of this was that many young people previously denied the status of adults became recognised as such.⁴⁰ Nevertheless, he recognises that children of various ages below majority have legal capacity to take certain actions and decisions. This can be gleaned from the decision in the case of Gillick⁴¹ which will be discussed elsewhere in this thesis. Note however that while this may be peculiar to a child in the UK, a Nigerian child who has attained majority cannot be said to have legal capacity to take certain actions and decisions unilaterally.

³⁶ Thomas (n 26) 15.

³⁷ Bainham (n 20) 92.

³⁸ *ibid.*

³⁹ Family Law Reform Act (1969) s 1; *Report of the Committee on the Age of Minority* (Cmnd 3342, 1967).

⁴⁰ Bainham (n 20) 69.

⁴¹ *Gillick v West Norfolk and Wisbech Area Health Authority and the DHSS* [1985] 3 All ER 402.

1.2.2 *When does childhood begin?*

Having acknowledged that there is a variation in the age of a child, the question on when childhood begins still poses some difficulties as it generates different answers. The status of the unborn child or the foetus, for instance raises questions as to the beginning of childhood. Bainham acknowledges this when he also states that under the English law, childhood is established at birth and not before.⁴² This is the same position in the United States of America, as the unborn child is not regarded as a person under the Constitution.⁴³ What this means according to him is that where legal protections are granted to the foetus, such protection are not based on the status of childhood. Thus, from the foregoing, childhood in both the UK and USA does not appear to exist before birth. In Nigeria however, while the CRA accords rights to an unborn child especially to protection from harm or injury caused to the child wilfully, recklessly or negligently before, during or after the birth of the child,⁴⁴ it limits such right where the father of an unborn child dies intestate and the unborn child is only entitled to the distribution of his deceased's father's estate if he was conceived during his father's life time.⁴⁵ Also, the same position applies to an unborn child whose mother dies intestate.⁴⁶ However, while this is the statutory position, in terms of distribution of estate, it may vary from one culture to another and from individuals and families. That is to say, what obtains in Nigeria is more culture-specific. For example, Mr. A dies intestate and without a child during his life time although married to Mrs A. Mr. A had a concubine (Ms. B) who was expecting a child for him unknown to Mrs A but known to Mr A's extended family members. When the child was born, he was introduced to Mrs A as beneficiary of his late father's estate. Traditionally, Mrs A cannot protest as she will be expected to accept the child as heir to his late father's estate and to allow his lineage to continue. This scenario is however an example of a purely traditional setting, although with the changing familial nature,

⁴² Bainham (n 20) 70.

⁴³ *Roe v Wade* 410 US 113 [1973]; Bainham (n 20) 70.

⁴⁴ CRA 2003 s 17 (1).

⁴⁵ CRA 2003 s 17(2).

⁴⁶ CRA 2003 s 17 (3).

devolution of property is regulated in more modern approaches owing to awareness that has been created. But in the UK the situation is different. Bainham points out that the effect of drawing a line for childhood at birth is to protect a newly born baby from potentially inadequate and irresponsible parents. In such a situation, an authority may not take a pre-emptive strike by making the foetus a ward of court since a foetus is not a 'child', but might intervene only after birth, and might found its intervention largely on the mother's behaviour towards the unborn child while pregnant or where there is significant harm.⁴⁷

As gleaned from above, determining the beginning of childhood poses some difficulties, just as there are some difficulties in trying to determine the end of childhood. It is for this reason that we should look at the end of childhood to see if we can locate a common ground.

1.2.3 *When does childhood end?*

The end of childhood also poses some difficulties and this question has raised some scholarly debates focusing on different interpretations. Various national and international legislations have the age of eighteen as the end of childhood. Children below the age of eighteen for instance cannot be conscripted in the army otherwise they would be regarded as child soldiers.⁴⁸ Issues that may arise would include such questions as the capacity of the child to make decisions and the argument on consent. The question relating to decision making could be whether eighteen year-olds for instance can order alcoholic drink? If this is the case, does childhood end with the right to be able to drink or purchase alcohol?⁴⁹ Or the right to make choices?⁵⁰ It can be said that childhood begins and ends at different ages in different societies and for different purposes.

⁴⁷ Bainham (n 20) 71; *Paton v British Pregnancy Advisory Service Trustees* [1979] QB 276.

⁴⁸ Optional Protocol to the Convention on the rights of the Child on the Involvement of Children in Armed Conflict, adopted by GA Res A/RES/54/263 on 25 May 2000, entered into force on 12 Feb. 2002, arts 1-3.

⁴⁹ Some states place this right at 21 years.

⁵⁰ Right to choose to have an abortion, for instance (*Gillick case*).

As expounded by Ncube, in the traditional African cultural context, 'childhood is not perceived in terms of age but rather it is seen in terms of inter-generational obligations of support and reciprocity.'⁵¹ According to him, an African child remains a child to his or her parents who are entitled to his support when in need and at old age.⁵² It is a well known practice that the African child must always show respect to his parents and elders in the society and that is why Ncube admits that childhood is a continuous period of self-effacing obedience to traditional authority.⁵³ By traditional authority, we can conclude that this includes parents and elders. Thus, having identified that in Africa childhood is not considered in terms of age but obligations, we should bear in mind that a child would one day become an adult and therefore gain some autonomy. But the situation of the child who is incapacitated appears to be different, as the child will remain like a child as he/she would be unable to make informed decisions in matters concerning him/herself without assistance from a parent or carer. This is more so where the child cannot live a normal life as a result of the incapacitation. Therefore, from the African traditional perspective, it can be said that the end of childhood does not necessarily only depend on age. The present author therefore is of the view that in addition to having autonomy, acquiring the skills, ability and capacity of adulthood will be relevant when determining the end of childhood.

That notwithstanding, in some situations or circumstances we see a variation on when childhood ends. While some will hold that attaining adulthood ends parent-child relationship, there are other varying arguments suggesting that such relationship continues. In line with this view is that given by Bainham where he opines that because the age of majority exists, attaining adulthood should bring to an end the legal significance of a parent-child relationship, but he notes that many young adults still reside in the parental home which means that to some extent there is a continuity of some degree of

⁵¹ Welshman Ncube, 'The African Cultural Fingerprint? The Changing Concept of Childhood' in Welshman Ncube (ed), *Law, Culture, Tradition and Children's Rights in Eastern and Southern Africa* (Aldershot 1998) 11-27 at 18 (Ncube).

⁵² *ibid.*

⁵³ Ncube (n 51) 19.

dependency.⁵⁴ Thus, he gives the example of mentally disabled young adults for instance, who are actually dependent on their parents as much as young children.⁵⁵ Another example where parent-child relationship may endure for life has to do with succession. This may be the case with inheritance. For instance, under customary law amongst the Igbos in Nigeria, the property of a deceased father is shared amongst his sons. But where the son is a minor, the property may be held by his uncle in trust until he attains adulthood. The situation is different where the deceased does not have a son, his property would be shared amongst his brothers. This in itself has created a lot of hardship on his widow and daughters who in a majority of cases are left with nothing. Owasanoye notes however that the situation is only mitigated where the deceased contracted a common law marriage and did not die intestate⁵⁶ as seen in the case of *Bamgbose v Daniel*.⁵⁷ Thus, there appears to be no certain set out age of majority as this may vary owing to some continued dependency relationship as seen above in the case of succession. With respect to adoption, applicants for adoption should have attained the age of 25.⁵⁸ In international abduction cases, the Hague Convention ceases to apply to a child that has attained the age of 16.⁵⁹ In the UK also, Bainham notes that with respect to private acts of buggery between two consenting males, the requisite age was reduced to 18 in 1994⁶⁰ although recently the House of Commons voted to lower the age to 16 to be in consonance with the age of consent for heterosexual intercourse.⁶¹ Again, this age limit also shows the variation on when childhood ends for different offences or purposes across jurisdictions.

Even the UNCRC deliberately fails to oblige states parties to have a particular age for a child in order to allow for flexibility mainly because of cultural relativism, bearing in mind the existing multicultural societies. Therefore suggesting the need for a uniform age of majority which terminates childhood

⁵⁴ Bainham (n 20) 71.

⁵⁵ *ibid.*

⁵⁶ Bolaji Owasanoye, 'The Regulation of Child Custody and Access in Nigeria' (2005) 39 Fam.L.Q 405-428 at 405 (Owasanoye).

⁵⁷ (1955) A.C 107.

⁵⁸ CRA 129 (a)(i).

⁵⁹ Hague Convention 1983 art. 4.

⁶⁰ Criminal Justice and Public Order Act 1994 s 143.

⁶¹ Sexual Offences Act 1967 s 12(1); Bainham (n 20) 71.

would not serve the purpose of the UNCRC nor other instruments that have stipulated different ages to suit their circumstances. However, there should be a checklist or guideline for state parties to follow. This would curb any form of legislation or policy that would be in violation of the rights of the child or contrary to the purpose of the BIC principle.

In essence, having established that children exist, it becomes necessary to look at whether they have rights. Moreover, the notion of children's rights had continued to stir debates therefore necessitating the need for this discussion which will follow subsequently.

1.3 The Notion of Children's Rights

At this stage it becomes necessary to consider the notion of children's rights and to see whether or not these rights can be claimed. Children have claimed a range of rights for themselves which have resulted in some rights-based arguments of which Breen identifies that a two-fold problem exists namely, the definition of a child and the enforcement of children's rights.⁶² The latter will be discussed in a later chapter in this thesis. In relation to children's rights discourse, there is need to draw a distinction between two sets of rights, namely legal and moral rights on the one hand and, welfare and liberty rights on the other hand. The thesis shall briefly attempt to give an explanation of the difference between both notions of rights as this will clearly help in identifying the particular notion of right that can feature positively within a multicultural society.

1.3.1 *Legal and Moral Rights*

The present author will now consider the distinction between legal and moral rights (or 'claim rights' as referred to by Feinberg). Breen draws a distinction between legal rights and moral rights by defining legal rights as those rights which children are deemed to possess and which are enforceable by law;

⁶² Claire Breen, *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law* (Martinus Nijhoff 2002) 71 (Breen).

whereas moral rights are those rights which children possess but which are not legally enforceable.⁶³ Wolfson asserts that a world with moral rights or claim rights (as Feinberg refers to them) is sufficient to convince anyone that the notion of rights and the related concepts are a significant and valuable addition to moral life.⁶⁴

In furtherance to this, Freeman notes that most of the debate surrounding children's right have been centred on moral rights as against institutional or legal rights.⁶⁵ He opines that these moral rights were based on either claims that children may make against those who regulate society or against particular individuals requesting a particular type of treatment. Thus, he stressed that children's rights were therefore based on moral rights which implies a relationship between the concepts of rights and claims. Thus, the present author agrees with Breen where she argues that a child could have a claim even if the child could not make that claim or is unaware that he or she possessed that claim.⁶⁶ If this position is taken, then it can be rightly said that valid claims when justified can result in rights.

1.3.2 *Welfare and Liberty Rights*

Welfare rights and liberty rights have been given various distinctions by various authors. While some describe welfare rights as being concerned with the protection of children, and liberty rights as being geared towards a child's self-determination,⁶⁷ others such as Breen insist that welfare rights protect children whereas liberty rights protect children's rights.⁶⁸ However, a more appropriate distinction is that given by Freeman where he states that 'welfare rights (protection rights) merely required that the individual possessed interests which could be protected and promoted as in the doctrine of the

⁶³ *ibid.*

⁶⁴ Susan A Wolfson, 'Theoretical Underpinning 'Best Interests of the Child' in Michael Freeman and P Veerman, *The Ideologies of Children's Rights* (1992) 23 *International Studies in Human Rights*, 7-28 at 8-9 (Wolfson).

⁶⁵ *ibid.*

⁶⁶ Breen (n 62) 71.

⁶⁷ Breen (n 62) 72.

⁶⁸ *ibid.*

BIC'.⁶⁹ Therefore, all the above distinctions point to the fact that welfare rights aim at protecting the interests of the child while liberty rights protect the rights of the child.

Thus, having identified the above notions of rights, it will be appropriate to state that the moral notion of rights can feature positively within the context of multicultural societies. This is because moral rights are those rights which children should possess but which are not legally enforceable. This is more apt to apply in the multicultural society of Nigeria in comparison with welfare rights which in addition to being concerned with the protection of a particular child, appears to be more applicable in developed societies such as the UK.

1.4 Theories on Children's Rights in Both a Theoretical and International Context in Light of Nigeria

There are two theories on children's right, namely: the Will/Choice theory, and the Interest/Benefit theory. Each of these theories will be closely examined below.

1.4.1 Will/Choice Theory

The will/choice theory as developed by Hart views the purpose of law as being able to grant the widest possible means of expression to the individual, the maximum degree of individual self-assertion.⁷⁰ Hart sees this theory as closely related to the ideas of sovereignty, and related to ideas of moral individualism in the sense that it identifies the right-bearer by virtue of the power that he/she has over the duty in question. This power which he states can be waived, enforced or extinguished would only be based on his/her choice. Thus, he submits that the individual discretion comes into play here.⁷¹ Therefore, he opines that all men have equal right to be free and should be

⁶⁹ Wolfson (n 64) 7-9.

⁷⁰ Michael DA Freeman (ed), *Lloyd's Introduction to Jurisprudence* (8th edn Sweet & Maxwell 2008) 394 (Freeman).

⁷¹ *ibid.*

given the freedom to exercise their will. Accordingly, while adults already have that freedom to exercise their will, children should be given the same opportunity. However, the underlying suggestion is that children lack that capacity to exercise such powers. This view is strongly advocated by Waldron who argues that 'Hart's analysis is in principle incompatible with the attribution of rights to beings incapable of exercising powers of waivers, such as babies and ducks'.⁷² That is why Waldron argues that the opponents of the Will theory see it as evidence of its inadequacy.⁷³ In terms, Waldron therefore sees the inability of children to waive or enforce their rights as an inadequacy of the choice theory. Hart however views such incapacity as an advantage of the choice theory. The first inadequacy or difficulty which Freeman identifies is that the theory seems to allow all rights to be waived. He therefore sees Hart's views on the nature of rights as morally or conceptually inadequate in the sense that our duty not to kill or torture cannot be set aside by our potential victims releasing us from our duties.⁷⁴

A second difficulty identified with the will theory bothers on procedure. The main issue is with a person having a substantive right and the problem of having the ability to claim it (enforceability). In defence of this criticism, Hart acknowledges that children have rights but lack the ability to claim these rights. Thus, when he states that some rights holders lack the *locus standi* to bring their grievances forward, he is referring to children as he maintains that the remedy available to them is to be provided by someone else other than the child. In his words:

Some right-holders lack the standing to bring their grievances forward. Children, for example, do not have the 'right' to sue. There is a device available to them: they may sue through their "next friend" (usually a parent).⁷⁵

From the foregoing, children lack the ability to claim their rights but can only exercise such rights through someone else. For instance, local authorities in

⁷² Jeremy Waldron, *Theories of Rights* (OUP 1984) 12 (Waldron).

⁷³ *ibid.*

⁷⁴ Freeman (n 70) 394.

⁷⁵ Freeman (n 70) 394-395.

discharging their duties can exercise this right on behalf of the child. But the difficulty identified here is whether such a person with this duty will be willing to act.⁷⁶ Thus, following Hart's view, it can be said that children can be represented by their parent or guardian, next friend or local authorities. In sum, what the opponents of the Will theory see as a disadvantage of the theory, the proponents such as Hart see as an advantage, as someone else other than the child has the duty to act on behalf of the child. Drawing from this argument, it means that the Will theorists view this as an advantage because someone is available to exercise this right on behalf of the child where the child is unable to exercise the right thereby ensuring the protection of the child's right.

However, to clarify who has the duty to act, the will theory suggests that in relation to children's rights, it is sufficient if a person acting on behalf of the child has the relevant powers over the duty in respect of the child. While Freeman suggests that such a person would usually be the parent, he disagrees with the fact that powers given to local authorities do not constitute rights as what such powers do is to protect the rights that already exist.⁷⁷ In agreement with Freeman on this point, it is argued that the power given to local authorities is to enable them exercise that duty only and not a right. Thus, in exercising that duty, they tend to protect the already existing rights of the child which are indispensable.

This leads to the debate on the difference between substantive rights and ancillary remedial provisions of which Freeman acknowledges the existence of confusion between both.⁷⁸ First, substantive right means an indispensable human right. McColgan sees substantive rights as rights which are not expressed in terms of equality or non-discrimination but which operate in practice to ameliorate disadvantages suffered by particular groups.⁷⁹ In the same vein, the English Dictionary sees it as a basic human right that is

⁷⁶ Kate Standley, *Family Law* (6th edn, Palgrave Macmillan 2008) 301-306 (Standley).

⁷⁷ Freeman (n 70) 395.

⁷⁸ *ibid.*

⁷⁹ Aileen McColgan, 'Principles of Equality and Protection from Discrimination in International Human Rights Law' (2003) EHRLR 157-175 at 163 (McColgan).

regarded as existing naturally and indispensably – for instance the right to life.⁸⁰ Substantive rights also include ‘a right to equal enjoyment of fundamental rights, privileges and immunities distinguished from procedural right’.⁸¹ Based on the above, since it is asserted that substantive rights are indispensable human rights guaranteed to all human beings, then children are no exception and that is why these rights are expressly worded in statutes and legislations aimed at protecting particular groups. An example of such legislation is the UNCRC which specifically aims at protecting children. Thus, while taking a cursory look at the UNCRC, McColgan notes that examples of detailed provisions on the rights of the child including the right to enjoy freedom of expression, freedom from abuse and neglect, right to life as well as socio-economic rights guaranteed by other human rights instruments are also contained therein.⁸² We can therefore conclude that the UNCRC is one of a number of instruments that protect children’s rights. However, the reason for relying mainly on the UNCRC in this discourse is because it is the main instrument specifically enacted to protect children’s rights globally and it is from the UNCRC that the rights of the child is domesticated into Nigerian national law thereby resulting in the enactment of the Child Rights Act 2003 which also contains these substantive rights.

On the other hand, the ancillary remedial provisions would include provision of the child’s basic needs. This falls in line with the definition given by Black’s Law Dictionary that remedial laws or statutes are legislation providing means whereby causes of action may be effectuated, wrongs redressed and relief obtained.⁸³ While substantive rights are natural human rights (inherent rights), ancillary remedial provisions are statutory provisions. Based on this, it is arguable that substantive rights have the potential to provide more effective protection for a child than ancillary remedial provisions, and may play a role in defining and stimulating support for children’s rights issues. However, both substantive rights and ancillary remedial provisions go hand in hand. So, while substantive rights are inherent, where there is a breach, enforcement

⁸⁰ Encarta English Dictionary.

⁸¹ Black’s Law Dictionary (6th edn, West Publishing Co.1990) (Black’s Law Dictionary).

⁸² McColgan (n 79) 163.

⁸³ Black’s Law Dictionary (n 81).

will usually imply that its provisions are enshrined in ancillary remedial provisions which are statutory provisions.

In general, there is often an unclear distinction between substantive rights and ancillary remedial provisions. To eliminate this confusion, it is necessary to draw a distinction between rules and principles as advocated by Dworkin.⁸⁴ He notes that a conception of law as a system of rules does not take into account principles.⁸⁵ He further explained the ways in which 'legal principles' can be distinguished from 'legal rules' and argues that although both sets of standards point to particular decisions about legal obligation in particular circumstances, they still differ in the character of the direction they give.⁸⁶ Expounding on his thesis, Dworkin invoked the case of *Riggs v Palmer*,⁸⁷ an 1889 case where a New York court had to decide whether an heir named in his grandfather's will could inherit under that will even though he murdered his grandfather to do so.⁸⁸ In reaching a decision, the court concluded that "no man shall inherit from his own wrong". The reason Dworkin gives for proposing that principles differ from rules in the character of the discretion they give is that while rules are applicable in an all-or-nothing fashion, principles state "a reason that argues in one direction but do not necessitate a particular decision".⁸⁹ Dworkin is therefore of the view that when a particular principle is said to be a principle of our law, it means that if it is relevant, the principle is one which officials must take into account. He notes that a rule may be either valid, in which case the answer it gives must be accepted; or it is not valid, which implies that it contributes nothing to the decision.⁹⁰ In his view, 'all-or-nothing' is not seen in law but is seen mostly in the way rules operate. His argument seems to advocate for the need for exception to rules when he gives an example with a game of baseball where the rule states that a batter who had three strikes is not out if the catcher drops the third strike. Thus, for this rule to be accurate, such exception needs to be taken into

⁸⁴ Ronald Dworkin, *Taking Rights Seriously*, (Gerald Duckworth 2005) 26-27 (Dworkin).

⁸⁵ Freeman (n 70) 387.

⁸⁶ Dworkin (n 84) 24.

⁸⁷ 115 N.Y. 506, 22 N.E 188 (1889).

⁸⁸ Dworkin (n 84) 23.

⁸⁹ Dworkin (n 84) 26.

⁹⁰ Dworkin (n 84) 24.

account. Impliedly, if a rule has exceptions, then such exceptions must be accurately stated and taken into consideration otherwise the rule will be inaccurate and incomplete.⁹¹ Another example that clearly provides a distinction between a principle, a rule or policy is the repugnancy doctrine first reflected in the High Courts of the Western Region in s 12. The reason for bringing this to light is to show the relevance of this doctrine and to provide further clarity on the distinction between rules and principles. The section provides as follows:

The High court shall observe and enforce the observance of every native law and custom which is applicable and is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any law for the time being in force and nothing in this Act shall deprive any person of the benefit of any such native law and custom.⁹²

The Ordinance is a colonial legislation which came into force on 29th August 1955. Uchegbu notes that its aim is to effect the administration of justice in the colony.⁹³ He further points out that although the Ordinance does not state the procedure for determining what customary law is, s 14 of the Evidence Act clarifies this where it states that:

Provided that in case of any custom relied upon in any judicial proceeding it shall not be enforced as law if it is contrary to public policy and is not in accordance with natural justice, equity and good conscience.⁹⁴

The present author echoes Uchegbu when he argues that the language of the Ordinance is a command issued by the colonial Sovereign to the courts in the colony of Nigeria to respect and enforce native law and custom only in so far as it is not repugnant to natural justice, equity and good conscience.⁹⁵ But the

⁹¹ Dworkin (n 84) 24-25.

⁹² High Court Laws of Western Region of Nigeria 1959, s 12 (1); High Court of Lagos Ordinance, Cap 80, s 26(1).

⁹³ Amechi Uchegbu, *The Jurisprudence of the Nigerian Legal Order* (Ecowatch Publications 2004) 78 (Uchegbu).

⁹⁴ Evidence Act, Cap E14 LFN 2004 s14.

⁹⁵ Uchegbu (n 93) 78.

issue that needs to be determined is whether such Ordinance falls within the realm of a 'policy', 'rule' or 'principle'. In line with Uchegbu's argument, it can be said that 'the clause clearly laid down a rule which can be said to be a principle or policy'.⁹⁶ Thus, relying on Dworkin's thesis on rules and principles, courts of law must have an open mind and deliver judgment which must be accompanied by its own reason.⁹⁷ Where this is done in cases involving children's rights, it will ensure that the BIC principle will be applied. Drawn from the above, it can be said that the repugnancy doctrine is a principle which has evolved from a colonial situation just like the BIC which emanated from the UNCRC, therefore since courts have the discretion in delivering judgment, particular regard should be made to rules and principles that exist or are effected to protect the rights of the child by ensuring that their substantive rights and ancillary provisions are taken into consideration.

In the light of the above, it is the considered opinion of the present author that substantive rights would properly be regarded as rules whereas ancillary remedial provisions would fall into the category of principles. Thus, it can be said that rights of the child are legal rules whereas the concept of BIC is an example of a principle: being a statutory provision contained in the UNCRC. Importantly, as Dworkin argues, such a principle is one that officials are obliged to take into consideration. Thus, a consideration of the provision of the BIC contained in Article 3 of the UNCRC would explain this point more. The Article provides that 'in all actions concerning children ... the BIC shall be a primary consideration.' Notably, this Article does not provide for any exceptions. Therefore if any exception is read into it this would make it inaccurate and incomplete. Thus, it can properly be regarded as a principle in contrast with a rule which, based on Dworkin's thesis, may provide for exceptions and where this is so, then such exceptions must be accurately stated otherwise the rule will be inaccurate. Therefore, being a 'principle' relevant to our law it follows that officials must take it into account. It is submitted that this position is supported by the very words of Article 3.

⁹⁶ Uchegbu (n 93) 79.

⁹⁷ *ibid.*

Lastly, and more importantly, in the context of Nigeria, there is no doubt that Article 3 is relevant to its law, being a signatory to the UNCRC. Specifically, Nigerian officials are bound to take the BIC principle into account when considering issues bothering on the rights of the child. However, an exception to Article 3 may be located in arguments relating to 'culture defence' since Nigeria is a multicultural society. Woodman also points out that the issue of culture defence arises mainly in multi-cultural societies from rules or the normative aspect of culture.⁹⁸ However, discussion on culture will be elucidated later in this discourse. In the light of the foregoing, it is pertinent to agree with Woodman that culture may be an issue when it is not mentioned in statements of the general rules of law.⁹⁹ In a subsequent chapter in this thesis, the issue of culture will be discussed in some detail. Meanwhile the next subsection will offer an examination of the interest theory of rights.

1.4.2 Interest/Benefit Theory

At this point it becomes necessary to critically evaluate the interest/benefit theory as propounded by the proponents of this theory. The proponents such as MacCormick and Raz, opine that the purpose of rights is not to protect the individual's assertion but to protect certain interests.¹⁰⁰ While noting the above opinion, Freeman asserts that rights are benefits secured for persons by rules regulating relationships.¹⁰¹ Again with this view, we see that rules feature in the interplay between rights and children as Freeman points out. We can therefore conclude that rules regulate relationships between those with responsibility to protect the child's rights and the child.

There are however different versions of the interest theory although they all tend to arrive at the same objective. While one version is of the view that 'X has a right whenever he stands to benefit from the performance of a duty',

⁹⁸ Gordon R Woodman, 'The Culture Defence in English Common Law: The Potential for Development' in Marie-Claire Foblets and Alison Dundes Renteln (eds), *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (Hart Publishing 2009) 11.

⁹⁹ Woodman (n 98) 10.

¹⁰⁰ Neil MacCormick, *Legal Rights and Social Democracy* (Clarendon Press 1982) 158-161; J Raz, *The Morality of Freedom* (Clarendon Press 1986) 166; Freeman (n 70) 395.

¹⁰¹ Freeman (n 70) 395.

another version (by MacCormick, Raz and Campbell) opine that a child can have a right (whether in moral theory or within a legal system) whenever the protection or the advancement of an interest of the child is recognised (by moral theory or the legal system) as a reason for imposing obligations.¹⁰² This is where Freeman bases his argument which the present author supports. That is because the right of the child exists irrespective of the performance of a duty. It could therefore be a right recognised morally or legally.

As seen above, although many scholars seem to support the interest theory mainly because it covers all types of rights, it has however received criticism for failure to explain why rights should be tied to benefit. Freeman exemplifies this where he states: “can X’s interests be advanced by the rule conferring on him/her rights? Furthermore, a parent’s interests may be advanced by the rule limiting the contracts that a minor child may enter, but no rights are necessarily conferred on the parent by that rule.”¹⁰³ But, notwithstanding these limitations, Freeman maintains that the interest theory provides the most convincing explanation of what having a right entails.¹⁰⁴

A cursory look at Hohfeld’s analysis of rights shows that he is of the view that there is a difference between the statement that “X has a book”, and “X has a right to R”. While he describes the former as a normative statement (which means a rule, legal or otherwise), he sees the latter as descriptive. Hohfeld further submits that the statement ‘X has a right to R’ is confusing as it may be used to depict a number of different ideas as it is used in everyday discourse, including legal discourse. Thus, using the sentence ‘Child A has a right to education’ may mean that anyone has a duty to let Child A have education so that Child A can claim against that person. This means that Child A is free to do or refrain from doing something.¹⁰⁵ Although Hohfeld’s analysis has been criticised, Freeman is of the view that he uncovered the longstanding

¹⁰² J Raz (n 100) 166; Freeman (n 70) 395-396.

¹⁰³ Freeman (n 70) 396.

¹⁰⁴ *ibid.*

¹⁰⁵ Freeman (n 70) 396-397; Wesley N Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (Yale University Press 1919) (Hohfeld) 38.

confusion and offered valuable analytical clarification to rights analysis.¹⁰⁶ While Hohfeld maintains that rights correlate to a duty, it is arguable that not every duty will imply that there must be a correlative right. For instance the duty of a State to promote the best interests of a child would not constitute a right as this duty varies from State to State in the sense that what one State will consider as being adequate for a child may invariably not be the same standard set by another State.

There are arguments that it would be wrong to assert that children have rights when they lack the capacity to claim those rights for themselves or waive them. This argument denies the fact that children have interests which need to be protected. The interest theorists have argued that the concept of rights need not be confined to those who can lay claim to or waive them. These theorists according to Fortin hold that a person has a right where his interests are protected in certain ways 'by the imposition of (legal or moral) normative constraints on the acts and activities of other people...'¹⁰⁷ Thus, we can conclude that once a person's interests are legally or morally protected by someone else, then that person has a right.

But as noted by Freeman, the proponents of the choice theory of rights have been criticised by MacCormick for insisting on remedying children's rights through the enforcement of someone else's correlative duty. MacCormick is of the view that it is as a result of the rights children have, (for instance, the right to care and nurture) that the imposed legal provisions requiring others to provide that care and nurture is justified.¹⁰⁸ That is why as pointed out by Fortin, he stresses that 'the existence of rights presupposes the remedy: *ubi ius, ibi remedium*'.¹⁰⁹

However, while accepting that children are rights holders, Fortin attributes the difficulties in enforcing these rights to their apparent powerlessness. According to her, this is because children are often dependent on the very

¹⁰⁶ *ibid* 398.

¹⁰⁷ Fortin (n 5)13.

¹⁰⁸ Fortin (n n 5) 13.

¹⁰⁹ *ibid*; Freeman (n 70) 395.

adults who are acting in breach of their rights, for instance their parents.¹¹⁰ Thus, she notes that many writers today would prefer to use the term *obligations* owed to children rather than rights. While O'Neill points out that an appeal to rights has little chance of empowering children because when they are too young, they are unable to respond to such an appeal and by the time they are old enough to respond, they are near adulthood and free from dependence. Thus, she opines that the main remedy for children's powerlessness is for them to grow up.¹¹¹ Fortin also notes that children may have moral rights *prior* to any correlative duties vesting in anyone to fulfil them or without it being clear who is obliged to fulfil the right. In furtherance to this, the child's right to be educated to the limit of his or her abilities exists but it is unclear who has the power to enforce it and who has the duty to provide it.¹¹² Again, here lies the basis of this discourse as the difficulty lies on enforcing children's rights.

Clearly, the jurisprudential theory on the scope of rights has set the debate in motion. However, this seems to be inadequate as it has failed to provide a definite response to the question whether children should be regarded as 'rights holders'. All the arguments above have been geared towards this issue. Accordingly, Miller advocates for the need to consider ideal moral rights. These are rights claimed for men but not necessarily recognised in practise. Some of these rights are referred to as 'natural rights' or 'human rights'.¹¹³ According to Miller, natural and human rights are ideal because they are claimed for all men regardless of whether they are actually recognised in any particular society.¹¹⁴ In support of this argument, ideal moral rights seem to be the most appropriate to form a middle way in the debates whether children have rights. By claiming ideal moral rights, we can rely on the fact that since these rights can be accessible to all individuals, it includes children.

¹¹⁰Fortin (n 5) 14.

¹¹¹*ibid*; Onora O'Neill, 'Children's Rights and Children's Lives' 6 (1) *Int J Law Policy and the Family* (1992) 24-42 at 38-39.

¹¹²*ibid*.

¹¹³David Miller, *Social Justice* (Clarendon Press 1976) 78 (Miller).

¹¹⁴*ibid*.

Furthermore, attempts have been made to distinguish between two categories of human rights, namely the traditional natural rights of Locke and the French revolutionaries (consisting of life, property and liberty) and; on the other hand, the most recent rights comprising of social and economic rights (for instance, the right to work, and subsistence).¹¹⁵ Miller distinguishes between the two classes to the extent that the first category comprises of rights to be allowed to do things, corresponding to duties in others not to interfere; whereas the second category comprises of rights to be given things, corresponding to duties in others to provide them.¹¹⁶ This distinction helps to show that the issue of children's rights will fall under these broad categories, namely natural rights, and socio-economic rights although this research includes other categories such as cultural rights. The next sub-section will briefly discuss the distinction between rights and needs.

1.4.3 Rights and Needs: Are Children Rights Holders?

Flowing from the foregoing, it becomes imperative to bring to the fore the question on rights and needs of children as holders or otherwise of these rights. Therefore, having considered the distinction between substantive rights and ancillary remedial provisions, and a distinction between rules and principles, there is need to consider whether there is a distinction between rights and needs. This is necessitated by the debates whether children are indeed rights holders, and if they are who has the duty to protect the rights. Although some scholars such as Hart opine that the term 'rights' is inappropriate to be applied to 'babies or to animals'.¹¹⁷

On the contrary, Federle is of the view that rights-talk suggests that the child's need for protection is a right. This entails a right to be cared for and nurtured, or to be placed in a permanent and safe loving home.¹¹⁸ However, following the debates on whether children are rights holders, Freeman notes that while

¹¹⁵ Miller (n 113) 79.

¹¹⁶ *ibid.*

¹¹⁷ HLA Hart 'Are there Any Natural Rights?' in Waldron (n 59) 77-90 at 82.

¹¹⁸ Katherine H Federle, 'Children's Rights and the Need for Protection' (2000) FLQ 421-444 at 422 (Federle Children's).

some scholars such as Hohfeld argue that children only have claim rights,¹¹⁹ others for instance Hart, argue that rights co-relate to duties.¹²⁰ But Freeman maintains that it is not every duty that implies a correlative right.¹²¹ Therefore following Hart's view, to have a right would imply a corresponding duty on the parents, and also on the state where the parents fail to do so.¹²² In this vein, if we take rights as needs that the child may have, which warrants protection, then it is consistent with the interest theory of rights. According to this theory, those who claim that children have rights identify as rights those interests which correlate to the child's need for protection. Take for instance, the child's interest in being nurtured, cared for and loved is worthy of protection as a right. Also, the child's basic interests, such as food, shelter and love, may warrant protection and take priority over other kinds of interests, like the need for an education. No doubt, Federle is of the view that even the status of the child as a child could create specific set of rights based on the child's developmental and other needs.¹²³ The stream of thoughts clearly show that while some scholars opine that rights should not be applied to children, others have submitted that the debates on rights suggest that the need to protect the child constitutes a right, whereas others have held that children have claim rights, while some scholars have maintained that rights co-relate to duties. The present author maintains that some of these rights which children claim are substantive rights which are due to everybody therefore children are no exception even where they lack the ability to exercise that right.

The above position is in line with the interest theory which has made efforts to resolve the debate of having a right without having the ability to exercise it. This is because the right is an interest which is based on the child's needs. Therefore, the right exists regardless of who will enforce or exercise it. In essence, it could be said that the child may have a right to be cared for regardless of the identity of the individual who has the corresponding duty to provide that care. Even where the person with the duty fails to perform that

¹¹⁹ Freeman (n 57) 395-396.

¹²⁰ *ibid.*

¹²¹ *ibid.*

¹²² Jonathan Herring, *Family Law* (4th edn, Pearson Education Ltd 2009) 439-442; Waldron (n 72) 13.

¹²³ Federle Children's (n 118) 422.

duty, the child's right still exists. The interest theory therefore provides a view of children's rights which is not tied to the capacity of the child as a rights holder.¹²⁴ The present author agrees with this view because the right exists and does not necessarily rely on the exercise of a corresponding duty by someone else. However, it is necessary to note that the interest theory has been criticised for failure to explain why rights should be tied to benefits in the first place. The argument raised by Freeman is whether someone's interests for example can be advanced by a rule without that rule conferring rights on the person?¹²⁵ Freeman opines that while a parent's interests may be advanced by the rule limiting the contracts that a minor child may make, no rights may however be conferred on him by that rule.¹²⁶

Having considered the interest theory, there is need to note the numerous challenges that are associated with this theory. Firstly, someone else other than the child enforces the right. This is because the interests identified as giving rise to rights are mainly protective, which goes further to show the child's incompetence. In line with this view, it has been argued previously that interests would fall under the ancillary remedial provisions which means they are not rights but needs which ought to be provided by someone else. It therefore can be said that since these interests ought to be protected by a person other than the child they are not rights. Being interests provided by someone else, it goes further to reaffirm that the rights are protective, as such the child does not have the ability to enforce these interests.

Another challenge of this theory is the lack of certainty that someone else would definitely enforce the child's rights. In line with this, Federle points out that there is little assurance that the adult who enforces the right will do so in a way that would serve the child's interests.¹²⁷ While Federle's view may be true, the child's right even when enforced sometimes lacks implementation that would serve the child's best interests especially owing to some constraints that the person empowered to enforce the child's rights may face.

¹²⁴ *ibid.*

¹²⁵ Freeman (n 70) 389-390.

¹²⁶ Freeman (n 70) 396.

¹²⁷ Federle Children's (n 118) 422.

One of such constraints which he identifies is 'how do we determine what interests are best for the child?' Fortin however has identified an approach that seeks to promote children's views which arguably have had both positive and negative effects. That approach is the standard of the BIC. A second approach identified by Eekelaar as Fortin points out include, the use of the hypothetical retrospective judgment which implies that the adult should guess what the child might retrospectively have wanted.¹²⁸ Thirdly, Eekelaar proposed a more sophisticated approach which is the concept of 'dynamic self-determinism'. This approach implies a decision-making method with the intention of replacing the BIC.¹²⁹ Fortin is of the view that this approach seeks to guide a child to adulthood with the maximum opportunities so that the child can form and pursue life-goals thereby making autonomous decisions.¹³⁰ Lastly, Eekelaar suggests the paternalistic approach which implies that the child's wishes are a significant factor in the adult's decision.¹³¹ He notes that this approach could bring about some disadvantages such as paternalistic coercion to restrict the child's liberty while at the same time accepting the need to promote the child's capabilities for decision-making and responsibility.¹³² However, in line with Fortin's suggestion, there is need to find an acceptable balance between respecting children's choices and retaining the power to override decisions which may destroy their future lives.¹³³ Other approaches from the feminist perspective include law as patriarchy as identified by Olsen.¹³⁴ However, the feminist approach is outside the purview of this thesis. The main focus of this thesis is on the best interests approach. As will be seen from the following discussion the BIC approach has received criticisms for being indeterminate.

Scholars such as Mnookin and a number of academics as pointed out by Breen have argued against the use of the BIC standard on grounds of its

¹²⁸ Fortin (n 5) 23.

¹²⁹ *ibid.*

¹³⁰ Fortin (n 5) 24.

¹³¹ *ibid.*

¹³² *ibid.*

¹³³ *ibid.*

¹³⁴ Frances Olsen, 'Children's Rights: Some feminist approaches to the United Nations Convention on the Rights of the Child' (1992) 6 (1) *Int'l J of Law, Policy and the Family* 192-220.

indeterminacy. The argument is that children are disadvantaged by some of these approaches used to protect them. With respect to the best interests standard, they argue firstly, that the standard which in itself is indeterminate makes it difficult to identify what interests are 'best' for the child, and it fails to show which rights or duties flow from those interests. Secondly, it is too indeterminate to be of use in legal decisions.¹³⁵ Thirdly, the standard is structured in the language of parental rights and responsibilities.¹³⁶ On the contrary, this may not be the case as we see an emerging new application of the standard in different perspectives arising in discourses concerning children.¹³⁷ In line with this, the present author maintains that although the standard may be indeterminate, it is still being greatly used in a range of legal decisions. However, the difficulty lies in the fact that its applicability will differ in societies especially in such societies where the recognition of parental rights and responsibilities are not fully established in their laws owing to diverse cultural implications and varying legislations. Again, this situation in such societies can be remedied if a consensus is reached by ensuring that the interests of the child is taken into consideration in constructing rights for children and a way of doing this is by choosing what is best for a particular child and having a yardstick to arrive at such decisions although this may be easily achievable in modern societies.

Notably, there has been a shift towards protecting children in modern societies. Eekelaar points out that in early societies, children were viewed primarily as agents for the devolution of property within an organised family setting and that the law did not lay down any provisions for Guardians for children.¹³⁸ Eekelaar also notes that a father's duty to support his children was first *legally* expressed in the poor laws of the sixteenth century. Prior to this, he emphasises that no attempt was made by private law to protect children's interests but private law protected the interests of fathers through its

¹³⁵ Breen (n 62) 54.

¹³⁶ *ibid.*

¹³⁷ Federle Children's (n 118) 422.

¹³⁸ John Eekelaar 'The Emergence of Children's Rights' (1986) 6(2) OJLS 161-168 at 163 (Eekelaar).

legal remedies¹³⁹ so the law stepped in indirectly to enforce the father's obligation to educate his children by sending them out on apprenticeship.¹⁴⁰ In agreement with Eekelaar, by imposing a duty on the father it can be interpreted as safeguarding the children's interests or rights.¹⁴¹ On the contrary, under public law, Eekelaar noted that injuries to the children were injuries to the father so protection was only given where the father's failure in regard to the children's interests was threatened by other people.¹⁴²

On the other hand, the criminal law had always protected children against severely injurious or life-threatening acts perpetrated against them by their parents.¹⁴³ However, there are contrary arguments that this protection only covered a small segment of a child's exposure to danger. This can be gleaned from the fact that early legislation controlling the employment of children in factories and mines was aimed at protecting the interests of children.¹⁴⁴ But a contrary argument claims that these controls were aimed at protecting the interests of the parents to profit from their children's labour.¹⁴⁵ One of the reasons proffered by Eekelaar in response to this argument is that unless a father seriously threatened his child's well-being, the father's rights are paramount, therefore since the children were not of age and in the care of their parents, the parents are in the best position to know their best interests.¹⁴⁶ The present author disagrees with Eekelaar to the extent that the child knows what is best for him or her. The father's rights should not be more important than that of the child. While total autonomy of the child is not the argument here, the BIC should be the primary consideration in actions concerning the child. For instance, a child's right to education does not give the child the ability to determine which school is best or what level of education is best for the child. Eekelaar's position would therefore suggest

¹³⁹ Eekelaar (n 138) 166.

¹⁴⁰ *ibid.*

¹⁴¹ *ibid* 167.

¹⁴² *Ibid* 167.

¹⁴³ *ibid*, *R v Senior* (1899) 1 QB 283 suggests the possibility of manslaughter or conviction for murder where the child's parents fail to organise suitable medical treatment. But in *R v Sheppard* (1981) AC 394 where parents failed to provide treatment due to their low intelligence, they were not punished; Herring (n 122) 400.

¹⁴⁴ Eekelaar (n 138) 167.

¹⁴⁵ *ibid.*

¹⁴⁶ *ibid.*

that the father makes decisions for the child. Such power if not controlled can lead to child labour, child abuse and various harmful effects on the child which is in violation of the rights of the child and the BIC principle. However, there may be certain decisions that the father can rightly take on behalf of the child such as decisions where there is a threat to life (in medical cases) as will be seen later in this thesis.

Based on the above discussion, it can be said that while one school of thought is of the view that the term 'rights' is inappropriate to be applied to 'babies or to animals' as earlier stated,¹⁴⁷ others have opined that rights correlate to duties. This section looked at the distinction between needs and rights, and made attempts to draw a distinction between rules and principles, using Dworkin's principle. However, for further clarification, it is apt to offer distinctions drawn on rules and principles. Firstly, Hart sees principles as "broad, general or unspecific".¹⁴⁸ The reason he gives is that what is often regarded as a number of distinct rules can be seen as examples of a single principle.¹⁴⁹ Secondly, because principles refer more or less explicitly to some purpose, goal, entitlement, or value, they are regarded from some point of view as desirable to maintain or to adhere to, and so not only as providing an explanation or rationale of the rules which exemplify them, but as contributing to their justification.¹⁵⁰ Thirdly, he refers to Dworkin who sees rules in an 'all-or-nothing' manner in the sense that if a rule is valid and applicable to all in a given case then it determines the outcome. He supported his argument with some examples of legal rules, such as legal rules prescribing a maximum speed limit of 60 mph on the turnpike road, or statutes that regulate the making, proof and efficacy of wills such as the statutory rule that a will is invalid unless it is signed by two witnesses.¹⁵¹

In expounding on his thesis, Dworkin proffers reasons why legal principles differ from rules. First, he states that legal principles differ from all-or-nothing

¹⁴⁷ *ibid*; Waldron (n 72) 1-12.

¹⁴⁸ Herbert Lionel Adolphus Hart, *The Concept of Law* (2nd edn, OUP 1994) 260 (Hart).

¹⁴⁹ *ibid*.

¹⁵⁰ *ibid*.

¹⁵¹ *ibid*.

rules because they point towards a decision or state a reason which may be overridden but which the courts take into account, but they do not necessitate the decision. According to him, the statement that “no man may profit from his own wrong” is a non-conclusive principle. Dworkin therefore sees rules as ‘all-or-nothing’ and principles as ‘non-conclusive’.¹⁵² In line with the above, the BIC would rightly come under legal principles.

Secondly, legal principles differ from rules because they have a dimension of *weight* but not validity. The argument Hart makes here is that where there is conflict with another principle of greater weight, one principle will be overridden and fail to determine a decision, but will nevertheless survive to be used in other cases where it may be used with some other principle of lesser weight. On the contrary, rules are either valid or invalid but do not have this dimension of weight so in the event that they conflict, only one of them can be valid, and a rule which loses in competition with another must be reformulated so as to make it consistent with its competitor.¹⁵³ I lend support to Hart where he disagrees with Dworkin for being incoherent as he (Dworkin) had earlier stated citing *Riggs v Palmer*, that rules may conflict with principles and that a principle will sometimes win in competition or lose. Thus, Hart states that the existence of such competition shows that rules do not have an all-or-nothing character since they can conflict with principles which may outweigh them.¹⁵⁴ Again, the same analysis applies if we take a principle to provide a reason for a new interpretation of some formulated legal rule.¹⁵⁵ This shows that there is an incoherence which Hart admits.¹⁵⁶ Thus, a way of eliminating this incoherence is to propose that rules should be fashioned to adapt to different circumstances. In line with the above, the BIC standard should therefore be fashioned to adapt to different circumstances. From the foregoing theoretical discourse, it became evident that with time, children’s rights gained recognition internationally following the emergence of the human rights regime which was later witnessed at the national level. Thus, children’s rights

¹⁵²Hart (n 148) 261.

¹⁵³*ibid.*

¹⁵⁴Hart (n 148) 262.

¹⁵⁵*ibid.*

¹⁵⁶*ibid.*

discourse will be incomplete without a discussion on the historical perspective on children's rights.

1.5 Historical Perspective

As noted from the above discussion, it can be said that the theories of rights have influenced the historical development on children's rights. It is as a result of incorporating human rights theories into the development process that the historical and political perspectives on children's rights emerged. And this has in turn shaped the entire discourse on whether children should be regarded as rights holders. The present author noted the disparity of theories with regard to children's rights portrayed by the different schools of thoughts such as the will/choice theorists and the interests/benefit theorists. However, the fact remains that some of these rights are substantive in nature whereas they also have ancillary remedial provisions where such rules are accepted as rules or principles of our law, in which case the state must ensure that they are given due enforcement because if it is accepted as principle of our law it implies that the state has given it recognition. The promotion of children's rights draws heavily from the theoretical arguments thereby influencing the normative framework on children's rights as reflected in international, regional and national instruments.

However, in spite of the jurisprudential and theoretical debate on the existence and scope of children's rights, children's rights have continued to be promoted internationally. An overview of the emergence of human rights as stated by Fortin shows that the term 'human rights' only came to the fore in the aftermath of the Second World War when the draftsmen of the 1948 Universal Declaration of Human Rights (UDHR) adopted the term rather than the well-known phrase '*rights of man*'.¹⁵⁷ Prior to this, the UN Charter of 1945 had proclaimed that one of its primary purposes is to promote and encourage 'respect for human rights and fundamental freedoms for all without distinction

¹⁵⁷ Fortin (n 5) 34.

as to race, sex, language, or religion.’¹⁵⁸ Fortin points out that the UDHR guarantees “the inherent dignity and ... equal and inalienable rights of all members of the family”.¹⁵⁹ This shows that human rights have long been established since 1945. The following sub-section traces the historical development of human rights in general as well as the development of human rights specifically tailored to the needs of children at the international level. This will be followed by a brief consideration of the historical development of children’s rights in the context of the Nigerian State.

1.5.1 International Human Rights: General

In 1948, the United Nations General Assembly adopted the UDHR which guaranteed “the inherent dignity and...equal and inalienable rights of all members of the human family”.¹⁶⁰

Fortin submits that the civil and political rights contained in post-War treaties were based on ideas of early natural law philosophers of the seventeenth-century such as John Locke and Hugo Grotius who opined that man has inalienable rights which are fundamental to human nature.¹⁶¹ Locke opines that according to the laws of nature each human being is entitled to the inalienable moral right to life, liberty and property. But the question which comes to the fore is who is entitled to enforce these inalienable rights? The present author agrees with Fortin that the obligation to protect these rights falls on governments. That is the position of Feldman as asserted by Fortin where she states that:

... the idea at the root of human rights thinking is that there are certain rights which are so fundamental to society’s well-being and to people’s chance of leading a fulfilling life that

¹⁵⁸ UN Charter, Ch 1 art 1(3) adopted on 24 Oct 1945
<http://www.un.org/en/documents/charter/chapter1.shtml> accessed on May 31 2010.

¹⁵⁹ Fortin (n 5) 34.

¹⁶⁰ *ibid.*

¹⁶¹ *ibid.*

governments are obligated to respect them, and the international order has to protect them.¹⁶²

Importantly, Fortin points out that since 1948 mankind has been witnessing an increasing number of treaties seeking to protect the individual from oppressive interference by governments, by providing for various kinds of human rights. They contain provisions such as protection from torture, from conviction without trial and freedom of expression.¹⁶³ Examples of such human rights-related treaties post the UDHR 1948 include the International Covenant on Civil and Political Rights (ICCPR) 1966 and the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966 (containing a list of 'second generation rights'), together known as the International Bill of Rights. Fortin notes that these treaties require states parties to take positive action to promote the welfare of individual human beings.¹⁶⁴ This requirement therefore includes children as it has been accepted that children have equal human rights as adults. Again, the issue of enforcement is addressed by the treaties. For instance, under the ICESCR states are required to make resources available for certain additional social welfare rights, for instance "the right to an adequate standard of living¹⁶⁵ and the right to the highest attainable standard of physical and mental health."¹⁶⁶ Although these social rights exist, there is difficulty in acknowledging them owing to lack of enforcement because they are regarded as second generation rights which are not immediately enforceable but depend on availability of resources by states. Furthermore, Fortin asserts that their inclusion in a number of international instruments, including the UNCRC serves as a reminder to states parties of their obligation towards their citizens.¹⁶⁷

The movement towards the international protection of human rights later moved on to protection of specialised groups of people such as women, indigenous people and children. Fortin notes that by the second half of the

¹⁶² David Feldman, *Civil Liberties and Human Rights in England and Wales* (OUP 2002) 34-35; Fortin (n 5) 35.

¹⁶³ Fortin (n 5) 35.

¹⁶⁴ Fortin (n 5) 33.

¹⁶⁵ ICESCR 1966 art 11; Fortin (n 5) 35.

¹⁶⁶ ICESCR art 12; Fortin (n 5) 35.

¹⁶⁷ Fortin (n 5) 35.

twentieth century, children's rights began to gain more cognisance and it became widely acceptable that children also have human rights like adults which must be protected. Thus, a new international dimension witnessed governments, local authorities, courts of law and agencies became more focused on the need to effectively promote children's right.¹⁶⁸ Also witnessed was an emergence of international instruments aimed at protecting children's rights which will be discussed in the next subsection.

1.5.2 *The Rights of the child and the United Nations*

This discourse so far has shown that although efforts in producing an instrument with binding force to cover all aspects of children's *needs*¹⁶⁹ have been made long before the international human rights activity generated by the Second World War, however, only little progress was made. Fortin noted that the first instrument devoted to the protection of children's rights was the Declaration of the Rights of the Child referred to as the 'Declaration of Geneva' adopted by the Fifth Assembly of the League of Nations in 1924.¹⁷⁰ She described this Declaration as 'brief and aspirational' containing only five basic principles stated in the following terms:

the child must be given the means requisite for its normal development both materially and spiritually; the child that is hungry must be fed; the child that is sick must be nursed; the child must be the first to receive relief in times of distress.¹⁷¹

Fortin sees the Declaration of Geneva as 'aspirational' because it merely invites states parties to be 'guided by its principle in the work of child welfare'.¹⁷² In this sense, the present author is of the view that the Declaration just like the UNCRC lacks the desired enforcement needed to implement children's rights. Notably, the protection of the rights of the child

¹⁶⁸Fortin (n 5) 36.

¹⁶⁹ *My italics* ('needs' because before the emergence of rights-talk they were not recognised as rights).

¹⁷⁰Fortin (n 5) 37.

¹⁷¹ Declaration of the Rights of the Child, GA Res 1386 (XIV) 14 UN GAOR Supp (No 16) at 19, UN Doc A/4354 (1959); Principles 1-10 of the Declaration; Fortin (n 5) 37.

¹⁷²Fortin (n 5) 37.

took an important stride with the emergence of the Declaration of the Rights of the Child adopted by the United Nations General Assembly in 1959. Although it was a much longer document containing ten principles aimed at promoting children's rights, Fortin opines that it still had the limited status of a declaration therefore, could not constitute legal obligations, which means States were only required to take note of the principles contained therein, on grounds that they are universally accepted as being applicable to all children.¹⁷³ Consequently, as a result of absent legally binding obligations, many states parties ignored the suffering conditions of children. Moreover, she notes that the 1959 Declaration failed to acknowledge that children, unlike adults, are entitled to the first generation human rights; the freedom from state oppression made no reference to the child's name and nationality as well as children's civil and political rights.¹⁷⁴

In a bid to impose legal obligations on state parties, children's Rights began to gain prominence in the international arena in the 1970s. Owing to pressures from the violations of children's rights globally, and in order to ensure a more systematic approach to protect children's rights thereby leading to the agitation for an international document that would guarantee children's rights by imposing legal obligations, in 1976 at the request of UNICEF, the United Nations General Assembly declared 1979 as the International Year of the Child and urged governments to commemorate the year by making special contributions aimed at improving the well-being of children.¹⁷⁵ This document was the Draft UNCRC.¹⁷⁶

Fortin traced the history of the interpretation and application of the *best interests* standard back to 1978 with the role played by the Polish government when Poland submitted their contribution stating therein that the non-binding provisions of the Declaration on the Rights of the Child 1959 be adapted in order to ensure their suitability for inclusion in a binding treaty.

¹⁷³Fortin (n 5) 38.

¹⁷⁴ *ibid.*

¹⁷⁵ Declaration of the International Year of the Child, GA Res A/RES/31/169 of 21 December 1976; Fortin (n 5) 39.

¹⁷⁶ *ibid.*

In 1980, a report on Poland's proposed Draft Convention emerged. It provided that:

[I]n all actions concerning children, whether undertaken by their parents, guardians, social or state institutions, and in particular by courts of law and administrative authorities, the BIC shall be *the* paramount consideration.¹⁷⁷

A further proposal submitted by the United States was not considered by the 1980 Working Committee. The proposal states that:

[I]n all official actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, or administrative authorities, the BIC shall be a primary consideration.¹⁷⁸

In 1981, the Working Group discussed the Draft Proposal of the United States and Article 3 of the revised Polish text but expressed concern that although the Polish proposal offered a better protection to children, not everyone agreed with such a broad standard. The issue that generated much debate was that the word 'paramount' was rather too broad. As seen from both proposals, the argument was whether the BIC should be 'the' or 'a' primary consideration. While some of the delegates felt that the interests of the child should be 'a primary consideration' in all actions concerning children, others felt it should be 'the primary consideration'. However, Breen notes that they are not to be the overriding, paramount consideration in every case. This is because other parties may have equal, or even superior, legal interests in some cases. Consequently, Breen suggests that this proposal seems to offer children protection through the back door, in the sense that the child's interests would not be overriding and private family decisions would not be regulated and no specific obligations would be imposed.¹⁷⁹ Following these points, it seems appropriate to prefer the word 'a primary'.

¹⁷⁷ UN Doc. E/CN.4/1349, 2-3.

¹⁷⁸ UN Doc. E/CN.4/L.1542.

¹⁷⁹ Breen (n 62) 82.

Remarkably, in 1989, the Working Group adopted the text of the paragraph by incorporating suggested revisions by UNICEF and the technical review team of the Secretariat and came up with the following text which has received the approval of state observers and complies with existing international standards such as the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW):

[I]n all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the BIC shall be (a) primary consideration.¹⁸⁰

From the above, the difficulties associated with the best interests standard commenced with providing a single definition. However, this has not rendered the standard inadequate. A second difficulty identified by Breen is the practice of tradition which plays a prominent role in the analyses of the best interests standard.¹⁸¹

Other difficulties identified are those associated with calls for increased autonomy for the child.¹⁸² However, Breen is of the view that these difficulties may be overcome when children are granted welfare rights. In essence, children could be granted a right to be protected as opposed to the right to self-determination advocated by liberalists.¹⁸³ She further asserts that the issue of the rights of the child has become increasingly complicated where liberty and welfare rights have been viewed against the child's legal and moral rights. These difficulties appear to dwindle down owing to the awareness that children are actually right-holders. This can be gleaned from the near total ratification of the UNCRC.¹⁸⁴

¹⁸⁰ UN Doc. E/CN.4/1989/WG.1/WP.2.

¹⁸¹ Breen (n 62) 85.

¹⁸² *ibid.*

¹⁸³ *ibid.*

¹⁸⁴ Ratified by 193 states parties except United States and Somalia; www.unhchr.org – OHCHR accessed on 18 Sept. 2007; www.unicef.org/crc/convention.htm; Geraldine Van Bueren, 'Children's Rights: Balancing Traditional Values and Cultural Plurality' in Gillian Douglas & Leslie Sebba (eds), *Children's Rights and Traditional Values* (Ashgate 1998) 15-30 at 15.

From the foregoing, it would appear that Member states were in favour of the idea of a Convention on the Rights of the Child, although it took nearly ten years before a final draft of the UNCRC was completed. It was then adopted by the General Assembly in November 1989 and finally entered into force in 1990.¹⁸⁵ Nigeria signed the Convention on 26th January 1990 and ratified same on 19th April 1991.¹⁸⁶

1.5.3 The United Nations Convention on the Rights of the Child (UNCRC)

The UNCRC contains provisions that cut across a wide range of children's needs and aspirations. Fortin notes that the 40 articles in the UNCRC are concerned with substantive rights, civil, political, economic, social and cultural issues. The UNCRC generally applies to 'every human being below the age of eighteen years'.¹⁸⁷ The UNCRC is seen as a departure from earlier international instruments aimed at addressing children's need for care because it includes all the traditional civil and political rights such as freedom of expression,¹⁸⁸ association and assembly¹⁸⁹ and religion.¹⁹⁰ She further states that by including children's social welfare rights, the UNCRC emphasises that states must not only protect children by safeguarding their fundamental freedoms, but must also devote resources to ensure that the potential for maturing into a healthy and happy adulthood is realised.¹⁹¹ Thus this is also in line with the requirement of the UNCRC where it obliges States parties to use the maximum extent of their available resources.¹⁹²

From the foregoing, it can be said that since the UNCRC covers a wider range of interrelated provisions than other international human rights instruments, the BIC becomes relevant as one of the general principles of the UNCRC as it

¹⁸⁵Fortin (n 5) 39.

¹⁸⁶www.ohchr.org/english/countries/ratification accessed on 18th September 2007.

¹⁸⁷ Art 1 – unless the age of majority is attained earlier; Fortin (n 5) 39.

¹⁸⁸ Art 13.

¹⁸⁹ Art 15.

¹⁹⁰ Art 14.

¹⁹¹Fortin (n 5) 40.

¹⁹² UNCRC 1989 art 4.

aids in bridging the gap in terms of interpretation and application of the provisions of the UNCRC. Also, the Committee on the Rights of the Child (CRC) saddled with the responsibility of realising the obligations of the UNCRC¹⁹³ reiterates the interrelationship but elevates four of the articles namely article 2 (freedom from discrimination), article 6 (the right to life), article 12 (respect for the child's views) and article 3 (the BIC)¹⁹⁴ to the status of general principles. The present author agrees with Fortin when she states that although none of these four principles is more important than the other, but article 3 which requires a commitment to the child's best interests underpins all the other provisions. Article 3(1) provides that the 'BIC shall be a primary consideration'. The word 'a' indicates an emphasis and this provision generally departs from other international, regional or national instruments such as the ACRWC.¹⁹⁵ Indeed, this same provision is evident in national instruments such as the Nigerian Child Rights Act which places the BIC to be *the* primary consideration.¹⁹⁶ However, in the UK Children Act 1989 where emphasis is placed on the child's welfare in both public and private law proceedings for care and supervision order, the child's welfare has been seen to be of paramount consideration.¹⁹⁷

The reason given for using the wording 'primary' instead of 'paramount' is because there may be other competing interests, for instance, those of justice and society, as a result of which paramountcy may be inappropriate.¹⁹⁸ Fortin states that although the 'best interests' principle does not adopt a paramountcy criterion, the CRC would not allow it to be downplayed.¹⁹⁹ Thus, Fortin stresses that the CRC is of the view that Article 3 be used as 'a guiding principle' for interpreting the provisions of the UNCRC. What this means is that children's rights should be interpreted based on what is best for them

¹⁹³ UNCRC 1989 art 43.

¹⁹⁴ UNCRC 1989 arts 2, 6, 12 and 3.

¹⁹⁵ ACRWC 1990 art 4 (1) states that 'In all actions concerning the child undertaken by any person or authority the best interests of the child shall be *the* primary consideration'.

¹⁹⁶ CRA 2003 s 1.

¹⁹⁷ Children Act 1989 s 1; Standley (n 76) 273-288 at 276.

¹⁹⁸ Fortin (n 5) 40.

¹⁹⁹ Fortin (n 5) 40. Note that the Children Act (CA) 1989 and the ECHR take a 'paramountcy' approach. S 1 of the CA provides, 'when a court determines any question with respect to – (a) upbringing of a child; or (b) the administration of a child's property or the application of any income arising from it, the child's welfare shall be the court's paramount consideration'.

which is the purport of the principle.²⁰⁰ Note that the UNCRC provides various classifications which will be discussed subsequently. Firstly, the classification under the UNCRC will be discussed, followed by that of various scholars then other classifications.

1.5.4 Classifying the Convention Rights

The rights contained in the UNCRC have been given different classifications by several scholars. Some of these scholars such as LeBlanc,²⁰¹ Freeman,²⁰² Wald,²⁰³ and Campbell²⁰⁴ have been identified.²⁰⁵ Contrary to Fortin's view that none of the classifications avoids overlap, the present author is of the view that the classifications are distinct and do not overlap especially when looking at Le Blanc's classification.²⁰⁶ Accordingly, the next discussion will look at the classification offered by LeBlanc as it offers a broad and all encompassing classification which also includes 'membership rights'. This inclusion emphasises the way in which the UNCRC addresses children's need for community. These rights briefly explained below are namely, survival rights, membership rights, protection rights and empowerment rights.²⁰⁷

Survival Rights

Survival rights as aptly described by Fortin includes not 'only the right to life but also the right to all those rights which sustain life, such as, to an adequate standard of living and the right to health care.'²⁰⁸ This definition clearly shows the contrast with the other rights, as will be seen below. Briefly, while membership rights mean treating the child as a member of his or her

²⁰⁰ Fortin (n 5) 41.

²⁰¹ Lawrence Le Blanc, *The Convention on the Rights of the Child: United Nations Lawmaking on Human Rights* (University of Nebraska Press 1995) Pt Two (Le Blanc).

²⁰² Michael Freeman, 'The Limits of Children's Rights' in Michael Freeman and Philip Veerman (eds), *The Ideologies of Children's Rights* (Martinus Nijhoff 1992) 29-46.

²⁰³ Michael Wald, 'Children's Rights: a framework for analysis' (1979) 12 University of California Davis Law Review 255-282 (Wald).

²⁰⁴ Tom Campbell, 'The Rights of the Minor' in Philip Alston, Stephen Parker and John Seymour (eds) *Children, Rights and the Law* (Clarendon Press 1992) 1-21.

²⁰⁵ Fortin (n 5) 41; Trevor Buck, *International Child Law* (2nd edn Routledge 2011) 28 (Buck).

²⁰⁶ Fortin (n 5) 40.

²⁰⁷ Le Blanc (n 201); Fortin (n 5) 41.

²⁰⁸ Fortin (n 5) 41.

community and family, protection rights on the other hand guards the child against abuses of power by individuals and the state. However, empowerment rights accords children respect as effective members of the communities in which they live, by protecting their freedom of thought and conscience and encouraging the children's capacity for self-determination.²⁰⁹

Importantly, it can be said that survival rights are the more important rights, as they include more than the rights necessary for bare survival. As such, states must take positive steps to ensure that children enjoy a full life, with the potential of maturing into healthy adults. Although Article 6 fails to recognise the unborn child's right to survival, this right was accorded to the unborn child in the preamble to the UNCRC.²¹⁰ To ensure this, the UNCRC obliges state parties to ensure the survival and development of the child to the maximum extent possible.²¹¹ Thus, what this means is that the UNCRC is telling the States that children must be provided with the resources to develop their full potential. In essence, the UNCRC ensures that children's economic and social rights are fully acknowledged especially since a child needs a standard of living adequate for his or her 'physical, mental, spiritual, moral and social development',²¹² social security benefits, and the right to the 'highest attainable standard of health and to facilities for the treatment of illness and rehabilitation of health'.²¹³ Although the UNCRC clearly assures the child's survival right, this is difficult to ensure in a multicultural society especially owing to the lack of resources notwithstanding the provisions of Article 6 (2). Fortin also supports this view to the extent that many of these rights require some commitment of resources before they can be fully implemented. Also, Article 4 envisages that the right to survival may not be possible especially in some States where resources are scarce. It is therefore based on this that the Committee stresses the need for all States to take measures to promote

²⁰⁹ *ibid.*

²¹⁰ Para 9 of the preamble requires States parties to bear in mind that 'the child' by reason of his physical and mental immaturity needs special safeguards and care, including appropriate legal protection before and after birth.

²¹¹ UNCRC 1989 art 6 (2).

²¹² UNCRC 1989 art 27.

²¹³ UNCRC art 24(1); art 24(2)(a)-(f) provide details on implementing this right; Fortin (n 5) 41.

children's economic, social, and cultural rights, "to the maximum extent of their available resources".²¹⁴

Membership Rights

Membership rights are important to both children and adults and are seen by Fortin as rights that accept the child as a member of his or her community and family.²¹⁵ In addition to this, the UNCRC recognises the equality of all children and their freedom to enjoy all rights free from discrimination on grounds of 'race, colour, sex, language, religion, political or other opinion, national, ethnic or social origin, property, disability, birth or other status'.²¹⁶ Thus, by including a series of positive measures to protect children with disabilities, the UNCRC aims at ensuring their full integration into the community.²¹⁷ Furthermore, the UNCRC also protects the right of children of minority groups to follow their own culture, religion and language.²¹⁸ Lastly, the UNCRC recognises that a name and a nationality is important in order for children to gain membership of a community, they must have a right to know and be cared for by their parents,²¹⁹ and the right to preserve their identity.²²⁰ Therefore, by stipulating these positive rights, the UNCRC aims at protecting the rights of the child as member of a community.

Another feature pointed out by Fortin is that the UNCRC recognises the importance of children as members of the family unit. By recognising parental roles, the role of members of the extended family, the UNCRC takes into consideration the relevance of local customs or persons involved in the care of the child by stating that states parties should:

²¹⁴ UNCRC 1989 art 4; Fortin (n 5) 40.

²¹⁵ Fortin (n 5) 41.

²¹⁶ UNCRC art 2(1). Note that this article has been criticised for failure to protect children born out of wedlock. The Article places the responsibility on states parties to respect and ensure the rights in the Convention to each child within their jurisdiction.

²¹⁷ UNCRC art 23(1)-(4).

²¹⁸ UNCRC art 30.

²¹⁹ UNCRC art 7.

²²⁰ UNCRC art 8.

...respect the responsibilities, rights and duties of parents or, where applicable, the members of the extended family or community as provided for by local custom, legal guardians or other persons legally responsible for the child, to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance in the exercise by the child of the rights recognised in the present Convention.²²¹

Furthermore, the UNCRC directs States to recognise that both parents have common responsibilities for the development and upbringing of their children. It recognises that although parents have the 'primary responsibility' for their children's upbringing, they may require the state's assistance in fulfilment of this task.²²² The UNCRC further promotes family reunification and requires states to ensure that children are not separated from their parents against their will under Articles 9 and 10. Furthermore, where children are deprived of an upbringing by their own parents, the UNCRC requires states to provide care and substitute parenting.²²³

Protection Rights

Protection rights protect children from any form of abuse of power, exploitation and maltreatment by individuals and the state. Its inclusion in the UNCRC is intended to eradicate child prostitution and other forms of sexual exploitation, economic exploitation and other harmful effects of child labour.²²⁴ The UNCRC requires states to protect children from all forms of abuse, including physical, emotional, sexual abuse, ill-treatment and neglect while they are in the care of their parents.²²⁵ Furthermore, the UNCRC aims to protect children from armed conflicts as well as from participating in hostilities (for example, child soldiers) when below 15 years. Its essence is to guard children against abuses of power by individuals and the state.²²⁶ Therefore, by including these set of rights, the UNCRC intends to protect all children without exception.

²²¹ UNCRC art.5.

²²² UNCRC art 18(1)-(2); Fortin (n 5) 42.

²²³ UNCRC art 20, 21.

²²⁴ Fortin (n 5) 41.

²²⁵ UNCRC arts 19, 33, 37(1).

²²⁶ UNCRC art 8; Fortin (n 5) 41.

Empowerment Rights

This fourth remarkable classification is based on the UNCRC's acknowledgement that children being active and creative, need to struggle to shape their own lives. According to Fortin, to ensure this, they must be assisted to develop their independence and ability to take responsibility for their future.²²⁷ Fortin opines that by extending the traditional civil and political rights to children, the Convention requires all children, irrespective of age to have the same dignity and worth as adults.²²⁸ Moreover, Fortin points out that one of the most important articles of the UNCRC is Article 12 because it assures to children capable of forming their own views, "the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child".²²⁹ The UNCRC protects the child's opportunity to be heard in any judicial or administrative proceedings affecting the child.²³⁰ With respect to the right to religion, the UNCRC also requires states to secure their rights to freedom of thought, conscience and religion, privacy and the freedom to meet and mix with others and share views.²³¹ By recognising the right of the child to education, the UNCRC aims at empowering the child as education will aid in developing the child's views and critical thought.²³² Although Fortin is of the view that empowerment rights are the most remarkable as they recognise the child's ability to form his or her own views, this seems to be a difficult classification in terms of its applicability in a multicultural society. Again, using the Nigerian example, this can be achieved by legal means but then the passage of such legislation must be domesticated in all the states which again might pose some difficulties as some might view it as granting children express autonomy.

Note however that the UNCRC has received criticisms owing to its internal inconsistencies which Fortin points out. First, it reflects an ambition to focus

²²⁷ Fortin (n 5) 41.

²²⁸ Fortin (n 5) 42.

²²⁹ UNCRC art 12(1).

²³⁰ UNCRC art 12 (2); Fortin (n 5) 42.

²³¹ UNCRC articles 14(1), 16, 15; Fortin (n 5) 42.

²³² UNCRC arts 28(1)(a)-(e), 29; Fortin (n 5) 42.

on the need to promote children's capacity for eventual autonomy, and at the same time maintain the traditional role of the family in the society and the authority of parents over their children.²³³ Secondly, the drafting has been criticised for including the freedom of religion as it suggested a complete autonomy for freedom of religion. Following Fortin, the drafting needs to be improved upon, for instance, to give certain groups of children such as the disabled greater attention.²³⁴ Also, it should allow greater participation by member States in all the articles of the UNCRC. The present author maintains that when member states are involved in the lawmaking process, it will greatly address the question of cultural bias. Thirdly, it lacks a direct formal method of enforcement.²³⁵ Although these are only a few of the criticisms, the general opinion is that the UNCRC remains a remarkable instrument as it provides a comprehensive set of standards against which ratifying states may measure the extent to which children's rights are fulfilled in the States.²³⁶

1.5.5 *Other Classifications of Children's Rights*

Apart from the above classifications offered by LeBlanc under the UNCRC (1989), various authors, organisations, etc. have also offered different classifications of children's rights.²³⁷ This subsection briefly considers some of these other classifications in order to further illustrate the various perspectives on children's rights. Firstly, Freeman categorises children's rights into four, namely, welfare rights, protective rights, rights grounded in social justice and rights based on children's claims to more freedom from control and more autonomy over their lives.²³⁸ A brief classification is offered by Campbell who classified children's rights according to the minor's status as a person, child, juvenile and future adult. Also, while Standley reaffirms

²³³ Fortin (n 5) 43.

²³⁴ Fortin (n 5) 44.

²³⁵ Fortin (n 5) 46.

²³⁶ Fortin (n 5) 45.

²³⁷ Buck (n 205) 28.

²³⁸ *ibid*; Fortin (n 94) 17, 41; Michael Freeman, 'The Limits of Children's Rights' in Michael Freeman, and Philip Veerman, (eds) *The Ideologies of Children's Rights* (Martinus Nijhoff 1992) (Limits).

Hammarberg's position by proposing four classifications (referred to as the "four Ps") namely, participation of children in decisions involving their own destiny; protection of children from harm; prevention of harm; and provision and assistance for their basic needs;²³⁹ Wald classified children's rights as 'rights against the world, protection from inadequate care, rights to an adult legal status, and rights versus parents'.²⁴⁰ It would appear that Wald's classification is advocating for autonomy of children, but Eekelaar on the other hand provided a classification of children's interests namely, basic interests, developmental interests and autonomy interests.²⁴¹ Apart from these scholars, various organisations are not left out. One of such is the UNICEF which provided four categories of rights and a set of guiding principles. While it classifies the rights of the child as survival rights, development rights, protection rights and participation rights, UNICEF goes further to include non-discrimination, adherence to the BIC as guiding principles.²⁴² However, Bevan's classification according to Buck contains two broad categories, namely, protective and self-assertive rights. Buck sees this classification as the most accepted of all the categories, while stating that 'though it is simplistic, at least it accurately reflects a key theme in child law practice, the conflict between the need to promote children's capacity for self-determination'.²⁴³ His argument is based on the child's capacity to make autonomous decisions. This argument has been disputed on grounds that it may be inappropriate to give a younger child the final decision about which parent the child may want to live with, in the event of a parental dispute for instance. However, he suggests the need for *consultation* with the child during this decision-making process.²⁴⁴ Thus, if a child cannot be accorded the status of an autonomous being, Buck maintains that there is the need for some adult and/or state constraint on a child's autonomy, which should be commensurate with the maturity and competence of the developing child.²⁴⁵

²³⁹ *ibid*; Standley (n 76) 220.

²⁴⁰ *ibid*; (Wald n 203) 255.

²⁴¹ Eekelaar (n 138) 171-182.

²⁴² UNICEF 'Rights under the Convention on the Rights of the Child' www.unicef.org/crc/index_30177.html accessed on 13/05/2010.

²⁴³ Buck (n 205) 28.

²⁴⁴ *ibid*.

²⁴⁵ Buck (n 205) 32.

The present author agrees with Buck to the extent that consultation with the child during the decision-making process is necessary but expresses fears that the child may not be granted autonomy, as such autonomy may not likely exist in a multicultural society such as Nigeria as the views of every particular child cannot be heard, and of course the difficulty of determining what may be in the best interests of a particular child in the multicultural Nigerian society. However, of all the classifications, the one which seems to correspond more with children's rights in the multicultural society of Nigeria would likely be the classification offered by LeBlanc, namely survival, membership, protection and empowerment rights.

Arguably, children should be given an opportunity to make and follow only choices that would be in their best interests in order not to make any decisions that would affect their lives. Children therefore need protection from abuse and/or neglect. Based on this, it would be apt to classify children's rights as right to ensure that the best interest of the child is adequately protected. This is more simplistic and would be adequate for this discourse. However, following Bevan's classification, a suggested classification would include self-assertive rights, protection and provision. This classification is necessitated by the fact that each child's best interests may vary. The child's assertive need for protection is a right which in itself demands that someone should provide protection for the child. However, each child's paramount need is to be provided with life's most basic needs and above all, survival. Therefore, children should be given adequate protection of their best interests so that they can live fulfilled lives.

But in addressing the question whether the child has autonomy, Buck notes the difficulties which such autonomy practiced by children would pose. First, is the need to respect children's interests when they make choices. Secondly he identifies the need to override their decisions that would damage their lives. The problem also is evident with parents of adolescents faced with the dilemma of when to exercise authority over the child on the ground that it is in the child's best interests, or to allow the child to follow his/her choices, which although not approved of, provides the child with a sense of being taken

seriously and affords the child an opportunity to learn better the practice of autonomous decision making.²⁴⁶ While these views would appear possible in some societies such as the UK especially owing to principles like the welfare principle and the Gillick principle, in Nigeria it will be difficult to enforce as Nigeria does not have such a principle at the domestic level. Also, the ability to make autonomous choices will be hindered by customary or traditional beliefs that would hinder a Nigerian child from making such decisions. Generally, drawing from the earlier discussion, in deciding which of the theories relating to children that is more practicable in Nigeria, it seems to be the interest or benefit theory as against the will or choice theory. The Nigerian situation will be discussed in other parts of this thesis. However, the next section is limited to the historical development of children's rights in Nigeria as this will show that the discourse on children's rights has been imbibed in the Nigerian society over time with the collaboration of the government and non-governmental organisations.

1.6 Historical Development of Children's Rights in Nigeria: A Nutshell

Remarkably, the development of children's rights in Nigeria has been greatly influenced both by the theoretical framework on human rights as well as other normative framework designed to protect the rights of children globally which emerged as a result of the awareness to protect the rights of the child. The normative framework referred to include, international treaties, for instance, the UDHR,²⁴⁷ ICESCR²⁴⁸ and the ICCPR.²⁴⁹ Taking a cursory look at the basis of children's rights in Nigeria, there is need to emphasise that ensuring the protection of children's rights in Nigeria has been made possible through the joint efforts of civil societies, non-governmental organisations (NGOs) such as Save the Children and multilateral/development partners such as the UNICEF in collaboration with the Federal Government of Nigeria. This is necessitated by the need to fulfil the country's international human rights obligation to protect the rights of every child.

²⁴⁶ Buck (n 205) 32-33.

²⁴⁷ UDHR adopted by the UNGA in 1948.

²⁴⁸ ICESCR 1966.

²⁴⁹ ICCPR 1966.

The humanitarian crisis erupted by the Nigeria civil war in May 1967 posed a challenge for UNICEF who intervened in the civil conflict although its mandate did not allow it to do so without the permission of the national government. However, UNICEF insisted that its mandate was to provide assistance to all Nigerian children. Although the war came to an end on 10 January 1970, UNICEF continued to contribute to the post-war relief with the help of the International Committee of the Red Cross (ICRC).²⁵⁰

After the civil war, with the economic boost from increase in oil revenue, UNICEF again played a role in ensuring that the needs of children were included into the country's priorities. One of the highest priorities was education which was adopted as a policy with the implementation of free and compulsory primary education. Another priority was in the area of health which emphasised on the provision of equitable distribution of health facilities, attention to preventive measures, intensified training of health workers, and improved health services among others.²⁵¹

At the global level, UNICEF adopted a new strategy to reach children in a more effective way by integrating services that would be flexible enough to be adapted by the community. UNICEF continued to play a major role in the health sector by collaborating with the Federal Government of Nigeria to introduce programmes in the area of child survival.²⁵² This is a positive step in compliance with the requirements of the UNCRC with respect to promoting the BIC in a multicultural society. Multicultural developing societies such as Nigeria can rely on the provisions of the UNCRC which obliges the UN and other competent inter-governmental or non-governmental organisations to cooperate with the states parties, in particular, developing countries to protect and assist the child in the realisation of the rights contained in the UNCRC.²⁵³

Between 1990 and 1999 Nigeria seriously began to recognise children's rights by first taking part in the World Summit for Children organised by the United

²⁵⁰ UNICEF Nigeria <http://www.unicef.org/nigeria/about.html>, accessed on 22 Feb 2010.

²⁵¹ *ibid.*

²⁵² *ibid.*

²⁵³ UNCRC arts 22(2) and 24(4).

Nations in New York in 1990. At the Summit, Nigeria signed a 10-point Plan of Action adopted at the Summit including a set of development goals for the year 2000. In 1991, Nigeria ratified the UNCRC adopted by the UN General Assembly in 1989. Thereafter, the Ministry of Justice set up a National Committee for Women and Children to develop practical steps towards incorporating the rights of the child in the Nigerian legislative and judicial systems. By ratifying the UNCRC, the government is obliged to effect its provisions on children in Nigeria. However, the process of doing this is by domesticating international treaties into national laws as stipulated by section 12 of the Constitution of the Federal Republic of Nigeria 1999.²⁵⁴ Ratification implies that the federal legislature will have to pass a similar Bill which becomes law. Once passed into law, all the 36 states of the federation of Nigeria will also have to pass Laws similar to the Bill passed at the Federal level. The implication of this which will be discussed later in this thesis shows that in comparison with the UK for instance, the history of the development of human rights is more grounded. Therefore, it is easier for a country with a consistent human rights history to advance a broader human rights document such as the UNCRC. With respect to Nigeria, the advancement of such an international treaty requires domestication which the present author views as one of the obstacles to implementation of the rights of the child nationally. Although the state party has made efforts to develop its human rights history, mainly by ratifying international treaties on human rights affecting children and taking policy actions, these steps still need to be fully advanced.

However, in 1992, the Federal Government adopted a National Programme of Action to domesticate the goals of the World Summit at the National level. UNICEF again provided technical support to set up an inter-ministerial committee to track the goals performance.²⁵⁵ Unfortunately, owing to some political uncertainties and the deteriorating economy, UNICEF began to face some challenges which resulted in the emergence of an increased number of children in especially difficult circumstances. The situation got worse in 1999.

²⁵⁴ CFRN 1999 s 12.

²⁵⁵ UNICEF 'Millenium Development Goals' www.unicef.org/mdg accessed on 29 May 2010; <http://www.unicef.org/Nigeria/about.html> accessed on 14 September 2010.

However, in September 2000, during the UN Millenium Summit, Heads of States and Governments adopted the Millenium Declaration and what is referred to as the “Millenium Development Goals (MDGs)”. Each of the MDGs is linked to the well-being of children. Notably, the MDGs programme has guided UNICEF’s work over the years. UNESCO works with schools and the Ministry of Education, culture and tourism, while UNFPA addresses Child/maternal mortality and maternal health. Today, in compliance with the requirement of articles 22 (2) and 24 (4) of the UNCRC, the Federal Government of Nigeria cooperates with UNICEF and other UN agencies with core mandates aligned with the MDGs. These MDGs are namely, eradication of extreme poverty and hunger, achievement of universal primary education, promotion of gender equality and empowerment of women, reduction of child mortality, improving maternal health, combating HIV/AIDS, malaria and other diseases, ensuring environmental sustainability and development of a global partnership for development.²⁵⁶ If this position of cooperation is maintained, it will go a long way in ensuring that the rights of every Nigerian child is protected and the principle of the BIC is adhered to through the joint efforts of the MDGs and the UN agencies.

Also, the Nigerian government under the leadership of Late President Umar Musa Yar’Adua in 2007 included the provision of qualitative and functional education in the Federal Government’s seven-point agenda to transform Nigeria. This goes a long way to show the importance which the government attaches to education.

In addition to these policies, the government also established a Children’s Parliament which provides a forum for children’s voices to be heard. This in essence ensures their right to participate, but it can be critiqued on the basis that not every child’s voice is heard in this forum as the disadvantaged child’s best interests may not be just to participate but more of ensuring that all the programmes of the MDGs are fulfilled. Again, some children are deprived from such opportunities owing to some cultural beliefs.

²⁵⁶UNICEF (n 242).

The above discussions have elucidated the discourse on the theories of children's rights. The thesis has also noted the historical perspective on the emergence of children's rights. The focal point will be the responses emanating from these areas with particular reference to the BIC principle and how it is applied in some jurisdictions. The first example will be the UK through the Children's Act of 1989. This is particularly important because it shows how the principle has featured in different domains.

1.7 The Children Act 1989

The Children Act 1989 is an important piece of legislation which has ensured some changes in the legal position of children since it came into force. Its role with respect to the responsibility of parents is made clear when Thomas points some of the features of the Act. Firstly, he notes that the Act locates parental rights within parental responsibility. Although parents do not relinquish this right, others may be able to acquire it.²⁵⁷ Parental responsibility has been defined as 'all the rights, duties, powers, responsibilities and authority which by law a parent of a child has in relation to the child and his property'.²⁵⁸ Secondly, where there is inadequate parental care, the Act specifies a standard for compulsory intervention if there is significant harm or its likelihood to the child.²⁵⁹ Thirdly, with respect to private disputes, the Act provides that the law should intervene only if it is in the BIC to do so.²⁶⁰ Finally, the Act grants children the right to participate in decisions affecting their lives and takes into account the age and understanding of the child.²⁶¹ However, the ascertainable wishes and feelings of the child must be taken into account, a fact which re-echoing the words of Thomas the Act expressly directs the courts and social agency workers such as local authorities, to discover and take into account.²⁶²

²⁵⁷ Thomas (n 26) 60.

²⁵⁸ Herring (n 122) 401; Children Act 1989 s 3.

²⁵⁹ Children Act 1989 s 1(3)(e); Thomas (n 26) 60.

²⁶⁰ Thomas (n 26) 60.

²⁶¹ *ibid.*

²⁶² *ibid.*

The Act also recognises the child's right to choose so that a child of sufficient understanding is empowered to partake in decisions affecting his/her life. This has become evident in decided cases which have made inroads into the BIC. The following subsection will discuss briefly how case law has influenced the rights of children by referring to the UK Gillick case. In addition to this, the subsection will portray some recent developments in case law. Thus, the question of a child having sufficient understanding and intelligence to choose which parent to live with is one that only the child can provide answers. This was the decision of the House of Lords in the case of *Gillick v West Norfolk and Wisbech Area Health Authority*,²⁶³ (referred to as 'the Gillick judgment') that a doctor could in 'exceptional circumstances' give contraceptive advice to a girl under 16 without parental consent or consultation. According to Thomas, the judgment has greatly made an impact on children's rights within families thereby establishing an increasing right for children to determine their lives provided that they have a full understanding of the implications of their decisions'.²⁶⁴ This has raised the issue of consent which will be discussed further in chapter 3 of this thesis.

This view establishes a new right for all children and is not limited to older children. This is because the focal point here is not only the issue of age of older children but also the question of whether the child has sufficient understanding and maturity.

The age and level of maturity of the child also plays an important role in child abduction cases.²⁶⁵ This was witnessed in the recent international abduction case decided by Mrs Justice Black in the Court of Appeal involving a six-year old girl who had to choose which parent she wants to live with.²⁶⁶ The court took into consideration the fact that the six-year old had 'attained an age and level of maturity to have their wishes taken into account'.²⁶⁷ The mother of a girl aged six and her two brothers aged three and eight were removed from

²⁶³ [1985] 3 All ER 402, [1986] 1 AC 112.

²⁶⁴ Thomas (n 26) 61.

²⁶⁵ The Hague Convention art 13.

²⁶⁶ *W v W* [2010] EWHC 332 (Fam).

²⁶⁷ *ibid*, para 49.

their father's homeland in Ireland where they had spent all their lives and brought to the UK by their English-born mother. The Judge used her discretion and ruled in favour of the mother that the children should reside with their mother. Although there are criticisms that the ruling undermined the basis of the Hague Convention on the Civil Aspects of Child Abduction (1980)²⁶⁸ which requires that the future of children in such cases ought to be decided by the courts of the country from which they have been unlawfully abducted,²⁶⁹ this particular case is unique in the sense that the court took into consideration the principle of the BIC despite the provisions of the Hague Convention. Nigeria's failure to ratify the Hague Convention to date poses difficulties but courts in Nigeria should rely on such judgments as the BIC will be reflected in abduction cases. Notably, the principle has featured in different domains ranging from consent to medical treatment, abduction, among others. Therefore, it can be argued that the application of the BIC principle will depend on the circumstance of each particular case.

1.8 A Comparative application of the Best interests principle

The BIC principle has taken different dimensions. It is for this reason that Alston and Walsh deemed it necessary to provide a comparison of the principle at national and international levels, while noting that the principle has featured at both levels in various countries.²⁷⁰ However, they noted in particular the relevance of the approaches adopted in the UK and France because of the pervasive influence they had on their former colonies (such as Nigeria which is a former colony of Britain).²⁷¹ This section will therefore portray the status of the best interests principle in Nigerian family law by providing a comparative application of the principle as it features in different aspects of family. The section will show how the principle featured at different

²⁶⁸ Adopted 28 October 1980, entered into force 1 December 1983 (Hague Convention) with 82 state parties at the time of writing this thesis.

²⁶⁹ Hague Convention art 8.

²⁷⁰ Philip Alston and Bridget Gilmour-Walsh (eds) *The Best Interests of the Child: Towards a Synthesis of Children's Rights and Cultural Values* (UNICEF 1996) 3 (Alston and Gilmour-Walsh).

²⁷¹ Alston and Gilmour-Walsh (n 270) 3.

stages in national laws such as the UK, France, and a few other jurisdictions but will go further to portray how the principle featured in Nigerian family law.

French Law

Alston and Walsh noted the development of the Best Interests Principle both in French law and English law. They acknowledged that early laws relating to children in France were not made to protect the children but to protect other interests in the society.²⁷² It was not until the 19th century that laws to protect children emerged, for instance the Napoleonic codes which provided that in the event of divorce, custody of the children should be given to the person who obtains the divorce, unless the court orders that custody should be granted to someone else.²⁷³

Notably, the French law as well as the English law at that time gave recognition to custody, although Alston and Walsh opine that such recognition could be displaced where there is proof that the best interests principle would be adequately served through a different arrangement. But after World War II, family law took a new dimension by becoming more child centred thereby ensuring the importance of the BIC as a relevant factor in legislations.²⁷⁴

England and Wales

Just like the French law, Alston and Walsh noted that before the 20th century, the English common law did not grant children adequate recognition within the society nor in the family. Any concept of the right of the child therefore at that time was unfamiliar to the common law. However, the common law recognised the parental right of a man in a family unit as a result of marriage. Therefore, man's main concern was to safeguard his parental rights rather than the interests of children. The common law therefore at that time only

²⁷² Alston and Gilmour-Walsh (n 270) 4.

²⁷³ *ibid.*

²⁷⁴ Alston and Gilmour-Walsh (n 270) 4; Jacqueline Rubellin-Devichi, 'The Best Interests Principle in French Law and Practice' in Philip Alston (ed), *The Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press 1994) 259-280.

contained few provisions designed to safeguard the interests of the children.²⁷⁵ Goonesekere notes that during the period, parents had no legal duty to support their children. Secondly, children could not sue a person responsible for the death of a parent which may result in loss of parental support. The laws at that time as noted by Alston and Gilmour-Walsh were designed to serve the interests of the fathers, thereby granting fathers a right of custody of their heirs or right to reject an heir. In addition to these, the father could claim for loss of services which the child would have provided if not for the injury. Therefore, the common law during this period saw the child only as a resource for the father's use and to protect the father's financial and other interests.²⁷⁶

Notably, with the introduction of the use of equity as against the common law, the notion of children's rights gained more recognition. The Court of chancery was now able to intervene on behalf of the crown to make the child a ward of the court and to enforce orders such as those relating to the child's education. Unfortunately, in spite of the existence of these equitable rules, concerns were still expressed over the reluctance of courts to protect children's rights as noted by Goonesekere. It was therefore as a result of these developments in equity that the application of the best interests principle emerged which later influenced the common law principles which later applied the best interests principle as a paramount consideration in custody disputes. Goonesekere notes its reflection in various legislative instruments such as the Guardianship of Infants Act of 1925.²⁷⁷

Alston and Walsh note that former British colonies have also expressly incorporated the principle into their national laws. Some of these laws still apply to date. For instance, in South Asia, the Guardianship and Wards Act 1990 enacted by the English Parliament still applies in Bangladesh, Pakistan and India. However, one of the consequences noted is that since the Act emerged from English law, it accords to the father the superior paternal right

²⁷⁵ Alston and Gilmour-Walsh (n 270) 3; Savitri Goonesekere, 'The Best Interests of the Child: A South Asian Perspective' in Alston (ed) 1994 (n 261) 117-149.

²⁷⁶ Alston and Gilmour-Walsh (n 270)3.

²⁷⁷ Goonesekere (n 275) 117-149.

unless he is not fit to be a guardian.²⁷⁸ In the present author's view, this position may not be in the BIC and is definitely not in compliance with the provisions of the present UNCRC.

Albeit, the best interests principle has varying historical dimensions and the following discussion will should its varied application in other British colonies such as Zimbabwe and Nigeria.

Zimbabwe

The situation in Zimbabwe as pointed out by Alston and Walsh is not different from others as the best interests principle features in matters of custody and guardianship. They note that courts in Zimbabwe are empowered to ensure that the interests of the child is paramount when making decisions relating to custody of children. But with respect to illegitimate children, the best interests principle takes a lesser role²⁷⁹ in the sense that rather than granting custody rights to the father, custody is granted to the mother contrary to the English Guardianship and Wards Act 1990. But a third party may be granted rights if it is in the welfare of the child to do so.²⁸⁰

Nigeria

Nigeria departs from the Zimbabwe model and adopts the English model. In the Nigerian customary law system, the child remains in the custody of his father especially for the purposes of inheritance and this is mainly the situation in patriarchal systems. But in some societies within Nigeria, an unmarried mother still has custody of the child unless by mutual agreement she and members of the families agree otherwise.²⁸¹ Admittedly, the situation

²⁷⁸ Goonesekere (n 275) 125; Alston and Gilmour-Walsh (270) 4.

²⁷⁹ Alston and Gilmour-Walsh (n 270) 4.

²⁸⁰ *ibid*; Alice Armstrong, 'School and Sadza: Custody and the Best Interests of the child in Zimbabwe' (1994) 8 *International Journal of Law and the Family*, 151-190 at 153.

²⁸¹ For instance among the Ogonis of Rivers State, the first daughter of a man remains unmarried but custody of children outside marriage are given to her under native law and custom; Edwin I Nwogugu, *Family Law in Nigeria* (Reprinted edn, Foludex Press 2006) 333-336.

here is close to what is obtainable in Zimbabwe where the illegitimate child remains in the custody of the mother except the court agrees otherwise. However, the application of the best interests principle is not only limited to custody matter.

In Nigeria, Owasanoye notes that custody of children as awarded by each state varies and is dependent on the custom of each area. He reaffirms that custody under Nigerian customary law is governed by the dowry system. He defines dowry as the bride price paid by a man to the family of his wife for her hand in marriage. On the contrary Anyebe sees bride price as 'money or farming or work done in lieu of money given by the man to the parents of the woman, and witnessed by the mediator and definitely understood to be bride price'.²⁸² Furthermore, Owasanoye notes the influential role the dowry plays in the traditional approach to custody under customary law. For instance, in a situation where a couple is separated, any child born by a wife whose dowry has not been refunded by the husband belongs to the estranged husband.²⁸³ The present author notes that this situation is waning away in Nigeria as a result of modernisation or what can be termed 'current awareness' brought about by the human rights regime advocated through the repugnancy doctrine as will be discussed subsequently.

- *Customary Practice, the Courts and the Repugnancy Doctrine*

Under customary law mothers have custody of their children born out of wedlock. But where a mother remarries and fails to repay her dowry, her husband can claim any child she subsequently bears even when the child is not his biological child.²⁸⁴ In explaining this, Owasanoye notes that the reason is that the first marriage still subsists in the eye of customary law until the dowry is subsequently returned. But when a woman marries another husband without repaying the bride price, the first husband or his family members can claim the children of the second marriage as long as the first

²⁸²Bolaji Owasanoye (n 56) 419; Samuel Nwankwo Chinwuba Obi, *The Customary Law Manual* (Government Printer 1977) 269 (Obi); AP Anyebe, *Customary Law: The War Without Arms* (Fourth Dimension 1985) 72.

²⁸³ Owasanoye (n 56) 420.

²⁸⁴ Owasanoye (n 56) 425.

marriage was not validly dissolved.²⁸⁵ There are some instances where custody of the child was given to the non-biological father, a situation which the Nigerian courts have described as ‘repugnant’ and challenged such ‘odious customs’ that would allow a non-biological father to have custody of a child on the basis of a dowry that was not repaid, or a custom that would allow a widow to be inherited by the deceased’s brother.²⁸⁶ Some others have argued strongly that it cannot be said to be in the BIC to hand the child over to a stranger in preference to his biological parent(s).²⁸⁷ In line with the above, these earlier court decisions were not given in the child’s best interests and that is why the courts today frown at such decisions.

- *Islamic Law and Custody Rights in Nigeria*

Under Islamic law, Owasanoye points out that the father remains the legal guardian of the children as such he has the responsibility to protect them since they are in his custody.²⁸⁸ The varying custody rules which are based on the different schools of Islam have been identified.²⁸⁹ One of such schools is the Maliki school which majority of muslims in Nigeria ascribe to. In the event of divorce, the Maliki school grants custody of a son under seven years of age to the mother, and custody of a daughter to the mother until she reaches puberty because of the believe that mothers are in a better position to take care of the children. If the mother dies, then the mother’s female relative takes custody of the children.²⁹⁰ But if she remarries, custody of the children from her first husband will be given to the maternal grandmother.²⁹¹ But in the Eastern part of Nigeria, a widow’s children remain members of the late husband’s family including legitimate children of

²⁸⁵ Yemi Osinbajo, ‘Legitimacy and Illegitimacy under Nigerian Law’ (1990) 14 Nig. J. of Contemp. L. 30-45 at 32 (Osinbajo).

²⁸⁶ *Mojekwu v Iwichukwu* (2004) 8 SCM, 129.

²⁸⁷ Owasanoye (n 56) 425; AA Owolabi, ‘Some Reflections on the Custody of an Infant in Divorce Proceedings’ in Olawale Ajai & Toyin Ipaye (eds) *Rights of Women and Children in Divorce* (Friedrich Ebert Foundation, Lagos 1997).

²⁸⁸ Owasanoye (n 56) 422.

²⁸⁹ The *Hanafi* school and the *Maliki* school for instance.

²⁹⁰ Owasanoye (n 56) 423.

²⁹¹ *ibid.*

the late husband even where the children were not born in his lifetime.²⁹² Under the Hanafi school, custody of the child to the mother terminates at the age of seven for boys and nine for girls. Therefore, a child is allowed to choose which parent to live with when the child reaches these ages. But failure to make this choice would amount to a casting of lots.²⁹³ Owasanoye further notes that both schools agree that where a parent is unfit, morally bankrupt, or negligent, custody of the child is to be granted to the other parent.²⁹⁴ Both schools also agree that visitation rights should be given to the parent without custody right.²⁹⁵ From the foregoing, the present author agrees with Owasanoye when he states that Islamic law, unlike its customary law counterpart favours women more when it concerns issues of custody and this is because the Koran allows the mother to have access to the children rather than granting custody to the father.

- *Common Law and Statutory Law*

The early common law position is a complete departure from the Islamic and customary law position. According to Osinbajo, this is because, under early common law jurisprudence, a child whose parents were never married was regarded as an illegitimate child and this greatly disfavoured the child.²⁹⁶ Today, the Constitution of the Federal Republic of Nigeria (CFRN) 1999 and other state legislations disallow any discrimination to any citizen by reason of the circumstances of his birth.²⁹⁷ The CRA also implicitly protects children born out of wedlock by applying the provisions of Chapter IV of the CFRN 1999.²⁹⁸ With respect to custody disputes, by establishing a Family Court, the father or mother may apply to the court to seek an order for parental

²⁹² Obi (n 282) 210.

²⁹³ Owasanoye (n 43) 423.

²⁹⁴ *ibid.*

²⁹⁵ *ibid.*

²⁹⁶ Early common law regarded the illegitimate child as “*filis nullius*”, which literally means the child of the community, but implies ‘a son of nobody or an illegitimate child’; Osinbajo (n 285)30.

²⁹⁷ CFRN 1999 s 42 (2).

²⁹⁸ CRA 2003 Pt II.

responsibility for the child.²⁹⁹ But more importantly, section 1 of the Act obliges the Court to consider the BIC when making such an order. Most importantly, both parents may agree on joint parental responsibility in the BIC.³⁰⁰

The above discussions have illuminated the diverse practices in the familial system with respect to custody of children in Nigeria focusing mainly on customary law practice, the Islamic law system and statutory law. The position today is that the BIC principle has featured more in custody issues with the emergence of the CRA and the influence of the Nigerian Constitution. However, owing to the existing pluralistic laws, there is no uniform application of the principle in customary law, Islamic law and the Nigerian Statutes. The Principle being one from an international origin needs to be imbibed in the Nigerian legal system to ensure that the best interest of every Nigerian child is adequately protected and to give effect to the advocacy on children's rights.

1.9 The BIC Principle and International Law

The relevance of the best interests principle cannot be overlooked as it has featured in various international instruments dealing with children. One of such instruments is the Declaration of the Rights of the Child which recognises that "mankind owes to the child the best that it has to give".³⁰¹

But the major instrument which has been acknowledged to comprehensively deal with children's rights is the 1959 Declaration of the Rights of the Child. *Principle 2* of the Declaration states that:

the child shall enjoy special protection and shall be given opportunities and facilities, by law and by other means, to

²⁹⁹ CRA 2003 s 153.

³⁰⁰ CRA 2003 s 68 (1) (2)

³⁰¹ Geneva Declaration of the Rights of the Child, adopted 26 September 1924 by the League of Nations O.J. Spec. Supp.; Alston and Gilmour-Walsh (n 257) 4.

enable him to develop physically, mentally, spiritually and socially in a healthy and normal manner and in conditions of freedom and dignity.³⁰²

The principle has been incorporated into international instruments that deal with children, for instance the United Nations Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW) which requires states parties “to ensure that family education includes ... that the interests of the child is the primordial consideration in all cases”.³⁰³ Also, the CEDAW provides that in marriage and family relations the child’s interests should be paramount.³⁰⁴ The child’s best interests featured as being of paramount consideration under the UN Declaration of 1986 in cases of adoption and foster placements.³⁰⁵

Other UN Committees such as the Human Rights Committee have often referred to the ‘paramount interests of children’.³⁰⁶ The best interests principle also features at the regional level and has been mentioned in instruments such as the ACRWC.³⁰⁷

Apart from these international and regional instruments, the best interests principle has featured in case law. Its application was witnessed in the case of *A (A Minor) (Cultural Background) Re*³⁰⁸ involving a Nigerian child placed with English foster parents by her grandmother for five and a half years. The grandmother sought the return of the child. In delivering judgment, although the court considered that the child’s Nigerian background, culture and the

³⁰² Declaration of the Rights of the Child 1959, GA Res 1386 (XIV) 14 UN GAOR Supp (no 16) 19, UN Doc. A/4354; Alston and Gilmour-Walsh (n 257) 5.

³⁰³ Convention on the Elimination of Discrimination against Women (CEDAW) art 5b adopted in 1979 by the UN General Assembly entered into force 3 Sept. 1981; Alston and Gilmour-Walsh (n 270) 6.

³⁰⁴ CEDAW 1979 art 16 (1)(d).

³⁰⁵ Declaration on Social and Legal Principles relating to the Protection and Welfare of Children with Special Reference to Foster Placement and Adoption Nationally and Internationally, UN Declaration of 1986, art 5 adopted on 3 Dec 1986, 95th plenary meeting GA/Res/41/85.

³⁰⁶ ICCPR General Comment No. 19 Protection of the family, the right to marriage and equality of spouses art 23, <http://www.unhchr.ch/tbs/docs.nsf> UNOHCHR accessed 21 October 2007.

³⁰⁷ ACRWC art 4 (1) OAU Doc. CAB/LEG/24.9/49 (1990) entered into force 29 Nov. 1999.

³⁰⁸ [1988] Fam. Law 65.

problem of being brought up by an English family were important factors to the case, the court however balanced the adverse effect of removing the child from a family she had lived with for over five years and considered that the child's interests were paramount and it was in the child's best interests to remain with the foster parents but have continuous contact by way of reasonable access with her grandmother.

1.9.1 The Best Interests Principle and the UNCRC

The BIC principle features in the UNCRC and is said to attach some weight to the UNCRC. In considering the weight of the principle, Archard explains that the terms 'paramount' and 'primary' are used with either the definite or indefinite articles. In other words, the words 'a' and 'the' are used to qualify the consideration that should be given to a child's best interests.³⁰⁹ Having identified four possible weightings, namely, 'the paramount', 'a paramount', 'the primary' and 'a primary', he identified a fifth weighting which is 'a consideration'.³¹⁰ Put together therefore, a consideration that is primary ranks first whereas a consideration that is paramount will trump all other considerations and would be the consideration that determines the outcome. In agreement with Archard, what this implies is that if we take the best interests principle to be a primary consideration, then it means that there are other considerations, therefore it will be the first consideration among all the others.³¹¹

The best interests principle features in different contexts and has been applied in a variety of cases although as noted above it first featured mainly in custody disputes and in the medical context.³¹² In the medical context, the main issue is that of ability to make informed decision. The *Gillick case* aptly illustrates this. However, going beyond these two domains, the principle has

³⁰⁹ David Archard, 'Children's Rights' in Zalta EN, *The Stanford Encyclopaedia of Philosophy* (2002) 20 (Archard 2002).

³¹⁰ Archard 2002 (n 309) 20.

³¹¹ *ibid.*

³¹² Archard 2002 (n 309) 21.

also been given a broader application in respect of all policies and laws affecting children which admittedly is the intent of Article 3 (1) of the UNCRC.

The principle being described by Alston and Gilmour-Walsh as an ‘umbrella’ provision is relevant because it shows the approach to be taken in every action concerning children as required by the UNCRC. Most importantly, they note its relevance to all the articles of the UNCRC as it is often used alongside other articles of the UNCRC to clarify questions arising from the UNCRC.³¹³

In spite of this important feature of the best interests principle, there are difficulties in accepting it. The next section will look at these difficulties with the aim of bringing to light the reason why the principle has not gained a universal application.

1.9.2 Difficulties in accepting the best interests principle

Archard identifies some of the difficulties associated with the application of the best interests principle. One of the difficulties is the import of the best interests of a child principle. The second difficulty bothers on how the term ‘best interests’ should be interpreted.³¹⁴ First, we shall discuss the problem of the import of the principle.

The import of the best interests principle requires that the best be done for a child. One must therefore act ‘so as to promote maximally the good of the child’.³¹⁵ Take for instance medical decisions, the present author agrees with Archard when he maintains that what is relevant is not that the child receives medical treatment but that the child is treated by a skilled medical personnel with adequate facilities and perhaps without expenses.³¹⁶

³¹³ Alston and Gilmour-Walsh (n 270) 1.

³¹⁴ Alston and Gilmour-Walsh (n 270) 21.

³¹⁵ *ibid*; Buchanan AE and Brock DW, *Deciding for Others: The Ethics of Surrogate Decision Making* (CUP 1998) 10 (Buchanan and Brock).

³¹⁶ Archard 2002 (n 270) 21.

Therefore the BIC principle cannot be uniformly applied when it comes to medical treatment because not all states can afford medical treatment and what may be termed as adequate medical facilities in one state may not meet the standard of another state. That is if it is agreed that states have the responsibility to cater for medical treatment. But where this responsibility is placed on the individual, the same will be the case as not every individual can afford medical treatment. As such, a uniform application of the best interests principle in relation to medical treatment will face challenges.

Its failure to take into account the interests of others has been identified as another problem. Archard expounds on this with the following example. First, he states that he might be able to improve the situation of child A but this might be only at the cost of worsening the situation of child B. Based on the above, the principle does not allow the interests of all children to be equally weighed. Accordingly, Archard is of the view that the principle requires individuals to be impartial in promoting the best interests of each and every child equally.³¹⁷ But in as much as Archard advocates for an equal application of the principle, he opines that it should not be promoted above the interests of an adult. This is because although it might be in a child's best interests for an adult to give her entire time for the child's care, no adult needs to sacrifice his or her own welfare for the child.³¹⁸

A second difficulty identified is how the best interests principle should be interpreted.³¹⁹ Again, we can also admit here that its interpretation would vary mainly because of the different contexts in which it will apply. Secondly, the present author is of the view that the varying cultural and socio-economic contexts might also affect its uniform interpretation. Archard suggests some interpretations of the best interests principle. One of them is the 'hypothetical choice' interpretation of the principle which according to him is a way to understand its interpretation. This interpretation looks at what a child would possibly choose for himself under specified hypothetical circumstances.

³¹⁷ Archard (n 309) 22.

³¹⁸ *ibid.*

³¹⁹ Archard (n 309) 21.

Another interpretation he identifies is the 'objectivist' interpretation of the best interests principle which involves offering an account of what is best for the child. This account is usually independent of the child's desires, actual or hypothetical.³²⁰

Furthermore, Archard acknowledges that the difficulties surrounding the 'objectivist' interpretation are largely based on arguments that what is best for any child is indeterminate. His argument is based on the fact that it is difficult to determine what is best for a child. There is a lack of certainty on whether a child will flourish if raised by a set of parents or some others.³²¹

Also, it seems to be a general opinion that what is best for a child is set in broader cultural disagreements. Eekelaar while citing Alston reaffirms this.³²² Whereas Archard maintains that what is best for the child will vary from culture to culture.³²³ That is to say that, it will be different in different cultures and perhaps would vary according to situations. Although this appears ambiguous, it has been suggested that to eliminate this ambiguity the phrase 'in different cultures' can be interpreted to mean 'in different circumstances'.³²⁴

In agreement with Archard, the statement 'what is best for a child in different cultures' would imply that there is no general agreement across cultures about what is best for a child, therefore each culture has its own understanding of what is in the child's best interests.³²⁵ That is why he submits that there is a best interests principle specific to each culture. And this is the more reason why for instance what culture 'A' thinks is best for any child is best for any child even though it is contrary to culture B's position of what is best for any child. However, in spite of the different opinions or views, the consensus is that although what is best for a child is different in different cultures and is

³²⁰ Archard (n 309) 22.

³²¹ *ibid*; Robert Harris Mnookin, 'Foster Care – In Whose Best Interests?' in O'Neill O and Ruddick W (eds) *Having Children: Philosophical and Legal Reflections on Parenthood* (OUP 1998) 179-213; *Re M (Zulu Boy case)* discussed in this thesis.

³²² John Eekelaar, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994), *Int'l J. of Law, Policy and the Family*, 42-61 at 47-48.

³²³ Archard (n 309) 22.

³²⁴ Archard (n 309) 23.

³²⁵ Archard (n 309) 24.

mainly what each culture believes to be best for its children, but it still remains consistent with the best interests principle having a single universal content. Therefore, following this view what is best for children is still the same whatever the culture.³²⁶ Note that because the principle applies in different contexts it is ideal that it allows for variation in its application although for uniformity there should remain one single best interests principle and a checklist for its application should be provided and adhered to by states parties.

Although Archard and others have agreed that the best interests principle should have one single universal content, he still maintains that there is difficulty in agreeing on what the principle should be. This difficulty can be attributed to culture based differences. But Archard notes that even within single cultures of western societies which have a broad understanding of what is in a child's best interests, there are still disputes as to whether it is morally right to smack a child.³²⁷ In agreeing with Archard, these culture based differences have affected the formation of international treaties such as the UNCRC which has also received reservations based on such cultural grounds.³²⁸ This being one of the hindrances to the implementation of the UNCRC will be discussed in a subsequent chapter in this thesis.

Arguably, since there are various approaches to the best interests principle, it cannot be said that the principle has one universal application especially with the different cultural disagreements. From the foregoing, it has been shown that the principle has featured in different domains but the most remarkable feature of the principle is that it remains paramount in all actions that concern children. The next subsection will discuss its impact in different jurisdictions and different domains.

1.8.3 Impact of the BIC principle

³²⁶ Archard (n 309) 23.

³²⁷ *ibid.*

³²⁸ *ibid.*

The best interests principle has played a significant role in the context of family law in various countries including the United Kingdom, France, India, Canada, United States and Zimbabwe.³²⁹ It is also gaining recognition in Nigeria though at a slow pace compared to the developed countries. Alston and Gilmour-Walsh acknowledge that by including it in the UNCRC, it opens a whole new chapter for the principle and would create room for a careful analysis of its content and implications.³³⁰

As noted earlier, the principle which is seen as the 'guiding principle' of the UNCRC is no longer only confined to custody and medical sphere but now covers a wider scope. Also, it has been noted that due to the wide ratification of the UNCRC, the importance of the BIC principle has been felt by children globally and by the entire international human rights body. Finally, the advocacy for children's rights to be implemented in a culturally sensitive manner also reflects the best interests principle.³³¹

However, in spite of these merits, the best interests principle has received criticisms. Firstly, it is seen as indeterminate and open-ended. By this, Alston and Gilmour-Walsh explain that its application in any given situation will not lead to any outcome.³³² But the problem lies with identifying the criteria to be used to identify alternative options open to the decision maker that wishes to act in the BIC.³³³ This is in conformity with Dworkin's theory in his book *Taking Rights Seriously* discussed earlier to the effect that the Judge will use his discretion to act in the BIC. This is also the position of many court decisions as Judges have rather given decisions based on what is best for a child.

Its impact in Nigeria is also witnessed through its inclusion in statutes such as the UNCRC 1989 and subsequent domestication of the UNCRC into national law, namely the CRA 2003. As a follow up to this, the domestication of the

³²⁹Alston and Gilmour-Walsh (n 270)1.

³³⁰*ibid.*

³³¹ *ibid.*

³³² Alston and Gilmour-Walsh (n 270) 2.

³³³*ibid.*

UNCRC through the passage of the CRA is a positive step by the Nigerian government to protect the rights of Nigerian children. Notably, the principle has also featured in court decisions in Nigeria. These steps are gradually gaining grounds and would make positive impact in protecting the rights of every child.

In echoing the words of Freeman, it can be submitted that “the case that children have rights has to a large extent been won: the burden now shifts to monitoring how well governments honour the pledges in their national laws and carry out their international obligations”.³³⁴

Conclusion

This chapter has examined the definition and theories of childhood by specifically noting the various views of scholars on the concept of childhood. The chapter notes the historical evolution of childhood at different periods across different societies and emphasises this variation as reflected in various relevant statutes/legislations. Thus, a definition of who is a child and when childhood starts and ends lacks uniformity.

Importantly, the chapter considered the great breath of scholarship on whether children are rights-holders or not. By focusing on various theoretical approaches on the emergence of children’s rights, the chapter specifically illustrated the difference between interests and rights as well as needs and rights. Secondly, owing to the relevance of a historical framework on children’s rights, the chapter looked at how the law developed in this area to the extent that today children are regarded as ‘rights-holders’ notwithstanding the unsettled theoretical/doctrinal debates.

The chapter evaluated the divergent views of different theorists of children’s rights. For instance, while some scholars of the will/choice theory argued that to have a right, one must have the corresponding duty, the interest

³³⁴ Freeman Limits (n 238) 39.

theory on the other hand, sees rights as needs that a child may have. The disadvantages of some of the approaches used to protect children – in this case, the best interests standard were also discussed in this chapter. The justification for including rights in international instruments such as the UNCRC obliges states parties, governments, and local authorities of their duties towards children and individuals.

Also, in an attempt to provide a distinction between rules and principles as expounded by Dworkin, the chapter provided some distinction between substantive rights and ancillary remedial provisions. Furthermore, various classifications of children's rights were discussed and the present author noted that even though they are distinct the BIC principle, being a principle of our law and not a rule, and being a provision and not a substantive right should be allowed some exceptions but strongly maintains that some substantive rights such as the right to life cannot in comparison with the BIC principle be given any exception.

This chapter also identified two different notions of rights, namely - legal and moral rights; and welfare and liberty rights. It noted that the conception of children's rights are more specifically seen in Nigeria in terms of moral principles although there exist legal rights which may be enforceable but this can only be possible where there is adequate law in place. The chapter also notes that because children's best interests may vary, consensus needs to be reached that will be in the best interest of every child.

Just as the concept of childhood has changed over time, so also has family context experienced some changes across jurisdictions. The next chapter will look at the changing familial context of Nigeria and the government's efforts in initiating programmes aimed at ensuring the BIC. The chapter will also show the difficulty in determining the applicable law for resolving disputes involving child custody and provides a comparative study of how such an issue is resolved in relation to the different forms of marriages contracted by the parties.

Chapter Two

The Changing Family Context of Traditional Nigeria and the Application of the Best Interests Principle

2.0 Introduction

In this chapter, we shall be considering the child in the context of the family by exploring the different changing concepts of the family. This is necessitated by the fact that not only is there different concepts of childhood but there are different concepts of the family in Nigeria. The chapter looks generally at the family and identifies the best interests principle in family disputes, mainly custodial disputes in Nigeria. With over 350 ethnic groups, Nigeria is today regarded as the largest black African nation. The country is a federation made up of thirty-six states, with an additional Federal Capital Territory called Abuja.¹ Nigeria recognises three major official tribes and languages, namely Igbo, Hausa and Yoruba and the religions practiced include Christianity which is predominantly practiced by the Igbos in southern Nigeria, with is a mix of Christianity and Islam among the Yorubas. The majority of Hausas on the other hand are moslems and practice Islam although some Yorubas are moslems. Nigeria as an entity emerged in 1914 following the amalgamation of the Northern and Southern protectorates and the colony of Lagos by the British. The Nigerian nation is administered by a Federal Constitution (the grundnorm), the Laws of the Federation of Nigeria (LFN) and other laws in its legal system. Owasanoye notes that the British laws, culture and standards that were imported into Nigeria referred to as the received English laws had immense implications for the administration of justice.² He further notes that these received English laws trace their origin to the provisions of Section 45 of

¹ CFRN 1999 s 3. The three levels of government in Nigeria are federal, state and local government with each State having its laws and judiciary and the 36 states subdivided into 774 Local Governments.

² Bolaji Owasanoye, 'The Regulation of Child Custody and Access in Nigeria' (2005) 39 Fam. L. Q 405 – 428 at 406 (Owasanoye).

the (Miscellaneous Provisions Act) (Cap 89) LFN 1958 (now repealed) which provided that the English laws received into Nigeria consisting of “the common law of England, and the doctrines of equity, together with the statutes of general application which were in force in England on the 1st day of January 1900 shall be applied in Nigeria”.³

The present author supports Owasanoye where he states that traditional culture continued to play a major role in Nigeria’s socio-economic structure thereby influencing the administration of justice, especially when applying laws and standards governing matrimony, inheritance, custody of children, and family law issues. Arguably, this factor has affected the full application and implementation of international law principles such as the UNCRC to which Nigeria has obligated itself.⁴ This chapter highlights the changes that Nigeria has witnessed in its family structure, while noting that the traditional family structure has undergone major upheavals as a result of a number of multiple factors such as poverty, population, social and economic factors.⁵ It offers an evaluation of the government’s response to these problems while noting that some of the policies and programmes which the government has put in place in line with international obligations have not been solely geared towards ensuring the BIC but were mainly directed towards economic development. Furthermore, discussions on the factors responsible for these changes from traditional to contemporary Nigeria will follow. Finally, the chapter suggests strategies that would aid in buttressing the current policies and laws in Nigeria in order to ensure the protection of the family in the future. Meanwhile, discussions on the classic traditional family structure will follow.

³ Laws of the Federation of Nigeria 1958, s 45 (Miscellaneous Provisions Act) Cap 89; Adewale A Olawoyin, ‘Admiralty Jurisdiction in the Federal Courts in Nigeria: Innovation or incongruity under the Admiralty Jurisdiction Act 1991’ (2004) 35 J. Mar. L. & Com. 79-98 at 98.

⁴ Owasanoye (n 2) 406.

⁵ Adewale Olawatoyin Ipaye, ‘The Changing Pattern of Family Structure in Nigeria: Issues, Problems and Strategies for Family Support’ (Ipaye) in John Eekelaar and Thandabantu R Nhlapo (eds) *The Changing Family: International Perspectives on the Family and Family Law* (Hart Publishing 1998) 33-36 at 34.

2.1 The Classic Traditional Structure of the Nigerian Family

The complex nature of the Nigerian family structure has been recognised especially with respect to the different forms of marriage which can be contracted. These marriages according to Ipaye come with different and sometimes conflicting legal and social consequences.⁶ For instance, he notes that there is the customary law marriage, which is a union which reflects the cultural beliefs and ethos of the people. There is also the statutory marriage which is a monogamous union described by Lord Penzance as “the voluntary union for life of one man and one woman to the exclusion of all others”.⁷ The laws which govern monogamous marriage in Nigeria are now contained in the Marriage Act (MA), LFN 2004 and the Matrimonial Causes Act (MCA) Cap M7 LFN 2004.

Lastly, there is the Islamic marriage which is a reflection of the influence of Arabic culture in mainly the Northern parts of Nigeria. These multiple forms of marriage have inherent problems which according to Ipaye greatly affect the woman or wife. Gleaned from the above, statutory law in Nigeria allows a man to marry only one wife to the exclusion of all others,⁸ for instance the MA prohibits any person whose marriage is valid under the Act from contracting another valid marriage under customary law.⁹ While under customary law a man could marry an unlimited number of wives, the provisions of Islamic law in Nigeria which are in accordance with the tenets of the Maliki school adhered to in Islamic law, stipulate that a man may not marry more than four wives and is under an obligation to treat them equally.¹⁰

Apart from these different complex forms of marriage creating confusion thereby affecting the wife, widowhood law and practice was cited as one of

⁶ Ipaye (n 5) 35.

⁷ *Hyde v Hyde* [1886] LR 1 P & M 130 at 133; AB Kasunmu and JW Salacuse, *Nigerian Family Law* (Butterworths 1966) 5.

⁸ MA LFN 2004, Cap 218, ss 33 and 40.

⁹ MA LFN 2004 Cap M6, s 35.

¹⁰ Holy Qu’ran, Surat 4:3, Al Nisa. Note that a man can only marry four wives at any given time. Another feature of Islamic law will include the husband’s right to divorce his wife by unilaterally repudiating the marriage; Ipaye (n 5) 35.

the consequences of each form of marriage and Ipaye attributes this to the variation that exists between states. For instance, while a widow in the south-western states of Nigeria (Yorubas) is entirely entitled to her husband's personal estate and one third of his real estate,¹¹ a widow who was married under customary law cannot inherit her husband's property, real or otherwise.¹² The reason Ipaye gives is that under customary law, succession follows the blood. Therefore this means that succession is through lineage which means through the descendants of a common ancestor who is usually the founder of the family. Several authors have referred to lineal descent as the basis of the family in African societies, therefore this discourse will look at succession and marriage concurrently particularly because of their divergence and influence in protecting children's rights in Nigeria.

2.2 Traditional Inheritance Structure

- Succession Patterns

The following discussion on intestate succession under customary law in Nigeria notes that the succession pattern varies according to the ethnic groups in the country. This discourse shall be limited to only a few ethnic systems, namely Yoruba, Ibos, Ijaw, Bini, the Northern states and a few other states.

- Yoruba System

With respect to intestate succession, Nwogugu notes that the Yoruba customary law system (practices by made up of Lagos, Ogun, Oyo, Ondo and Kwara states) grants the children of the deceased his real property to the exclusion of other blood relations. He also notes that the landed property of

¹¹ Administration of Estates Law of Western Region 1959 s 49.

¹² Ipaye (n 5) 34.

the deceased who died intestate is devolved to his children as family property. Thus, all the deceased legitimate and illegitimate children are entitled to succeed in the property but the management of the family property is controlled by the *Dawodu* (eldest surviving son of the deceased).¹³

- Ibo System

In the Ibo system made up of Anambra, Imo States and some parts of Rivers State and Bendel state, he notes that the cardinal principle of customary law of succession in Igboland is primogeniture (succession by the first born of the male line). By this, succession is through the eldest male in the family known as 'Okpala'. But Nwogugu also notes that in the case of the nuclear family succession is through the eldest male child of the deceased, whereas with respect to the extended family succession is through the eldest son of the ancestor. Also, females are not allowed to be family heads no matter their seniority in the family.¹⁴

- Bini System

Under the Bini customary system, Nwogugu notes that succession is governed by the principle of primogeniture but unlike the Ibo customary law, on the death of the intestate father, all the disposable property of the deceased devolve to the eldest son to the exclusion of his other brothers and sisters although he might use his discretion to give some part of the estate to

¹³Edwin I Nwogugu, *Family Law in Nigeria* (Reprinted edn, Foludex Press 2006) (Nwogugu) 399.

¹⁴Nwogugu (n 13) 401.

his siblings and is obliged to provide maintenance for the younger children and other dependants of the deceased.¹⁵

- Ijaw System

Among the Ijaws, Nwogugu also notes that the succession rights depend on the marriage contracted by the person's parents. The practice is that the children of a 'big-dowry' marriage known as '*iya*' and their mother belong to their father's family and have succession rights in that family. In a 'small-dowry' (or *igwa*) marriage both the children and their mother belong to their mother's family and the children inherit from their maternal uncles and maternal relations. He cites the Okrika people of Rivers State where children of *igwa* marriage now claim from their father's estate or claim from whichever side they find more beneficial.¹⁶

- Northern System

In the Northern states which practice Islamic law, the rights of succession are laid down in the Koran and the estate of the deceased is shared among his heirs. While his male children have equal shares, his female children have half share each as in the case of *Yunusa v Adesubokun*. But a child who is not a moslem will be disinherited.¹⁷ The above systems have shown the diverse succession patterns in Nigeria. Impliedly, having a uniform system of succession would not be achievable considering the different systems.

¹⁵ *ibid* 412; *Ogiamen v Ogiamen* [1967] NMLR 245, 247.

¹⁶ Nwogugu (n 13) 412-413.

¹⁷ [1970] 14 JAL 56; Nwogugu (n 13) 413.

Having noted this, the next subsection will look at the different marriage patterns to locate the application of the BIC principle.

- Marriage Patterns

In the pre-colonial era, indigenous societies gave the family legal and social recognition. These indigenous systems were culture-based, and the marriages in these societies differed from one ethnic group to another.¹⁸ A nuclear family was defined as 'one which comprises a founder, his wife or wives and all his children whether adult or minor'.¹⁹ Whereas the family is described as '...a group of closely related people, known by a common name and consisting usually of a man and his wives and children, his son's wives and children, his brother and half brothers and their wives and children whether adult or minor'.²⁰ In agreement with Ipaye, in Africa, a family cannot be constituted of a man, his wife and children as is the case in other societies such as the United Kingdom. Although polygamy is a known practice in Nigeria, monogamy can also exist in a customary law marriage.²¹ Briefly, there is need to discuss the preliminary formalities that must be fulfilled in a customary law marriage and as will be shown, these formalities differ in some aspects from what is obtainable in statutory law marriages. In Southern Nigeria for instance, they include, obtaining parental consent, the bride's consent, and the payment and acceptance of bride price, followed by the formal handing over of the bride to the groom's family.²² But while Nwogugu gives a list of formalities to customary law marriage in Nigeria, and mentions age as one of the preliminaries to marriage under customary law, he notes that such marriage may be preceded by betrothal and that the Nigerian customary law does not specify any lower age-limit for betrothal as girls may be betrothed at an early age, sometimes from birth.²³ Note that this practice

¹⁸ Ipaye (n 5) 34.

¹⁹ SNC Obi, *The Customary Law Manual* (Government Printer, Enugu 1977) 130.

²⁰ Nwogugu (n 13) lxxvii.

²¹ Ipaye (n 5) 34.

²² Nwogugu (n 13) 18-20; Ipaye (n 5) 34; Margaret C Onokah, *Family Law* (Spectrum Books Ltd., 2003) 126-133 (Onokah).

²³ Nwogugu (n 13) 18.

of early betrothal which customary law approves is not permitted under the CRA 2003 which prohibits child betrothal.²⁴ This is a major change in the traditional family system and reflects the requirement of the UNCRC.

The present author notes that some of these customary practices enforce the continued subjugation of children within the family and society. For example marrying off or betrothing a female child without her consent may not be in the child's best interests and may also pose some health hazards. Other customary practices such as female circumcision have been noted to be in violation of the child's rights and subjugation of the female child. Although some arguments which the present author does not support have been used to justify female circumcision, such as the enhancement of fertility, achievement of safe childbirth and notions of female hygiene,²⁵ recently there has been strong advocacy on the need to abolish female circumcision both at the international and national levels. At the international level, the UNCRC strongly obliges States parties to protect the child from all forms of physical or mental violence, injury and abuse to the child.²⁶ At the national level, the CRA 2003 prohibits the use of tattoo or skin mark on any child and stipulates a penalty in contravention of its provision.²⁷

Thirdly, the principle of primogeniture has been identified as one of the customary practices that allow male dominance.²⁸ The principle refers to the notion that succession only follows the blood, through the eldest male in the family referred to as '*Okpala*'.²⁹ This custom has been found to be notorious because of the inability of the wife or female child to inherit or administer the man's estate. This is because in the event of intestacy under native law and custom the devolution of property follows the blood. Therefore it has been

²⁴ CRA 2003 s 22.

²⁵ Isabella Okagbue, 'Igbo Customary Law and the Rights of Women in the Family' in IA Ayua *et al* (eds) *Law, Justice and Nigerian Society*, NIALS Commemorative series No. 1, 1995 201-217 at 204 – radical circumcision, infibulation and clitoridectomy were identified as the different types of circumcision performed on women; Ipaye (n 5) 35.

²⁶ UNCRC 1989 art 19.

²⁷ CRA 2003 s 24. S 24 (2) imposes a fine of not more than five thousand naira (equivalent of 20 GBP) or a fine or both fine and imprisonment of not more than one month.

²⁸ Ipaye (n 5) 35.

²⁹ Although a few ethnic communities practice matrilineal succession; Nwogugu (n 13) 401.

noted that a wife or widow not being of the blood cannot make claim to any share.³⁰

Finally, widow inheritance has also been identified as a practice that allows male dominance because it does not allow females to inherit land but ensures access to bequest.³¹ While Ipaye notes that its basis is to ensure the continued survival and protection of the widow notwithstanding her husband's death, he gives the reason that the widow is considered as a chattel which has been paid for and bought by her deceased husband at marriage. It is based on the belief that she belongs to the family as such can be inherited at her husband's death. The widow has little or no choice, and unless she has some financial independence, she would be subjected to series of marriages within her late husband's paternal family else she stands a chance of leaving her matrimonial home. In the present author's view, this kind of practice is definitely not acceptable and would affect the child of the marriage. It would be apt to describe it as contrary to the BIC where a child is deprived of inheriting his father's property. A report carried out concludes that women are still denied the opportunity to own property, in particular, land is not owned by women in many customary law systems. The best they can get is the right to the use of such land. Thus, the general feeling is that this is the position despite the constitutional provisions barring discrimination.³² This position was seen in the case of *Mojekwu v Mojekwu*, where a widow was disinherited from claiming her late husband's land by a repugnant custom when she challenged the custom. Ipaye specifically noted the ruling of the Court of Appeal stating that:

...all human beings...are born into a free world and are expected to participate freely, without any inhibition on grounds of sex; and that is constitutional... Accordingly, for a customary law to discriminate against a particular sex is to

³⁰ *Sogurno-Davis v Sogurno* [1929] 9 Nigeria Law Report 79 at 80.

³¹ Under some customary practices, especially in the South East, the widow is one of the properties to be inherited after her husband's death; *Children's and Women's Rights in Nigeria: A Wake-up Call, Situation Assessment and Analysis*, National Planning Commission and UNICEF Nigeria, 2001, 240 (Assessment).

³² Ipaye (n 5) 36; Toyin Ipaye, 'Women and the Law: The Nigerian Experience' [1995] JARL 60; *Assessment* (n 31) 240.

say the least of an affront on the Almighty God Himself...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.³³

From the above decision it was noted that religion has a great influence in court decisions. In *Mojekwu* case, the court ruled that a woman can have equal inheritance rights with a man since God who created human beings is the final authority to decide who should be male and female.³⁴ In reaching its decision, the court of appeal held that determining the sex of a baby is God's monopoly and not that of the parents.³⁵

Also, the Supreme Court has held as repugnant, a custom that makes a child born some years after the death of the mother's husband, the child to the deceased.³⁶

In essence, this decision has shown that the practice of disinheriting a woman in patrilineal societies is discriminatory. Thus, by denying the woman the right to inheritance, the present author maintains that such a practice would affect the well being of any child of the marriage because there will be no provision for the child. The child would be denied the right to education, food, maintenance and provision of life's most basic needs among others. It will therefore be contrary to statutory provisions protecting children, for instance the best interests principle as contained in the UNCRC and the CRA 2003 which provides for the right to family life.³⁷ Thus, by declaring such customary practice as illegal and discriminatory, this decision by the court opened a floodgate for other discriminatory or degrading practices to be challenged in court.

³³ [1997] 7 NWLR pt. 512 (*Mojekwu*); *Assessment* (n 31) 241.

³⁴ Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Hart Publishing 2005) 168 (Banda).

³⁵ Per Niki Tobi JCA (as he then was) in *Mojekwu* (n 33) Pt 512 at 305; *ibid*.

³⁶ *Peter Chinweze v Veronica Masi* [1989] All NLR 1. A decision which Kaniye SA Ebeku criticised in 'The Legal Status of Nigerian Children Born by A Widow: *Chinweze v Mazi Revisited*' [1994] 38 JAL 46–60.

³⁷ UNCRC 1989 art 9; CRA 2003 s 8.

Note however that on appeal to the Supreme Court in a later case brought by the deceased's daughter, Mrs Iwuchukwu,³⁸ the court held that the court below (the court of appeal) erred when it held that the *Ile-ekpe* custom is repugnant to natural justice. The Supreme Court did not overrule the court of appeal's decision based on the new human rights regime that women should not be discriminated on account of their sexual orientation, but took into consideration that there are customs that excluded women from being family heads (referred to as 'kola tenancy') which was the crux of the matter before the court. In the present authors view, the earlier decision of the Court of Appeal referring to a custom that disinherits a woman as 'repugnant' clearly shows the relevance which the court attached to customs. However, to ensure that the best interests principle is ensured and that the rights of the child are protected when questions of inheritance arise, Judges should ensure that discriminatory practices which are contrary to the child's rights are not accepted.

This was the situation in the traditional family structure of some southern and eastern states in Nigeria. Some authors are of the view that the situation is different in Northern Nigeria, where Islamic law is predominant. Under Islamic law the wife is expected to be totally submissive to the husband.³⁹ A report on the situation of children in Nigeria showed that with respect to inheritance under the Muslim law, women are given some protection although some form of discrimination is still evident. For instance, apart from the provisions that might be made in a will, which is limited to one-third of the property as earlier discussed, a widow is still entitled to one quarter of her deceased husband's property (or one-eighth where the deceased had children), while the widower on the other hand is entitled to half of his deceased wife's property (or one quarter where the deceased had Children). Where the husband left several widows, they all have a share in the fixed entitlement, while the children share in the residue of the estate (after the fixed shares allotted to parents and spouses). But the daughters receive half the share of what the sons

³⁸ *Mojekwu v Iwuchukwu* [2004] 4 S.C (Pt II) 1.

³⁹ Ipaye (n 5) 36; Javaid Rehman, 'The Sharia, Islamic Family Laws and International Human Rights Law: Examining the Theory and Practice of Polygamy and Talaq' (2007) 21 Int'l J of Law, Policy and the Family, 108 -127 at 113.

receive.⁴⁰ Also, unlike Yoruba widows, Hausa widows have the right to inherit whether or not they have children. The family of a Hausa widow's husband has no claim on her after the death of her husband.⁴¹

By contrast, a South-East⁴² widow is handed over to one of her husband's male heirs as part of the deceased's estate.⁴³ This is clearly a case of widow inheritance discussed earlier and would arguably not be in the wife's interest or in the best interests of the deceased children as it cannot be ascertained whether it is their wish for their mother to be inherited by their uncle. Also this practice can be said to be repugnant and in the present author's view would fail the repugnancy test. In the case of *Bamgbose v Daniel*⁴⁴ where the question before the court was whether the daughter by the Christian marriage or the son by customary marriage should succeed to his estate as he had died intestate. Applying the rule in *Cole v Cole*⁴⁵ the court held that the daughters alone were entitled to succeed. Thus, the position as clearly stated by the Marriage Ordinance s 36(1) is that 'where any person who is subject to customary law contracts a marriage in accordance with the provisions of this ordinance, and such person dies intestate, subsequently to the commencement of this ordinance, leaving a widow or husband, or any issue of the marriage; and also where any person who is the issue of any such marriage as aforesaid dies intestate subsequently to the commencement of this ordinance: the personal property of such intestate and also any real property of which the said intestate might have disposed by will, shall be distributed in accordance with the provisions of the law of England relating to the distribution of personal estates of intestates, any customary law to the contrary notwithstanding...'⁴⁶ Also, if married under a Christian marriage,

⁴⁰ Assessment (n 31) 240.

⁴¹ Abdullahi A An-Na'im, *Islamic Family Law in a Changing World: A Global Reference Book*, (2002) Zed Books 291; JOD Akande, 'Law and the Status of Women in Nigeria' (African Training and Research Centre for Women, 1979).

⁴² This is also the situation in some South-South states with Igbo cultures.

⁴³ Assessment (n 31) 291.

⁴⁴ [1955] 14 WACA 116.

⁴⁵ [1898] 1 NLR 15.

⁴⁶ Marriage Ordinance s 36(1) Laws of Nigeria 1958; Samuel Nwankwo Chinwuba Obi, *The Ibo Law of Property* (Butterworths 1963) 214 (Obi Ibo).

(monogamous marriage) then the rule in *Cole v Cole* will apply granting the widow exclusive right to succession.⁴⁷

This section has looked at the Nigerian traditional family structure by specifically highlighting marriage and lineal descent as two issues that have differing rules and practices across the different ethnic groups in Nigeria. Also, the present author refers to both marriage and lineal descent concurrently because some authors have focused mainly on one aspect whereas they both play a role in familial issues as such it becomes inherent to portray their effect and influence in the family which overall affects the protection of the woman and in effect that of the child. However, this traditional structure evolved overtime owing to some factors which the subsequent section will discuss.

2.3 Emerging/Evolving Trends Beyond the Traditional Framework

In Nigeria, the family structure experienced some phenomenal changes as a result of population, rural-urban migration, industrialisation, education, economy, and contact with western civilisation. Today, it appears that the classic traditional family structure is losing its grounds. Some of the contributory factors identified include monogamy, urbanisation, and single-parenthood. These factors will be discussed subsequently. This section looks at the government's responses to these new trends and focuses on the different policies and programmes put in place by the Nigerian government.

1. *The Normative Framework: Monogamy*

Before the advent of British colonialists, the traditional Nigerian family was polygamous. Polygamy reflects the dominant position of men in most African societies. Its economic impact in traditional societies cannot be overlooked as it served as a tool in ensuring a steady supply of labour. In addition to this, it

⁴⁷ Obi Ibo (n 46) 213.

has been noted that polygamy also provided social prestige, as well as political power.⁴⁸

But owing to contact with the British imperial legal system, western-type laws were introduced into Nigeria, particularly in the area of family relations, divorce and succession. For instance, Ipaye notes that the MA which was a western law introduced the concept of monogamy. The MA which was generally applicable in Nigeria sets out the procedure for contracting a statutory marriage. Section 35 of the statute strongly prohibits multiple marriages. Secondly, any violations of the provisions of the Act were backed up by other statutes, for instance the Criminal Code which provides for the offence of bigamy.⁴⁹ This therefore shows that enforcement would be made easy as there are other statutes with sanctions against polygamy.

Monogamy therefore has a lot of positive effects which have been identified. One of such is that a wife married under the statute is in a superior position to a wife married under customary or Islamic law. Some of the reasons adduced include, firstly, that the wife married under the statute does not need to compete for the patronage and attention of her husband. This is because the law prohibits him from marrying other women under any other system of law while the statutory marriage still subsists. Secondly, in the event of divorce, some legislation, for instance the Matrimonial Causes Act (MCA) places the wife in a much stronger position.⁵⁰ She is given an opportunity to be heard before the dissolution of the marriage; she is also entitled to equal distribution of the marital property;⁵¹ and in some cases, she may also have the right to financial support such as a maintenance order on dissolution of the marriage.⁵² Lastly, unlike the wife married under customary law, on the dissolution of the marriage she can obtain custody of the children either solely or jointly.⁵³ By this provision, it can be agreed that the MCA recognises the

⁴⁸ Ipaye (n 5) 37.

⁴⁹ Criminal Code Act, LFN 2004, Cap 370 s 77; Ipaye (n 5) 37.

⁵⁰ MCA, Cap M6 LFN 2004, s 33; *Assessment* (n 31) 239.

⁵¹ MCA, Cap M7 LFN 2004 s 72(1).

⁵² MCA, Cap M7 LFN 2004 s 70.

⁵³ MCA, Cap M7 LFN 2004 s 71 (1); *Williams v Williams* [1987] 2 NWLR (Pt. 54) 66; Ipaye (n 5) 37.

equal right of each party to the custody of children.⁵⁴ Today, with increased access to formal education and acceptance of western values, an increasing number of women tend to contract marriages under the statute or better still convert their customary marriages to statutory forms of marriage by performing a subsequent ceremony under the Act.⁵⁵ To a large extent, this will guarantee the protection of the rights of the child and would guard against any violation of the rights of the child so that in the event of dissolution of the marriage for instance, the child can benefit from any statutory protection provisions rather than recourse to any repugnant customary practice that may not be in the BIC.

2. *Urbanisation*

According to Ipaye, the traditional rural pattern of dwelling which required all family members to live together in a common dwelling established by their ancestors fostered strong kinship ties and provided support for each family member.⁵⁶ Thus, having noted that male dominance at that time ensured kinship ties, it can be said that it can also have an influence in the devolution of property of the deceased, as such the male being the head of the family can decide who can inherit and who may be disinherited.

Notably, Ipaye is of the view that the drift of people from the rural areas to urban cities significantly affected traditional family structures in Nigeria. The drift of men from rural areas to work in the urban areas and send money to their families brought about development and changes in the traditional structure. But as the men migrated to the cities, life became increasingly difficult for the women who had to fend for the home, their children and the farm. Consequently, many women began to join their husbands in the cities while other single women also migrated to the cities to look for greener

⁵⁴ *Assessment* (n 31) 239.

⁵⁵ Attempts to convert such marriages however fell short of the requisite procedures in some cases such as *Chukuma v Chukuma* [1996] 1 NWLR (Pt 426) 543; *Anyaegebunam v Anyaegebunam* [1973] 4 SC 121.

⁵⁶ Ipaye (n 5) 39.

pastures.⁵⁷ With such a drift they experienced high cost of living, leading to prostitution, teenage pregnancy and social problems such as alcoholism, street children among others.⁵⁸ Thus, we can state here that urbanisation was a result of the shift from the rural areas but this came with some attendant problems.

3. *Single-parenthood*

In the traditional family structure, women had no financial dependence. However, in post-colonial period, Ipaye maintains that more women have access to education and find employment in the formal sector of the economy rather than farming and trading. He notes that the development of the cities created avenues for improved transportation and opened opportunities for women to migrate to the cities to find suitable marriage partners.⁵⁹ Although there is no statistic to prove that more females are single parents, research shows an increasing number of households headed by females, often arising either from divorce, separation, women having children outside wedlock and single women who cater for their relatives living with them.⁶⁰ Ipaye attributes the engagement of women in work to the social and economic problems experienced in Nigeria at that time which made women to abandon their traditional occupation of home-making to find employment thereby engaging in long hours of work with the consequence of leaving the children without attention, while some of the children were withdrawn from schools and forced into the informal trade.⁶¹ This led to adverse social and economic consequences which may not be in the BIC.

⁵⁷ *ibid.*

⁵⁸ Ipaye (n 5) 38-39.

⁵⁹ Ipaye (n 5) 39.

⁶⁰ Ipaye (n 5) 38-39.

⁶¹ Ipaye (n 5) 40.

2.4 Determining the Applicable Law for Resolving Custodial Conflict between Divorcing Parents

Another issue of great concern is the regulation of child custody and access to children in Nigeria. Custody has been defined as the right of a person to exercise control and to take care of the children of a marriage after the dissolution of the marriage by a court of competent jurisdiction.⁶² A more simplistic definition which is akin to the previous definition is that provided by Nwogugu where he states that 'custody means the physical care and control of the child.'⁶³

The legal regulation of child custody in Nigeria as rightly identified by Owasanyo is complex in a lot of ways due primarily to the historical development of the country. First to be identified is that, in common with many of the territories that have undergone colonisation, Nigeria has a tripartite system of laws, namely statutory, customary or Islamic laws. Thus, the appropriate court to resolve custody disputes when they arise would depend on the type of marriage that was celebrated by the parents.⁶⁴ Secondly, Nigeria has a federal system of government but child custody issues are determined by both state and federal legislation.⁶⁵ Thirdly, the geographical location of the family also affects the custody norms to be applied. This implies that customary law will vary to some extent depending on the locality. However, the way to determine the applicable law is by examining the parents' marriage which could be statutory, customary or Islamic. Any of these forms of marriage are binding but in the event of divorce

⁶²AA Owolabi, 'Some Reflections on the Custody of an Infant in Divorce Proceedings' in Olawale Ajai & Toyin Ipaye (eds) *Rights of Women and Children in Divorce*, (Friedrick Ebert Foundation Lagos, 1997) (Ajai and Ipaye); Owasanoye (n 2) 406. Note however, that modern child law in England e.g. has been shaped by a number of guiding principles, one of which is that the primary responsibility for the upbringing of the children rests with their parents. The Children Act 1989 replaces rights and duties with parental responsibility; Stephen M Cretney, Judith M Masson and Rebecca Bailey-Harris, *Principles of Family Law* (7th edn, Sweet & Maxwell 2003) 522.

⁶³ Nwogugu (n 13) 258.

⁶⁴ Owasanoye (n 2) 406.

⁶⁵ CFRN 1999, s 17 (3) (f) gives legislative power to regulate children's issues to the state legislature rather than the federal legislature. Thus, legislation such as the CRA 2003, passed at the federal level, must, in line with s 12 of the CFRN be domesticated at the state level before it can be operative in each state; *ibid*.

or separation, all incidental matters, for instance, custody of the children would be determined by the type of marriage celebrated.⁶⁶ Where the parents entered a Christian marriage (also referred to as a statutory marriage) and celebrated under the MA, custody decisions will be an issue for determination by the High Court and governed by both Nigerian legislation and the received English law.⁶⁷

But where the parents entered a customary marriage, custody of the children will be governed by the diverse customs in the particular geographical region of the country, as well as the customary courts created by statute to enforce these customary laws.⁶⁸ Custody of children of an Islamic marriage on the other hand is usually governed by Sharia law.⁶⁹

For purposes of determining the applicable divorce and custody law, there are some requirements that must be satisfied. For instance, if a Christian marriage (which is synonymous to a statutory marriage) is celebrated in a church that is not licensed to celebrate marriages, the marriage will not be effective as a statutory one and would at best be regarded as a customary marriage. This was the situation in *Obiekwe v Obiekwe* where the parties went through a religious ceremony in a church without obtaining the registrar's certificate, contrary to the requirement of the MA. Justice Palmer in that case stated that 'the only form of monogamous marriage is the marriage under the Ordinance or nothing.'⁷⁰ Certainly, a particular form of marriage will aid in the dissolution of property as it affects the child of the marriage.

Issues of choice of law are further complicated by the current practice of the majority of Nigerians to celebrate their marriage twice, for instance performing

⁶⁶ Owasanoye (n 2) 406.

⁶⁷ The MCA, Cap M7, LFN 2004 s 8.

⁶⁸ For example, the Customary Courts Law of Lagos State of Nigeria 1973, No 10, Cap 34, Laws of Lagos State of Nigeria 1994. Note also that the CFRN 1999, s 281 (1) provides for the establishment of a Customary Court of Appeal for any State that requires it.

⁶⁹ CFRN 1999, s 277 (2) (a-e) establishes the jurisdiction of the Sharia court of Appeal to include, 'any question of Islamic personal law regarding marriage...including a question relating to the validity or dissolution of such a marriage or a question that depends on such a marriage and relating to family relationship or the guardianship of an infant.'

⁷⁰ [1963] 7 ENLR 196, 199.

a customary or Islamic marriage, followed by a church or registry wedding that is monogamous or statutory in nature. In the event that one party files for divorce to end the statutory marriage, it then means an automatic dissolution of the customary or Islamic marriage. But the question which arises is which child custody regime would apply? The general view is that statutory law will apply since it overrides customary law.

Apart from the above, the present author agrees with Owasanoye that customary law is subordinate to statutory law where questions of incompatibility arise. For instance, following the repugnancy doctrine a custom regarding child custody that is repugnant to natural justice, equity and good conscience will not be recognised or enforced by the courts. This doctrine which will be discussed later in this thesis has been codified in the High Court Laws of the various states of the Federation. Section 26(1) of the High Court Law of Lagos State for instance provides that:

[t]he High Court shall observe and enforce the observance of every customary law which is applicable and not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any law for the time being in force...⁷¹

2.4.1 Right to Custody in Statutory Marriages

a. Statutory Provisions and Modifications

Before the emergence of statutory modifications, the position at Common Law was that the father had an absolute right to the custody of his legitimate children until they attained the age of majority. This was premised on the fact that English common law regarded the father as the natural guardian of an infant.⁷² The change in this position by the twentieth century according to Owasanoye now empowered the mother to be the most appropriate person to

⁷¹ Laws of Lagos State 1973, cap 52; Owasanoye (n 2) 409.

⁷² Owasanoye (n 2) 410; AA Oba, 'Islamic Law as Customary Law: The changing perspective in Nigeria' (2002) 51 ICLQ 817-850 at 827.

take care of the child due to the fact that she possesses natural maternal tendencies which the child needs in tender years.⁷³ Various statutes were enacted by the English Parliament, such as the Guardianship of Infants Act of 1886 which vested powers on the English colonial courts in Nigeria to grant custody to either of the parents of the children of the marriage, having regard to the paramount welfare of the infant and conduct of the parents.⁷⁴ Thus, by virtue of being statutes of general application received into Nigeria, the various English custody statutes, including the Guardianship of Infants Act, were now applicable in the old northern and eastern regions of Nigeria.

Owasanoye cites as an example a statutory provision of a State in Nigeria regarding the award of custody and specifically highlights the provision which states that particular regard should be given to the welfare of the child in any custody issue concerning the upbringing or administration of property of a child. The section provides:

where in any proceeding before any court the custody or upbringing of a child or the administration of any property belonging to or held in trust for a child, or the application of the income thereof, is in question, the court ... shall regard the welfare of the child as the first and paramount consideration
...⁷⁵

Echoing Owasanye, by this provision, the monopoly granted the father at common law is directly removed to favour the interest of the child.⁷⁶

Consequently, State statutory provisions in custody matters arising from statutory marriages became reinforced by federal law throughout Nigeria. For instance, s 71 (1) of the Matrimonial Causes Act (MCA) being a federal law provides that 'in proceedings with respect to the custody, guardianship, welfare, advancement, or education of the children of a marriage, the court

⁷³ *ibid.*

⁷⁴ Guardianship of Infants Act 1886, cap 27 s 5. This Act is a Statute of General Application in Nigeria.

⁷⁵ Infants Law of Oyo State, s 25.

⁷⁶ Owasanoye (n 2) 411.

shall regard the interest of the children as paramount'.⁷⁷ While Owasanoye contends that s 71(1) shifts the overriding consideration beyond the immediate desires of the contending parties to the more enduring needs of the children of the marriage, he opines that this brings about the principle of the BIC. The MCA imposes a duty on the court to ensure that the interests of the child as a person are placed before that of the conflicting parents/parties.⁷⁸ The present author shares the same view and reemphasises that in custody situations the court should use what is best for the child to be the paramount consideration. But custody may differ in patrilineal and matrilineal systems. Nigeria practices both systems. By patrilineal, we refer to a system of inheritance that tilts to the father (male) whereas matrilineal gives recognition to the females in relation to inheritance.

b. Custody and Financial Relief

With respect to inheritance, where the question of custody arises, Owasanoye notes that the patrilineal system of inheritance assumes that the father has custody of the child. However, it would appear that where the father does not contest custody, he is not obliged to make provision for the upkeep of the children and may not be compelled to do so in the absence of a judicial order.⁷⁹ Thus, where a mother takes custody of the children in the absence of a judicial order, and the father does not contest or challenge this move, it will be presumed that the mother has the capacity to take care of the children. However, if she files for divorce and maintenance, then she must specifically demand for a child support order, otherwise it will not be given automatically, and the courts will assume that she can take care of the children without assistance. It is a known parlance that Nigerian courts will not award relief where it is not sought. The argument being that even though the father has a duty, the mother needs a court order to be able to enforce that duty. A difficulty identified is that when support is ordered, the courts lump child support with maintenance orders without separating the two. For instance, in

⁷⁷ MCA Cap M7 LFN 2004 s 71(1); Onokah (n 22) 232.

⁷⁸ Owasanoye (n 2) 411.

⁷⁹ Owasanoye (n 2) 412.

*Kalejaiye v Kalejaiye*⁸⁰, a wife, after being awarded custody of four children, asked for maintenance, the court assessed her means and earning capacity and determined that she did not require financial support, but ordered periodic financial maintenance for the two children only. There is therefore the need for the court to improve its attitude of lumping child support order with maintenance for the wife. In addition, there are criticisms that there is no objective analysis of how the court arrives at the sum to be awarded.⁸¹ The present author is of the view that these issues need to be addressed and improved upon to avoid the disparities in awarding financial reliefs in custody disputes. Notably, the CRA 2003 contains provisions on orders for financial relief against parents.⁸² Hopefully, this would provide the necessary guideline for the judiciary to follow. In spite of this, the existence of other multiple statutes would still affect the effective implementation of the CRA.

Also, various states and federal statutes contain provisions for financial relief for failure to provide necessities. There is a new awareness that failure to provide financial relief will either lead to a civil or criminal charge depending on the circumstance of the case. For instance in a civil suit brought by the Probation officer against Mr. Nwachukwu⁸³ of Rivers State in the Ahoada Magisterial District, for failure to provide maintenance allowance totalling N52,000⁸⁴ for the upkeep and sustenance of his child aged one year and four months who was in the custody of his mother, the respondent (Mr. Nwachukwu) was compelled by the court to contribute a monthly maintenance for his child's upkeep in compliance with the requirements of s 26 (1) (b) & (c) of the Children and Young Persons Law (CYPL) of Rivers State 1958.⁸⁵ The court reasoned that failure to provide maintenance exposed the child to moral danger and is contrary to the provisions of the Children and Young Persons Act (CYPA) of Nigeria 1958.⁸⁶ Similarly, the court held the same decision in a

⁸⁰ [1986] 2 QLRN 161.

⁸¹ Owasanoye (n 2) 412.

⁸² CRA 2003 First Schedule, ss.1 and 2.

⁸³ *Probation Officer v Mr. Nwachukwu* [unreported] Chief Magistrate's Court [AMC/Mis/2006].

⁸⁴ Equivalent of about 200 GBP at the time of writing this thesis.

⁸⁵ Rivers State version of the domesticated Children and Young Persons Act 1958 referred to as Children and Young Persons Law.

⁸⁶ A Federal statute.

criminal charge of *Commissioner of Police v Mary Sunday* where a recognisance entered into by a defendant was forfeited because the person he stood for as surety failed to provide necessities for his two months old child and the mother.⁸⁷ Therefore the offence is punishable under s 140 of the Criminal Procedure Law of Rivers State.⁸⁸ The offence is also punishable under the Criminal Code Laws of Rivers State, cap 37 of 1999 as applied by the court in some other decisions.⁸⁹

When the courts look at the issue of custody, it refers to the MCA. Section 71(1) MCA 1990 raises two main principles on issues concerning custody of children from a statutory marriage, namely – the interest of the child being of paramount consideration, and the discretion of the court.

- *Paramount Consideration*

The first principle raised by s 71 (1) is that the interests of the child should be the paramount consideration. In illustrating this, the case of *Williams*⁹⁰ is often cited. In this case, both the appellant and the respondent were Nigerians and married in London in 1963. Six years after the father separated from his wife and never set eyes on the wife or daughter during that period, he later petitioned for the custody of his daughter. He testified that his wife refused to allow him pay the daughter's fees, and that he wanted the daughter to be educated in England like her two brothers, who had been left in his custody following the separation, and that the appellant had no time for her daughter.⁹¹ In determining the best interests of the daughter, Kalifat, the court observed that:

... the emotional attachment to a particular parent, mother or father; the inadequacy of the facilities, such as educational, religious, or opportunities for the proper upbringing are matters which may affect [the] determination of who should

⁸⁷ [unrep] AMC/18 CR/2010.

⁸⁸ Criminal Procedure Law of Rivers State Cap 43, 1999 s 140.

⁸⁹ *Commissioner of Police v Progress Sunday* [unreported] Charge No. 149c/2008; *Commissioner of Police v Kennedy Ideozu* [unreported] Charge no. AMC/205/09.

⁹⁰ *Williams* (n 52) 66.

⁹¹ *ibid*; *Owasanoye* (n 2) 413.

have custody...all the relevant factors ought to be considered...the paramount consideration being the welfare of the child...⁹²

However, the court relied more on the paramount consideration which arguably implies that the overriding consideration is the welfare of the child. Note also that the court took into consideration several other relevant factors in determining custody under this welfare principle. These include, the character and conduct of the parties, the age and sex of the child, the emotional and psychological stability of the child, the welfare and economic status of the parents, the parents' nationality and the transfer of the child outside jurisdiction as well as other factors such as the child's education and religious upbringing. These factors will be discussed below with illustrations from a few cases.

i. The Character and Conduct of the Parties

The character and conduct of the parties is inevitably an important consideration in determining the BIC. This is because the conduct of the parties towards each other may adversely affect the child. As evidenced in the case of *Okafor v Okafor*⁹³ the court refused to grant custody of the child to a mother on grounds that she had not seen her child physically for almost six years other than through photographs. Note however, that the fact that a party is responsible for the breakdown of the marriage will not disentitle the party from custody.⁹⁴ In spite of the above, the Court will clearly not be disposed to give custody to an abusive parent.⁹⁵

⁹² *Williams* (n 52) (Karibi-Whyte SCJ).

⁹³ [1976] 6 CCHCJ 27.

⁹⁴ In *Williams* case (n 52) 66, the Supreme Court held that the commission of adultery by a spouse does not necessarily deprive that party of custody only if the circumstances of the adultery make it desirable.

⁹⁵ *Kolawole v Kolawole* suit No.HCL. 45D/81 1 July 1982, [unrep] High Court Ogun, where the court refused to grant custody to a mother who had tried to kill the child; Eunice Nkiru Uzodike 'Custody of Children in Nigeria – Statutory, Judicial and Customary Aspects' (1990) 39 (2) ICLQ 419-433 at 424.

ii. The Age and Sex of the Child

The age and sex of the child is also a relevant factor in determining the BIC. Although statements have been made to the effect that it is better to have young children remain in custody with their mothers especially female children, the reason adduced for this can be gleaned from the *Williams* case where Justice Oputa stated that: “[t]here are periods in a girl’s life when she is undergoing the slow advance to maturity when she needs her mother to discuss and answer her many questions about herself, her development both physiological and psychological.”⁹⁶ However, this cannot be said to be the general rule as each case will depend on its circumstances. The same position was taken by the court in the case of *Odulate v Odulate*⁹⁷ where the court awarded custody of the female child of the marriage to the wife and held that the girl “has the right to develop her personality under her mother.”⁹⁸

An issue that has raised great debate is the Nigerian courts’ approach in deciding that boys grow up with their fathers and girls grow up with their mothers. This should not be the case as by doing so, the court fails to take into account other relevant factors. For instance, in *Oyelowo v Oyelowo*⁹⁹ both parents applied for the custody of their two children aged nine and ten years old respectively. Since the separation of their parents, the children had lived with their mother. The trial judge held that since they are male children, their rightful place is in their father’s home. On appeal, the Court of Appeal Judge Nnaemeka-Agu (as he then was) supported this judgment stating that ‘in the context of Nigerian culture, boys rightly belonged to the man’s family’.¹⁰⁰ He added that the MA was to be interpreted by taking into consideration that it was being applied in Nigeria, and that the cases decided in England should be applied with caution. In support of this view, Kolawole JCA added that: “[t]he Matrimonial Causes Act is...Nigerian legislation; it is not a foreign law, neither is it a law for the elite. The law therefore must be

⁹⁶ *Williams* (n 52) 175; *Owasanoye* (n 2) 414.

⁹⁷ [1975] 2 NWLR 239.

⁹⁸ *ibid*; *Onokah* (n 22) 233.

⁹⁹ [1987] 2 NWLR 239.

¹⁰⁰ *ibid*.

construed bearing in mind the prevailing situation in the country.”¹⁰¹ In a dissenting view, Kutigi JCA saw the question of a male child belonging to his father’s family as irrelevant, although it sounds valid under the Nigerian situation, but it does not have any relevance in the application of the MCA. It is argued that the court in this case was more influenced by the patrilineal culture of the society rather than the BIC. Thus, the present author is in support of the suggestions raised that the relationship of a male child to his father’s family should not be regarded as a rule which should be applicable in all custody cases. It should rather be one of the factors to be considered by the courts. Therefore, following Owasanoye, when other factors are equal, then it may be used to tilt the balance.¹⁰² Other factors worth considering will follow briefly.

iii. Emotional and Psychological Stability

In considering a change of custody, the courts exercise caution. This is because of the danger of psychological harm which may arise, especially where a child has lived with one parent for a considerable length of time.¹⁰³ Note that in Nigeria, the practice of seeking the professional help of psychologists and psychiatrists when dealing with custody issues is not developed. However, in agreement with Owasanoye, it can be used since no law prohibits it and its application will assist the courts in reaching a fair decision in the BIC.¹⁰⁴

iv. Welfare and Economic Status

Also, in determining the BIC, the capacity and ability of the parent to provide welfare and material needs of the child is of paramount consideration and will be taken into account. This principle was enunciated in the *Williams case* as follows: “[a] child is entitled to enjoy [the] care and attention the parents can offer. Provided that a parent is in a position and willing to provide them. The

¹⁰¹ *ibid.*, Owasanoye (n 2) 414.

¹⁰² Owasanoye (n 2) 415.

¹⁰³ *Williams* (n 52) 127.

¹⁰⁴ Owasanoye (n 2) 416.

child should not be denied them by [the] actions of either parent.”¹⁰⁵ Apparently, a party seeking custody needs to set out for the courts consideration, his/her plans and arrangements for the upbringing of the child in question. Echoing Owasanoye, the mere fact that one spouse has more material wealth should not be the deciding factor but what is relevant is the fact that one spouse is in a much better financial state and can provide better accommodation.¹⁰⁶ This was also the reasoning behind the court’s decision in the case of *Nzelu v Nzelu*¹⁰⁷ where the court recognised that because the husband lived in a three-bedroom accommodation with an annual salary which was four-times compared to that of his wife who also occupied a two bedroom flat, it was necessary for the court to award custody of the children of the marriage to the husband. Onakah notes that in awarding custody, the court will not readily award young children of statutory marriage to the mother only because she needs to provide motherly care. The court will take into consideration other circumstances unlike the customary court that will normally grant custody of a child under the age of four to the mother.¹⁰⁸

v. Parent(s) Nationality and Transfer of the Child Outside Jurisdiction

Where a parent wishes to take the child abroad and the question of nationality is raised, the Nigerian courts do not discriminate between Nigerian and non-Nigerian parents. This is evidenced from the case of *Oloyede v Oloyede*,¹⁰⁹ where it was held that the fact that the mother was Irish did not justify awarding custody to the Nigerian father, whom the court found unfit, even though it was clear that the Irish mother could relocate out of the jurisdiction.¹¹⁰ A contrary decision was taken in the *Williams case* where both parents were Nigerians and the father who resided abroad wanted the daughter to attend school abroad. This case witnessed a departure as both parents were in agreement that the child attended school abroad. When this

¹⁰⁵ [1987] 2 NWLR at 123.

¹⁰⁶ Owasanoye (n 2) 415.

¹⁰⁷ [1997] 3 NWLR, 472.

¹⁰⁸ Onokah (n 22) 232.

¹⁰⁹ [1975] 1 NMLR 181.

¹¹⁰ *ibid.*

is the situation, the courts will not bar a child from leaving the country if both parents are in agreement without compromising the welfare of the child.¹¹¹

vi. Other Relevant Factors

The Nigerian courts also take into consideration other relevant factors in applying the BIC principle. They include the child's education and religious upbringing. Generally, the child is expected to adopt the father's religion until the child attains majority. According to Owasanoye, for instance the courts examine the advantages and disadvantages of any arrangements concerning the education and religious upbringing of the child. Secondly, the court takes into consideration the need to put siblings together although this is not a rule or policy.¹¹² Finally, the preference of the child is taken into consideration. While in some cases, the Judge may need to carry out a private interview with the child, especially where the child is old enough to express his or her wishes, the court is however not bound to follow the wishes of the child, but a child's preference may serve as a guide in reaching a fair and just decision in the case.¹¹³

- The Discretion of the Court

The second principle raised by s 71 (1) concerning the custody of children is the discretion of the court. To this extent, the court has the discretion to "make such order in respect of the custody, guardianship, welfare, advancement and education of the children as it thinks fit."¹¹⁴ However, Owasanoye warns that this discretion must be executed judiciously.¹¹⁵ By using its discretion, the court can employ the use of social inquiry, or make a joint custody order, access order or even award custody to a non-parent. This shows that the discretion of the court with respect to custody issues is wide as will be explained below.

¹¹¹ *Williams* (n 52) 134; Owasanoye (n 2) 415.

¹¹² Owasanoye (n 2) 416.

¹¹³ Owasanoye (n 2) 417; Onokah (n 22) 232.

¹¹⁴ MCA s 71(1).

¹¹⁵ Owasanoye (n 2) 417.

- Social Inquiry Report

A court may also adjourn its proceedings until a report has been obtained from a welfare official where necessary in the determination of the custody of the children. This report should cover all aspects of the life of the child and the child's relationship with the parents, as well as arrangements for the welfare and education of the child. The Judge may also conduct his own investigation by acting as a social worker.¹¹⁶

- Joint Custody

Joint custody order may be granted by the court when it is satisfied that it is desirable to place custody of the children of the marriage in the hands of the party who can best protect the child's interests, the court will do so in order to ensure the BIC. Nigerian courts do not hesitate to exercise their discretionary powers to enter 'split' custody orders which grants custody to one parent and care and control to the other. This is done when there is a prospect that both parties will co-operate.¹¹⁷

- Rights of Non-Parents to Custody and Access Orders

The court may use its discretion to appoint a grandparent as a joint guardian and may grant custody of the children to the grandparent.¹¹⁸ This power was invoked by the court in a Nigerian case where a grandparent requested the custody of the children after the death of her deceased daughter because it was evident that the father lacked the capacity to take care of the children who had dropped out of school as a result.¹¹⁹

Where the court makes an order that places the child with one parent, the spouse without custody may be given reasonable access right by the court.

¹¹⁶ MCA 1990 s 71(2); Owasanoye (n 2) 417.

¹¹⁷ MCA 1990 s 71 (3); Owasanoye (n 2) 418; Nwogugu (n 13) 258; *Williams* (n 52) 84.

¹¹⁸ High Court Laws of Lagos State, s 17. Owasanoye (n 2) 418.

¹¹⁹ Nwogugu (n 13) 258; T Kehinde, 'Divorce in Nigeria: A Legal Practitioner's Viewpoint' (Kehinde) in Ajai & Ipaye (n 61).

The court may also place the child with a third party where it deems it reasonable to do so.¹²⁰ However, it has been noted that where individuals other than the natural parents have custody, provisions for proper access should be included.¹²¹ It is based on this that there are calls for the Nigerian statutory courts to use English law as a persuasive authority because it permits grandparents to have access to their grandchildren. This is possible because of Nigeria's historical common law roots.¹²²

Having identified the relevant factors the Nigerian courts use to grant custody, the situation as will be shown subsequently is different in custody of children from customary marriages.

2.4.2 The Best Interests Principle and Right to Custody in Customary Marriages

In practice the award of custody of children by customary courts varies from one state to another depending on the custom of the area. Generally, under customary law, custody has been tied down to the dowry system practiced throughout the whole country. The bride price paid by a man to the family of his wife to fulfil traditional rites and to release her to marry him is referred to as 'dowry'.¹²³ Bride price may be used interchangeably with the words 'dowry, or bride-wealth. It refers to any gift or payment, in money, natural produce, brass rods, cowries or in any other kind of property whatsoever, to a parent or guardian of a female person on account of a marriage of that person which is intended or has taken place.¹²⁴ Normally, the bride price is determined by the bride's family, as such its payment is regarded as a sign of the husband's commitment. The marriage therefore joins the larger families together, not just the spouses. While in some families, the dowry is given to the wife, in others it is shared among family members. Among the Igbos in eastern

¹²⁰ MCA s 71 (3).

¹²¹ MCA s 71 (4).

¹²² Owasanoye (n 2) 418.

¹²³ Anyebe (n 46) 71; Owasanoye (n 2) 418.

¹²⁴ Nwogugu (n 13) 51.

Nigeria, the dowry is usually very expensive, and is largely influenced by the wife's status, whether educated or the level of education attained. In other cases, the family may ask the husband to buy expensive items in addition to training or educating the wife's siblings.¹²⁵ The consequence of this was that most Igbo men had to marry late as they waited to be financially stable before marriage. Also, it forced the men to rather venture into trade than formal education which has led to a high drop out of males from schools in eastern Nigeria.¹²⁶ However, these negative consequences also extend to the females as many women of marriageable age were still not married. Thus, in a bid to curb the problem, some States and customs in the East tried to regulate the bride price by statute and by enlightenment campaigns.¹²⁷

In some other parts of the country, the dowry is only a token fee. Arguably, it is said that dowry is a factor encouraging discrimination against women and in some cultures it portrays that the woman is a chattel, therefore a property which can be inherited upon the husband's death. The essence of dowry to traditional marriage has been noted. Also, the dowry system has greatly influenced the traditional approach to custody under customary law so that upon the separation of a couple, if the dowry is not refunded, then any child born by the woman belongs to the husband she separated from, even when he is not the father of the child.¹²⁸ It has been noted that the rule of natural justice usually recognises the biological father as the rightful custodian. This patrilineal culture is the practice in Lagos State where the Customary Courts award custody of a child above the age of seven to the father. It has been noted severally that the practice stems from the custom that once a man pays dowry for a woman, he "owns" her as well as all the children from the marriage.¹²⁹ In any case, this practice has persisted although the legislature has attempted to make necessary inroads such as providing customary courts with unlimited jurisdiction in matrimonial causes and custody disputes. S 23 of the Customary Court Law of Lagos State provides that 'in any matter

¹²⁵ Owasanoye (n 2) 420.

¹²⁶ *ibid.*

¹²⁷ R Abati, 'Wives for Sale: N15,000 please! – All Roads lead to Ahoada, Rivers State', Vanguard Newspaper, 24 Jan. 2006, p 8.

¹²⁸ Owasanoye (n 2) 420.

¹²⁹ *Edet v Essien* [1932] 11 NLR 47; Owasanoye (n 2) 420; Kehinde (n 121).

relating to the guardianship and custody of children, the interest and welfare of the child shall be the first and paramount consideration'. Thus, Owasanoye notes that whenever there is need to review an order made by the customary court in the interest of a child, the court may, on its own motion and upon the application of any of his relatives or guardian, vary or discharge such order.¹³⁰

Note also that the unlimited jurisdiction over matrimonial matters empowers customary courts in Lagos to look into all aspects of customary law marriages, to the extent that the court may order a refund of the dowry and make other orders about the custody of the children of the marriage. Unfortunately, in spite of the unlimited broad jurisdiction, the best interests provision of s 23, and the repugnancy doctrine,¹³¹ the practice of Lagos customary courts in awarding custody of children to the fathers has largely continued. Hopefully, from such provisions set out by s 23, may emerge new legislation in future especially since it is in line with the provisions of the CRA 2003.

2.4.3 The Best Interests Principle and Right to Custody in Islamic Marriages

Under Islamic law, custody rules may vary according to the different schools of Islam namely the Maliki and Hanafi schools.¹³² It has been noted that majority of Nigerian Muslims belong to the Maliki school of thought. This school reflects the view that women are better able to care for children under the age of seven. Thus, in the event of a divorce, custody of the son is given to the mother until he reaches the age of seven while, custody of the daughter remains with the mother until she reaches the age of puberty. But where the mother dies, custody of the children will usually go to the mother's female

¹³⁰ Owasanoye (n 2) 421.

¹³¹ Magistrate Court Law, s 24 provides that 'a magistrate shall observe and enforce the observance of every customary law which is applicable and is not repugnant to natural justice, equity and good conscience, nor incompatible either directly or by implication with any law for the time being in force, and nothing in this Law shall deprive any person of the benefit of customary law.'

¹³² Maliki and Hanafi schools.

relatives but if the mother remarries then custody of the children goes to the maternal grandmother.¹³³

To qualify as a custodian, Islamic law stipulates some qualifications and these include, that a custodian must be an adult, physically fit, sane and must live in an area considered fit for the child. In addition to these, it is mandatory for a custodian to be a Muslim, a pious person and entitled to wages for the upkeep of the child but he can be reimbursed for any expenses incurred.¹³⁴ Owasanoye notes that such a muslim must raise a child according to the tenets of the religion. Failure to follow the tenets of the religion may result in disinheritance. He notes further that the Hanafi school also has a number of adherents. According to this school, custody of the mother terminates at the age of seven for boys and nine for girls. However, to be able to cope with menstruation, girls are given an additional two years and this period can be extended if necessary. When the child reaches these ages, he/she can make a choice of which parent to stay with, and if undecided, a choice is made for the child by casting lots. Just like the Maliki school, a parent loses custody if that parent is unfit, negligent and morally bankrupt.¹³⁵

With respect to access rights, under both schools of thought, both parents have equal visitation rights irrespective of which parent has custody. It is said that in this respect, Islamic rules seem to favour women more than customary law principles because the Qur'an makes room for each parent's access to the children. In addition to this, Islamic law unlike its customary law counterpart in Nigeria does not only permit the mother to have custody of her sons until the age of seven, but the Maliki school grants custody of a daughter to the mother until she reaches puberty.¹³⁶ This provision arguably, allows room for the child and the parent with custody to establish closer relationships.

¹³³ Owasanoye (n 2) 423; Maryam Uwais, 'Family Law in Northern Nigeria' in Akua Kuenyehia (ed) *Women and the Law in West Africa: Situational Analysis of Some Key Issues Affecting Women* (WALWA) (Sedco Publishing 1998) 215.

¹³⁴ Owasanoye (n 2) 423.

¹³⁵ *ibid.*

¹³⁶ Owasanoye (n 2) 423.

2.4.4 *The Best Interests Principle and Children Born Outside Wedlock*

The position of a child whose parents were never married was disfavoured under early common law jurisprudence. The child was regarded as an illegitimate child.

- *Common Law and Statute Law*

However, today, under the Constitution of the Federal Republic of Nigeria 1999, Federal and State legislations now provide that no citizen of Nigeria shall be subjected to any form of disability or deprivation merely by reason of the circumstances of his birth.¹³⁷ Under the common law, where the parents of the child were never married, the mother has custody right of the child. However, due to the statutory responsibility placed on the father compelling him to make financial provisions for the child, the mother and child do not have strong legal grounds to demand contribution from the father.¹³⁸

Notably, the CRA 2003 makes provision for children born out of wedlock. The Act establishes a Family Court¹³⁹ to which either the father or mother may apply to seek an order for parental responsibility for such a child. Section 1 of the Act obliges the court to consider the BIC in making such an order. The present author notes that the positive effect of establishing the family court is that it will ensure effective enforcement of the provisions of the CRA but that is only if there is compliance by the enforcement agencies and the willingness of aggrieved parties to seek redress in court.

Also, the Act allows the parents to have joint responsibility for their child if a consensus is reached.¹⁴⁰ Unfortunately, in spite of the provisions contained in the Act, presently it is only effective in the Federal Capital Territory and a few

¹³⁷CFRN 1999 s 42 (2). Note that the early common law's recognition of an illegitimate child as "*filius nullius*" has also been traced to the Bible in Deuteronomy 23:2; Owasanoye (n 2) 424; Yemi Osinbajo, 'Legitimacy and Illegitimacy under Nigerian Law' (1989) 14 Nig. J. of Contemp. L., 30-45 at 30 (Osinbajo).

¹³⁸ Owasanoye (n 2) 424.

¹³⁹ CRA 2003 s 153.

¹⁴⁰ CRA 2003 s 69.

states in Nigeria. Thus, it will only take full effect when passed by all the state legislatures in the country in line with the requirement of the Constitution that international treaties must first be domesticated into national law to become effective.¹⁴¹ Apparently children born outside wedlock under customary and Islamic law, have a different experience as will be seen.

- *Children born outside wedlock under customary Law and Islamic Law*

The situation is different for children born out of wedlock under customary law. This is because such children are usually regarded as belonging to their mothers. But where the mother was previously married to someone who is not the father of the child, and either neglected or was unable to pay back her bride price, then her husband can have a claim to any child she subsequently bears, even though he is not the biological father of the child.¹⁴² In the same vein, if a woman marries a second husband without paying back the first husband's bride price, the first husband or his family may claim the children of the second marriage as long as the marriage between her first husband and herself have not been dissolved.¹⁴³ These cases are however rare and non-biological fathers sometimes still get custody especially in customary courts. Many other courts have also ruled against such practices by relying upon the repugnancy doctrine to challenge such odious practices which they regard as being against the BIC.¹⁴⁴ Nevertheless, it is trite law that under customary law, mothers of children born out of wedlock still maintain custodial rights but this does not bar the biological father from applying for paternal responsibility or access as provided by the CRA when it becomes applicable in the various states in Nigeria.¹⁴⁵

The situation is however different under Islamic law as children born out of wedlock are stigmatised. A good example can be gleaned from the

¹⁴¹ CFRN 1990 s 12; Owasanoye (n 2) 424.

¹⁴² Owasanoye (n 2) 425.

¹⁴³ *ibid*; Osinbajo (n 137) 32.

¹⁴⁴ *Edet v Essien* [1932] 11 NLR 47.

¹⁴⁵ Owasanoye (n 2) 425. CRA 2003, s 69.

introduction of Sharia criminal law in some States of Northern Nigeria in 2000. Under this law, the mother of a child born out of wedlock risks the chance of being stoned to death as a consequence of adultery.¹⁴⁶ This punishment seems to be one-sided as majority of the cases in the past have penalised only the women.¹⁴⁷ But Islamic law allows Islamic parents of such children to marry in order to remove the stigma and give the child the father's name.¹⁴⁸ There are divergent views that such children born out of wedlock belong to the man¹⁴⁹ but what is relevant here is that she must not have committed adultery.

2.4.5 Recognition of Foreign Court Orders

Where a foreign court makes custody or access orders which are in conformity with the provisions of the MCA¹⁵⁰ such orders may be recognised in Nigeria. As Owasanoye points out, with respect to child abduction, Nigeria is presently not a party to the Hague Convention on the Civil Aspects of International Child Abduction or to any other International Convention with specific rules on custody or access orders, neither does Nigeria have any mechanism to seek a return order.¹⁵¹ Notably, at the domestic level, the CRA 2003 has a provision concerning abduction, removal, and transfer of a child from the lawful custody of a parent, guardian or any other person legally entitled to have custody.¹⁵² The CRA imposes a stiff jail term of seven years for offenders.¹⁵³ It is believed that the section aims specifically at discouraging child trafficking. Unfortunately, in spite of these provisions, the CRA has been criticised for being of limited effect and this is attributed largely

¹⁴⁶ *Amina Lawal v The State* (n 151); a similar case is that of Sadiya Hussaini Tungar-Tudu(2002); Jeff Koinange 'Woman Sentenced to Stoning Freed' Feb 23, 2004 CNN <http://www.cnn.com/2003/WORLD/africa/09/25/nigeria.stoning/> accessed on 24th Oct. 2007.

¹⁴⁷ *Amina Lawal v The State* [2003] USCFT/CRA/1/02 (Katsina State Sharia Court of Appeal). Amina from Niger State was sentenced to death by stoning in 2002. Her conviction was quashed by the Sharia court of Appeal on technical grounds and as a result of the interference of the international human rights community; www.amnesty.org.uk accessed on 24 Oct. 2007.

¹⁴⁸ Owasanoye (n 2) 426.

¹⁴⁹ Alhaji Abdul-Malik Bappa Mahmud, *Marriage under Islamic Law* (Hamdan Express Printers 1981) 44.

¹⁵⁰ MCA LFN 2004 (cap M7) s 88.

¹⁵¹ Owasanoye (n 2) 428.

¹⁵² CRA 2003 s 21 (1).

¹⁵³ CRA 2003 s 27(2).

to the fact that the statute has to be passed at the state level before it can become operative in the various states thereby slowing the quick application of the UNCRC.

While this is the requirement at the international level, the Nigerian government on its part has made efforts over the years to ensure that the rights of the child are adequately protected. This is evident from the policies and programmes the government initiated. The next subsection aims to briefly discuss these although it notes that they have not actually made meaningful impact nor adequately influenced the children rights discourse in Nigeria.

2.5 INITIATIVES FROM THE GOVERNMENT

The Nigerian government over the years embarked on various initiatives with the aim of revamping the country's economy that was declining and to resuscitate the significant reduction in the standard of living of many Nigerians. As a result of this, in 1986, the government in collaboration with the International Monetary Fund (IMF) embarked on the Structural Adjustment Programme (SAP). In agreeing with Ipaye, although this development policy was aimed primarily at revamping the country's economy, other developmental policies aimed particularly at the family were put in place by the government.¹⁵⁴ These policies will be discussed briefly in the subsequent sub-section.

2.5.1 *National Programmes and Policies relating to Child and Family welfare Services*

I. National Programme of Action (NPA)

The National Programme of Action for the Survival, Protection and Development of the Nigerian Child (NPA) is one of the programmes

¹⁵⁴ Ipaye (n 5) 40.

established by the government and adopted in 1992 in response to the goals set by the World Summit for Children. The NPA laid out a set of objectives and strategies covering the major sectors which have a direct bearing on the well-being of children, including their health, education, nutrition, sanitation and water. It also focused on the protection needs of Children in Especially Difficult Circumstances (CEDC), including street children, children suffering from conflicts and disasters, children suffering from abuse and neglect.¹⁵⁵

Unfortunately, like the previous programmes and policies, the NPA did not make much impact. It received criticism for not having any definite government policy on CEDC. Secondly, it was criticised for being vague on the strategies and the specific actions that would be undertaken which were never implemented.¹⁵⁶ Owing to these difficulties, the number of CEDC rather increased and there was no sign of the formulation and implementation of effective programmes to address their plight. Apparently, the goals set by the programme were never achieved during the military era thereby resulting in its neglect.¹⁵⁷ Arguably, we can conclude that if this programme was implemented, the problem of CEDC would have been solved thereby ensuring that the best interests of such children are protected.

Over the years various administrations put in place other economic programmes aimed at empowering the family.¹⁵⁸ These programmes will be briefly discussed below.

II. Family Support Programme (FSP) and the Family Economic Advancement Programme (FEAP)

¹⁵⁵ Assessment (n 31) 242.

¹⁵⁶ These actions included, carrying out a baseline study on children in especially difficult circumstances, establishing early detection and monitoring centres, child welfare centres, adoption centres, increasing the number of motherless babies homes/orphanages, increasing budgetary allocation to the social welfare sector, and reviewing the laws affecting women and children.

¹⁵⁷ Assessment (n 31) 242.

¹⁵⁸ Ipaye (n 5) 44.

With the emergence of the FSP in 1995, the role of the family as a basic social unit was emphasised. Its role was to promote the socio-economic empowerment of the family as a catalyst for development. The programme was initiated by Maryam Abacha, the wife of the then military Head of State, Major General Sani Abacha (Late). It was divided into three phases: firstly, the mobilisation of support for the programme, secondly, the promotion of child and maternal health, while the third phase was aimed at implementing the FSP for the year.¹⁵⁹ With time, the FSP metamorphosed into the FEAP with the aim of providing loans to people, improving their standard of living and training them.¹⁶⁰

Although these objectives were identified as laudable, in agreement with Ipaye, it would appear that they do not satisfy the need to protect the BIC and merely focus on development goals.¹⁶¹

III. National Youth and Development Policy

In 2001, under the government of President Olusegun Obasanjo, Nigeria put in place a National Youth Development Policy. However, this programme is yet to be meaningfully implemented as the structures to ensure its effectiveness are yet to be developed.¹⁶²

IV. National Poverty Eradication Programme (NAPEP)

One of the strategies initiated by the government to eliminate poverty is the establishment of the NAPEP which commenced in 2001. The programme which is a central coordination point for all anti-poverty efforts from the local government level to the national level seems to be well focused but needs greatly improved funding to scale up the programme.¹⁶³ Although it has put in place a number of poverty eradication programmes yet these programmes in

¹⁵⁹ *ibid.*

¹⁶⁰ FEAP; Assessment (n 31) 244.

¹⁶¹ Ipaye (n 5) 44.

¹⁶² African Peer Review Mechanism (APRM) Country Self-Assessment Report, The New Partnership for Africa's Development (NEPAD), Executive Summary 2007, para 31 (APRM Report). The APRM is an assessment system voluntarily adopted by member states of the African Union for assessing their performance. Nigeria acceded to the APRM in 2003.

¹⁶³ APRM Report, 90.

the present author's view are yet to have any direct meaningful impact on the family especially in the area of protection of the child as the programmes are mainly focused on economic development and capacity building.

VI. *National Economic Empowerment and Development Strategy (NEEDS)*

In 2004, the Nigerian government initiated a programme for economic revival embodied in the NEEDS. The NEEDS recommends reforms in a wide range of areas and places emphasis on people. One of its goals requires that the bulk of government's capital funds should focus particularly on rebuilding infrastructure and improving education and health.¹⁶⁴ Thus, just like other programmes, this development programme was aimed at the economy although indirectly affects the family. The evident problem which the present author envisages is that when policies are not child welfare oriented then they cannot directly protect the child. Therefore, the state party should ensure that its policies on children focus directly to protecting children's rights and not only economic development.

Conclusion

Arguably, the programmes introduced by the government have been laudable but what comes to mind is whether these programmes have brought about the much needed social and economic change in the family. This chapter has highlighted the social and economic changes that Nigerian women and children have encountered which were either negative or positive. We witnessed the changes from the traditional family groupings to new forms of family groupings. The chapter notes that some statutory provisions require that customary laws which are unconstitutional should be nullified as they violate both national and international standards of behaviour.¹⁶⁵

¹⁶⁴ APRM Report, 83, 86.

¹⁶⁵ CFRN 1979 s 39; CEDAW art 16.

The chapter also discusses the different legislations which existed at different times in Nigeria. Based on these, it is evident that Nigeria needs a new law which would integrate the existing different systems of marriage, particularly divorce, custody and access issues. For instance, an integration of the customary, Islamic and statutory custody laws which are all based on diverse traditions, resulting in incompatibility with each other will need to be integrated to curb the incompatibility. A first step would be to review the Constitution to contain an integration of the marriage laws.¹⁶⁶ This, in the present author's view would bring about the much needed certainty and social equality. However, this may be very difficult to achieve in view of the multiple cultures in Nigeria. The problem envisaged is that no culture may be willing to reject its customs and take another custom. Perhaps, the best approach will be to use only aspects of the culture that do not violate international human rights, such standards should also pass the repugnancy test.

By giving a descriptive analysis of the traditional family structure in Nigeria, the chapter identifies some practices which the courts identified as repugnant. In relation to child custody and access to children, the thesis acknowledges the complexity of legal regulation of child custody in Nigeria which is attributed to the historical development and the tripartite system of laws. As a result of this, custody disputes are regulated by the type of marriage the parents celebrated. This brings about the issue of choice of law. The thesis succinctly notes that in custody disputes the courts ensure that the welfare and BIC is paramount before that of the conflicting parties. To ensure this, the court uses a checklist. But the thesis draws a margin of appreciation to the extent that in the event of conflict or incompatibility, statutory law will often override customary law. There is therefore need for an internal restructuring of the existing laws in Nigeria. This would take into consideration the challenges of implementation owing to the diverse cultures. This effort would create uniformity in the legal system and would ensure the continued protection of the best interests of the Nigerian child enmeshed in a multicultural civil

¹⁶⁶Andreas Rahmatian, 'Termination of Marriage in Nigerian Family Laws: The Need for Reform and the Relevance of the Tanzanian Experience' (1996) 10 Int'l J. of Law, Policy and the Family, 281-316 at 308.

society. The next chapter seeks to identify some factors which influence the implementation of the BIC principle in Nigeria.

Chapter Three

Influences on the Implementation of the Rights of the Child and the Principle of the Best Interests of a Child

3.0 Introduction

The world today is generally referred to as a global village. Thus, in a global perspective, there is great concern about the exploitation of children under dangerous and unhealthy conditions. This chapter notes that the implementation of the rights of the child and the principle of the BIC has been influenced by socio-economic, cultural and religious factors. As a result of these factors, implementing the rights of the child and the principle of the BIC faces enormous challenges especially in developing societies like Nigeria. These factors infringing children's rights and their socio-economic implications such as lack of education, child street begging, commercial exploitation, sexual exploitation, trafficking in children, street children, and children in armed conflict situations will be discussed in this chapter. The chapter illustrates the reasons why children, particularly in developing countries suffer the worst forms of child labour especially in most hazardous conditions as compared to their counterparts in developed countries. Generally, as seen from the previous chapter, it would be noted that to a large extent, States have put in place machineries, such as enacting enabling laws aimed at promoting the welfare of the child as well as curbing child labour practices both at the international, regional and national levels but unfortunately the problem still persists. Albeit, the influences on the implementation of the rights of the child and the principle of the BIC will be discussed in the following subsection starting with the socio-economic influences.

3.1 Socio-economic Influences

This subsection identifies poverty as one of the socio-economic challenges in Nigeria and would specifically use the phenomenon of child labour to portray the difficulties which the international community faces in enforcing international law at the domestic level once the State party has acceded to be bound by the provisions of the international instrument. It therefore becomes imperative to make a holistic overview on the issue of child labour in the light of international human rights law regime.

3.2 Overview on Child Labour and the International Human Rights Law Regime

Child labour has been aptly identified as the most prevalent source of child abuse in the world today. The statistics of children involved in child labour is quite revealing. The United Nations International Children Emergency Fund (UNICEF) estimates that hundreds of millions of children globally under the age of fifteen are in employment.¹ To curb this menace, several suggestions and approaches have been proffered. One of such is that given by Bullard when he advances the need for traditional governmental approach as a means of preventing the premature entry of children into the workforce. This will include enacting and enforcing child labour legislation and introducing compulsory primary education. But these proposals are viewed as insufficient to eliminate the problem of child labour.² As a result of this inadequacy, relying on international law will aid in eliminating child labour as it makes provision for protection measures. Bullard reaffirms this when he states that because children are in need of special protection, they should be given opportunities by law and through other means to enable them develop physically, mentally, spiritually, socially and morally in a healthy and normal manner, with freedom and dignity.³ This argument is based on the fact that

¹ Carol Bellamy, 'The State of the World's Children' UNICEF 1996; Bullard (n 2) 141.

² Madeleine Gray Bullard, 'Child Labor Prohibitions are Universal, Binding and Obligatory Law: The Evolving State of Customary International Law Concerning the Unempowered Child Laborer' (2001) 24 Hous. J. Int'l L 139 -185 at 142 (Bullard).

³ Bullard (n 2) 142.

most countries have laws that regulate the employment of children but these laws may be limited by their narrow scope, lack of clarity, and loopholes which is why a reliance on international law rather than the domestic laws of different states is more ideal. But in spite of these inadequacies, the present author agrees with Bullard that the most daunting problem faced by States in addressing the issue of child labour lies in the monitoring and enforcement of the domestic labour laws of another sovereign State. This is a major problem faced by international law over domestic jurisdictions and that is why enforcement of the UNCRC at the domestic level poses challenges. We can therefore conclude that monitoring and enforcement are major hindrances to the implementation of the best interests principle. Indeed, while it is agreed that international law rest on the consent given by States to limit their sovereignty and be bound by the rules of international law, some rules are said to have become so entrenched and well recognised that consent is no longer required. An example is the right of everyone to life. Bullard suggests that such international norms should be used as protection for those who cannot protect themselves. Ideally, Bullard is referring to children.⁴ In essence, international law should be used to protect children against child labour and other hazardous conditions as it is not in their best interests to engage them in such employment.

Unfortunately, at the domestic level, the lack of adequate enforcement and supervision has rendered some of the existing child labour laws virtually impotent. For instance, in some developing countries, laws protecting children are enacted but not enforced, primarily because child labour is a structural part of the economy.⁵ Bullard notes reasons why the situation persists in poor countries. First, families in poor countries put their children to work out of necessity so that the children's meagre earnings will assist in providing basic needs, food and medicine for themselves and their siblings.⁶ Nigeria provides a clear example in this category as children from poor backgrounds are seen engaging in excessive farm work and hawking for their

⁴ Bullard (n 2) 143.

⁵ *ibid.*

⁶ *ibid.*

parents. Secondly, officials are reluctant to discourage the practice of child labour when it is discovered. Thirdly, the ministries are usually understaffed, lack resources, lack adequate training, and receive low pay thereby allowing room for corruption. Also, enforcement agents face hostility from powerful economic interest groups and parents'.⁷ Lastly, employers receive advance warning of visits by enforcement agents. Most importantly, when violations are reported and charges brought, judicial responses are often slow and inadequate. But despite the proliferation of human rights conventions, legislations, and international labour agreements that focus on labour problems, harmful child labour practices continue to flourish worldwide.⁸ According to Bullard, the existence of these international instruments and recent developments could adequately convert child labour prohibitions into violations of international law. Recently, the international community witnessed the elevation of harmful child labour practices to the level of customary international law. Indeed, the worst forms of child labour could be said to violate *obligatio ergo omnes*, therefore a crime against humanity. Thus, as customary international law, child labour prohibitions are universal, obligatory and binding on all nations and individuals.⁹ This being the case, as earlier suggested, consent of a State party may not be required to eradicate child labour practices. However, in practice this may be difficult to achieve because of the sovereignty of States and also because of the fact that the State may have included some reservations when ratifying treaties, for instance the UNCRC. The present author maintains that since the worst forms of child labour are prohibited by customary international law, the phenomenon, extent, causes and the effects of child labour globally and in Nigeria is worth addressing.

Thus, discussions on the phenomenon of child labour at the international level will follow. This shows that the international community is aware of the menace, and has made efforts to curb the practice through its institutions such as the International Labour Organisation (ILO).

⁷ ibid 144.

⁸ ibid 145.

⁹ ibid 146.

3.2.1 CHILD LABOUR AND THE ILO

It is common knowledge that children have been engaged in different types of work. However, Buck notes that it is not all work performed by children under the age of eighteen that can be termed 'child labour'. This is why he describes the phenomenon of child labour as complex, therefore needing a distinction between work that children do at home within the family or for an employer (which may accrue some benefit and contribute to their well-being and development), from 'child labour' which portrays forms of exploitation of children that are harmful to their general well-being.¹⁰

Buck notes the commitment of various organisations such as the ILO, to abolish child labour globally¹¹ by way of formulating policies and legislations. For instance, in 1998, the ILO adopted a *Declaration on Fundamental Principles and Rights at Work*.¹²

Having established the international community's commitment to abolish child labour, Buck identifies the kinds of child labour that should be targeted, and the types of child work that should be discouraged and argues that not all forms of work are child labour. His suggestions are based on the wordings of the ILO which expounds on the term 'Child Labour' by distinguishing between work that children do at home at home or for an employer, which may be beneficial and may contribute to their wellbeing, and child labour that is exploitative. He describes exploitative work as having the following characteristics:

... it is carried out full-time at too early an age; the working day is excessively long; it is carried out in inadequate conditions; it is not sufficiently well-paid; it involves excessive responsibility; it undermines the child's dignity and self-esteem. On the

¹⁰ Trevor Buck, *International Child Law* (2nd edn Routledge 2011) 166 (Buck).

¹¹ *ibid.*

¹² ILO Declaration on Fundamental Principles and Rights at Work, 86th Session, Geneva, 19 June 1998, art 2.

other hand, beneficial work is defined as that which promotes or stimulates the child's integral development ... without interfering in his/her scholastic or recreational activity or rest.¹³

In line with the above, the present author agrees that it is not all forms of child labour that should be punished as children in different cultures may be engaged in light work which may not necessarily be harmful or hazardous to the health of the child. In Nigeria for instance, it is a customary practice to engage mostly the girl-child (female child) in house work such as cooking in the kitchen with the mother to prepare the girl-child ahead of marriage. But such work should not be detrimental to the BIC.

Child Labour is also seen as 'work that affects a child's enjoyment of his or her fundamental rights: civil, political or economic, social and cultural – particularly the broad right to survival and development of the child.'¹⁴

From the foregoing, attempts made to define the phenomenon of child labour have only done so without bringing to light its causes. In agreement with Buck, if the causes are known, then it will show to a great extent the complexity of the problem. While the 2002 ILO Global Report contains a statistics showing the extent of the problem as noted by the ILO,¹⁵ other ILO report re-emphasise that child labour is rooted in poverty.¹⁶

¹³ ILO Report 2002 (n 15) para 25; Buck (n 10) 166-167.

¹⁴ Jacqui Gallinetti, 'Worst Forms of Child Labour: A View from Out of Africa' in Julia Sloth-Nielsen (eds), *Children's Rights in Africa – A Legal Perspective* (Ashgate 2008) 323-341 at 323 (Gallinetti).

¹⁵ *ibid*; ILO Global Report under the Follow-up to the ILO Declaration on fundamental principles and rights at work, International Labour Conference 90th Session 2002, 156 http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_publ_9221124169_en.pdf (ILO Report 2002) accessed on 12th September 2010.

¹⁶ ILO 'New ILO Global Report on Child Labour – As Efforts to End Child Labour Slow, ILO Calls for "Re-energized" Global Action' 08 May 2010. http://www.ilocarib.org.tt/portal/index.php?option=com_content&task=view&id=1363&Itemid=368 accessed on 14 January 2011; Buck (n 10) 170-171; Tapan Kumar Shandilya et al (eds), *Child Labour Eradication: Problems, Awareness and Measures* (Deep and Deep Publications 2006) 2; Umme Kulsum, 'Child Labour: Problems and Prospects' in Mahaveer Jain and Sangeeta Saraswat (eds) *Child Labour from Different Perspectives* (Manak Publications 2006) 197.

It should however be noted that child labour is not only caused by structural economic and educational disadvantage, it also contributes to the maintenance of such structural flaws. Take for instance children in India engaged in child labour in the carpet industry. The reason given for this is that it will result in difficulties if children are prohibited from such work, and the damage that would result when they are withdrawn from the industry.¹⁷ Also in Nigeria, poverty is a structural part of the economy thereby leading to persistent child labour practices. Therefore, based on the linkages between poverty, child labour and educational disadvantage, there have been calls for countries to pay closer attention to the extent and nature of child labour because of its social and economic effects to the development of a country.¹⁸

3.2.2 The Extent of Child Labour

The extent of child labour is no doubt wide spread and far reaching than one may ordinarily assume and has become very complex in nature. It is this complexity that has today resulted in many policy responses to the issue. Buck asserts this when he notes the diverse approaches policy thinking has taken in the past.¹⁹ First, the thinking developed with the main objective of removing all children from harmful work. The reasoning is that children's best interests would be best served by freeing them to enjoy a childhood in caring family environments. Secondly, in distinguishing 'child work' from 'child labour', he notes that while the former is regarded as work which was considered not really harmful and less likely to damage children's educational opportunities, the latter is said to be likely injurious.²⁰ Thus, as earlier noted this distinction between child work and child labour that is exploitative shows that it is not every job that a child can do that is necessarily harmful. For instance, part-time and after-school jobs can be performed by a child without

¹⁷ Buck (n 10) 170-171.

¹⁸ ILO Report 2002 (n 15) para 63; Buck (n 10) 169; UN General Assembly 'The rights of the Child' (23 Feb. 1999) UNGA Res A/53/128 accessed on 16 January 2011.

¹⁹ Buck (n 10) 174.

²⁰ *ibid* 166; Sheena Crawford, *The Worst Forms of Child Labour: A Guide to Understanding and Using the New Convention* (DFID 2000).

interfering with the child's development and education and could provide wages and experience for the child.²¹ Alternatively, jobs requiring long hours, pay no living wage, prevent children from attending school and subject them to hazardous conditions are regarded as exploitative.²² In developing countries, for instance, children are viewed as economic resources contributing to secure the family's survival. They are also engaged in various kinds of child labour which they justify through cultural arrangements.²³ Arguably, depending on the circumstances, such contribution or engagement could be considered as child labour.

The ILO sees harmful child labour as work that places too heavy a burden on the child; endangers the safety, health or welfare of the child; exploits the child as a cheap substitute for adult labour; uses the child's efforts but does nothing for his development; and work that impedes the child's education or training thereby prejudicing his future.²⁴ Arguably, this type of work which compels the engagement of the child shows an evident lack of choice therefore signifies slavery therefore should be universally condemned.

Associated with these problems is the difficulty in ascertaining the magnitude of the problem globally. It will therefore be useful to have a reliable statistics that will show the extent of the problem. This problem is not only limited to the international sphere, some national jurisdictions such as Nigeria also cannot ascertain the extent of the problem. However, the ILO has made efforts to provide some estimates which have aided in identifying the nature and magnitude of child labour as will be shown in the subsequent discussion.

3.2.3 The Nature and Magnitude of Child Labour

Several documented accounts on the nature of child labour have noted that child labour is predominant in the informal sector, for example family-based

²¹ Bullard (n 2) 147.

²² *ibid.*

²³ Gallinetti (n 14) 323.

²⁴ International Labour Office, 'Child Labour' Extract from the Report of the Director-General to the International Labour Conference, 69th Session, 1983, ILO Geneva.

enterprises outside the state regulatory regime²⁵ which explains the difficulty in regulating or monitoring such child labour practices. The first global reliable statistics on the magnitude of child labour was first collated in the year 1979 recognised as the International Year of the Child.²⁶ At the time of doing this research, the ILO estimated that 215 million children globally between the ages of four to fourteen years are still trapped in child labour.²⁷ This estimate contrasts previous estimates on the number of children engaged in economic activities. In 1996, the ILO estimates that 250 million children between the ages of four to fourteen were economically active in the developing world. Out of these, 120 million were in full time work, 61 per cent were found in Asia. Africa had 32 per cent whereas seven per cent was found in Latin America.²⁸ In 2000, the International Programme on the Elimination of Child Labour (IPEC) estimated that 211 million children aged five to fourteen years old were economically active. Since the above examples show a variation in the estimates, perhaps it can be concluded that the magnitude of the problem is declining. But most importantly is the fact that these estimates bring about concern for the international community because of the possibility that they may be underestimated mainly due to the covert nature of the many forms of child labour. There is therefore the need to apply caution as the methodologies used in collating such statistics vary globally. For instance, while some national statistical surveys used children aged ten years and above, others used children aged five years and above.²⁹ Also, most of the national statistical surveys, for instance the National Statistics on Nigeria had only covered children aged ten to sixteen years.³⁰ Therefore the present author is of the view that it will be inappropriate to say that there is comprehensive statistics on the magnitude of child labour owing to these variations. If this is the situation globally, then it will even be more difficult for

²⁵ Buck (n 10) 175; ILO, Accelerating Action Against Child Labour: Global Report under the Follow-up to the ILO Declaration on Fundamental Principles and Rights at Work, International Labour Conference, 99th Session 2010, Report 1B, ILO Geneva (ILO Report 2010) 353.

²⁶ Buck (n 10) 176.

²⁷ ILO Report 2010 (n 25) 24.

²⁸ ILO Report 1998; Buck (n 10) 172; Child Labour: Targeting the Intolerable, para 1, ILO (1996) <http://www.ilo.org/public/English/standards/ipec/publ/clrep96.htm>; Bullard (n 2) 140.

²⁹ Buck (n 10) 176.

³⁰ Worst Forms of Child Labour – Nigeria: Global March Against Child Labour Report 2005, <http://www.globalmarch.org/worstformsreport/world/nigeria.html> accessed on 17 January 2011 (Worst Forms Report Nigeria); Buck (n 10) 176.

a developing society such as Nigeria to have a comprehensive statistics on children engaged in child labour.

In 2004, the ILO recorded an estimate of 13.9 per cent of children aged five to seventeen years engaged in child labour as against 16 per cent in 2000.³¹ This decline in the statistics shows to a large extent that there was a reduction in the number of child labourers. But in agreement with Buck, in reality the figure still remains huge and the effect of this is that children continue to engage in harmful work that may result in some negative consequences.³² In 2006, the ILO concluded that the number of child labourers had fallen by about 11 per cent over the last four years.³³ While the 2006 report notes that the decrease is occurring in the area of hazardous work which decreased by 26 per cent and by 33 per cent for children between the ages of five and fourteen,³⁴ the ILO Global Report of 2010 on the other hand shows that efforts to combat the worst forms of child labour are reducing. In the 2010 Report, the number of child labourers aged five to fourteen fell by 10 per cent and the number of children in hazardous work in this range fell by 31 per cent. The report notes that while child labour among girls decreased by 15 million or 15%, there is an increase of 8 million or 7 per cent among boys, as well as an increase by 20 per cent from 52 million to 62 million among young people aged 15 – 17.³⁵ This shows to a large extent that, efforts to combat child labour is reducing which means the problem still persists with an increase in the number of boys engaged in child labour as compared to girls. This position is also reflected in the Child Labour Report carried out on Nigeria in 2005 which estimated a total of 12 million child labourers and projected 1,262,000 girls and 2,597,000 boys between the ages of 10-14 as economically active.³⁶ From the foregoing, although the reduction in the number of girls and children is a positive effort, there is great concern that

³¹ Global Report under the follow-up to the ILO Declaration on fundamental principles and rights at work “The end of child labour: Within reach”, International Labour Conference, 95th Session 2006, www.ilo.org/declaration (ILO Report 2006) para 25, accessed on 20 August 2007.

³² ILO Report 2006 (n 31) 26; Buck (n 10) 176.

³³ *ibid.*

³⁴ *ibid.*

³⁵ ILO Report 2010 (n 25) 5, 24.

³⁶ Worst Forms Report Nigeria (n 30) 1.

there is a reduction in the projected goals set out since 2006 to eliminate the worst forms of child labour by 2016. There are also fears that progress towards 2016 may not be realisable due to the persistence in child labour and the global economic meltdown.³⁷ A way of achieving this is to use the joint efforts of international, regional and national stakeholders to provide a legislative framework that will aid in combating child labour practices globally. Some of these legislative frameworks are already in place and have received wide ratifications such as Conventions No 138 and 182. Unfortunately despite their existence the incidences of child labour still persists perhaps because of the varied nature of child labour. The next section will discuss these legislative frameworks and their relevance in the elimination of child labour practices.

3.3 LEGISLATIVE FRAMEWORK ON CHILD LABOUR

That child labour has become a menace and hydra-monster that needs to be curtailed by legislative framework is a fact that cannot be overemphasised. Therefore, considering the negative impact of child labour practices, the need to regulate such practices globally at international, regional and national levels mainly through legislation emerged. The following sub-sections will look at the different frameworks put in place at all these levels, in a bid to curb the problem of child labour.

3.3.1 *The International Legislative Framework on Child Labour: Child Labour and the UNCRC 1989*

One of the identified international legislative frameworks on child labour is the UNCRC 1989. Its essence is to extend the inherent rights of all human beings to children.³⁸ The UNCRC's aim to fight child labour is manifested when it recognises the right of the child to education, rest and leisure, protection from

³⁷ ILO Report 2010 (n 25) ix.

³⁸ UNCRC 1989 art 6; *Combating Child Labour: A Review of Policies* (Organisation for Economic Co-operation and Development, 2003) 113 (OECD).

economic exploitation and from performing hazardous work that interferes with the child's education or harmful to the child's health, mental, physical and social development.³⁹ It obliges states to take measures to make primary education compulsory and free to all and encourage secondary education.⁴⁰ It further urges states to provide minimum age legislation for admission to employment, regulation of hours and conditions of employment.⁴¹ The provisions of the UNCRC which are relevant to child labour as pointed out by Buck are reflected in article 32 (protection from economic exploitation and child labour), articles 11 and 35 (combating trafficking in children), article 19 (protection against violence, abuse, neglect and exploitation), and article 38 (setting international standards in relation to children in armed conflict).⁴² The present author concludes that these provisions are not adhered to by states parties although they have been clearly specified in this international legislative framework such as the UNCRC.

With respect to monitoring child labour, the UNCRC requires States parties to provide effective remedies and stronger monitoring. Owing to its wide ratification,⁴³ there is a sense of legal obligation on all States to adhere to its provisions, thereby giving child labour a status of *opinion juris* in the sense that even those States that have not ratified the UNCRC are to consider the prohibition of child labour as customary law.⁴⁴ In line with its human rights obligations, Nigeria has signed and ratified a number of treaties including the UNCRC,⁴⁵ the State party has also ratified the ILO Convention No. 138 concerning Minimum Age for Admission to Employment,⁴⁶ and the ILO Convention No. 182 concerning the Prohibition and Immediate Action for the

³⁹ UNCRC 1989 art 27, art 32; Bullard (n 2) 148-149; Gallinetti (n 14) 326.

⁴⁰ UNCRC 1989 art 28.

⁴¹ *ibid*; UNCRC 1989 art 32 (2).

⁴² UNCRC 1989 art 43; Buck (n 10) 185.

⁴³ 140 signatories, 193 ratifications at the time of writing this thesis; UN 'United Nations Treaty Collection' http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11&chapter=4&lang=en accessed on 20 January 2011.

⁴⁴ Bullard (n 2) 163.

⁴⁵ Signed on 26 January 1990 and ratified on 19 April 1991.

⁴⁶ Minimum Age Convention, 1973 (No 138) adopted on 26 June 1973 by the General Conference of the ILO at its fifty-eight session, entered into force on 19 June 1976.

Elimination of the Worst Forms of Child Labour on 2nd October 2002.⁴⁷ At the regional level, the State party has ratified the ACRWC in July 2001. Notably, the State party has also ratified the Optional Protocol to the UNCRC on the sale of children, child prostitution and child pornography on 27 September 2010 but is yet to ratify the Optional Protocol on the Involvement of Children in Armed Conflict.⁴⁸ The passage of the latter Protocol will aid in the implementation of the substantive rights contained in the UNCRC, moreover the BIC principle and the rights of the child will have full legal backing. What remains will be the issue of implementation or enforcement.

The CRC empowered to monitor the UNCRC acknowledges that there are factors impeding its implementation in Nigeria. They include the long-standing ethnic, religious and civil strife, economic constraints (e.g. poverty), unemployment and the heavy debt burden. The CRC is of the view that these may have impeded progress in fully realising the rights of children as enshrined in the UNCRC.⁴⁹ In the present author's view, addressing these factors will aid in combating child labour in Nigeria.

Admittedly, UN legislations relevant to child labour issue, namely - the ILO Declaration on the Fundamental Principles and Right at Work (1998), the *Minimum Age Convention* of 1973 and the *Worst Forms of Child Labour Convention* of 1999 have provided the necessary framework to curb the issue of child labour at the international, regional and national levels owing to the obligations they place on states parties to the conventions.

From the foregoing, the majority of these international legislations are strongly against work that interferes with the child's education. In the same vein, other regions such as Africa have similar legislations to curb the menace of child

⁴⁷ ILO C182 Eighty-Seventh Session, Geneva 17 June 1999; <http://www.ilo.org/ilolex/english/newratframeE.htm> accessed on 19 January 2011.

⁴⁸ OHCHR, Treaty Bodies Database <http://www.unhchr.ch/tbs/doc.nsf/Statusfrset?OpenFrameSet> accessed on 19 January 2011; 'FG to Ratify Protocols on Child Rights' *Daily Trust*, Nigeria, (5 December 2007) 8.

⁴⁹ 38th Concluding Observations on the Second Periodic Report of Nigeria (CRC/C/70/Add.24) at its 1023rd and 1024th meetings held on 26 January 2005, and adopted at the 1025th meeting held on 26 January 2005 <http://www.unhchr.ch/tbs/doc.nsf/>

labour. The next subsection discusses legislative responses to child labour in the African region.

3.4 THE AFRICAN LEGISLATIVE FRAMEWORK ON CHILD LABOUR

At the African regional level, the African Charter on the Rights and Welfare of the Child (ACRWC) 1990 has been acknowledged as the first comprehensive regional treaty on the rights of the child.⁵⁰ It also contains provisions dealing with child labour just like the UNCRC. Although it has some resource constraints, Baderin notes that the African regional human rights system is making efforts to meet the demands of institutional developments of human rights.⁵¹

The Charter provides that every child shall be protected from all forms of economic exploitation and from performing any work that is likely to be hazardous or to interfere with the child's physical, mental, spiritual, moral, or social development.⁵² But it deliberately fails to refer to work that may interfere with the child's education or work that is harmful.⁵³ However, it urges States parties to take all appropriate legislative and administrative measures to ensure its full implementation.⁵⁴ With the same drive used at both the international and regional levels to combat child labour, Nigeria also enacted a framework on child labour at the national level. This legislative framework as noted earlier is the CRA 2003 which embodies provisions that guard against child labour. This will be discussed subsequently.

⁵⁰ Buck (n10) 82.

⁵¹ Mashood A Baderin, 'Recent Developments in the African Regional Human Rights System' (2005) 5 Human Rights Law Review 117-149 at 148.

⁵² African Charter on the Rights and Welfare of the Child 1990 entered into force 29 Nov 1990, OAU Doc. CAB/LEG/24.9/49, art 15 (1).

⁵³ Gallinetti (n 14) 327.

⁵⁴ ACRWC 1990 art 15.

3.5 NIGERIAN LEGISLATIVE FRAMEWORK ON CHILD LABOUR

The CRA 2003 prohibits exploitative labour.⁵⁵ It provides that no child should be subjected to any forced or exploitative labour⁵⁶ or employed to work in any capacity except where he is employed by a member of his family on light work of an agricultural, horticultural or domestic character.⁵⁷ It further provides that no child should be required to lift, carry or move anything so heavy as to be likely to adversely affect his physical, mental, spiritual, moral or social development,⁵⁸ or employed as a domestic help outside his own home or family environment.⁵⁹ Despite the existence of these provisions aimed at protecting the child from exploitative labour, there is need for enabling enforcement machinery, without which the legislation will be ineffective. Notably, unlike other international instruments, the CRA stipulates a penalty for any person who contravenes any of these provisions and on conviction such a person would be liable to a fine not exceeding fifty thousand naira or imprisonment for a term of five years or to both fine and imprisonment.⁶⁰

In addition to the CRA 2003, another enforcement instrument is the National Trafficking in Persons Act 2003 which prohibits any person from unlawful forced labour, with a punishment of imprisonment for five years or to a fine not exceeding One Hundred Thousand Naira⁶¹ or to both fine and imprisonment.⁶² Yet, in spite of these legislative frameworks, exploitative labour thrives in Nigeria with its attendant socio-economic implications. Though it is acknowledged that child labour persists globally, the reasons for its existence in societies vary but its effect appears to be uniform especially since it

⁵⁵ CRA 2003 s 28.

⁵⁶ CRA 2003 s 28 (1)(a).

⁵⁷ CRA 2003 s 28 (1)(b).

⁵⁸ CRA 2003 s 28 (1)(c).

⁵⁹ CRA 2003 s 28 (1)(d).

⁶⁰ CRA 2003 s 28 (3). Naira is the Nigerian currency and fifty thousand naira is equivalent to £200 as at the time of writing this thesis.

⁶¹ Trafficking in Persons (Prohibition) Law Enforcement and Administration Act (NAPTIP) 2003 s 22 signed on 7 July 2003, enforced on 14 July 2003.

⁶² NAPTIP Act 2003 s 23.

contradicts the purport of the UNCRC and fails to ensure the rights of the child and principle of the BIC. These socio-economic implications of child labour will be examined briefly.

3.6 Socio-Economic Implications of Child Labour

According to Ellenbogen, looking at the larger issue of child labour will provide an opportunity to look at the factors that contribute to its prevalence, and its consequences. He rightly identifies the difficulty of compiling accurate and reliable statistics to the problem as one of the most significant obstacles in the child labour discourse. This problem also exists in countries with lack of funding, proper infrastructure and inadequate resources.⁶³ Child labour has also been identified as a central obstacle to realising the right of the child to education.

Another category of children engaged in lighter forms of work through fostering arrangements exist in Nigeria. Here, the guardian ensures that they merge their domestic chores with vocational courses, if not full time education. In agreement with the Report on Nigeria, combining work with school has disadvantages as the time committed to working inevitably takes their time for education thereby making the children tired, and lacking full concentration in class.⁶⁴ Thus, the present author suggests that programmes on education should focus on mechanisms to reduce the negative consequences of child labour, access to education and learning with the aim of meeting the particular needs of working children.⁶⁵ It is hoped that with these mechanisms in place, the BIC engaged in other forms of child labour would also be protected. Other common forms of child labour which are regarded as exploitative include, street children, children involved in armed conflicts, commercial sexual exploitation of children, sexual exploitation of children, trafficking in children

⁶³ Marc Ellenbogen, 'Can the Tariff Act Combat Endemic Child Labor Abuses? The Case of Côte D'Ivoire' (2004) Texas Law Review 1314-1347 at 1318.

⁶⁴ Situation Assessment and Analysis, *Children's and Women's Rights in Nigeria: A Wake Up Call* (UNICEF 2001) 208 (Assessment).

⁶⁵ *ibid.*

and child street begging. These will be discussed subsequently starting with child street-begging in Nigeria.

3.6.1 Child Street Begging

Another form of child labour is child street begging. The CRC is aware that the phenomenon of child begging has become more visible.⁶⁶ Its relevance to this discourse has been noted because of its negative psychological, social and health consequences, making it grave enough to constitute a separate discussion.⁶⁷ The report on children in Nigeria found that there are three categories of child beggars in the urban centres, namely those who lead blind parents or relatives; those who beg entirely on their own; and those who act as fronts for parents, especially mothers who supervise their children from a close distance and are usually hidden from the public.⁶⁸ In all these three cases, child beggars suffer enormous risks and consequences such as constant abuse, sexual exploitation and aggression from the general public.

Begging may take different dimensions depending on the region in Nigeria. While in the northern part of Nigeria, it is attributed to a religious practice, in the south it seems to be mainly used for economic gains. In the northern part of Nigeria, for instance, begging is more widespread and regarded as 'a religious duty'. This category of begging is associated with the *almajiranci* system.⁶⁹ *Almajiri* means 'street begger'. This system as noted from the report carried out is a semi-formal form of Qur'anic education initially established in the pre-colonial era (during which time it was funded by the state) whereby, mostly male children are sent by their parents to reside with Islamic teachers, or 'mallami' (singular 'mallam') for instruction in the Qur'an and other Islamic texts.⁷⁰ Traditionally, children were sent to places far from

⁶⁶ CO CRC: UK of Great Britain and Northern Ireland.15/02/95. CRC/C/15/Add.34, 15.

⁶⁷ Assessment (n 64) 209.

⁶⁸ *ibid.*

⁶⁹ *Almajiranci* is an Arabic word *almuhajir* meaning "he that migrated", an allusion from the time of Prophet Mohammed when the Meccans migrated to Medina; Assessment (n 64) 209.

⁷⁰ Assessment (n 64) 209.

their parents to acquire religious knowledge under the custody of a *mallam*, and at the same time used to beg for alms or serve in their teacher's farms.⁷¹

The *almajiranci* system has evolved over the years mainly due to the changing economic circumstances. Earlier, the *mallam* and his pupils lived on the royal patronage, with gifts from the parents and the generosity of the community and the state. But after the British introduced western education, the system collapsed and the funding was abolished. Also because poverty had become more widespread and communal support ceased, begging became rampant when the Qur'anic teachers began to send their pupils to beg. This practice led to some adverse negative effects as pointed out by the report on Nigeria.⁷² First, begging is time-consuming and reduces the hours of education. Second, as a result of the dwindling resources of their benefactors, some of the *almajirai* faced with hunger end up engaging in deviant behaviour such as theft, thuggery, pick-pocketing, and vandalism. Such delinquent behaviour defeats the upright moral code they were supposed to learn from Qur'anic instruction. They were also actively involved in communal clashes in the northern part of Nigeria over the years.⁷³ The system has been increasingly criticised by the general public and religious leaders alike who have called for reforms in the ways the system operates. However, the government has not done much to tackle the problem of child begging and its underlying causes. But there is a remarkable exception in Kano State where the State government took the drastic ban on street begging in December 2000.⁷⁴ Other efforts to prohibit child begging are reflected in legislative frameworks such as the CRA 2003 which prohibits the buying, selling, hiring or otherwise dealing in children for the purpose of hawking or begging for alms or prostitution and stipulates a conviction of imprisonment for a term of ten years.⁷⁵ Other children at risk include those who cannot be provided with one of the most basic needs, such as, shelter, therefore resort to living on the streets.

⁷¹ *ibid.*

⁷² *ibid.*

⁷³ Notably in Bauchi, Kano, Kaduna, and Adamawa States; Assessment (n 64) 209.

⁷⁴ Assessment (n 64) 209.

⁷⁵ CRA 2003, s 30 (1) (2) (a) – (f).

3.6.2 Street Children

Street children have variously been defined as “Children living on the streets, whose immediate concerns are survival and shelter, children who are detached from their families and living in temporary shelters such as hostels and abandoned houses and who move from place to place with friends; children who remain in contact with their families but, because of poverty, overcrowding, or sexual abuse will spend some days and most nights in the cities; and children who are in institutional care, who have come from homelessness and are at risk of returning to a homeless existence.”⁷⁶ These street children usually engage in some form of work. In order to curb this problem, the present author shares Byrne’s suggestion that the situation is not a question of trying to implement blanket bans on work, but instead ensuring that such children are not put at risk.⁷⁷ The present author opines that the emergence of street children in the first place is largely as a result of their lack of protection or inadequate efforts in protecting their rights and their best interests. Today, many children on the streets earn their living from engaging in economic activities, while others find themselves on the streets as a result of homelessness.

It appears impossible to have the exact number of street children but it is likely that there is an increasing number. However, the most commonly cited estimate is that provided by UNICEF that about 100 million street children exist in the world today.⁷⁸ These children are vulnerable, therefore the first target in most cases. In Brazil for example, four-fifths of the prisons population was mainly made up of street children. So, in a bid to clean up Rio de Janeiro before the 1992 World Summit, these street children were assassinated by the government.⁷⁹ In Nigeria, some street children have

⁷⁶ Susan O’Rourke Von Struensee, ‘Violence, Exploitation and Children: Highlights of the United Nations Children’s Convention and International Response to Children’s Human Rights’ (1995) 18 Suffolk Transnat’l L. Rev. 589-662 at 589, 187 (Struensee).

⁷⁷ Iain Byrne, *The Human Rights of Street and Working Children—A Practical Manual for Advocates* (Intermediate Technology Publications Ltd., 1998) 15.

⁷⁸ Consortium for Children: Street Children Statistics
http://www.streetchildren.org.uk/uploads/resources/Street_Children_Stats_FINAL.pdf
accessed on 22 January 2011.

⁷⁹ Struensee (n 76) para 617.

been vulnerable to ritual killings. What has been suspected to be ritual killing of a Nigerian child was also witnessed in London some years ago.⁸⁰ A survey of street children carried out in three pilot states revealed that more than 50 per cent were living with Mallams (Islamic teachers). Of this, 17.6 per cent lived under the bridge while 6 to 10 per cent lived in their parent's homes. The majority of those living with Mallams were mainly in Adamawa State with a recorded 62.5 per cent, while 94.1 per cent were found in Kano State and 50 per cent of the children living under the bridge were found in Lagos State. 23.4 per cent of these children were found to have stayed on the street for up to 6 months; while less than 10 per cent of them had lived on the street for three to four years.⁸¹

However, it has been noted that it is as a result of some factors that these groups of children leave their homes. These factors may vary from physical maltreatment, emotional problems, family financial problems, misdemeanours, unemployment, and migration from neighbouring states. The physical conditions and lack of shelter, alongside malnutrition and lack of clothing expose these children to frequent illness. If possible, they survive by carrying out menial jobs; many others are an easy target for drug peddlers. Their condition is deplorable and it calls for necessary action.⁸²

There is therefore need for preventive strategies to be put in place to stop more children from joining those already on the street. Some contributory factors such as marital and financial problems within the home have been identified as reasons for their resorting to living on the street. They require timely detection, investigation and monitoring by social welfare officers, with adequate funding and fully mainstreamed social welfare programmes. Aware

⁸⁰ The unidentified boy was found floating in the London River Thames. The British police believed the boy was a victim of ritual killing after being brought to Britain from southwest Nigeria; 'Nigeria Police round up 30 in 'evil forest' ritual killings' Associated Press – St Petersburg Times online (World and Nation) Aug 06, 2004 http://www.sptimes.com/2004/08/06/Worldandnation/Nigeria_police_round_.shtml accessed on Aug 22 2010.

⁸¹ UNCRC, *Consideration of reports submitted by States parties under article 44 of the Convention: Convention on the Rights of the Child: 3rd and 4th periodic report of States parties due in 2008: Nigeria*, 5 January 2010, CRC/C/NGA/3-4, available at: <http://www.unhcr.org/refworld/docid/4b7aa9660.html> accessed 22 January 2011.

⁸² Assessment (n 64) 216.

of these requirements, Nigeria has made attempts to mainstream the requirements of the UNCRC into national policies.⁸³ Also, interventionists and reintegration programmes need to be adequate. The only assistance for street children presently, comes from NGOs. But they have failed to take into consideration that these street children had developed strong bonds with their companions and later the NGOs find that after making efforts to provide shelter and assistance for these children they usually return to the streets. This is because the NGOs have failed to make attempts to reintegrate them with their families. Moreover, the Federal and state governments have neglected their responsibilities towards these especially vulnerable children.⁸⁴ From the foregoing, the present author maintains that efforts aimed at curbing the problem of street children should be focused towards their reintegration into the mainstream of society in order to prevent them from going back to the streets. This responsibility should be that of the state and not solely the NGOs that have done so in the past. Budgetary allocation should therefore be directed towards solving this problem. If this is done, it will be in compliance with the requirement of Article 4 of the UNCRC.

Notably, most of the UNCRC's fifty-four Articles have relevance to street children. The UNCRC calls for special protection for children deprived of a family environment and protection from abuse and neglect by other caregivers. Furthermore, the UNCRC recognises the rights of every child to an adequate standard of living⁸⁵ and to education.⁸⁶ It provides for protection of children from economic, sexual, and other forms of exploitation. The UNCRC also realises that there are children engaged in armed conflict and frowns against such participation. This will be briefly discussed in the next sub-section.

⁸³ *ibid*; 'CRC Examines Report on Nigeria' 26 May 2010 <http://www.reliefweb.int/rw/rwb.nsf/db900SID/KH11-85U53X?OpenDocument> accessed on 22 January 2011.

⁸⁴ *ibid*.

⁸⁵ UNCRC art 27.

⁸⁶ UNCRC art 28.

3.6.3 Children in Armed Conflict

The issue of children in armed conflict was reflected in the drafting of the UNCRC and its subsequent development.⁸⁷ This further led to the emergence of the *Optional Protocol to the Convention on the Rights of the Child on the involvement of Children in Armed Conflict* (OPAC).⁸⁸ Buck notes that the increasing number of children in armed conflict situations has been a subject of great consideration as noted in the case of Liberia.⁸⁹ Some of these children were as young as nine years old. Girls were also reported to be raped and forced to become combatants and slaves of the soldiers. While the above portrays the situation in some African countries, it has been reported that in the UK children under the age of eighteen years have taken part in hostilities overseas.⁹⁰ This shows that the problem is not only peculiar to African but one of global concern.

Although Nigeria has not experienced child soldiers like its counterparts in African countries like Sierra Leone and Liberia, there has however been involvement of adolescents in communal conflicts. It was reported that adolescents were involved in the early 1990s crimes of murder, arson and looting during communal clashes in some northern states in the country. Reports have shown that some 'almajiris' were involved in some of the clashes in the north, especially in Kano state. Also between 1999 and 2000 children aged 16 in the Niger Delta region were engaged to oppose the government's policy on the Region.⁹¹ Thus, it has been noted that the involvement of children in ethnic clashes has raised fears about the serious risk of the emergence of child soldiers in Nigeria, if the root causes of youth

⁸⁷ UNCRC art 38.

⁸⁸ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflict 2000, GA/RES/54/263 of 25 May 2000, entry into force 12 Feb 2002.

⁸⁹ CO Liberia, 2004. Other African countries such as the Democratic Republic of Congo have been reported to recruit children into armed groups (List of Issues: Rwanda 2004, CRC/C/70/Add. 22) 11; Buck (n 10) 309.

⁹⁰ CO United Kingdom 2002.

⁹¹ Save the Children, UK 'Sexual exploitation must not be tolerated', May 9, 2006, http://www.essex.ac.uk/armedcon/story_id/000380.html accessed on 23 Aug 2010; Assessment (n 64) 217; Worst Forms Report 2005 (n 30).

frustration, vigilantism and intolerance are not adequately addressed.⁹² Children have been victims of communal violence besides their recruitment in violent acts and rape in the case of girls. Such clashes have led to children being orphaned, while several of the children have been displaced for varying periods of time from their homes.⁹³ The CRA 2003 in s 34 prohibits the recruitment of children into the armed forces⁹⁴ and states that the government or and any other agency shall ensure that no child is directly involved in any military operation or hostilities.⁹⁵ In spite of this provision, apparently, it does not appear that the government has done much to prevent children from being involved in armed conflict or addressing its effects on children. Besides, children have also been actively involved in commercial exploitation in Nigeria.

3.6.4 Commercial Exploitation of Children in Nigeria

Although children have always contributed to work in the Nigerian society, the increasing poverty in the late 1970s necessitated millions of children to be involved in different types of labour that are exploitative, hazardous and prejudicial to their welfare and development. Poverty and certain cultural traits have been identified as the causes of widespread child begging.⁹⁶ In addition to these, middlemen have played an exploitative role on the desperate and ignorant parents, particularly in rural areas, to procure children for commercial trafficking. These trafficking rackets have been said to be on the increase, channelling huge number of children to the employment markets of urban cities. This has resulted in a growing trade in young girls for the purposes of prostitution both domestically and internationally. These young Nigerian girls aged ten to fifteen are transported as far as Europe as debt-

⁹² Assessment (n 64) 217.

⁹³ For instance, the religious communal clash between muslims and Christians in the northern parts of Zango-Kataf, Kaduna, Bauchi and Ife-Modakeke ethnic conflict amongst the Yorubas in the 1990s; Assessment (n 64) 216-218.

⁹⁴ CRA 2003 s 34(1).

⁹⁵ CRA 2003 s 34(2).

⁹⁶ Assessment (n 64) 203.

bonded sex workers.⁹⁷ Such trafficking of children with its attendant negative consequences is seen as contrary to their best interests.

The male children are not left out as a Report shows seven suspected Nigerian traffickers arrested near Abuja in an attempt to traffic 105 male children all packed in a van. The case was referred to the National Agency for the Prohibition of Trafficking in Persons (NAPTIP) for further investigation being an agency established by the Nigerian government to curb trafficking in persons. While the suspects maintained that they were taking the children (*almajirais*) for Qur'anic education with their parents' permission, the NAPTIP thinks otherwise and noted that it will take due process of the law and bring the perpetrators to book.⁹⁸ But one of the children confirmed that he is a Qur'anic student and demanded to be taken back to his parents.⁹⁹ The present author maintains that the controversy here is whether the parents actually gave their consent and if they did, are they certain that the children are taken for Islamic instruction or slavery. If they are taken for Qur'anic education the question posed by UNICEF is who would pay the fees? Also, is it in the child's best interests to be taken from his parents care to acquire Qur'anic instructions far from home, to live with strangers and possibly engage in child street begging?

Recently, the Nigerian media has also been replete with incidences of child kidnapping in the Niger Delta region. One of such incidence is the kidnapping of a three year old British child, Margaret Hill from a vehicle taking her to school. She was released after three days on payment of some ransom demanded by her kidnappers.¹⁰⁰ A few days after her release, a three year old son of a traditional ruler, Prince Samuel Ovunda Amadi was also kidnapped on his way to school and the perpetrators were demanding a

⁹⁷ *ibid*; Worst Forms Report Nigeria (n 30) 2.

⁹⁸ Victoria Isiramen (UNICEF Representative) 'Child Traffickers Arrested with 105 children' www.thisdayonline.com; 3 March 2008, accessed on 3 March 2008; R Buhari, 'Child Traffickers Arrested with 105 children' 01 Jan, 2008 accessed on 01 Jan, 2008; www.allafrica.com/stories/200801240386.html accessed on 03 March 2008.

⁹⁹ *ibid*.

¹⁰⁰ www.bbc.co.uk 8th July, 2007; Thisday Newspaper 'Another 3-year-old Boy Kidnapped' by A Ogbu, 13th July 2007, www.thisdayonline.com accessed on 13 July 2007. Note that before Hill's kidnap two other toddlers were earlier kidnapped although with less media coverage.

ransom of 50 million Naira.¹⁰¹ These increasing incidences of child kidnapping taking place in the Niger Delta region of Nigeria have been grossly condemned both nationally and internationally with calls on every Nigerian to join hands in bringing the perpetrators to justice.¹⁰² Agreeing with this stance, this responsibility should be 'an urgent non-negotiable responsibility for the future of the nation'.¹⁰³ Prof. Wole Soyinka while asserting the vulnerability of children in conflict situations condemns the act of child kidnapping because it degenerates the culture of childhood globally. He opines that the nation should set an example of collective conscience.¹⁰⁴ The present author is of the view that the cause of this kidnapping could be attributed to economic reasons. But be that as it may, it is no reason for another person to take a child against the child's will for commercial purposes. This is contrary to the provisions of the UNCRC, against the human rights of the child and could pose hazards to the life of the child.

There are other forms of child labour which the government needs to adequately address mainly because children have been exploited in various other ways. One of such is sexual exploitation of children which for instance is growing immensely as a result of some socio-economic factors such as poverty. This incidence which has been frowned upon both nationally and internationally will be discussed in the next sub-section.

3.6.5 Sexual exploitation

The sexual exploitation of children constitutes an abuse of their rights as deplored by the UNCRC. Article 34 of the UNCRC requires states parties to protect the child from all forms of sexual exploitation and sexual abuse, and more so, to prevent the inducement or coercion of a child to engage in unlawful sexual activity and the exploitative use of children in prostitution.¹⁰⁵

¹⁰¹ Equivalent of about 250,000GBP as at 2011.

¹⁰² I Sowunmi, 'Soyinka Condemns Child Kidnapping', 14th July 2007, Thisday Newspaper Nigeria www.thisdayonline.com accessed on 14 July 2007.

¹⁰³ *ibid.*

¹⁰⁴ *ibid.*

¹⁰⁵ *ibid.*

The Report notes that it is as a result of its role in the development of the HIV/AIDS endemic in the country, that commercial sexual exploitation became a problem of special concern. Although studies in this area are limited but the few carried out indicate that sexual exploitation of girls is not limited to prostitution as many girls experience other forms of sexual abuse. For instance, these girls get involved in sexual liaisons to obtain all kinds of favours. Students in secondary and tertiary education are also subjected to sexual pressure by teachers and other students.¹⁰⁶

Sexual abuse of children is a global problem that has been addressed ambiguously in existing human rights law. Although international law recognises that children have the right to be free from sexual abuse, in practice there seems to be no specific enforceable international protection for children against sexual maltreatment. Levesque notes the reluctance of nation-states to interfere with other states, nor enact national laws that define the rights of children to be protected from sexual abuse. He admits that it is time to enact explicit laws that protect against specific abuses.¹⁰⁷ The present author agrees with Levesque where he noted that states are reluctant to interfere with other states to protect children from sexual abuse and concludes that this may be as a result of the sovereignty of states. However, there are strong disagreements that states do not enact national laws that protect children from sexual abuse. A good example in Nigeria is the CRA 2003 and other statutory provisions that criminalise sexual abuse. The CRA criminalises sexual abuse and exploitation and provides that anyone found liable of the offence on conviction, shall be imprisoned for a term of fourteen years.¹⁰⁸ Sexual exploitation goes a long way in infringing the human rights of children involved in this act. However, another new trend which has been frowned at both nationally and internally is trafficking in children.

¹⁰⁶ Assessment (n 64) 210.

¹⁰⁷ Roger JR Levesque, "Sexual Use, Abuse, and Exploitation of Children: Challenges in Implementing Children's Human Rights" (1994) 60 Brooklyn Law Review 959-998; Mohammed Y Mattar, 'Trafficking in Persons: An Annotated Legal Bibliography' (2004) 96 Law Library Journal 669-726 at 713.

¹⁰⁸ CRA 2003 s 32 (1),(2).

3.6.6 *Trafficking in children*

Trafficking in children mainly for domestic service or prostitution is a relatively new phenomenon and has attracted wide concern with limited research studies. Many of these trafficked children have been sent by their families to work as domestic servants from a very young age, thus they are more vulnerable to every form of harassment and exploitation. Scarpa identifies tradition and local culture as contributory factors in determining the vulnerability of the children to be trafficked. This is because in the African tradition, children are sent off to stay with other family members as an exchange for educational opportunity.¹⁰⁹ Generally, trafficking in persons is a grave violation of human rights which has recently attracted the international community's attention.¹¹⁰ But, a number of international legislations aimed at combating trafficking put in place since the early 20th century, have been rendered useless owing to the lack of effective enforcement mechanisms. It was not until 2000 that a modern comprehensive international tool to combat trafficking emerged through the establishment by the United Nations of a Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children (Palermo Protocol).¹¹¹ This brought about a consensus on a common normative definition on trafficking in human beings. The Protocol provides a framework for law reform and the criminalisation of this practice.¹¹² The Palermo Protocol defines trafficking in children as:

... the recruitment, transportation, transfer, harbouring or receipt of a child for the purpose of exploitation. Exploitation shall include, at a minimum, the exploitation of the prostitution or others and other forms of sexual exploitation, forced labour or services, slavery or practices similar to slavery, servitude or the removal of organs.¹¹³

¹⁰⁹ Silvia Scarpa, 'Child Trafficking: International Instruments to Protect the Most Vulnerable Victims' (2006) 44 Family Court Review 429-447 at 432.

¹¹⁰ Tel Raviv, 'International Trafficking in Persons: A Focus on Women and Children – The Current Situation and the Recent International Legal Response' (2003) 9 Cardozo Women's Law Journal 659-668.

¹¹¹ Protocol to Prevent, Suppress and Punish Trafficking in Persons, especially Women and Children, Supplementing the United Nations Convention Against Transnational Organised Crime, Annex II, Art 3(a), December 12, 2000 GA Res/55/25, UN Doc. A/55/383 (2000) (Palermo Protocol).

¹¹² Palermo Protocol, art 5.

¹¹³ Palermo Protocol, art 3(a).

Furthermore, the provision criminalises the trafficking of a child for exploitative purposes, irrespective of the means used. Strictly speaking, there appears to be no justification for trafficking and some scholars have referred to trafficking as 'a crime against humanity'.¹¹⁴

But irrespective of the fact that the provision focuses primarily on the criminal prosecution of perpetrators of trafficking, the Protocol also addresses the rights and needs of children who fall victim to traffickers. Thus, in order to achieve maximum effectiveness, States that ratify the Protocol need to review national laws and ensure compliance through a national legislative process. Thus, in agreement with Obakata, having an effective national law would require legislative reform which should not only address the criminal area, but consider all national normative frameworks to further promote the human rights of children.¹¹⁵

Other suggestions made include that the definition provided by the Palermo Protocol should be considered in light of other critically important international legal instruments such as the UNCRC and its Optional Protocols. This is because by prohibiting child trafficking in article 35, the UNCRC ensures the prevention of child trafficking for any purpose or in any form. The present author is of the view that once States take drastic action through legislation to protect and prevent children from trafficking, then protection of other situations that are contrary to the BIC would follow.

With respect to commercial exploitation, this has been taken care of by the UNCRC when it reinforces its Optional Protocol on the Sale of Children, Child Prostitution and Child Pornography. The Protocol contains a definition which seeks to draw attention to the process that may lead into a situation of exploitation, rather than focusing on child exploitation. Thus, it states that the sale of children would mean any act or transaction whereby any person or

¹¹⁴ Tom Obakata 'Trafficking as a Crime against Humanity' (2005) 54 (2) ICLQ 445-458 at 445 (Obakata).

¹¹⁵ UNICEF, *Trafficking in Human Beings, Especially Women and Children in Africa* (Innocenti Research Centre 2003).

group of persons transfers a child to others for remuneration or any other consideration.

The adoption of the Palermo Protocol and other relevant international instruments does not mark the end of the unrelenting commitment of the international community to combat this practice. For instance, other remarkable international efforts such as the Rome Statute of the International Criminal Court,¹¹⁶ address trafficking within the context of enslavement, thereby suggesting a crime against humanity. It goes further to identify other related practices such as sexual slavery.¹¹⁷

3.6.7 Trafficking in Children: The Nigerian Situation

Evidently, what existed in the traditional Nigerian society as fostering arrangement has been taken advantage of and is now seen as commercial trafficking which has greatly obstructed the traditional fostering arrangement.¹¹⁸

Child trafficking for sexual exploitation may be linked with other phenomena, ranging from child prostitution, sex tourism, and pornography. The Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography while describing the act states: “Child pornography ... involves sexual abuse and exploitation of children is linked to child prostitution, child sex tourism and the trafficking of children for sexual exploitation.”¹¹⁹ Child trafficking has also received condemnation on account of neglect and abuse.

Child trafficking moved to the forefront of public attention, largely as a result of some high profile cases that attracted much media coverage. One of such

¹¹⁶ Entered into force in 2002.

¹¹⁷ art 7 (1)(c); 2 (c) defines enslavement ‘as the exercise of any or all of the powers attaching to the right of ownership over a person and includes the exercise of such power in the course of trafficking in persons, in particular women and children’; Obakata (n 114) 4.

¹¹⁸ Assessment (n 64) 211; CRA 2003, s 100 recognises that traditional fostering arrangements can be obtained by making an application to the court.

¹¹⁹ UN Economic and Social Council, Commission on Human Rights, Rights of the Child: Report submitted by Mr. Juan Miguel Petit, Special Rapporteur on the Sale of Children, Child Prostitution and Child Pornography, 61st Session, Agenda Item 13, at 7, § 18, UN Doc. E/CN.4/2005/78 (2004); Scarpa (n 109) 431.

was the much celebrated case of *Adjo “Anna” Climbié*,¹²⁰ the Ivorian girl who died in London in February 2000 as a result of neglect and horrendous physical abuse by her carers. Victoria’s family had sent their daughter to England in the hope that she would have a better life but her life was sadly ended.¹²¹ This incidence proves that child trafficking is contrary to the child’s right to life and violates statutory provisions such as the UNCRC and the CRA 2003. It also shows the failure of child protection systems which also reoccurred in the Baby P case in the UK. In Nigeria, lots of children are trafficked for commercial reasons in large numbers.

In an effort to provide a statistics of children engaged in commercial exploitation, the Nigerian immigration authorities affirmed that children between the ages of seven and sixteen have been transported to Gabon and Cameroun for commercial sex work in Europe from various parts of Nigeria. It is estimated that between March 1994 and January 1997, at least 400 children were rescued in Akwa Ibom State, which is one of the main departure points for Gabon.¹²² Trade in girls has escalated despite constitutional provisions outlawing slavery and forced labour.¹²³

As noted earlier, the Nigerian government on 8th September 2000 signed and ratified the Optional Protocol to the Convention on the Rights of the Child on the Sale of Children, Child Prostitution and Child Pornography and ratified same on 27th September 2010.¹²⁴ Nigeria also became a signatory to the Transnational Organised Crime Convention and its Trafficking in Persons Protocol on the 13th December 2000. Article 5 of the Protocol enjoins States parties to criminalise practices and conducts that subject human beings to all forms of exploitation, including the minimum sexual and labour exploitation.

¹²⁰ *The Victoria Climbié Inquiry*, Cm 5730, 2003.

¹²¹ *ibid*; HC Health Committee, *The Victoria Climbié Report* (Sixth Report) 9 <http://www.publications.parliament.uk/pa/cm200203/cmselect/cmhealth/570/570.pdf> accessed on 13 March 2011.

¹²² Assessment (n 64) 211.

¹²³ CFRN 1999 s 34.

¹²⁴ Doc.A/RES/54/263, 25 May 2000, 54th Session of the UNGA, New York, entered into force on 18 January, 2002. There are presently 118 signatories and 142 State parties to the Protocol; http://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-11-c&chapter=4&lang=en accessed on 20 January 2011.

Notably, the passage of the National Agency for the Prohibition of Trafficking in Persons and Other Related Matters (NAPTIP)¹²⁵ in Nigeria envisages a step forward in addressing this nature of crime together with its attendant problems, but more effort needs to be geared towards this problem. However, Nigeria still needs to ratify the Optional Protocol on the Involvement of Children in Armed Forces as well as the Trafficking in Persons Protocol (Palermo Protocol) as ratification would aid in stopping the further exploitation of children.

Child trafficking violates international human rights law therefore ought to be eradicated. Trafficking has been noted for its complexity and there has been apparent legislative slowness to keep pace with it. Most countries have laws against exploitative child labour but it is also important that they have legislation specifically against trafficking in persons. However, even in countries where there is appropriate legislation, enforcement is often hampered by general ignorance in the law. Nigeria for instance, has legislative framework against trafficking but majority of the people are unaware of it. Another problem identified is the non enforcement of anti-trafficking laws owing to reasons such as corruption in the security forces, lack of cooperation, and the difficulty of pursuing cases through the courts.¹²⁶ Admittedly, child trafficking has exposed so many vulnerable children to risks. A legal framework for international action and national action with adequate sensitisation programmes is therefore necessary to curb this menace.

3.7 Advocating for a framework for international action

The approach of the ILO has been to promote child labour standards and supervise their implementation in countries that have ratified the relevant Conventions. To effectively comply with the objectives of the convention, the present author supports the need for a legal framework in addition to the

¹²⁵ s 4 vests some functions in NAPTIP; NAPTIP Act 2003, s 23 provides that anyone who commits the offence of trafficking is liable on conviction to imprisonment for life.

¹²⁶ UNICEF, 'End child exploitation' www.unicef.org.uk/campaigns accessed on 1 November 2007.

existing national normative framework (the Conventions) which is very relevant to policy makers in effecting children's rights as it will serve as a stable point of reference for the various policy actors responsible for different aspects of children's rights. It also provides the basis on which violators of these rights can be held accountable.¹²⁷

The ILO Report notes that other development efforts in many countries have been channelled within the context of various complementary frameworks such as the Millenium Development Goals (MDGs), and the New Partnership for Africa's Development (NEPAD).¹²⁸ The present author maintains that these development efforts have also featured in Nigeria through legislation and have been relevant to the government.

In agreement with Buck, the adoption of appropriate legislation and regulation will in future, ensure the prohibition and elimination of child labour.¹²⁹ However, the entire framework should be reviewed in order to provide coherence, balance and coverage. In agreement with Buck, when such legislation is formulated at the national level, it poses more challenges than achieving the appropriate legislative standards. A reason the present author attributes to the non-uniform legislations at the various national levels. In spite of these, the focus should now be on eliminating the most hazardous forms of child labour. This is reflected in the *Worst Forms of Child Labour Convention* of 1999 which is seen as an important development in human rights standards. Buck aptly refers to the Convention as one instrument which does not focus international action on an entirely new cause, but on eliminating, as a matter of priority, the worst forms of child labour.¹³⁰ Indeed, advocates of children's rights should concentrate their efforts to eliminate child labour by focusing on litigation. Also, the universality principle allows for jurisdiction to enforce sanctions on crimes against international law. Bullard maintains that the worst forms of child labour being one of such, and a peremptory norm which affects the international community as a whole, can

¹²⁷ ILO Report 2002 (n15) 274; see also Buck (n 10) 189.

¹²⁸ ILO Report 2006 (n 31) para 231; ILO Report 2010 (n 25) 123.

¹²⁹ Buck (n 10) 189.

¹³⁰ Buck (n 10) 188.

be punishable as it endangers values to which the global community is committed.¹³¹ Thus, following Buck there is no need for legislations to focus on a new cause but to be continuous in taking action. Since the focus of international human rights law is to eliminate child labour, with the coming into force of the Worst Forms of Child Labour Convention, its aim alongside domestic laws should be to continue to fight child labour in all its ramifications.

Policies aimed at combating child labour must be tailored to meet particular needs. Such policies should focus on the underlying constraints and incentives that are provided to parents who rather prefer to send their children to work. The present author supports the interventionist approach as also advocated by the ILO Report where it recommends that the consensus of both the governments, academics and practitioners should support interventions that help working children cope with poverty, and such programmes should be geared towards poverty alleviation and making quality education widely available and accessible.¹³² Arguably, this would be in the best interests of these working children especially since it is not all work that is termed as child labour.

Various organisations have supported the need for strategic programmes. One of such is the Time-Bound Programme developed by the ILO.¹³³ In addition to this, the ILO has been working with countries using the Strategic Programme Impact Framework (SPIF) which is an approach used in identifying desired outcomes and ways of achieving them. UNICEF also developed a complementary strategic framework around the concept of the protective environment.¹³⁴ Also, a mainstreaming approach on children as recommended by UN General Assembly Special Session in 2002, placed child labour on the development agenda. This sets a new ambition for the

¹³¹ Bullard (n 2) 181-182.

¹³² Critique of the ILO Global Report 'The End to Child Labour - Within Reach' http://www.workingchild.org/critique_of_ilo_global_report.htm accessed on 16 January 2011.

¹³³ ILO Report 2006 (n 31) para164 notes the Government of the United Republic of Tanzania's commitment in 2001 to eliminate the worst forms of child labour in the country by 2010 through the implementation of a time bound programme. The ILO financed by the US initiated the project.

¹³⁴ ILO Report 2006 (n 31) 109.

worldwide movement against child labour and more importantly, it recognises child labour on the agenda of finance and planning ministries, especially since the worldwide movement has to convince governments to take action to end child labour.¹³⁵ NGOs have also played an important role by partnering with Intergovernmental Organisations (IGOs) with an increased coordination with other UN bodies such as the UNICEF, United Nations Development Programme (UNDP), United States Agency for International Development (USAID), Department for International Development (DFID), Food and Agriculture among others. Finally, capacity building programmes, education, training and development are also relevant to curb the problem of child labour.

As seen from the foregoing, the causes of child labour are complex and not only limited to economic development and poverty. Cox for instance opines that economic development alone will not necessarily reduce the problem of child labour if other causes remain unaddressed. Indeed, if cultural beliefs mean that a country lacks the will power to change things, if children in the work force are still cheaper employees, or educational opportunities are not available, child labour may remain a problem even where a country has achieved its economic ability to eradicate it.¹³⁶ Child labour being multi-faceted needs a multi-faceted approach and the international community needs to realise that a multi-dimensional approach would be needed to curb the practice. In agreement with Cox, the present author maintains that such approach should encompass economic, social, educational and cultural fronts.¹³⁷ By so doing, it will focus on addressing these key areas which have mainly been recognised as obstacles to the implementation of the BIC. Perhaps it is as a result of the diversity of cultures that the UNCRC provides for flexibility in article 3. Thus, this flexibility becomes relevant because it can be adapted to the diverse social, economic and cultural differences of various legal systems although these have been seen as obstacles to the implementation of the BIC principle. Moreover, having recognised that culture influences the application of the BIC, the present author maintains that cultural

¹³⁵ILO Report 2006 (n 31) 110.

¹³⁶Katherine Cox, 'The Inevitability of Nimble Fingers? Law, Development and Child Labor' (1999) 32 Vanderbilt Journal of Transnational Law 115-166 at 144 (Cox).

¹³⁷Cox (n 136) 164.

relativism should not be used to justify an infringement of the substantive rights of children. The discussions which follow will briefly bring to light the role culture and cultural diversity play in the implementation of children's rights and its influence on the application of the BIC principle.

3.8 Cultural Influences

Cultural influences have also been identified as an obstacle in enforcing the rights of the child and implementing the principle of the BIC. The following sub-section will discuss cultural diversity and its influence in enforcing children's rights.

3.8.1 Cultural Diversity

Cultural diversity has been a major influence in enforcing human rights of persons including children. In the same vein, it has also been difficult enacting a universally applicable framework of human rights that would guide every person irrespective of the disparity in religion, cultural background and orientation. An-Na'im notes the necessity for a globally acceptable framework for human rights which he states is difficult to achieve in a world of profound cultural diversity.¹³⁸ According to him, because human rights are said to be universal, indivisible, interdependent and interrelated the onus is now on the international community to treat human rights globally in a fair and equal manner on the same footing and with equal emphasis.¹³⁹ But in doing this, Otto is of the view that in spite of national and regional particularities and various historical, cultural and religious backgrounds, states have the duty to promote and protect all human rights and fundamental freedoms regardless of economic, political and cultural systems.¹⁴⁰

¹³⁸ A An-Na'im, 'Human Rights in Cross-Cultural Perspectives: A Quest for Consensus' (1993) 87 AMJIL 345-348 at 345.

¹³⁹ *ibid*; Vienna Declaration and Programme of Action, 1993, World Conference on Human Rights, U.N Doc. A/CONF.157/23, art 5 (Vienna Declaration).

¹⁴⁰ Dianne Otto, 'Rethinking the Universality of Human Rights Law' (1997) 29 *Colum Hum Rts L Rev* 1-46 at 1.

It would appear that the reason for this stance is because various cultures perceive international human rights law differently as a result, there seems to be different cultural approaches to international human rights law generally, and more specifically to children's rights debate. These cultural approaches are what the present author sees as hindrances to the development and effective implementation of universal human rights. This sub-section therefore aims at considering the ways in which multicultural global societies view international human rights law and will specifically identify some of the factors which affect and influence cultural interpretation of international human rights law. Some of the identified factors range from the role of legal actors to the law-making and drafting processes.

As a point of departure, the following sub-section explores the concept of culture and identifies some conceptual difficulties in cultural analysis especially with respect to the question of whether international law reflects only cultural factors. The sub-section explores the arguments on whether cultural differences serve the interests of those in power. It discusses some cultural influences in the international system by specifically referring to the UNCRC and further points out that the perception of cultural bias in the international system may limit the possibility of enforcement of international human rights law. Finally, the section examines the failure of the system to develop the concept of cultural rights that provide adequate protection for individuals and groups. In the absence of a definite approach, the section suggests a consensus. Meanwhile, discussions on the concept of 'culture' and the disagreements emerging from the difficulties in analysing this concept will follow.

3.8.2 The Concept of Culture

The term 'culture' for the purpose of this thesis refers to 'traditional culture', and both expressions are used here interchangeably. Simply stated, 'culture' consists of the beliefs and practices held or observed by specific human groups that have been passed down over the centuries from their ancestors

through their grand-parents, parents and the society around them. The term is difficult to define, but for the purpose of this discourse, reference will be made to a widely accepted definition given by the United Nations Educational, Scientific and Cultural Organisation (UNESCO) when it states:

Culture is a dynamic value system of learned elements, with assumptions, conventions, beliefs and rules permitting members of a group to relate to each other and to the world, to communicate and to develop their creative potential.¹⁴¹

Following the UNESCO definition, the present author notes that culture has its rules and agrees with Woodman when he submits that culture and its rules include religion, because conventions, beliefs and rules are seen as part of a religious system of thought.¹⁴²

Notably, culture is multifaceted and refers to a value system or a way of life. It includes language, religion, politics, child-rearing practices, marriage and attire.¹⁴³ Furthermore, culture affects both conduct and cognition. For instance it affects the manner in which a language is spoken and can also influence legal processes in many ways.¹⁴⁴ As seen from the diversity of what may constitute culture, conceptual difficulties as well as other factors that are culture related affect the implementation of international law. These will be discussed briefly.

1. Conceptual Difficulties in Analysing Culture

Although the UNESCO definition fails to explicitly include religion in its definition, the inclusion of beliefs and rules suffices here. That notwithstanding, there is need to note that there are conceptual difficulties in

¹⁴¹ Alison Dundes Renteln, 'Cultural Bias in International Law' (1998) 92 American Society of International Law Proceedings 232-243 at 233 (Renteln); Canadian Commission on UNESCO, A Working Definition of Culture (1977) 6 Cultural Trends 83.

¹⁴² Gordon R Woodman, 'The Culture Defence in English Common Law: The Potential for Development' in Marie-Claire Foblets and Alison Dundes Renteln (eds) *Multicultural Jurisprudence: Comparative Perspectives on the Cultural Defense* (Hart Publishing 2009) 7-34 at 8.

¹⁴³ Renteln (n 141) 83.

¹⁴⁴ *ibid.*

cultural analysis. This emerged from debates on whether international law reflects cultural factors. Other disagreements are based on Third World positions on standards but Renteln argues that it would be wrong to ascribe the positions taken to culture as other Third World interests in the past were not necessarily as a result of culture but were based on economic considerations. Clearly what this means is that apart from cultural considerations that affect the implementation of international law in the Third World, other factors, mainly economic also hindered the implementation. One which Renteln while citing Anand refers to as conflict of interests when she states that, 'it is this conflict of interests of the newly independent states and the western power, rather than differences in their cultures and religions, which has affected the course of international law...' ¹⁴⁵

2. International Law Analysis of Culture

Another disagreement is that international law analysis equates culture with nationality. Renteln is of the view that while in some situations they coincide, as in the case of language, in other situations it is a matter of government policy. What is implied here is that differences between nation-states on various legal topics may be based on different policies adopted by elites, instead of a fundamental difference that is based solely on societal values. ¹⁴⁶ The present author is of the view that because the elites adopt these policies, particular regard is not made to particular needs, especially the needs of children.

3. Post-Modern Tendency to deconstruct Culture

Finally, another difficulty identified is the post-modern tendency to deconstruct culture. This argument maintains that cultural differences are virtually meaningless because they are designed to serve the interests of those in power. For instance, any cultural difference militating against women's rights

¹⁴⁵ibid 233; RP Anand, 'Attitude of the Asian-African States Toward Certain Problems of International Law' in Fredrick E. Snyder & Surakiart Sathirathai (eds), *Third World Attitudes Toward International Law: An Introduction* (Martinus Nijhoff 1987) 5-22 at 17.

¹⁴⁶ ibid.

are said to be automatically held invalid. Based on this argument, it would appear that by definition, culture is 'male culture' because it was created by men and so illegitimate.¹⁴⁷ The present author does not agree with this argument because it suggests that policies and laws are made for the purpose of those who made them. This is not the case because policies and laws are made with input from the general public especially with the role played by NGOs. But in any case there must be adequate representation and consideration should be given to cultural differences. As a result of these difficulties and many others, some jurists have remained suspicious of arguments based on divergent cultural conceptions. They opine that culture should remain a contested concept and one whose influence should not be over-emphasised.¹⁴⁸ Culture has also influenced international law in many ways even in the manner in which it has been interpreted. The next subsection aims at showing this and the role legal actors played in ensuring that culture influenced the interpretation of international law.

3.9 The Role of Legal Actors

The role of the judiciary on this point is worth considering. Thus, in determining whether culture actually influences the interpretation of international law, Renteln notes the relevance of legal actors, namely judges. According to Renteln, Judges have refused to acknowledge cultural influences. They perceive themselves as belonging to a global culture in which case their national cultures cease to matter. Particular reference was been made to the International Court of Justice judges who rejected the notion that their cultural influences shaped their reasoning.¹⁴⁹ In discharging their duty, they accept the universality of international law by applying international standards notwithstanding cultural context. Secondly, these judges reject bias cultural or national factors so that they will not be partial since they are

¹⁴⁷ Renteln (n 141) 233.

¹⁴⁸ Philip Alston, *The Best Interests of the Child: Reconciling Culture and Human Rights* (Clarendon Press 1994) 20 (Alston); Renteln (n 141) 233.

¹⁴⁹ Renteln (n 141) 233; 242.

international judges.¹⁵⁰ However, the present author is of the considered opinion that Judges and indeed judicial officials are to some extent influenced by cultural orientation and sometimes by statutes. As such in making decisions, they take into consideration customs and traditions of the parties as long as they are not in violation of the fundamental rights of the child or repugnant - which is a test used in some colonial African countries as a benchmark. For instance, in Nigeria, customs and traditions which are expressions of cultural behaviour are guided by the provisions of the Evidence Act where it states in Section 14 that the court may take judicial notice of customs and apply same so long as such customs and traditions are not repugnant to natural justice, equity and good conscience. Among the Binis in Edo State of Nigeria for instance, the Supreme court has consistently upheld the Bini custom as it relates to inheritance of the *Igiogbe*.¹⁵¹ Apart from these influences, the law making and ratification processes have been identified as influences to the implementation of international law, which arguably also influence the protection of the child.

3.10 Law-Making Process

In identifying the law making process as a factor that influences the implementation of international law, Renteln exemplifies this when she says that delegates representing nations at international meetings for instance may make statements that reveal different values. Also, in the process of ratifying treaties, some States enter reservations based on cultural differences.¹⁵² For instance, observations from the drafting process of the UNCRC manifested an element of cultural bias from the phrase “*rights of the child*” instead of “*children’s rights*”, thereby reflecting a preference for individual rights rather than group rights.¹⁵³ Also, the UNCRC was criticised for using the ‘BIC’ standard, a standard challenged for its cross-cultural application.¹⁵⁴ With

¹⁵⁰ *ibid.*,

¹⁵¹ *Idehen v Idehen* [1991] 6 NWLR 382.

¹⁵² Renteln (n 141) 234.

¹⁵³ *ibid.*

¹⁵⁴ Cynthia Price Cohen, ‘Book Review’ (1995) 89 AJIL 854.

respect to cross-culture, others have argued that since the best interests standard developed in Anglo-American jurisprudence, it renders the instrument vulnerable to a charge of eurocentrism.¹⁵⁵ This argument is premised on the fact that the western States were the 'principal drafters' of the instrument and non-governmental organisations (NGOs) have manifestly frowned at the lack of participation by Third World countries.

Another issue identified with the drafting process is religious differences regarding the proper treatment of children, for instance some states that attended some of the Working Group's session challenged the provision of Article 21 concerning the obligation of states parties to implement a system of adoption that ensures the BIC. This resulted in a change in the provision to the effect that the right only applied to those states that permitted adoption. The present author is of the view that this is a positive move as it only limits adoption to the States that practice it rather than a general application. It took into consideration that there might be States, for instance Islamic States that do not practice adoption. Also, in line with this, pressures from Islamic states further led to the alteration or modification and removal of some provisions that were inconsistent with Islamic religion. Although this reflects the importance of cultural factors in drafting international human rights instruments, it goes a long way to show that religious or cultural differences can affect the development of international law,¹⁵⁶ as well as the implementation of children's rights. There is therefore the need to take into consideration the views of the developing States in the law making process. The same fear has been expressed by Harris-Short when she submits that the concerns of states from the developing world are being ignored.¹⁵⁷ '...Thus, a great deal more work still needs to be done to improve both the quantity and effectiveness of non-Western participation in the drafting process of

¹⁵⁵ Renteln (n 141) 234.

¹⁵⁶ *ibid.*,

¹⁵⁷ Sonia Harris-Short, 'International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the United Nations Convention on the Rights of the Child' (2003) 25(1) Hum Rts Q 130-181 at 155.

international conventions if the ideals of a fully inclusive, cross-cultural human rights regime are to be realised'.¹⁵⁸

The UNCRC notes how cultural considerations influence the application of international law, especially with respect to children. This is aptly reflected in Article 24(3) which requires states parties to 'take all effective and appropriate measures with a view to abolishing traditional practices prejudicial to the health of children'.¹⁵⁹ The amendments made to the initial provision of the article shows that the choice of language is relevant because the original version of the article as proposed by the informal NGO ad-hoc group had an additional phrase: 'and shall take all appropriate action including necessary legislative, administrative, social and educational measures to ensure that children are not subjected to such practices'.¹⁶⁰ In addition to this, there are arguments that in the ratification of human rights instruments states bind themselves to uphold the rights contained therein and should not complain about the origin of those rights. However, there are counter arguments that some states' parties ratify human rights instruments only to gain access to international capital even when they do not wish to be bound by them.¹⁶¹ But most importantly, these treaties are signed by the political elites of a country and may not be what the populace want to be bound by.¹⁶² Apart from the choice of language and ratification playing a significant role in the drafting process of treaties, the present author agrees with Banda that by placing reservations when ratifying a particular instrument, States intend to shy away from their most pressing problems thereby slowing down the implementation of international human rights law.¹⁶³ When these reservations are placed, implementation both at the international and domestic level will be hindered. In the following discussion, the thesis will briefly consider the use of reservations and its effects on human rights treaties.

¹⁵⁸ John Murphy, *International Dimensions in Family Law* (Manchester University Press 2005) 309-310.

¹⁵⁹ UNCRC 1989 art 24(3).

¹⁶⁰ Renteln (n 141) 234.

¹⁶¹ Fareda Banda, 'Global Standards: Local Values' (2003) 17 *Int'l J. of Law, Policy and the Family* 1-27 at 3 (Banda).

¹⁶² *ibid.*

¹⁶³ *ibid.*

3.11 Reservations

The use of reservations shows the effect of cultural differences on the interpretation of Conventions. Of note is the ratification of treaties by Islamic states with reservations to the effect that they will not be bound by the provisions in the treaties which conflict with Islamic law.¹⁶⁴ This is evident in some treaties like the UNCRC and the Convention on the Elimination of All Forms of Discrimination Against Women 1979 (CEDAW). By placing reservations, Renteln opines that Islamic states intend to interpret international human rights law in such a way that they will be exempted from sections of the instrument which they claim to be in conflict with their religious law.¹⁶⁵

The problem with this is that if all States place reservations with areas of conflict in the UNCRC for instance, then how would there be a uniform implementation of the UNCRC and how would children's rights be protected. But in as much as there is need for a uniform implementation, it would be difficult for States especially multicultural States to ratify such instruments without reservations. Also, as noted earlier, one of the reasons for the wide ratification of the UNCRC is because it allows for such reservations. However, placing reservations has some effects which the next sub-section will briefly discuss.

3.12 The Effect of Reservations to Human Rights Treaties

A major problem identified with human rights treaties is that at ratification, many states parties place reservations on some of the provisions of the Convention. Crucially, some of the reservations, Ernst notes, have received criticisms from other states parties on grounds that reservations are contrary to the 'object and purpose' of the Convention and are therefore impermissible

¹⁶⁴ Renteln (n 141) 236.

¹⁶⁵ *ibid.*

and unacceptable.¹⁶⁶ Of note, the issue of reservations has sparked off debates within and outside the UN, and it appears the Vienna Convention on the Law of Treaties has expanded the debate by interpreting the effect of reservations on international treaties.

The Vienna Convention defines a reservation as “a unilateral statement made by a State, when signing, ratifying, accepting, approving or acceding to a treaty, whereby it purports to exclude or to modify the legal effect of certain provisions of the treaty in their application to that State.”¹⁶⁷ The position within the UN system is that a treaty body lacks the power to declare that a reservation is inconsistent with the object and purpose of the relevant treaty.¹⁶⁸ However, States are prevented from making reservations where the treaty expressly prohibits the reservation, only permits specified reservations, or where the reservation contravenes the object and purpose of the treaty.¹⁶⁹ It has been argued that this last circumstance poses a problem of interpretation as there are no existing mechanisms to determine whether a specific reservation is incompatible with the object and purpose of a treaty. This implies that only the State making the reservation can determine this. As a result, some governments, international organisations and other stakeholders have called on states parties to withdraw their reservations to the UNCRC.¹⁷⁰

Reservations also have effect both on the State making it, on individuals and on the global community. Donnolo and Azzarelli note that the USA forfeits a prominent role in the human rights arena, which may negatively affect not only the human rights of its citizens but those of other citizens of the larger global

¹⁶⁶ Julia Ernst, ‘U.S Ratification of the Convention on the Elimination of All Forms of Discrimination against Women’ (1995) 3 Michigan Journal of Gender and Law 299-367 at 299; Vienna Declaration (n 139) Pt II, 5.

¹⁶⁷ Vienna Declaration (n 139) art 26.

¹⁶⁸ Andrew Byrnes and Jane Connors, ‘Enforcing the Human Rights of Women: A Complaints Procedure for the Women’s Convention’ (1996) 21 Brooklyn Journal of International Law 679-797 at 679.

¹⁶⁹ *ibid*; Gay J McDougall, ‘Toward a Meaningful International Regime: The Domestic Relevance of International Efforts to Eliminate All Forms of Racial Discrimination’ (1997) 40 HowLJ 571-595 at 571.

¹⁷⁰ *ibid*; Vienna Declaration (n 139) 46.

community.¹⁷¹ Thus, they maintain that the United States sends a message that it is not taking human rights treaties seriously.¹⁷² The effect is that the State party can possibly receive criticisms from other governments. This brings us to the issue of reciprocity in the sense that other States parties would possibly treat the USA in the same way when they are faced with human rights issues. Thus, An-Na'im supports the need for cross-cultural dialogue and suggests the *golden rule* of treating others the way one expects to be treated by them.¹⁷³ Impliedly, cross-cultural dialogue is essential when making laws as this will curb the increasing number of reservations thereby ensuring that the implementation of the rights of children and the BIC principle will be ensured. The above discussion has noted the global consequences that may arise when States parties enter reservations when ratifying international treaties.

In agreement with Powell, reservations generally undermine the idea of universality although they preserve states' ability to gain respect as human rights observers.¹⁷⁴ Soibhán notes that the extensive reservations entered in the UNCRC reflect the reluctance of states to apply human rights standards to the family.¹⁷⁵ In the light of the prevailing circumstances, pressures should be aimed at discouraging and reversing the present existing trend on placing such reservations.¹⁷⁶ To achieve this, there are suggestions for supervisory organs to play an important role of determining whether a reservation is consistent with human rights treaties.¹⁷⁷ However, in as much as the reservations are used by states parties to shy away from implementing their obligations under universal human rights, multicultural global societies also

¹⁷¹ Paula Donnolo & Kim K Azzarelli, 'Ignoring the Human Rights of Children: A Perspective on America's Failure to Ratify the United Nations Convention on the Rights of the Child' (1996) 5 Journal of Law and Policy 203-209 at 203.

¹⁷² *ibid.*

¹⁷³ Abdullahi An-Na'im, 'Cultural Transformation and Normative Consensus' (1994) 8 International Journal of Law and the Family 62-81 at 68.

¹⁷⁴ Catherine Powell, 'Introduction: Locating Culture, Identity and Human Rights' (1999) 30 Columbia Human Rights Law Review 201-224 at 201.

¹⁷⁵ Soibhan Mullally, *Gender, Culture and Human Rights: Reclaiming Universalism* (Hart Publishing 2006) 104-105.

¹⁷⁶ Belinda Clark, 'The Vienna Convention Reservation Regime and the Convention on Discrimination against Women' (1991) 85 Am.Int'l L 281-321.

¹⁷⁷ Andres E Montalvo, 'Reservations to the American Convention on Human Rights: A New Approach' (2001) 16 Am U Intl L Rev 269-305 at 269.

perceive international human rights law as alien and Eurocentric which is one of their justifications for placing reservations. The next section addresses briefly the issue of eurocentrism and how it affects the implementation of the UNCRC.

3.13 Eurocentrism

Eurocentrism as a factor is one argument which has stirred up controversy as to whether international law is Eurocentric, in the sense that it has European flavour having emerged from the European experience. Some of the reasons adduced to this claim were examined by Renteln.¹⁷⁸ Firstly, the ICJ has only two official languages, namely English and French. What this means is that a Judge whose native language is not English or French is at a disadvantage.¹⁷⁹ Secondly, the World court meets only in The Hague and its procedures are an amalgam of the common law and the civil law. In addition, much of the substantive law in the major instruments was developed by European states. Again, the representation at the ICJ appears to be non-proportional as European states have more representation than African, Asian and Latin American states.¹⁸⁰ In sum, once the representation is non-proportional, then the voice of some others will not be heard when issues concerning them arises.

Another reason is that non-European states may feel alienated by rules they regard as biased and strange. Some even view it as a form of cultural imperialism and neo-colonialism.¹⁸¹ Thus, if states take this view, there is the fear that they may not be inclined to submit disputes to international tribunals or to comply with international rules thereby limiting the enforcement of international human rights generally and the rights of children and more

¹⁷⁸ Renteln (n 141) 233-243.

¹⁷⁹ *ibid.*

¹⁸⁰ The 15 members of the court is distributed as follows: Africa (three) Latin America & Caribbean States (two) Asia (three), Western Europe and other States (five) and Eastern Europe (two); International Court of Justice <http://www.icj-cij.org/court/index.php?p1=1&p2=2> accessed on 8 May 2008; <http://www.the-hague.info/court/> accessed on 11th September 1652010.

¹⁸¹ Renteln (n 141) 233-243.

specifically, the BIC principle. But apart from these factors, other factors inhibiting the implementation of the rights of the child also exist in specified treaties. The following sub-section will bring to light these factors with reference to some treaties that abhor statutory provisions that are contrary to cultural practices that hinder the implementation of the rights of the child.

3.14 The Impact of Traditional and Cultural Practices on the Rights of Children

That tradition and cultural practices do to a large extent impact on the rights of children is a fact that cannot be over emphasised. The right of people to participate in their own culture is a human right as asserted by the Universal Declaration on Human Rights (UDHR) 1948.¹⁸² This was later reiterated in the International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966.¹⁸³ At the regional level, the ACRWC 1990 obliges states parties to 'take all appropriate measures to eliminate harmful social and cultural practices which affect the welfare, dignity, normal growth and development of the child and particularly, those customs and practices which are prejudicial to the health or life of the child; and those customs and practices which are discriminatory to the child on grounds of sex or other status'.¹⁸⁴ Most interestingly, the Charter places the responsibility on every child to 'preserve and strengthen African cultural values in his relations with other members of the society, in the spirit of tolerance, dialogue and consultation and to contribute to the moral well-being of society'.¹⁸⁵ Remarkably, the present author sees this as an acknowledgement that this responsibility is not only on the state or parents but also on the child to preserve African cultural values. The reverse is however the case with international instruments such as the UNCRC as there is no such provision to preserve cultural values.

¹⁸² UDHR 1948 art 27(1).

¹⁸³ ICESCR 1966 art 15(1)(a).

¹⁸⁴ ACRWC 1990 art 21 (1)(a)(b); ACHPR 1981 art 29 (7); PR Ghandi, *International Human Rights Documents* (3rd edn OUP 2002) 394.

¹⁸⁵ ACRWC art 31(d).

While Rahman and Nahid note that human rights law grants children special protection rights mainly because they cannot adequately protect themselves or make informed decisions on matters affecting them for the rest of their lives,¹⁸⁶ the UNCRC affirms the rights of the child to these protections.¹⁸⁷ The UNCRC's intention to protect children's rights has been hindered owing to some cultural practices that are regarded as a violation of children's rights. Female Circumcision or Female Genital Mutilation as preferred by some people has been generally regarded by the international community as a violation of children's rights. It is commonly performed on girls between the ages of four and twelve. The custom as noted by Renteln involves the removal of some or all of a woman's external genitalia.¹⁸⁸ She notes that the practice is prevalent in the Middle East and in Africa (even in Nigeria) which has necessitated calls by the UNCRC on States parties to abolish such traditional practices which are prejudicial to the health of children.¹⁸⁹ Moreover, the concluding observations of the CRC on particular countries, for instance Nigeria, often include a call for governments to stop female circumcision and traditional practices that are harmful to children.¹⁹⁰

However, in spite of the UNCRC's stance against harmful practices, other language in the UNCRC raises the issue of children's ability to consent to a procedure such as female circumcision. The instrument recognises that children have an '*evolving capacity*' to make decisions affecting their lives.¹⁹¹ By this provision, a mature minor may consent to events and procedures under certain conditions provided the child has the requisite capacity to make such decisions.

An interventionist approach seems to be supported by the UNCRC as it urges governments to promote the 'best interests' of the child by intervening to prevent the practice of female circumcision. Although preventing girls from

¹⁸⁶ Anika Rahman and Toubia Nahid, *Female Genital Mutilation: A Guide to Laws and Policies Worldwide* (Zed Books Ltd. 2000) 28.

¹⁸⁷ *ibid.*

¹⁸⁸ Alison Dundes Renteln, *The Cultural Defense* (OUP 2005) 51.

¹⁸⁹ UNCRC 1989 art 24(3).

¹⁹⁰ CRC/C/15/Add.61; CRC CO on Nigeria's Initial Report 1996.

¹⁹¹ UNCRC 1989 art 5.

undergoing female circumcision may not at first glance seem to be in their best interests, as earlier statements show that girls may encounter some social consequences such as difficulty in finding a spouse or gaining acceptance among peers. But in reality the girls may also face some negative health effect which is a reason why the 'best interests' standard should be interpreted to support the call to stop female circumcision.¹⁹²

In addition to this, international human rights law finds governments accountable for the practice of FGM in their countries. Freeman also maintains that arguing for immunity of cultural norms from scrutiny would hinder the development of international human rights law. Such a practice may be condemned by some in the claim for universality, but others may condone it in the name of culture. In his words, he states, "Our claim to normative universality is challenged by others as merely the imposition of a particular Western conception on those who have different conceptions of core human values."¹⁹³

The next sub-section will briefly discuss one of the hindrances faced in the implementation children's rights which have been mainly attributed to the notion of cultural relativism.

3.15 Cultural Relativism

The United Nation's efforts to establish universal respect for and observance of human rights and fundamental freedoms have been difficult owing to the emergence of the notion of cultural relativism.¹⁹⁴ While some scholars assert that cultural relativism in general "condemn(s) the notion that there are universal standards by which all cultures may be judged and...den(ies) the legitimacy of using values taken from western culture to judge institutions of

¹⁹² Traditional or Customary Practices Affecting the Health of Women: Report of the Secretary General (Fifty-Third Session, September 10, 1998) UNGA A/53/354, 17-18.

¹⁹³ Michael DA Freeman, *A Commentary on the UN Convention on the Rights of the Child Article 3: The Best Interests of the Child* (Martinus Nijhoff 2007) 37.

¹⁹⁴ JD Van der Vyver, 'American Exceptionalism: Human Rights, International Criminal Justice and National Self-Righteousness (2001) 50 Emory Law Journal 775-832 at 775.

non-western cultures”,¹⁹⁵ on the other hand, cultural relativists oppose the universality of human rights norms.¹⁹⁶ Donnelly notes that cultural relativism resides in non-western ‘traditional’ societies for instance, pre-colonial African villages, traditional Islamic social systems, and Native American tribes. However, most other analysts of the concept perceive it as an invention of the muslim world.¹⁹⁷ From the foregoing, there is certainty that cultural relativism is predominant in particular societies, including Nigeria. The present author is of the view that even though cultural relativists oppose the universal application of human rights norms, the application of the BIC principle should be uniform as this will ensure that the rights of the child are protected across jurisdictions. Certainly, some States may have the problem of legal transplantation, but Nigeria should not have that problem since the Nigerian legal system draws experiences from the common law system although Asein maintains that the duality of legal systems in Nigeria (namely, customary law and English law) and volume of external laws such as Islamic law in Northern Nigeria affect the rule to be applied.¹⁹⁸ In agreement with Asein the Nigerian legal system has long been influenced by foreign law such as the English legal system and bears a close resemblance to it as expressed by the Supreme Court in *Caribbean Trading and Fidelity Corporation v Nigerian National Petroleum Corporation*:

Quite apart from the fact that borrowing from other systems has always been and continues to be a common form of legal change and development and that legal transplantation is not foreign to most legal systems ... Nigeria does not cease to be Nigeria because it has chosen a particular mode for ensuring the procedural completeness of its legal system, just as Nigeria does not cease to be Nigeria by choosing the English language ... Our legal system draws much of its strength from being part of a common law system having its roots in the past while remaining organic.¹⁹⁹

¹⁹⁵ *ibid.*

¹⁹⁶ Jack Donnelly, ‘Cultural Relativism and Universal Human Rights’ (1984) 6 Hum Rts Q., 400-419.

¹⁹⁷ *ibid.*

¹⁹⁸ John O Asein, *Introduction to Nigerian Legal System* (2nd edn Ababa Press 2005) 4-5 (Asein).

¹⁹⁹ [2002] 34 W.R.N 11; Asein (n 198) 5.

Thus, we can say that since the Nigerian legal system derives heavily from other legal systems and external influences, to ensure that the child's rights are protected, there is need to have a uniform application of the BIC principle especially in areas which affect their human rights such as the right to life. But since there are divergent views on the definition and application of the BIC, these will have some implications as will be shown subsequently.

Asein points that the diverse levels of legality in Nigeria are influenced by the geo-cultural diversity.²⁰⁰ Nigeria has over 350 ethnic groupings and each has its peculiar differing custom and norms. This situation makes it difficult neither to prove customary law nor to have a harmonised Nigerian common law.²⁰¹ He further notes that the differences in the ethnic rules are evident in the areas of marriage, inheritance and property ownership.²⁰² These areas according to the present author affect the Nigerian child but the question is when they do arise, what law should be applied? For instance, the courts will usually take into consideration the type of marriage that the parties contracted, and the law the parties want to be governed by. In agreement with Asein, although customary laws are recognised as binding in the daily dealings of local communities to which they belong, they are subject to validation by relevant statutes,²⁰³ one of which this thesis has earlier identified as the repugnant doctrine as contained in s 14 of the Evidence Act 2004:

The doctrine of repugnancy in my view affords the court the opportunity for fine tuning customary laws to meet changed social conditions where necessary, more especially as there is no forum for repealing or amending customary laws... whenever customary law is confronted by a novel situation, the courts have to consider its applicability under existing social environment.²⁰⁴

In essence, in applying the BIC principle which cultural relativists would view as alien, the Nigerian courts ought to consider its applicability under existing

²⁰⁰ Asein (n 198) 6.

²⁰¹ *ibid.*

²⁰² *ibid.*

²⁰³ Asein (n 198) 119.

²⁰⁴ *Agbai v Okogbue* [1991] 7 NWLR 391 (Nwokedi, JSC); Asein (n 198) 130.

social environment. Thus, since the social environment presently needs an urgent application of this principle to protect the rights of the child in Nigeria, the court should continue to consider customary laws that meet the new social conditions and protect the BIC.

In England, Woodman notes that ‘the royal courts established judicial customs or precedents that specify the rules applicable throughout the realm which it referred to as ‘common law’, but did not discard the principle that the customary laws of particular communities within the jurisdiction were to be recognised and enforced.’²⁰⁵ He further notes that the courts in England continued to recognise and enforce customary laws but strictly enforced English law in criminal cases.²⁰⁶ But he further notes that English courts may take the culture of a defendant into consideration as seen in *R v Adesanya*²⁰⁷ where a Nigerian woman of Yoruba tribe cut her two son’s faces to give them facial marks, a practice common to the Yoruba culture. The court convicted her of assault occasioning actual bodily harm but she was given an absolute discharge on the ground that she was not aware she was breaking English law. This case shows that English courts will punish for any criminal offence irrespective of its recognition of customs. Thus, cultural relativism is not accepted in criminal cases involving child protection.

In Nigeria, the legal system is diverse with several rules thereby resulting in difficulty in knowing which rule to apply to the varied cultures. It is possible that as the CRA becomes effective and the courts continue to apply the repugnancy test, the emergence of a uniform legal system that would ensure the application of the BIC principle and the protection of the rights of the child in Nigeria is envisaged. Consequently, cultural practices can no longer be used to hinder the protection of children globally. The following sub-section acknowledges the relevance of culture but notes that there are limits to the application of culture.

²⁰⁵ Woodman (n 142) 14-15.

²⁰⁶ Woodman (n 142) 15.

²⁰⁷ Cited in Woodman (n 142) 31 [Unreported] in *The Times* of 16 and 17 July (1974) 4 Royal Anthropological Institute Newsletter 2; Gordon R Woodman, ‘The Challenge of African Customary Laws to English Legal Culture’ in Grillo Ralph et al (eds) *Legal Practice and Cultural Diversity*, (Ashgate 2009) 135-150 at 144-145.

3.16 Cultural Limits

Alston notes the relevance of culture to human rights, but he clearly states that in spite of this, culture must not trump rights.²⁰⁸ According to him, over the years, practices in relation to culture based arguments have yielded in favour of human rights norms following the human rights standards. These include child slavery, female infanticide among others. He identifies other recent cases where cultural arguments have been used to justify the denial of children's rights, namely female circumcision, the non-education of lower class or caste children, the exclusion of girls from education and other opportunities.²⁰⁹

These practices can best be described as being incompatible with children's rights norms therefore requiring the use of the BIC principle to serve as a defence to these cultural practices. By way of illustration, Alston refers to a case study where the principle was applied by the Canadian judiciary to present a preference in favour of the 'apprehension and placement of First Nations children away from their families as natural, necessary and legitimate, rather than coercive and destructive'.²¹⁰ Based on the above, this thesis agrees that cultural considerations must give way when there is a conflict with human rights norms. In addition to this, because customs are relevant to indigenous peoples they should be allowed to retain their personal laws which are now referred to as customary laws but on the basis that such customary laws pass the 'repugnancy test' as contained in most colonial systems.²¹¹

Conclusion

In conclusion, the chapter advances that the causes of child labour are complex and would influence economic development and education of the

²⁰⁸ Alston (n 154) 20.

²⁰⁹ *ibid.*

²¹⁰ Alston (n 154) 21; Marlee Kline, 'Child Welfare Law, "Best Interests of the Child" Ideology and First Nations' (1992) 30 Osgoode Hall Law Journal 375-423 at 423.

²¹¹ Banda (n 161) 4; (this test is used in Nigeria and most African countries); AP Anyebe, *Customary Law: The War Without Arms* (Fourth Dimension Publishers 1985) 7, 18.

child if its causes remain unaddressed. It will greatly affect the protection of the rights of the child as well as the implementation of the BIC principle. The chapter acknowledges that debates over the perception of international human rights by multicultural societies emerge daily but this can be solved by way of consensus between the parties. It further identified some conceptual difficulties in cultural analysis and argues that in the past, the conflict of interests between Third World (non-western) countries and western powers was not solely based on culture and religion but on other considerations which could be economic or political.

Other hindrances to the implementation of children's rights were identified in this chapter such as the role played by legal actors, eurocentrism and lack of participation of non-western states in the drafting process. These are seen as some of the obstacles or challenges to the development of international human rights norms. In addition to these challenges, the UN's efforts to establish universal respect for and observance of human rights and fundamental freedom has proved difficult owing to the arguments by cultural relativists that there are no universal standards to judge all cultures.

Although cultural arguments are necessary, in agreement with Alston they must not be repugnant to natural justice, equity and good conscience. The thesis advances this argument with specific reference to the BIC under Article 3(1) of the UNCRC which serves as a defence to cultural practices that are incompatible with children's rights norms. The thesis argues that this standard which is an obligation under international law faces a problem of implementation both in developed and developing countries alike. In Nigeria, some factors affecting its implementation are cultural practices which constitute a violation of international human rights.

At this point, this thesis therefore suggests the need for a consensus by supporting Renteln where he agrees that as long as cultural differences exist in the world, there should be dialogue about these value conflicts. States participation in lawmaking conferences and other international meetings is

very relevant. There is also the need for greater representation of non-western states in international institutions and in the law-making process.

Chapter Four

Implementing the Best Interests of a Child Principle

4.0 Introduction

This chapter examines the varying conception of the BIC principle and uses case law to portray its application in the United Kingdom and Nigeria. It also brings to the fore the mechanisms for implementing the best interests principle as contained in the UNCRC. The UNCRC's desire to protect children's rights is echoed when it obliges all States parties to respect and ensure the observance of the rights guaranteed to all children within its jurisdiction without discrimination of any kind.¹ In exercising this obligation, States parties are to be guided by the BIC which is *a paramount consideration*.² While the UNCRC sees the BIC as '*a*' *primary consideration*, on the other hand, the African Charter on the Rights and welfare of the Child (ACRWC) sees the BIC as '*the*' *primary consideration*.³ The ACRWC was developed to complement the UNCRC and provides a comprehensive framework for children's rights in addition to respecting and reflecting the traditions, customs and values of the African continent. Also, it is the only Convention in the African region that addresses the issue of adoption. The word '*the primary*' appears to be more strongly worded than '*a primary*' used in the UNCRC. The significance of '*a primary consideration*' over '*the primary consideration*' is that in cases involving children, an authority (for instance, social welfare institutions, judiciary, administrator) must have regard to the BIC and must consider the impact its decisions will have on those interests. Furthermore, by '*a primary*' it implies that the interests of the child will not necessarily be the only interests

¹ UNCRC 1989 art 2.

² UNCRC 1989 art 3 makes the BIC a primary consideration; Fareda Banda, *Women, Law and Human Rights: An African Perspective* (Hart Publishing 2005) 139 (Banda);

³ African Charter on the Rights and Welfare of the Child 1990 art 4, OAU doc. Cab/Leg/24.9/49 (1990), entered into force Nov. 29 1999; <http://www.africa-union.org/root/au/Documents/Treaties/Text/A.%20C.%20ON%20THE%20RIGHT%20AND%20WELF%20OF%20CHILD.pdf> accessed on January 10, 2010; Amanda Lloyd, 'The African Regional System for the Protection of Children's Rights' in Julia Sloth-Nielsen (ed) *Children's Rights in Africa* (Ashgate 2008) 33-51 at 36-37.

to be considered as there may be other competing interests, for example between adults and children, parents (or care givers) and children.⁴ Zermatten concludes that, 'while decision-makers must give primary consideration to the BIC, it does not entail that those interests will necessarily eclipse the competing interests in the case.'⁵ From the foregoing, by using 'a primary' the UNCRC affirms that there may be other competing interests whereas the use of 'the primary' by the ACRWC will imply that the BIC will be the only consideration in all actions concerning children. It therefore gives the principle a level of paramountcy and supremacy over all other considerations. Notwithstanding, under both instruments, states parties are still obliged to protect the rights of children. This obligation clearly does not allow room for derogation especially since the UNCRC makes no provision for states parties to place reservations. Also, after ratifying treaties, as a means of monitoring the extent of implementation, States parties are required to submit reports to the CRC which arguably, is the only means of monitoring. Apart from this lack of monitoring mechanism, there is also no court system which means that the UNCRC lacks a sanctioning mechanism. Thus, the only way the UNCRC becomes effective is when it is incorporated into domestic law in States where incorporation is necessary, for instance Nigeria. In this regard, States are to make legislations that conform to the UNCRC's standards. A good example is the United Kingdom (UK) where the European Convention on Human Rights (ECHR) was incorporated through the Human Rights Act 1998. However, incorporation is not a guarantee of protection as this requirement is not necessary in some States, but what is essential is for all states parties to make efforts to protect the rights of the child and to enforce the principle of the BIC.⁶ Although the UNCRC has not been incorporated in the UK, Nigeria on the other hand has incorporated the UNCRC through the Child Rights Act (CRA) 2003. Nigeria therefore has the legislation but limited developed case law unlike the UK.

⁴ Jean Zermatten, 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18(4) International Journal of Children's Rights 483-499 at 489.

⁵ *ibid.*

⁶ CRC 'Report on the 49th Session of the Committee on the Rights of the Child (Geneva, 15 September–3 October 2008) CRC/C/49/3, 25 Feb 2010 <http://daccess-dds-ny.un.org/doc/UNDOC/GEN/G10/410/05/PDF/G1041005.pdf?OpenElement> accessed on 13 January 2011.

However, it is important to note that the UNCRC was intended to be applied in its entirety. Therefore, considering English case law would no doubt, further develop the use of the best interests principle and its possible application. This chapter examines the Nigerian law applicable to children and offers a comparison of domestic legislations (in this case, the Nigerian Constitution of 1999 and the CRA 2003) with the UNCRC 1989 by drawing examples from other jurisdictions, mainly English law. Furthermore, the chapter discusses the framework put in place for the effective implementation of children's rights and explores ways in which the State party can adequately protect children's rights in order to be compliant with international standards *vis-à-vis* the UNCRC by ensuring that the BIC is adequately protected in all actions concerning children.

4.1 Interpreting the Best Interests of the child principle

Article 3 of the UNCRC establishes the principle which guides the interpretation of all other substantive provisions in the UNCRC. This is reflected by its introduction of the principle of the "BIC as a primary consideration" in all actions concerning the child.⁷ Freeman notes the relevance of Article 3 (1) as being pivotal to the UNCRC as a whole because it lays down the general standard which underpins the rights set out in subsequent articles.⁸ The UNCRC reiterates this principle numerous times, and implies that it reflects the standard with which compliance with the requirements of the UNCRC will be measured. But there are arguments that the principle does not guarantee that a child's best interests will always prevail. Spitz for instance maintains that it only guarantees that the child's interests will be given due weight in every circumstance and decision affecting the child.⁹ This position is true because there are circumstances in which the child's interests do not always prevail. The present author is of the view that

⁷ Lauren M Spitz, 'Implementing the UN Convention on the Rights of the Child: Children's Rights Under the 1996 South African Constitution' (2005) 38 *Van.J.Transnat'l L.* 853 – 1498 at 867 (Spitz).

⁸ Michael Freeman, *A Commentary on the United Nations Convention on the Rights of the Child Art. 3: The Best Interests of the Child* (Martinus Nijhoff 2007) 25 (Freeman Commentary).

⁹ Spitz (n 7) 867.

its interpretation and application should not be the same because in legally diverse societies, there are often diverse conflicting legal systems and other implications that can affect the uniform application of the BIC principle for instance. As such, the BIC cannot therefore be said to be universally applicable across all societies.

If we maintain that there is no universal application of the BIC, there is need to have a proper understanding of what the term 'best interests' implies. As seen earlier, various efforts made to define the term have not come up with a precise definition.¹⁰ While Eekelaar's definition comes in form of classification, namely basic interests, developmental interests, autonomy interests, others have noted that nations are now to take account individual children's evolving capacities and respect to ensure the inherent dignity of all children.¹¹

Freeman comments that while some may interpret best interests as a satisfaction of material needs, others lay emphasis on emotional security, psychological well-being and attention to developmental interest and some others stress moral or religious welfare. Certainly, what best interests means will be interpreted differently. It could also require that it is in the child's best interests to be reared in an environment safe from violence, sex, alcohol, drugs and gaming.¹² Clearly, education is in a child's best interests. But the question Freeman asks is 'where does it rank in emphasis with these other features of welfare? Does education mean schooling? Is it in a child's best interests to be educated by parents or a home tutor and thus deprived of interaction with other children?' Freeman maintains that whatever decision one arrives at largely depends on which aspect of a child's welfare is

¹⁰ See 1.5.2 of this thesis.

¹¹ J Eekelaar, 'The Emergence of Children's Rights' (1986) 6 (2) OJLS 161-182 at 171; Freeman Commentary (n 8) 27. Others e.g. Van Bueren describes the child's interests as the 4 Ps, namely, prevention (access to primary and preventive health care), provision (provision of adequate nutritious foods and clean drinking water, education, leisure), participation (right to be heard in matters affecting their welfare) and protection (against sexual and economic exploitation, cruelty, abduction and trafficking, recruitment into the armed forces and abuses in the criminal justice system); Roger JR Levesque 'Book Review: Geraldine Van Bueren, The International Law on the Rights of the Child' [1995] Fordham Intl Law J 832-839 at 832.

¹² Freeman Commentary (n 8) 28.

dominant in the minds of the judge or legislator.¹³ Thus, while the interpretation of the BIC may vary, the issue of consent cannot be overlooked because of its relevance in decisions that are taken in the BIC. The next subsection will show situations where the BIC principle has featured in case law by focusing on medical treatment, adoption and residence cases. It will show that the court has applied different interpretations such as whether the parents are devoted and responsible, the intelligence and competence of the child and whether the decision will be in the overriding BIC.

4.1.1 The Role of Consent in the Interpretation of the Best Interests of the Child

In interpreting the BIC, consent has been identified as playing a major role in a range of decisions affecting the child. The issue of consent is relevant in this thesis because it shows that decisions taken by the court have the consent of the child in question or the parents. However, the courts ensure that the overriding BIC remains paramount. But, parental consent is very relevant with respect to the child's medical treatment for instance. The courts are of the view that the child's best interests require that his future treatment should be left in the hands of his devoted parents. A statement by the court that the decision was endorsed by the child's parents and the local authority follows:

...it had been the unanimous view of those concerned with the treatment of K that nutrition should cease...¹⁴

Another example is drawn from the controversial case of *Re T (A minor) (wardship: medical treatment)*¹⁵ where a child aged eighteen months was suffering from a life-threatening liver defect. The doctors advised that the child should have a liver transplant as this had good success prospects, whereas the child's life expectancy without the transplant was just over two years. The parents refused to consent as the child had already undergone

¹³ *ibid.*

¹⁴ Per Sir Mark Potter in *Re K (A Child) (Withdrawal of Treatment)* [2006] EWHC 1007 Fam; [2006] All ER 120.

¹⁵ [1997] 1 All ER 906 at 913.

surgery which had caused so much pain and distress, and the mother who had deep concerns about the dangers of failure refused to consent, taking the view that it was better for her child to spend the rest of his short life without pain, stress and upset of intrusive surgery. Lowe and Douglas reaffirmed the court's reasoning that it was in the child's best interests to have a peaceful if short life with devoted parents.¹⁶ In reaching that decision, the court adopted the words of Bingham MR in *Re Z (A minor) (Freedom of Publication)*¹⁷ where he said:

...I would for my part accept without reservation that the decision of a devoted and responsible parent should be treated with respect...¹⁸

The present author notes that the relevant issues which the court took into account in deciding the cases are what it considers to be in the BIC and the decision of 'devoted and responsible parents'. Thus, following the decision in *Re T*, once it is accepted that the parents are devoted and responsible, then any decision they reach should fall within the range of decisions that can be classed as reasonable. If the decision falls outside the range of permissible decisions, it is unlikely that the parents would be seen as responsible or devoted parents who have decided only in the best interests of their child.¹⁹

The cases below further elucidate the difficulties in deciding what is in a child's best interests under case law. One of the reasons which Freeman notes for these difficulties is that there is no adequate checklist that decision makers can use to determine what is in a child's best interests.²⁰ For instance, it failed to provide a checklist of factors as compared with s 1 (3) of the UK Children Act of 1989. Also, Article 3 has been criticised for failing to provide some reference to 'harm a child has suffered or at risk of suffering'. However, Freeman opines that what constitutes harm may sometimes be controversial. Some other people ask whether 'physical chastisement'

¹⁶ *Re T (Wardship: Medical Treatment)* [1997] 1 FLR 502; N Lowe and G Douglas, *Bromley's Family Law* (10th edn, OUP 2007) 395.

¹⁷ [1995] 4 All ER 961 at 986; [1996] 2 WLR 88 at 113.

¹⁸ *ibid.*

¹⁹ *Re T (A Minor)* [1997] 1 All ER 906 at 918 (Roch LJ).

²⁰ Freeman Commentary (n 8) 30.

constitutes harm. Thus, where there is inconsistency on what constitutes harm, a checklist would be adequate to explain what may constitute harm. While Freeman notes the challenges this might pose, he reasoned that even though such an approach has proven useful nationally, it may be difficult to apply to an international document because there may be no consensus as to what may be included in the list.²¹ In essence, there is need to reach an agreement on what may constitute the best interests of a child. This will eliminate any other controversies that might arise in the interpretation of other issues similar to what may constitute harm to a child.

Also, in *Re M (Medical Treatment: Consent)* involving the refusal of a fifteen and half year old girl to consent to a heart transplant which was based on the explanation that she did not want to have another person's heart and that she did not want to take medication for the rest of her life, the court pointed out that she was intelligent and that her views should carry 'considerable weight'.²² According to Diduck and Kanagas, although the court did not explicitly rule on M's competence, it considered her to be lacking the competence necessary to make the decision. Moreover, the girl's mother had already given her consent to treatment. Based on this, the court ruled that 'despite the risks of the surgery and of rejection, and despite the risk that M might resent what has been done to her, the alternative of certain death meant that the operation would be in her best interests and should go ahead'.²³ From the foregoing, there is no doubt that the court takes into consideration the BIC even where the child is competent and has sufficient understanding and maturity to give consent or where the parent has already given consent.

A contrary decision emerged in the *Gillick* case where the court decided that parental right to determine whether or not their minor child below the age of sixteen will have medical treatment terminates if and when the child achieves

²¹ Freeman Commentary (n 8) 31.

²² [1999] 2 FLR 1097.

²³ *Re M (Medical Treatment: Consent)* 1100; Alison Diduck and Felicity Kaganas *Family Law, Gender and the State: Text, Cases and Materials* (2nd edn Hart Publishing 2006) 618 (Diduck).

sufficient understanding and intelligence to enable him or her understand fully what is proposed.²⁴ The *Gillick* case is advancing this thesis because it takes into view the relevance of the understanding and intelligence of the child as a determining factor in what is in the BIC, thereby appearing to do away with parental consent by granting autonomy only to the competent child. But as will be shown in the following discussion, Gillick does not remove parental consent. From the facts of this case, Mrs Gillick challenged the Department of Health's guidance that allowed contraceptive advice to be given to minors without parental knowledge or consent in 'exceptional circumstances'. The House of Lords rejected her claim and held that minors had the capacity to consent to medical treatment provided that they had sufficient maturity and understanding to decide on the matter in question. Many opinions emerged from this decision which appears to hold a promise of greater autonomy for these 'Gillick competent' children. Some authors saw the decision as suggesting that parental rights exist for the benefit of children and dwindle as the child reaches maturity.²⁵ On the contrary, some others opine that the child would need to have sufficient understanding and the capacity to consent to such treatment.²⁶ However, there is clearly a distinction between consent and refusal of treatment. This can be explicated by using *Gillick* interpretation. *Gillick* grants children the capacity to consent to treatment but does not remove parental rights to consent. Thus, Diduck and Kaganas maintain that the Gillick competent child's decision to refuse treatment can be overruled by the consent of her parents or the court.²⁷ The flexibility of the '*Gillick competence*' concept therefore enables the courts to give decisions that are commensurate with the gravity of the case. For instance, in *Re E (A Minor) (Wardship: Medical Treatment)*²⁸ the court overruled the refusal of a Jehovah's witness who was nearly sixteen years old, to accept blood transfusion because the court reasoned that he was not sufficiently competent as he did not have a full understanding of the manner of his death and the

²⁴ *Gillick v West Norfolk and Wisbech Area Health Authority* [1986] 1 AC 112; Diduck (n 23) 616.

²⁵ R Taylor, 'Reversing the Retreat from Gillick? *T (Axon) v Secretary of State for Health*' [2007] 19, 1 CFLQ 81-97 at 81 (Taylor).

²⁶ Diduck (n 23) 616.

²⁷ *ibid* 617; *Re M (Medical Treatment: Consent)* (n 23).

²⁸ [1993] 1 FLR 386.

extent of his own and his family's suffering.²⁹ A similar decision was held in *Re L (Medical Treatment: Gillick Competency)*³⁰ where a fourteen year old Jehovah's witness failed the *Gillick competence* test because she did not have sufficient details about the horrible way she is likely to die.³¹ Again, the present author stresses that having sufficient understanding is relevant in decisions that the child may make for himself or herself but such decisions even when made by the parents or the court must be only in the child's best interests.

A number of cases have shown that the courts decisions have been influenced by the *Gillick and Axon* cases emphasising on whether the child has sufficient understanding to make informed decisions. Note that the court usually looks at the circumstances of each case. For instance in *Re W (A Minor) Medical Treatment: Court's Jurisdiction*³² the court had regard to the nature of the child's illness and the serious deterioration of her condition and noted that it was in her best interests to direct her immediate transfer to a new unit for treatment without her consent.³³

Another example is the unreported case of Hannah Jones³⁴ (involving a 14 year old child who had cancer and refused to continue treatment and her decision was supported by her parents who refused to influence her on grounds that she had sufficient maturity and understanding), where the question that arose is whether the child understands the enormity of death. Even if the child is *Gillick competent*, the present author strongly maintains that where there are life-threatening decisions, the *Gillick competence* test will not suffice. Particular regard should be made at such times to what is best for the child, for instance doctors wishing to make decisions for the child can refer to the Mental Capacity Act 2005 which states:

²⁹ Taylor (n 25) 617.

³⁰ [1998] 2 FLR 810.

³¹ Taylor (n 25) 618.

³² [1992] 3 WLR 758.

³³ *ibid.*

³⁴ Max Pemberton, 'Hannah Jones right to die case: Doctors always listen to the child's views' 12 Nov 2008 www.telegraph.co.uk/health/healthadvice/maxpermberton/3444851/Hannah-Jones-right-to-die-case-Doctors-always-listen-to-the-child's-view accessed on 12 September 2010.

In determining for the purpose of this Act what is in a person's best interests, the person making the determination must not make it merely on the basis of –

- (a) The person's age or appearance, or
- (b) A condition of his, or an aspect of his behaviour, which might lead others to make unjustified assumptions about what might be in his best interests.³⁵

From the vast array of cases, it is evident that children's rights and the BIC principle have featured in various aspects and have gained national and international recognition. Even the courts have noted the growing willingness to give serious consideration to children's rights as seen in the case of *Mabon v Mabon*.³⁶

This effort is also reflected in the case of *Axon*.³⁷ In this case, Ms Axon a mother of five children, two of whom were daughters under the age of 16 at the time of the application. Ms Axon herself had undergone an abortion and regretted it. Being concerned that her daughters would have to undergo a similar experience without her knowledge and guidance, she then challenged the new Guidance which replaced the previous Department of Health Guidance upheld in the *Gillick* case as incompatible. The new Guidance was intended to clarify the existing position of advice given by medical professionals to young people on sexual matters, rather than change the old guidance. The Guidance was a reflection of the *Gillick* decision that young people could receive advice and treatment on sexual matters without parental consent or knowledge provided that the young person understood the advice and its implications and that the advice or treatment was in their best interests.³⁸ However, the court emphasised that the guidelines should not be regarded as a licence for doctors to disregard the wishes of parents on such matters whenever they find it convenient to do so. The court noted that such behaviour would amount to a failure in the doctor's professional

³⁵ Mental Capacity Act 2005 s 4 (1)(a)(b).

³⁶ [2005] EWCA Civ. 634, 32.

³⁷ *R (On the Application of Axon) v Secretary of State for Health* [2006] (Admin) QBD EWHC 37; [2006] 1 FCR 175 (*Axon*); Taylor (n 20) 618.

³⁸ *Axon* (n 37) 154.

responsibilities.³⁹ But the High Court rejected Ms Axon's challenge and reiterated that the 2004 Guidance is not unlawful for any of the reasons which the claimant contended as a result she was not granted the relief sought.⁴⁰

The case of *Axon* does not only concern the rights of children but lays emphasis on 'autonomy'. Taylor notes the submission by Silber J and Thorpe LJ on Article 12 UNCRC which states: 'States parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child'.⁴¹ The State is therefore entitled to give to the child the protection which international instruments such as the UNCRC accords to the child.⁴² Indeed, in agreement with Taylor, the cases of *Axon* and *Mabon* lay emphasis on the importance of the rights of the child to participate in decision-making, with the intention that when the child matures this right extends to the ability to exclude others from the decision-making process.⁴³ Thus, from the *Axon judgment*, it can be concluded that the UNCRC provisions support the general movement towards granting children greater rights concerning their own future while reducing the supervisory rights of their parents.⁴⁴ Apart from this visible right to autonomy granted to the child by the UNCRC, the subsequent discussion will show that other court decisions have been made in the psychological BIC.

One of such is illustrated in the case of *Re H (Shared Residence: Parental Responsibility)*⁴⁵ where the Court of Appeal acknowledged that, from the child's perspective, shared residence has a different psychological impact to

³⁹ *ibid* 155.

⁴⁰ *Ibid* 156.

⁴¹ Taylor (n 25) 617.

⁴² Statement by Baroness Hale of Richmond in *R (On the application of Williamson and others) v Secretary of State for Education* [2005] 15 UKHL 80, cited in *Axon* (n 37) 79.

⁴³ Taylor (n 25) 617.

⁴⁴ *Axon* (n 37) 115.

⁴⁵ [1995] 2 FLR 883. The court held that its decision was in the *psychological BIC* in the US case of *Painter v Bannister* (1966) 140 N.W 2d 152 involving a dispute between a six year old's father and his maternal grandparents. The father temporarily relinquished custody to them eighteen months after the death in a car accident of his wife and daughter. He later remarried. The US Supreme court of Iowa awarded custody to the grandparents relying heavily on the testimony of a child psychologist who testified that the child would 'go wrong' if he was returned to his father.

contact with a non-resident parent.⁴⁶ To buttress this decision, the court noted that it was important that the boys retain the perception that they lived with their father when they did not live with their mother.⁴⁷

Another illustration is found in the case of *Re M (Child's Upbringing)*⁴⁸ referred to as the 'Zulu boy' case where the question that arose was whether it was in a nine years old boy's best interests to remain in London with his foster mother or return to his parents in South-Africa. The foster mother was a white Afrikaner, while the parents were Zulus. The mother had been the foster mother's nanny and housekeeper/cook when she lived in South Africa. The child lived with the foster mother in London for four years with the parent's consent. There was no doubt that the child wished to remain with his foster mother having settled in England, but his view was not sought and his immediate return to South Africa was ordered by the court. Although the boy resisted, he was forced to be returned to South Africa. He spent a few months there before his parents allowed him to return to his foster mother in London. According to Freeman, the court reasoned that, '... it was in the interests of a child that he should be brought up by his natural parents and not, as was happening here, by a psychological parent'.⁴⁹ A further argument was that the child's development has to be 'Zulu development and not Afrikaans or English development'.⁵⁰ As seen from the above, a number of factors were taken into consideration by the court. One of them was the psychological attachment of the child to the foster mother.⁵¹ But most importantly, the court was more concerned about the risk that that child will be affected emotionally if taken away from the family. Another psychological factor given by the court is that the child will get grumpy and disagreeable, he

⁴⁶ [1996] 3 FCR 321 at 322 (*Re H*); S Gilmore, 'Court decision-making in shared residence order cases: A Critical Examination' (1 Dec. 2006) 18 (4) CFLQ 478-498 at 478.

⁴⁷ *Re H* (n 46) 328. In this case, the petitioner aged 16 years was expecting the child P in 1980 when she met the Respondent. Both parties married in 1982. In 1984, they had child L. The marriage broke down in 1992. Mother asked court to order that the two children spend an equal amount of time with the Respondent. Court granted that the children lived with them in alternate weeks. When the order was not implemented, the mother applied for it to be varied. The court ruled that the parent with whom the child lives must allow the child to visit or stay with the other parent and make them aware that they do not just visit.

⁴⁸ *Re M (Child's Upbringing)* [1996] 2 FCR 473; (1996) 2 FLR 441.

⁴⁹ *Re M* (n 23) 484; Freeman Commentary (n 8) 30.

⁵⁰ *Re M* (n 23) 485.

⁵¹ *ibid* 481.

will not quickly grasp *Ndelele* and *Afrikaans*. As a result, he will feel like an outsider with the group when he gets there and everything will go horribly wrong.⁵² But in spite of this factor, the present author maintains that although the court took into consideration the child's development which the court reasoned should be Zulu, this position cannot be said to be in the BIC but rather in the interests of the boy's parents who want him to be identified with the Zulu traditions. Accordingly, the child's best interests should have been sought and, if need be the *Gillick* principle should have been used to determine this.

Thus, based on the decision in this case, it can be concluded that cultural heritage played an important role in the judgment. The court noted its importance by asserting that it is fundamental to the case that the child should continue to grow up knowing himself to be a Zulu boy, identified with the Zulu traditions, knowing that he is South African and feeling identified and confident about that country.⁵³ Freeman submits that if it is in a child's best interests to grow up in the environment of his cultural origins, if biology is more important than psychology, blood than nurturance, then the court came to the right conclusion. However, the general question will be whether the child's best interests will be rightly identified.⁵⁴

Also, in an abduction case involving Nigerian children, the Minnesota law allowed a district court to modify visitation only if such modification would serve the BIC.⁵⁵ This was the case of *Olupo v Olupo* where the court granted custody of the children to their father resident in the US and held that it is in the children's best interests to do so.⁵⁶ The court made this decision based on the appellant's propensity to flee with the children. So, if she abducts the children to Nigeria, it would be virtually impossible for the respondent to recover them. One major reason for this is because Nigeria has not ratified

⁵² *ibid* 493. Freeman Commentary (n 8) 30.

⁵³ *Re M* (n 23) 484.

⁵⁴ Freeman Commentary (n 8) 30.

⁵⁵ Minnesota Statute § 518.175, Subd 5 (Supp. 2001).

⁵⁶ *Olupo v Olupo*, [2002] Dakota County District Court, F99414370.

the Hague Convention on the Civil Aspects of International Child Abduction.⁵⁷ The Convention which is an international treaty is empowered to curb international child abductions by providing judicial remedies to those seeking the return of a child who has been wrongfully removed. In agreeing with this decision, such abduction would essentially sever the children's contact with their father and the resulting separation from the father would therefore not be in the BIC.⁵⁸

From another adoption case we can conclude that parental religious beliefs conflict with the BIC. This can be gleaned from the adoption case of *Re J (Adoption: Consent of Foreign Public Authority)*⁵⁹ where Charles J. pointed out that under *Sharia* law parental responsibility did not include the natural parent's right to agree to adoption and that *Sharia* courts could not recognise an adoption order issued by an English Court.⁶⁰ However, the Qur'an permits *kafala*, which is likened to foster care and enables the child to benefit from substitute care without losing his family name or birth rights.⁶¹ Based on the above, parental responsibility will not include agreeing to adoption of a child where the order was issued by a foreign court. This position is likely to conflict with the BIC.

Also in *Re N (A Minor) (Adoption)*⁶² adoption was considered not to be in the child's best interests partly because of the shame and distress that adoption would bring to the Nigerian father who came from a culture where there was no concept of adoption.⁶³ But this position is likely not to be the case today as adoption is becoming more recognised owing to legislative changes in Nigeria especially with the passage of the Child Rights Act 2003 (CRA).⁶⁴ The Act obliges every State Government and the Federal Government, for the purpose

⁵⁷ Hague Conference on Private International Law, *Hague Convention on the Civil Aspects of International Child Abduction*, 25 October 1980, Hague XXVIII, <http://www.unhcr.org/refworld/docid/3ae6b3951c.html> accessed 13 March 2011.

⁵⁸ *Olupo* (n 56) I.

⁵⁹ [2002] EWHC 766 (Fam); [2002] 2 FLR 618.

⁶⁰ *ibid.*

⁶¹ *ibid.*

⁶² [1990] 1 FLR 58.

⁶³ *ibid.*; Caroline Bridge, 'Case Reports: Adoption: Religion, Family Law' (1 January 2007) 37 Family Law 10.

⁶⁴ CRA 2003 s 125(1) and (2).

of adoption, to establish and maintain within the State and, in the case of the Federal Government, within the Federal Capital Territory, a service designed to meet the needs of a child who has been or may be adopted.⁶⁵ In addition to this, the Act clearly recognises private fostering arrangement for children.⁶⁶ However, the focal issue maintained in this discourse is that the CRA still needs to be passed by all the States to ensure full implementation in line with the constitutional requirement of s 12 of the Constitution of the Federal Republic of Nigeria 1999.⁶⁷

Gleaned from the above discussions, the concept of the best interests is indeterminate. This is because of the different conceptions of what may be in a child's best interests. The stance of this thesis is that it varies from one society to another especially because of the existence of differences between cultures in society, and varies from one circumstance to another. Also, society is largely influenced by historical changes. For instance, today children are allowed to have their views heard in their best interests. Different factors have been shown to influence what is in the BIC. Arguably, it would appear that today, a child could be seen as having the right to autonomy with the ability to choose which parent to live with as seen in the case of *Molly Campbell*, also known as Misbah Iram Ahmed Rana. This case involved a twelve year old Pakistan girl whose mother (a Scottish woman) resides in Scotland. Molly fled from her home to live with her father in Lahore, Pakistan. The initial media reports that Molly had been abducted against her will proved contrary when Molly expressed her desire to be with her father and siblings in Pakistan because the Muslim culture suited her better and her mother's home had become a 'living hell'.⁶⁸ From information gathered, the Pakistan court ordered her return to her mother who was awarded an interim custody in the UK the previous year but the father appealed.⁶⁹ The case generated a legal battle between both parents until the mother decided to renounce her rights to

⁶⁵ CRA 2003 s 125 (1) (a).

⁶⁶ *ibid* ss 120-124 at 120.

⁶⁷ This section requires international treaties to first be domesticated into national law.

⁶⁸ Gerison Langdon-Down, 'Islamic Family Law: Culture Clash' (15 December 2006) 14 LS Gaz 1.

⁶⁹ *ibid*.

Molly/Misbah because she reasoned that it was in the BIC to do so in order not to affect her (the mother's) new family.⁷⁰

Having identified that there are many conceptions of the BIC and that many factors influence the application of the BIC principle which has featured in different domains, the above sub-section suggests that there should be a checklist to determine what will be in the best interests of a child because of the variation in society. When this is in place, perhaps it will allow for uniformity in the application. This would however be difficult to achieve owing to cultural factors. The next sub-section will therefore look at how culture can be reconciled with the BIC.

4.2 The Best Interests Principle vs Culture: A Margin of Appreciation

Freeman maintains that because cultural norms are a major concern they need to be reconciled with the best interests' principle. He further notes the relevance of cultural diversity in the international sphere which has necessitated this reconciliation.⁷¹

Cultural discourse is not only limited to the developing world but features in the developed societies. According to Freeman, it is not true that when culture is discussed in the context of human rights it is assumed to refer to cultural practices in the developing world. He supports his argument by stating that the English cultural practice of sending young children away to boarding public schools may not be in the children's best interests but such practice has not generated a lot of attention, rather it is practices such as female genital mutilation, child marriage, arranged and forced marriage which tend to be prevalent in the developing world that have been the focus of attention.⁷² The present author suggests that a way to accommodate cultural

⁷⁰ The Guardian UK, 'Why Molly Ran', 23 June 2007, <http://www.guardian.co.uk/world/2007/jun/23/pakistan.familyandrelationships> accessed on 10th September 2010. Her mother remarried and had another child so she did not want the present case to affect her new family.

⁷¹ Freeman Commentary (n 8) 33.

⁷² Freeman Commentary (n 8) 34.

considerations within the BIC principle is to allow for a margin of appreciation. That way there will be a consensus on what may be best for every child.

This margin of appreciation drawn from the European Human Rights jurisprudence is suggested by Alston and supported by Freeman.⁷³ When it is applied, it will give the States parties a degree of discretion, thereby enabling cultural considerations to be accommodated within the best interests' norm.⁷⁴ Freeman notes that by entering into reservations, impliedly, the UNCRC contains a functional equivalent to the margin of appreciation, but for obvious reasons States parties cannot enter a reservation to Article 3.⁷⁵

Although there are cultural practices which can possibly be reconciled with the best interests' standard, there are yet others which clearly fall outside any margin of appreciation. It can be said that this is a reason why Alston insists that culture 'must not be accorded the status of a metanorm which trumps rights'.⁷⁶ Others have maintained that cultural defence cannot be used in cases such as slavery and apartheid, child prostitution and female genital mutilation.⁷⁷ But others are of the view that the context of the UNCRC should not be overlooked as it acknowledges that the importance of the traditions and cultural values of each people should be taken into account in order to protect the harmonious development of the child.⁷⁸ These traditions and cultural values may not be problematic but even if the contrary is the case, the UNCRC clearly recognises that the child's welfare should be a primary consideration.⁷⁹ Remarkably, the best interests principle is given some flexibility in order to accommodate some cultural values. The UNCRC maintains that these cultural values if accepted should not be prejudicial to the health of the child and places the task of abolishing traditional practices that

⁷³ Philip Alston, 'The Best Interests Principle: Towards A Reconciliation of Culture and Human Rights' (1994) 8 (1) Int.J. Law & Fam 20.

⁷⁴ Freeman Commentary (n 8) 35.

⁷⁵ Freeman Commentary (n 8) 39.

⁷⁶ Alston (n 73) 20; Michael Freeman, 'Beyond Conventions – Towards Empowerment' (Freeman Beyond Conventions) in Droogleever Fortuyn M, *Towards the Realization of Human Rights of Children*, Lectures given at the 2nd international conference on Children's Ombudswork (Amsterdam 1992) 19-39 at 21.

⁷⁷ Freeman Beyond Conventions (n 76) 35.

⁷⁸ Preamble to the UNCRC 1989.

⁷⁹ UNCRC 1989 art 3(1).

are prejudicial to the health of the child on the States.⁸⁰ Admittedly, this recognition of cultural values shows that the UNCRC is flexible.

Indeed, the flexibility allowed 'best interests' should not only be seen in the cultural context but other factors, such as available resources need to be taken into consideration.⁸¹ Take for instance, traditional fostering arrangements in many parts of Africa which have been largely influenced by resource factors. This type of custody arrangement as aptly described by Armstrong is 'a way of sharing economic resources among family members'.⁸² This could mean a child living with a relative in exchange of some household work to be performed by the child. Although these practices may not be envisaged by the UNCRC, it is argued that they could be in the child's best interests because they ensure better schooling opportunities, food and of course shelter. In agreement with these authors, the BIC will only be ensured if the arrangement actually works, when the child is enrolled in school and not overburdened with household work.⁸³

Some reasons have been given for ensuring the BIC. Freeman for instance proffers the following reasons, firstly, that children have the right to have their welfare prioritised. Secondly, children are the most vulnerable in the society. Thirdly, children must be given the opportunity to become successful adults. Fourthly, adults create children. Fifthly, the desire to sacrifice one's own interest to those of one's child is what being a parent is about. According to him, this is aptly described as 'the argument from Solomon' where a true mother is prepared to give up her child rather than see him cut into two.⁸⁴ This brings us back to the earlier arguments on what a reasonable responsible and devoted parent would decide for their child. Of course she

⁸⁰ UNCRC 1989 art 24(2); Freeman *Beyond Conventions* (n 76) 35.

⁸¹ Freeman *Beyond Conventions* (n 76) 35; Eva Brems, *Human Rights: Universality and Diversity* (Martinus Nijhoff 2001); UNCRC 1989 art 4.

⁸² Freeman *Beyond Conventions* (n 76) 36; Alice Armstrong, 'School and Sadza: Custody and the Best Interests of the Child in Zimbabwe' (1994) 8 *International Journal of Law and the Family*, 151-190 at 151,170.

⁸³ *ibid*; Philip Alston and Bridget Gilmour-Walsh, *The Best Interests of the Child: Towards A Synthesis of Children's Rights and Cultural Values* (UNICEF 1996) 25; Bart Rwezaura, 'The Concept of the Child's Best Interests in the Changing Economic and Social Context of Sub-Saharan Africa' (1994) 8 *Int. J. Law and Fam*, 82-114 at 102.

⁸⁴ Freeman, *Beyond Conventions* (n 76) 40-41.

would want the child to remain alive and not die.⁸⁵ Finally, he used the utilitarian argument to prioritise children's interests so that by giving greater weight to children's interests it maximises the welfare of society as a whole thereby, putting children first helps to build for the future.⁸⁶ Thus, it will be apt to add that a good reason for the child's best interests is to ensure that every child lives a fulfilled life. Given these reasons which apparently are not exhausted, ensuring the best interests principle across jurisdictions remains an arduous task. Implementation of the BIC principle will be looked at in the next sub-section.

4.3 Implementing the Best interests of a child principle

The CRC often acknowledges that the implementation of best interests' principle is a difficult task and notes this in its comments to states parties when it reiterates that the principle is not fully applied and duly integrated in the implementation of policies and programmes of States parties.⁸⁷

The CRC invokes the principle to criticise many laws, policies and practices of States parties. It also notes the way culture, religion and tradition frustrate the implementation of the best interests' principle.⁸⁸ For instance, the CRC noted the challenges faced by Nigeria, namely the long-standing ethnic, religious and civil strife, economic constraints including poverty, unemployment and the heavy debt burden, which may have impeded progress to the full realisation of children's rights enshrined in the UNCRC.⁸⁹

Although these challenges have been acknowledged by the CRC, yet there are some practices that have been grossly criticised, such as the low minimum age of marriage. The CRC expressed strong concerns about

⁸⁵ *Re T (A Minor)* [1997].

⁸⁶ *ibid.*

⁸⁷ *ibid*; CRC/C/15/Add.257, Nigeria Second Periodic Report, CRC Thirty-ninth session, Consideration of reports submitted by states parties under art 44 of the Convention, 13/04/2005, para 34 (CO: Nigeria).
[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/b06804b33ec4eadbc1257018002c82db?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/b06804b33ec4eadbc1257018002c82db?Opendocument) accessed on 20 Sept. 2007

⁸⁸ *ibid* 40-41.

⁸⁹ CO: Nigeria para 8.

forced/early marriages. Although the federal legislation sets the minimum age of marriage at eighteen years, the legislation of most States and the customary law allows for early marriages and girls can be forced into marriage as soon as they reach puberty.⁹⁰ This has resulted in cases of violence and of course health hazards such as vesico-vaginal fistula (VVF) which is a condition resulting from giving birth when the cervix is not well developed. An example of child marriage resulting in violence was exhibited in the gruesome murder of Hauwa Abubakar. This incident made the headlines in 1987 when a child was married off by her father to a 40 year old cattle dealer whom he owed money. For two years she refused to go and live with her husband but at the age of twelve she was taken to him. She ran away from her husband twice because she did not want the marriage but was forcefully returned each time. Unfortunately, on the third occasion, her supposed husband pinned her down and chopped off her legs with a poisoned cutlass resulting in her death.⁹¹ The CRC raised concern that once the girls are married off they are not afforded protection and the enjoyment of their rights as children is not ensured contrary to the provisions of the UNCRC.⁹²

In a recent development, the media is replete with the marriage of a northern federal legislator to an Egyptian girl aged thirteen years. Senator Sani Yarima, a federal lawmaker and former Governor of Zamfara State in Nigeria has been accused by the public of violating the CRA, a federal law by marrying a thirteen year old girl. A move by the Senate and the House of Representatives to probe the marriage was made. In a defence by the Muslim Consultative Forum (MCF), the group argued that the age of eighteen as stipulated by the CRA for marriage was neither the age of maturity nor puberty under Islamic Law. According to the group, some of the provisions of the Act are in conflict with the tenets of Islam and the provisions of the Qu'ran. They strongly maintain that some States in Nigeria are forced to adopt and implement the CRA.⁹³ The case was referred to the National Agency for the

⁹⁰ CO:Nigeria para 54.

⁹¹ Katarina Tomasevski, *Women and Human Rights* (Zed Books 1999) 93.

⁹² CO: Nigeria, para 54.

⁹³ Onwuka Nzeshe, 'Yarima: Parliament Can't Annul Islamic Marriage' ThisDay Newspaper Nigeria, 6 July, 2010.

Prohibition of Trafficking in Persons (NAPTIP) for further investigation. The Agency submitted its findings and recommendations to the Attorney-General of the Federation (AGF) establishing a prima facie case against Yarima for the offence of child marriage contrary to the CRA. Although the case is now before the High Court,⁹⁴ it generated a lot of outburst because in an earlier response to the issue, the Attorney-General argued that the Senator has no case to answer before the law which means he cannot be prosecuted. According to the AGF, the CRA was enacted by the Senate to protect the Nigerian child, not the Egyptian child. What this means is that if this position is taken, Yarima cannot be charged to court for the offence of child marriage. The present author agrees with others who find it absurd that the Chief Law Officer of the country can limit who the Act should apply to, not bearing in mind that the Act is based on an international treaty of which Nigeria has acceded to. The jurisdiction defence by the Attorney-General according to the report cannot avail a person who commits a crime. If admitted, in agreement with Jiduwah, it will mean that foreign children in Nigeria will be left without protection from the CRA.⁹⁵ Obviously, this situation is capitalised upon as a result of the duplicity of laws as the Nigerian Constitution recognises marriages contracted under the Marriage Act and Customary Laws. Apparently, there is need to amend existing legislation to prevent early marriages as the children are taken advantage of. Measures should be taken to ensure that when underage girls are married off, they enjoy their full rights as enshrined in the UNCRC.⁹⁶ This is not to support early marriage, but in view of multi-cultural diversity and the provision of the UNCRC allowing national law to stipulate the age of a child, where early marriage is allowed, protective measures should be ensured. Fortunately, some national laws have made positive efforts to enact laws prohibiting early marriages. For instance, the CRA offers protection to children by prohibiting child marriage.

⁹⁴ Jacob, 'Child Marriage: NAPTIP Indicts Yarima' Leadership http://www.leadershipeditors.com/ns/index.php?option=com_content&view=article&id=14398:george-agba-abuja&catid=16:headline-news&Itemid=102 7 August 2010 accessed on 11 January 2011.

⁹⁵ Charles Jiduwah, 'AGF Bello Adoke is Dancing Naked on Senator Yerima and His 13 yrs old Wife' 1 September 2010, <http://www.saharareporters.com/article/agf-bello-adoke-dancing-naked-senator-yerima-and-his-13yrs-old-wife> SaharaReporters News, accessed on 2nd September 2010.

⁹⁶ CO: Nigeria, CRC/C/15/Add.257, para 55.

The Act renders any person under the age of eighteen years incapable of contracting a valid marriage, and any marriage so contracted is regarded as null and void and of no effect whatsoever.⁹⁷ Based on this provision, the purported marriage contracted from the above case by Yarima to a thirteen year old girl should at best be regarded as 'null and void'. But despite the provisions of the Act, the practice of child marriage still persists and violators are yet to be punished.

There is definitely need for sensitisation programmes, which will involve both the communities, religious leaders, the society at large and children in order to curb the practice of early marriages.⁹⁸ Article 3 should be incorporated into all policies and programmes relating to children. There is need for awareness-raising and educational programmes on the implementation of the best interests' principle and where these exist, they should be reinforced.⁹⁹ The above recommendations can best be achieved when child rights issues are introduced into the academic curriculum in schools. Secondly, by widely disseminating the provisions of the CRA alongside the UNCRC, every member of the Nigerian society for instance will be aware of the provisions of these statutes. From awareness raising and sensitisation programmes, individuals will be familiar with children rights issues and the government will be willing to incorporate the provisions of Article 3 into its policies and programmes. Once this is done, the violation of children's rights will be minimal if not extinguished.

The CRC acknowledges that some States parties may face economic constraints and is concerned that children's best interests may be neglected as a result of budgetary constraints.¹⁰⁰ Based on this, the CRC stressed on the need for the allocation of sufficient human and economic resources for its implementation and the use of participatory approach which will involve NGOs and children.¹⁰¹ Although the CRC is aware of the economic difficulties facing

⁹⁷ CRA 2003: Nigeria

⁹⁸ *ibid.*

⁹⁹ CO: Nigeria, CRC/C/15/Add.257, 35.

¹⁰⁰ UNCRC 1989 art 4.

¹⁰¹ CO: Nigeria, CRC/C/15/Add.257, 18.

the state party which it attributes to widespread corruption and uneven distribution of resources, it expressed grave concern that there is a severe lack of financial resources allocated to the protection and promotion of children's rights and calls on the State party to strengthen its implementation of Article 4 of the UNCRC by prioritising as a matter of urgency, budgetary allocations and efficient budget management, to ensure the implementation of the rights of children to the maximum extent of available resources where needed, within the framework of international cooperation.¹⁰² If adequate budgetary allocations are geared towards the full realisation of children's rights, then their best interests would be taken care of. For instance, children who cannot attend formal education due to poverty would be accommodated in the mainstream educational system.

There is also the need to have a checklist of factors to provide guidelines for what may constitute 'best interests'. Once a checklist is in place, it should be consistent with what is in the BIC. For instance, the guidelines developed by the UN under a UNHCR 'BID' (best interests determination) process for refugee children establishes some relevant factors in determining which of the available options is in the BIC. The UNHCR checklist for instance identifies follow-up measures and notes that each factor varies according to the individual child.¹⁰³ When a checklist is in place, it will identify measures that can be used when determining what is in the best interests of a child and will take into consideration that the factors in the checklist will vary according to the individual child.

Having looked at the normative framework for implementing children's rights, another pressing question at this point is how to implement these rights for children. The next sub-section looks at the mechanisms in place for implementing children's rights which have been categorised into international, regional and national enforcement mechanisms.

¹⁰² CO: Nigeria, CRC/C/15/Add.257, 21-22.

¹⁰³ UN High Commissioner for Refugees, UNHCR Guidelines on Determining the BIC, May 2008, available at <http://www.unhcr.org/cgi-bin/texis/vtx/refworld/rwmain?docid=48480c342> accessed on 13 January 2011.

4.4 Mechanisms for Implementing Children's Rights

Like other UN human rights treaties, the UNCRC lacks any formal enforcement procedure, nor sanctions for failure to meet the treaty's set standards. Thus, there is a presumption that nations that ratify UN human rights treaties only do so in 'good faith'. As a result, proof of this good faith is exhibited in a formal report which is submitted periodically to a committee of experts.¹⁰⁴ The procedure for doing so at the international level will be discussed briefly below with specific reference to the UNCRC which mandates the CRC with such responsibility.

4.4.1 International Enforceability: The UN Committee on the Rights of the Child (CRC)

The CRC which is responsible for examining the progress made by each State party in achieving the obligations set out in the UNCRC is made up of eighteen independent experts who are persons of high moral character and recognised competence in the field of human rights. Members are elected for a term of four years by States parties.¹⁰⁵ The CRC monitors States parties' implementation of the UNCRC. The CRC also monitors the implementation of the two optional protocols to the UNCRC, namely, the optional protocol on the involvement of children in armed conflict,¹⁰⁶ and optional protocol on the sale of children, child prostitution and child pornography.¹⁰⁷

The UNCRC has a self-executing character therefore its enforceability in international law is said to be practically inexistent. This is explicated by the fact that the UNCRC's monitoring mechanism involves only mere obligations for States parties to report to the CRC. This mechanism according to some

¹⁰⁴ Cynthia Price Cohen, 'The Jurisprudence of the Committee on the Rights of the Child' (1998) 5 Georgetown Journal on Fighting Poverty 123-207 at 201 (Cohen).

¹⁰⁵ UNCRC 1989 art 43; Office of the United Nations High Commissioner for Human Rights www.ohchr.org/english/bodies/crc/members.htm, accessed on 1 Aug. 2007.

¹⁰⁶ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts (2000) adopted and opened for signature, ratification and accession by GA Res RES/54/263 of 25 May 2000 entered into force on 12 Feb. 2002.

¹⁰⁷ Optional Protocol to the Convention on the Rights of the Child on the involvement of children in armed conflicts (2000) adopted and opened for signature, ratification and accession by GA RES/54/263 of 25 May 2000 entered into force on 18 Jan. 2002.

authors is based on the believe that the “implementation of the UNCRC has to be monitored in a “positive spirit, with a constructive and aid-oriented thrust and a strong emphasis on the need for international solidarity, cooperation, dialogue and technical assistance in fostering implementation.”¹⁰⁸ At best, this mechanism can be described as voluntary and is largely dependent on the fact that it emerged in order to gain more respect for children. As such, the UNCRC only imposes obligations on States parties to make its content widely known to all legal subjects.¹⁰⁹

Like all other UN human rights treaties, the UNCRC has been noted for lacking a direct method of enforcement or sanctions for non-compliance with the treaty’s standards.¹¹⁰ Thus, States parties who have ratified the UNCRC are presumed to have done so in good faith, with the intention of implementing it fully. States parties demonstrate this *good faith*¹¹¹ by submitting regular reports to the Committee of experts detailing the measures they have taken to implement the UNCRC.¹¹² Remarkably, the UNCRC contains some requirements for implementation which are contained in Articles 43, 44 and 45. Article 43 establishes a Committee of experts, known as the CRC. These experts are elected by States parties and serve in their personal capacities.¹¹³ The same article also provides for a procedure for electing Committee members,¹¹⁴ places of meeting,¹¹⁵ and salaries of the Committee members.¹¹⁶ Article 44 provides an outline of the reporting obligations of the States parties, and includes the frequency and content of the reports. While Article 45 lists initiatives that may be undertaken by the CRC to ensure the effective implementation of the UNCRC.¹¹⁷

¹⁰⁸ Philip E Veerman, *The Rights of the Child and the Changing Image of Childhood*, (Martinus Nijhoff 1992) 208-209; Andre Alen and Wouter Pas ‘The UN Convention on the Rights of the Child’s Self-Executing Character’ (Alen) in Eugene Verhellen, *Monitoring Children’s Rights* (Martinus Nijhoff 1996) 165 – 186 at 176.

¹⁰⁹ *ibid*; UNCRC 1989 art 42.

¹¹⁰ Spitz (n 7) 868; Trevor Buck, *International Child Law* (2nd edn Routledge 2011) 91.

¹¹¹ *My italics*.

¹¹² UNCRC 1989 art 44; Cohen (n 104) 201; Spitz (n7) 869.

¹¹³ UNCRC 1989 art 43(2).

¹¹⁴ UNCRC 1989 art 43(5).

¹¹⁵ UNCRC 1989 art 43(10).

¹¹⁶ UNCRC 1989 art 43(12).

¹¹⁷ UNCRC 1989 art 45(a)-(d).

The mechanism requires States parties to submit to the CRC, reports on the measures they have adopted which give effect to the rights recognised in the UNCRC and the progress made on the enjoyment of those rights.¹¹⁸ The CRC then examines each State party's report and conducts an oral hearing during which it asks questions from the State party's delegation. Thus, the CRC's role is to gain as much information as possible about the truthfulness of the State party's report, to draft and transmit 'list of issues' soliciting written responses from the State party and to conduct an oral examination of each State party's report.¹¹⁹ The last step in the monitoring process is the submission of a report to the UN General Assembly. The CRC thereafter presents 'concluding observations' to the State party.¹²⁰ Unfortunately, unlike some other human rights treaties that have courts for enforcing the rights contained therein, such as the European Convention on Human Rights (ECHR) which has a court known as the European Court of Human Rights (ECtHR), the UNCRC lacks a court system. Cohen notes that State parties make attempts to ensure that their national legislations and children's policies meet the standards of the UNCRC.¹²¹ But this is difficult to achieve owing to the multiplicity of laws and the diversities in the Nigerian legal system. Moreover, the present author finds this as inadequate because merely ensuring that standards are met does not entail enforcement.

The UNCRC can also provide technical assistance to a State party that is struggling to meet the treaty's standards. In this vein, Article 45 instructs the CRC to transmit State parties' requests for technical advice or assistance 'to the specialised agencies, the Children's fund, and other competent bodies'.¹²² Also, Article 45 allows the CRC to obtain information from a wide range of sources. The CRC has also expanded interaction with UN agencies and NGOs even further by annually holding discussion days in a bid to explore general topics of interest to all States parties, including topics on children and

¹¹⁸ UNCRC 1989 art 44.

¹¹⁹ *ibid.*

¹²⁰ *ibid.*

¹²¹ Cohen (n 104) 201.

¹²² UNCRC art 45.

war, economic exploitation, the girl child, the disabled child, the child and the family, and children living with HIV/AIDS.¹²³

Lastly, the implementation mechanism of the UNCRC emphasises public awareness about the standards of the UNCRC. This is because the UNCRC obliges State parties to “make the principles and provisions of the UNCRC widely known, by appropriate and active means, to adults and children alike.” Also, Article 42 obliges State parties to make their reports ‘widely available to the public in their own countries’. Thus, the inclusion of these provisions aims to improve the status of children by ensuring the adequate dissemination of information about children’s rights.¹²⁴ Although the reporting system in itself has a number of advantages, arguably from a legal point of view this monitoring mechanism has been regarded as very weak. For instance, unlike the European Convention on Human Rights and the International Covenant on Civil and Political Rights, the UNCRC does not contain the rights of States parties or individuals to submit complaints to an independent body against a State which infringes its treaty obligations. Thus, individuals wishing to complain about infringements of the UNCRC can only do so by political action, such as lobbying via NGOs or the media.¹²⁵ This is inadequate and needs urgent enforcement procedures such as a court system.

Other mechanisms for protecting children’s rights under the UN system include the appointment of Special Procedures, Representatives or Independent Experts to address specific country situations or human rights issues in a particular country.¹²⁶ Their duties include conducting studies, visiting specific countries, interviewing victims and making specific appeals, in addition to submitting reports and recommendations.¹²⁷ These procedures include a number of child-specific procedures as well as other broader procedures on children’s rights. Child-specific procedures will include, the Special Rapporteur on the sale of children, child prostitution and child

¹²³ *ibid.*

¹²⁴ UNCRC 1989 art 42.

¹²⁵ Alen (n 108) 177.

¹²⁶ www.unicef.org/crc/index accessed on 30th Sept. 2007.

¹²⁷ *ibid.*

pornography.¹²⁸ Another example is the Special Rapporteur on trafficking in persons, especially in women and children.¹²⁹ Country-specific special rapporteurs who focus on specific human rights situations in particular countries and regions can receive individual complaints.¹³⁰ When the Special Rapporteur receives information regarding violations of human rights, such information is transmitted to the government concerned for clarification.¹³¹ This sub-section has looked at how children's rights are implemented internationally using the framework of the UNCRC 1989 and it notes that the UNCRC lacks a stiff enforcement mechanism as its implementation requirements are merely obligatory. Other mechanisms for implementation were also discussed. Indeed, the UNCRC has made practical relevance as will be discussed subsequently.

4.4.2 The Practical Effect of the UNCRC

The UNCRC has been applauded for being a universally agreed set of rights for children.¹³² It is seen as a radical document which brings together for the first time in an international treaty children's welfare rights.¹³³ The UNCRC has advanced the debate on children's rights by acknowledging that children have rights, and these rights are recognised and agreed by the international community. In agreement with Flint, it has raised awareness about children's rights as an issue, thereby paving the way for a fundamental shift in attitude.¹³⁴ Moreover, the UNCRC's set normative standards serve as a 'yardstick' against which domestic laws could be judged.

One practical effect of the UNCRC is its ability to stimulate debate about the interpretation and implementation of children's rights in the developed world

¹²⁸ Mr. Juan Miguel Petit was appointed to this position in 2004; www.ohchr.org/english/bodies/chr/special/themes.htm accessed on 03/10/07.

¹²⁹ *ibid.* Ms. Sigma Huda was appointed Special Rapporteur in 2004.

¹³⁰ *ibid.*

¹³¹ *ibid.*

¹³² Lucy Flint, 'What Practical Difference has been made by the United Nations Convention on the Rights of the Child?' The Graham Turnbull Essay Competition (1999/2000), Law Society 1-21 at 12 (Flint); J Lestor, 'A Minister for Children' in Bob Franklin (ed) *The Handbook of Children's Rights* (Routledge 1995) 100-106 (Franklin).

¹³³ *ibid.*

¹³⁴ *ibid.*

without which, children advocates would still have been arguing on whether children's rights even exist.¹³⁵ Thus, the fact that we can now discuss the practical effects of the UNCRC illustrates the practical difference it has begun to make. Indeed, the fact that today we have an international standard for children's rights allows comparisons which we hope will bring about the much needed change.¹³⁶ Remarkably, Narayan reaffirms that the practical difference which the UNCRC has made is to bring the issue of children's rights to the fore and to the attention of State parties.¹³⁷ This will enable State parties adhere to international standards by practically applying same in their domestic laws.

But Flint is of the view that whatever the symbolic effect of the UNCRC, its full impact on the lives and development of children cannot be truly realised until it makes a difference in practice.¹³⁸ Thus, when the UNCRC becomes fully implemented, it will improve the quality of children's lives by granting them rights.

In order to have any significant impact on children's lives, it is essential for the principles in the UNCRC to be implemented into national law of some countries by way of domestication. The UK and Nigeria for instance, are examples of the countries requiring such domestication of international treaties. While the UK has not domesticated the UNCRC into national law, Nigeria has done so although the UK has a massive application of the BIC principle in case law as gleaned from the examples cited earlier in this thesis. Arguably, the implementation mechanism of the UNCRC is not as effective as other human rights treaties. For instance, by incorporating the ECHR through the Human Rights Act 1998 into UK domestic law, a dramatic change occurred so that English law has adjusted from time to time to take account of decisions of the Strasbourg institutions in cases where it concluded that the human rights of those living in the UK had been infringed. Fortin notes that

¹³⁵ *ibid.*

¹³⁶ *ibid.*

¹³⁷ Rashi Narayan, 'What Practical Difference has been made by the United Nations Convention on the Rights of the Child?' (The Graham Turnbull Essay Competition (1999/2000) Law Society 1-21 at 21.

¹³⁸ Flint (n 132)12.

through the incorporation of the ECHR into domestic law, a radical change of approach was witnessed as the fundamental rights of those living within the UK was protected thereby guaranteeing everyone's constitutional rights and protection.¹³⁹ In the case of the UNCRC, although internationally the UK is bound by the UNCRC, but because the UNCRC has not been internally incorporated, it is not binding domestically.¹⁴⁰ Generally, the impact of the UNCRC in Nigeria as well as the UK has been small. One of the obstacles affecting the slow implementation of the UNCRC in the UK as identified by Flint is poverty.¹⁴¹ The same factor is also identified as one of the factors affecting the implementation of the UNCRC in Nigeria.

A positive aspect of the UNCRC is that it triggered a growing concern for States to establish structures aimed at monitoring the circumstances of children and government policies towards children. One of such structures is the appointment of ombudsperson to represent children. Remarkably, many countries now have an ombudsperson for children.¹⁴²

By appointing a minister for children, the Minister would monitor the implementation of the UNCRC, check legislation for compatibility, initiate change in the area of children's rights, enhance the practical effect of the UNCRC, and create awareness of the issue. The present author agrees with this position because it would make a real difference since the lack of adequate representation of children shows that the UNCRC has not made meaningful impact in such countries.¹⁴³

¹³⁹ Jane Fortin, *Children's Rights and the Developing Law* (3rd edn CUP 2009) 57.

¹⁴⁰ Nigel Lowe and Gillian Douglas, *Bromley's Family Law* (10th edn OUP 2007) 23.

¹⁴¹ Flint (n 132)13. The same applies to Nigeria, CO: Nigeria, para 8.

¹⁴² *ibid.* Nigeria, New Zealand, Sweden and Costa Rica. The UK has four Commissioners for Children in England, Scotland, Wales and Northern Ireland; Jane Williams 'Incorporating Children's Rights: the Divergence in Law and Policy' (2007) 27 (2) *Legal Studies* 261-287 at 284.

¹⁴³ *ibid.*; Flint (n 132)14-15.

But despite the theoretical commitment of states to the UNCRC, it will be apt to say that several states still fail in their obligations towards children.¹⁴⁴ Nigeria is no exception. In France for instance, children still do not have direct access to justice. French law continues to discriminate against illegitimate children. The full effect of the UNCRC has been limited to the extent that the 'Cour de Cassation' has refused to allow direct applicability of the UNCRC in French courts.¹⁴⁵ Similarly, in Japan, illegitimate children are discriminated against. This is evidenced under the intestate succession law, where an illegitimate child takes half of what a legitimate child takes. Also, cultural perceptions limit the effect of the UNCRC.¹⁴⁶ A typical example is drawn from the Nigerian case involving the marriage of a 13 year old Egyptian girl-child to a Nigerian federal legislator discussed elsewhere in this thesis. It shows that religion hindered the application of the UNCRC to this case which is still generating lots of controversies resulting in questions of choice of law.

Thus, if the UNCRC lacks impact in all nations especially in industrialised nations, with all the available resources, its importance may be devalued. This lack of willingness to fully implement the UNCRC will undermine its purpose, therefore the full impact of the UNCRC will never be realised.¹⁴⁷ What this means is that 'the poorer children of the world, for whom the rights under the UNCRC could make the greatest difference, will never be accorded those rights'.¹⁴⁸

In practice, it may be necessary to be in agreement with the views of various authors that the UNCRC still needs to make more impact to the lives of children globally. To realise its practical impact, enormous work still needs to be done.¹⁴⁹ In many states, the UNCRC has failed to initiate changes in law,

¹⁴⁴ Flint (n 132)15; Gillian Douglas, 'The Significance of International law for the Development of Family Law in England and Wales' in Caroline Bridge (ed), *Family Law Towards the Millenium* (Butterworths 1997) 85-124 (Douglas).

¹⁴⁵ *ibid.* CO: France 2004.

¹⁴⁶ *ibid.* CO: Japan CRC/C/15/Add.231, 26th Feb. 2004, para 24.

¹⁴⁷ *ibid.*; Douglas (n 144).

¹⁴⁸ Flint (n 132) 16; Garton Sandifolo Kamchedzera, 'The Rights of the Child in Malawi: An agenda for research on the impact of the United Nations Convention in a poor country' (1991) 5 *International Journal of Law and the family* 241-257 at 241.

¹⁴⁹ *ibid.*; Douglas (n 144).

policy and practice. The following suggestions will however aid in promoting the realisation of the UNCRC. They include, firstly, direct implementation of the UNCRC into domestic law; secondly, allowing individual complaints to be heard by the CRC; thirdly, creating children's Minister, an ombudsman for children and an office for the supervision of children.¹⁵⁰ It is only the joint efforts of local, state, federal governments with the international communities and stakeholders working together that children's rights would be implemented with the ethos of the UNCRC.

4.4.3 The Role of the International Community in the Implementation of Children's Rights

The UNCRC permits the international community to take a supervisory role in the implementation of the rights contained in the UNCRC. In order to perform this task, Sacramento and Pessoa maintain that multilateral or bilateral cooperation may be used by the international community but only at the request of the State in need.¹⁵¹ They also note that developing countries see few results from the signing of treaties intended to improve the status of the child. According to them since these countries offer little or nothing in return, it is anticipated that the international community of States might ignore the serious problems of children in developing countries.¹⁵²

Notwithstanding, just like the Mozambican experience which the authors assert yields a different perspective of the normative role the international community plays in implementing children's rights, in Nigeria, the international community has developed a range of child welfare-oriented activities. Following Sacramento and Pessoa, international participation and organisation involving plans with a national multi-sectoral scope, such as emergency plans or international activity in programmes and projects in partnership with the State and with the participation of the local community

¹⁵⁰ *ibid.*

¹⁵¹ Luis Filipe Sacramento and Ana Maria Pessoa 'Implementation of the Rights of the Child in the Mozambican Context' in Michael Freeman, *Children's Rights: A Comparative Perspective* (Dartmouth Publishing 1996) 145-164 at 159 (Sacramento).

¹⁵² *ibid.*

need to be initiated in Nigeria.¹⁵³ This is because such participation offers an assurance that State plans and programmes would be realised especially since it is a well known fact that the State lacks the capacity to carry them out alone.¹⁵⁴ The international community has played an indispensable role with regard to the survival, protection and development of children and provided for the basic needs of a considerable number of abandoned, orphaned and street children. In agreement with the authors, adequate steps need to be taken by the international community with efforts of donor agencies so that grants can be meaningful in community development.¹⁵⁵ It is hoped that once these actions are taken, the implementation of the UNCRC in many developing countries, including Nigeria will be guaranteed.

In spite of the above, the UNCRC has one characteristic which is its comprehensive nature in the sense that it has been designed to protect the child in all aspects and everywhere. The implementation of children's rights is not only monitored by the CRC, nor limited to the international communities' supervisory role. Non-Governmental Organisations (NGOs) play a major role in monitoring children's rights which is not limited to the international level but spans through regions and nations.

4.4.4 NGOs Role in Monitoring Children's Rights

With the entry into force of the UNCRC, there emerged a global approach to the rights contained therein. These rights include civil, political, economic, social, cultural and spiritual rights and echoing Aguilar they all correspond to the human dignity of the child and contribute towards promoting the child's "higher interest".¹⁵⁶ The concept of the 'higher interest of the child' as explained by Aguilar is a theme pervading the UNCRC and aids in understanding the UNCRC as a whole to the extent that the child is now regarded as a subject of law and not an object. Thus, if it is agreed that a

¹⁵³ Sacramento (n 151) 164.

¹⁵⁴ *ibid.*

¹⁵⁵ *ibid.*

¹⁵⁶ Luisa Maria Aguilar 'The Role of the NGOs in Monitoring Children's Rights' in Eugene Verhellen, *Monitoring Children's Rights* (Martinus Nijhoff 1996) 503-507 at 503 (Aguilar).

child is a subject of law with rights that have to be protected, then it becomes agreeable with Aguilar that action needs to be taken to ensure that the child's rights are effectively exercised, and a political commitment obtained from governments with respect to children will not be out of place.¹⁵⁷ To ensure this, NGOs should play an important role both at the international and domestic levels. Still in agreement with Aguilar, international NGOs should embark on dialogue with other NGOs. Echoing Aguilar, dialogue should be established at all levels between, parents/children, institutions, NGOs/Media in order to permit communication.¹⁵⁸ By suggesting the need for dialogue, it emphasises a new way of taking positive action is required, which is the method usually applied by NGOs. This method implies monitoring and also suggests that there is a new relationship between persons which is not a balance of power. Further in agreement with Aguilar, by this method, what is required is love, rather than tolerance, with emphasis that love of children does not mean possession rather a concern for their higher interest.¹⁵⁹ Therefore, it is this concern for their higher interests that the present author interprets as the BIC.

Leonard asserts that NGOs have a vital role to play and they personify the overall notion of global civil society, encompassing the goals of enhanced individual participation and an enlarged political community, thereby indicating the remarkable changes that have occurred in the international system.¹⁶⁰ Indeed, NGOs maintain a rather strong capacity for action and influence, which according to Leonard has been evident both on the state as well as within various international bodies, and they continue to play an active role within international discourse to implement some form of change and they ensure that views that are not always considered by the state are taken into consideration.¹⁶¹ Despite the positive recognition given to NGOs, Aguilar maintains that they need to include the child's perspective in programmes,

¹⁵⁷ *ibid.*

¹⁵⁸ Aguilar (n 156) 506-507.

¹⁵⁹ *ibid.*

¹⁶⁰ Hammer M Leonard, *A Foucauldian Approach to International Law: Descriptive Thoughts for Normative Issues*, (Ashgate 2007) 116.

¹⁶¹ *ibid.*

action models and child policy plans.¹⁶² In the present author's view, doing so will ensure that their impact is further felt.

Significant progress could be achieved if the various national policies were coordinated and closer cooperation exists between international NGOs.¹⁶³ Aguilar makes a number of suggestions that would advance the rights of children. Firstly, he suggests that Government institutions with the responsibility for policy making on children should supply a more appropriate legal framework to ensure that the rights of the child is respected and implemented.¹⁶⁴ Secondly, in policy-making processes, NGOs take a practical dimension as their cohesion means that they can set down guidelines and reinforce coordination in order to achieve a social and political impact. Thus, raising awareness and identifying real needs will promote the implementation of more suitable action programmes.¹⁶⁵

Also, there is need for a child-sensitive social protection system targeted at reducing poverty and inequality in the society. Such a programme will greatly aid in addressing poverty, vulnerability and will further assist in implementing the Millenium Development Goals (MDGs). Child-sensitive social protection is 'an evidence-based approach that aims to maximize opportunities and developmental outcomes for children by considering different dimensions of children's well-being. It addresses the inherent social disadvantages, risks and vulnerabilities children may be born into and those acquired later in childhood.'¹⁶⁶ Such protection is best achieved through integrated social protection approaches. The present author stresses that this programme is lacking in several countries such as Nigeria whereas some other countries such as the UK and the USA have a strong social protection system although they still face challenges. While social protection programmes are necessary, for the programmes to be effective, they should include a check-list of factors

¹⁶² Aguilar (n 156) 505.

¹⁶³ *ibid.*

¹⁶⁴ Aguilar (n 156) 506.

¹⁶⁵ *ibid.*

¹⁶⁶ UK Department for International Development, et al., 'Advancing Child-Sensitive Social Protection', http://siteresources.worldbank.org/INTCY/Resources/395766-1187899515414/CSSP_joint_statement_8.20.09.pdf accessed on 13 January 2011.

that are strictly child-sensitive to address the challenges that may arise. Joint efforts of NGOs, individuals, governments and stakeholders would ensure the integration of a social protection approach that will provide a mechanism for the protection of the rights of the child and the application of the principle of the BIC.

Based on the above recommendations, it is hoped that when national policies have the appropriate legal framework which would have been identified by NGOs in collaboration with the governments, then implementation programmes would identify the real needs of children that would be aimed at ensuring the rights of children. If these suggestions are taken into consideration, then children in Nigeria would have their rights protected following the implementation of suitable programmes through policy as well as legal framework with the aid of the NGOs.

4.4.5 Regional Enforceability

At the regional level, children's rights are protected by express provisions in treaties. One of such treaties as noted earlier is the ACRWC 1990. The ACRWC has been commended by Lloyd for being the 'most forward thinking of all the regional systems'.¹⁶⁷

The ACRWC has a Committee of Experts¹⁶⁸ with an amazing innovation empowering the Committee to receive communications from any person, group or NGO recognised by the Organisation for African Unity.¹⁶⁹ This

¹⁶⁷ *ibid*; Amanda Lloyd, 'Evolution of the African Charter on the Rights and Welfare of the Child and the African Committee of Experts: Raising the Gauntlet' (2002) 10 (2) International Journal of Children's Rights 179-198; Dejo Olowu 'Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and Welfare of the Child' (2002) 10 International Journal of Children's Rights 127-136 at 127; Danwood Mzikenge Chirwa, 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 Int'l Journal of Children's Rights 157-177 at 155.

¹⁶⁸ ACRWC 1990 art 32.

¹⁶⁹ ACRWC 1990 art 44.

provision therefore allows children to petition to the Committee any alleged violation of their rights including their economic, social and cultural rights.¹⁷⁰

In furtherance to this, unlike the UNCRC, the ACRWC states that the child's welfare is *the primary* consideration.¹⁷¹ Freeman points out that article 4(1) extends to all actions by 'any person', so that parents are inclusive. He maintains that this provision is wider than that contained in the UNCRC and goes a long way to show that the peculiarity of the region is borne in mind.¹⁷² Thus, in agreement with Banda, since the region recognises that children have rights, there should also be an understanding that both parents and the State are obliged to provide and care for the children in equal measure.¹⁷³ This obligation is not only limited to the regional sphere, states also have the responsibility to enforce children's rights at the national level. This next subsection will discuss this with reference to Nigeria.

4.4.6 National Enforcement

Article 4 of the UNCRC requires states parties to undertake all appropriate legislative, administrative and other measures for the implementation of the rights in the UNCRC. It goes further to specify that with regard to economic, social and cultural rights, implementation should be to the maximum extent of the State party's available resources, and possibly, with international co-operation.¹⁷⁴

By enacting the CRA 2003 in Nigeria, the CRC notes the developments made in implementing the UNCRC such as the adoption of the CRA by twenty four States in Nigeria.¹⁷⁵ The CRC also expressed concern that many of the

¹⁷⁰ Freeman Commentary (n 8) 21.

¹⁷¹ ACRWC 1990 art 4(1)

¹⁷² Freeman Commentary (n 8) 21.

¹⁷³ Banda (n 2) 139.

¹⁷⁴ UNCRC 1989 art 4; Caroline Sawyer, 'International Developments: One Step Forward, Two Steps Back – The European Convention on the Exercise of Children's Rights' (1 June 1999) 11 (2) CFLQ 151-170.

¹⁷⁵ CRC fifty-fourth session, Consideration of Reports submitted by States parties under Article 44 of the Convention, Concluding Observations on Nigeria, CRC/C/NGA/CO/3-4, 11

existing legislations at the federal, state and local levels in Nigeria, particularly the religious and customary laws, do not fully comply with the principles and provisions of the UNCRC.¹⁷⁶ Take for instance the flogging of children in Nigeria. UNICEF condemned the decision to allow the public flogging of seventeen year old Bariya Ibrahim Magazu in the Northern State of Zamfara as her punishment for being pregnant outside marriage. She was flogged one hundred times with a cane. Although there was much public outcry against such punishment,¹⁷⁷ the present author notes that adequate steps have not been taken to curb such punishment which can at best be described as inhuman and degrading, and a form of violence although there is now a global consensus to protect children against all forms of violence, and to protect them from all cruel, inhuman and degrading treatment or punishment such as flogging.¹⁷⁸

The UNCRC prohibits the use of flogging as punishment for children.¹⁷⁹ Although the UNCRC takes into account the importance of traditional and cultural values of each people, it emphasises the dignity of the child and the right of the child to protection from abuse and violence.¹⁸⁰ Nigeria having undertaken the obligation to implement the principles contained therein should ensure that the nation's legal order conforms to these principles. Nigeria should investigate such incidences and make amendments to its domestic legal system to ensure compliance with international standards.

Although, the CRC is aware of the challenges faced by Nigeria, namely the long-standing ethnic, religious and civil strife, economic constraints including poverty, unemployment and the heavy debt burden, which may have impeded progress in fully realising children's rights enshrined in the UNCRC,¹⁸¹ it

June 2010, para 3; Combined third and fourth report of Nigeria to the Committee (CRC/C/NGA/CO/3-4) at its 1505th and 1507th meetings (CRC/C/SR 1505-1507) of 26 May 2010, adopted at its 1541 meeting on 11 June 2010.

¹⁷⁶ *ibid.*

¹⁷⁷ Children's and Women's Rights in Nigeria: A wake-up call (Situation Assessment) UNICEF 2001 (Assessment) 230.

¹⁷⁸ UNCRC 1989 art 37.

¹⁷⁹ *ibid.*

¹⁸⁰ UNCRC 1989 art 34.

¹⁸¹ CRC/C/15/Add.257 8, 13.

expects Nigeria to use all efforts and resources necessary to effectively implement the rights and principles enshrined in the CRA, and ensure as a matter of priority that the CRA is adopted in all states. Furthermore, the CRC advised Nigeria to take all necessary measures to ensure that all of its domestic and customary legislations fully conform to the principles and provisions of the UNCRC, and ensure its implementation.¹⁸²

The existing institutional structures in Nigeria aimed at ensuring the BIC and respect for the views of the child such as Children's Clubs in schools and the Children's Parliament at the national level, need to fully apply the best interests of the child principle and ensure that the UNCRC is fully applied and duly integrated into the implementation policies and programmes of the State party as recommended by the CRC.¹⁸³ In line with this recommendation, Nigeria should pursue its efforts to ensure the implementation of the principle of the BIC. The government should also fully support the functioning and further development of the Children's Parliament (at the national and state levels) which the CRC sees as a welcome development, and the Child Rights Information Bureau (CRIB) in the Ministry of Information.¹⁸⁴ Following the CRC's recommendation, the general principles of the UNCRC should be incorporated in all policies and programmes relating to children. There is also need to reinforce awareness-raising among the public at large, and to introduce educational programmes on the implementation of these principles.¹⁸⁵

The CRC, while noting the very positive development represented by the drafting and revision of the Bill expressed regrets that a copy of the Bill was not made available to the CRC although it is aware that the country suffered initial setbacks before the Bill was finally passed into law. Agreeing with

¹⁸² CRC/C/15/Add.257, 12.

¹⁸³ CRC/C/70/Add.24, 34.

¹⁸⁴ CRC/C/15/Add.257, 5; CO of Second periodic report of Nigeria (CRC/C/70/Add.24) at the Committee on the Rights of the Child's 1023rd and 1024th Meeting held on 26 January 2005 and concluding observations adopted at the 1025th meeting held on 26th Jan. 2005.

¹⁸⁵ CRC/C/15/Add.257, 35.

Cohen the lack of such enabling legislation raises doubts as to the priority previously given to the rights of the child in Nigeria.¹⁸⁶

Other concerns raised by the CRC include, persistent early marriages, child betrothals, discrimination in inheritance, widowhood practices and other harmful traditional practices. These practices are incompatible with the principles and provisions of the UNCRC. The CRC also expressed concern over the continued practice of female genital mutilation and is concerned that the measures being taken to address this practice are not sufficient.¹⁸⁷ The CRC therefore recommends that all legislation should be reviewed to ensure their compatibility with the eradication of such violations of children's rights and campaigns should be developed and pursued with the involvement of all sectors of society with a view to changing attitudes in the country as to the non-acceptance of harmful practices. Again, such action must be taken on a priority basis.¹⁸⁸ The problems of violence against children and the physical abuse of children in family, in the community, in schools, and in society were also noted by the CRC.¹⁸⁹ The CRC therefore recommends that public awareness and information campaigns must support education and advice on other family matters, including equal parental responsibilities and family planning in order to foster good family practices which are in accordance with the principles and provisions of the UNCRC.¹⁹⁰

4.5 Protection of Children under the Nigerian Constitution

On 19th April 1991 Nigeria ratified the UNCRC thereby agreeing to "respect and ensure" the observance of the rights set therein.¹⁹¹ By ratification, Nigeria has committed to conform to the provisions the UNCRC. Ratification also means Nigeria has obligated itself to report periodically to the CRC on the

¹⁸⁶ Cynthia Price Cohen, *Jurisprudence on the Rights of the Child*, Volume 1, Transnational Publishers 2005, 70 (Cohen).

¹⁸⁷ Cohen (n 186) 71.

¹⁸⁸ *ibid.*

¹⁸⁹ CO: Nigeria, 45.

¹⁹⁰ *ibid*

¹⁹¹ www.ohchr.org/english/law/crc-ratify.htm - accessed on 18 August 2007.

measures that it has adopted to give effect to the rights recognised in the UNCRC. Thus, Nigeria is to ensure that it brings its legislation, policy and practice in line with the requirements of the UNCRC. This is the requirement of Article 4 of the UNCRC which requires all signatories to “undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present UNCRC.”¹⁹² Therefore, the wordings of Article 4 can be interpreted as requiring legislative, administrative and judicial institutions of each State party to be primarily responsible for implementing the UNCRC. But the rights enumerated in the UNCRC become only accessible to children through incorporation into Constitutions and laws of the states parties.¹⁹³

While many Constitutions including the Constitution of the Federal Republic of Nigerian (CFRN) 1999 do not contain specific defined rights for children, on the contrary, the Constitution of the Republic of South Africa 1996 in section 28 grants specific defined rights to children in addition to, and not in place of the rights given to all citizens. Spitz notes that possibly, South Africa may be the “only country to include specific rights for children in its Constitution” titled in simple terms “Children” and draws inspiration from several comparative and international sources such as the UNCRC and the ACRWC.¹⁹⁴ Nigeria should therefore follow this trend.

The CFRN 1999 requires the State to provide free compulsory and universal primary, secondary, university education as well as adult literacy programme when practical.¹⁹⁵ But these provisions are non-justiceable and only a directive principle of state policy which means they are only obligatory for the State to provide and where the State fails, no action can be brought against it to enforce these non-justiceable provisions.¹⁹⁶ Therefore, the provisions of chapter two of the CFRN are regarded as ‘mere directives’. Based on this,

¹⁹² UNCRC 1989 art 4.

¹⁹³ Spitz (n 7) 872.

¹⁹⁴ Spitz (n 7) 874.

¹⁹⁵ Constitution of the Federal Republic of Nigeria (CFRN) 1999 s 18.

¹⁹⁶ CFRN 1999 ch 2; Julia Sloth-Nielsen, ‘Domestication of Children’s Rights in National Legal Systems in African Context: Progress and Prospects’ in Julia Sloth-Nielsen (ed) *Children’s Rights in Africa: A Legal Perspective* (Ashgate 2008) 53-72 at 59.

Akinseye-George maintains that government policies and budgets are to be shaped towards the realisation of the social and economic rights of Nigerians.¹⁹⁷ The present author follows this view and adds that such efforts should be made towards the realisation of children's rights. Another challenge is that since the provisions are non-justiceable, where a child is not educated, the child cannot bring an action against the Nigerian State for the enforcement of the provisions of the Constitution. Thus, it is best to make issues of children's rights justiceable in the constitution.

Although the CFRN is an important national instrument providing protection for children, the applicable provisions are indirect. The Fundamental Objectives and Directive Principles of State Policy in Chapter II of the Constitution contain guiding principles to direct the Nigerian State in the formulation and execution of policies. Several of these principles are important for child survival, development and protection.¹⁹⁸ Unfortunately, these provisions are non-justiceable¹⁹⁹ and cannot be legally enforced in a court of law because section 6(6) of the CFRN prevents the Courts from looking into whether or not the Fundamental Objectives and Directive principles of the State Policy have been implemented.²⁰⁰

In the case of *Archbishop Olubunmi Okogie v Attorney-General of Lagos State*²⁰¹ where the court relied on Section 6(6) and held that the provisions of Chapter II of the Constitution are not obligatory on the Government. In line with the report on Nigeria it can be concluded that this provision has remained a major obstacle to judicial intervention aimed at promoting the rights of children in Nigeria.²⁰² Notably, Item 60(a) of the Exclusive Legislative List of the 1999 Constitution now offers an avenue for the promotion and enforcement of the Fundamental Objectives and Directive Principles of State

¹⁹⁷ Yemi Akinseye-George, *Justice Sector Reform and Human Rights in Nigeria* (Centre for Socio-Legal Studies 2009) 90.

¹⁹⁸ CFRN 1999 Cap 2; Assessment (n 177) 234.

¹⁹⁹ Note however that the fundamental human rights contained in ss 33-44 of the Constitution are justiceable. These include provisions such as the right to life, dignity, liberty, fair hearing, freedom from discrimination, among others.

²⁰⁰ CFRN 1999 s 6 (6) <http://www.nigeria-law.org/ConstitutionOfTheFederalRepublicOfNigeria>.

²⁰¹ [1981] 1 NCLR 218

²⁰² Assessment (n 177) 235.

Policy. It empowers the National Assembly to establish federal authorities with specific purpose to promote and enforce the observance of the Fundamental Objectives and Directive Principles. In practice, this has not taken place, but it does absolutely offer an opportunity to promote children's rights.²⁰³ Hopefully, when the National Assembly takes steps to establish these authorities, avenues for enforcing children's rights in Nigeria would be created. But even if this is the case, the present author still opines that implementation would still be difficult because the federal legislators cannot legislate for the States. This can only be effective if similar laws are passed by the States.

In addition to this, there is need for the on-going review of the Constitution to consider inserting specific provisions that will focus on protecting the rights of children in Nigeria.²⁰⁴ The need to review laws on children in Nigeria is necessary especially because of the differing laws in the country. There is also the issue of alien laws which may pose difficulties in application especially in a multi-cultural society like Nigeria. However, what is most important is to ensure the BIC in Nigeria.

4.6 The Way Forward For Nigeria

Systemic problems still plague the Nigerian child welfare system which has not been adequately addressed by policy makers. To date, there is no adequate visible thrust to address or resolve the myriad of problems concerning children's rights in Nigeria and the protection of their best interests.

Research and literature have not adequately addressed the debate on the BIC. The need for a comparison of the best interests' principle and other existing machineries underpinning child welfare systems in Nigeria becomes instructive in understanding how these shape the interpretation of the BIC

²⁰³ *ibid.*

²⁰⁴ *ibid.*

principle. Sargeant suggests that a comparison of approaches, through a two-way system of information, may possibly lead to more sophisticated child welfare policy development that operates in the best interests of the individual child.²⁰⁵ To ensure this, the NGOs have to be involved by identifying and monitoring these child welfare policies so that laws on children will be guided by the BIC. Notably, there is now a trend towards recognising that all laws are guided by the BIC in order to ensure effective child protection.²⁰⁶

Indeed, this thesis agrees with Levesque that envisaging a world in which children's interests come first is rather difficult and the obstacles to implementing policies to reach that end are staggering.²⁰⁷ But it is this path that the international children's rights movement urge all nations to take.²⁰⁸ As such, Van Bueren advances the need for tremendous resources, the need to 'recognise positive rights, the need for adequate research to guide implementation efforts, and the general societal will to consider reforms'.²⁰⁹ Of course, there is the additional need to combat deep societal prejudices against children, and the need to resist projecting adults' feelings, thoughts and attitudes onto childhood.

In order to ensure the effective implementation of the BIC principle to all children in a multi-cultural society such as Nigeria and children globally, there is need for constructive engagement of all stakeholders. This is because, in all situations, constructive engagement and dialogue remains the best option in resolving problems. This approach will resolve the difficulties in implementing children's rights in Nigeria and globally.

²⁰⁵ Sarah Sargent, 'Best Interest of the Child in the USA and Europe' (2006) 24 Intl Fam LJ 2-8 at 6.

²⁰⁶ UNICEF, *Trafficking in Human Beings, Especially Women and Children in Africa*, Innocenti Research Centre, UNICEF 2003.

²⁰⁷ Roger RJ Levesque, 'Book Review: Geraldine Van Bueren, *The International Law on the Rights of the Child*' (1995) Fordham International Law Journal 832-839 at 836 (Levesque).

²⁰⁸ *ibid.*

²⁰⁹ Levesque (n 207) 836.

Conclusion

In conclusion, this chapter suggests a collective approach which is participatory as it engages every sector of the society ranging from the individual to the State and to the international level. It also proposes dialogue and suggests that child policy plans should be included in programmes concerning children and budgetary allocations should make provisions for children. Also, the provisions on children contained in national laws should be justiceable and have direct application. By being justiceable, children can rely on these provisions when bringing actions concerning the infringement of their rights.

The chapter suggests ways in which the state party can effectively ensure that children's rights are protected in compliance with international standards by drawing examples from other jurisdictions and using the requirements of the UNCRC and its implementation mechanism as a benchmark. Remarkably, great relevance is attached to the concluding observations of the CRC as an auditing tool and these concluding observations assist states parties in improving on the implementation of children's rights.

Drawing from Freeman's view, this chapter has shown that from the Nigerian experience, action needs to be taken to protect children. It has made reference to some aspects where legislative change would need urgent attention, and practice better monitoring. In agreement with Freeman, it has also shown the need for greater thought in order to protect the interests of children and to further their rights.²¹⁰ The chapter suggested that the UNCRC should be incorporated into Nigerian law so that any breach of a provision of the UNCRC should be an infringement of Nigerian law.²¹¹ Also, by ratifying international instruments such as the Hague Convention on the Civil Aspects

²¹⁰ Michael Freeman, 'The Convention: An English Perspective' in Michael Freeman, *Children's Rights A Comparative Perspective* (Dartmouth Publishing 1996) 93-112 at 108 (Freeman Convention); Michael Freeman, 'Children's Rights Ten Years After Ratification' in Bob Franklin (edn) *The New HandBook of Children's Rights: Comparative Policy and Practice* (Routledge 2002) 97-114 at 114.

²¹¹ *ibid.*

of International Child Abduction, Nigeria will be ensuring the protection of the BIC as this will help to curb situations of child abduction.

The concept of 'a child impact statement' as introduced by Freeman could be useful.²¹² It entails that all legislation, including policy changes and national laws are accompanied by an assessment of its effect on children.²¹³ So also will the concept of ombudsperson be useful to Nigeria as practiced in other countries such as Norway. Notably, Nigeria has established a Children's Parliament at the State and National level as well as a Child Rights Information Bureau (CRIB) in the Ministry of Information.²¹⁴ If adequately funded and maintained, they will provide children with the ability to make an input into decisions that will be taken in their best interests thereby providing the avenue to protect their rights.

²¹² Michael Freeman's 'Taking Children's Rights Seriously' (1988) 1 *Children and Society* 299-317 at 316-317.

²¹³ Freeman Convention (n 210) 108.

²¹⁴ CRC, 38th Session, CO: Nigeria 2nd Periodic Report (CRC/C/70/Add.24) para 5.

CHAPTER 5

CONCLUSION AND RECOMMENDATIONS

5.0 Introduction

Violations of children's rights are a common occurrence globally. Notably, the rights of the child have been expressly incorporated into international, regional and national legislations respectively.¹ This thesis has identified some of these violations such as child labour, child slavery, child marriage, child prostitution, child trafficking, and female genital mutilation among others. Although efforts have been made to curb the ill-treatment to children by the international community, these problems still persist and State parties to international instruments (treaties) face the challenges of implementing human rights treaties due to the factors enumerated. However, the emergence of the UNCRC has created an avenue for a global recognition of the rights of children but Article 3 of the convention which provides that the BIC should be a primary consideration in all actions concerning children, poses further implementation difficulties. A major difficulty can be traced to the differences in society as the thesis argues that what may be best for a child in developed countries may not be best for a child in a multi-cultural society or a developing country.

The Nigerian experience shows that action needs to be taken to protect children in particular, if we take Freeman's suggestion, legislative change will need urgent attention, practice better monitoring and greater thought towards protecting the interests and rights of children.² In essence, existing laws and new or future laws relating to children should ensure that the provisions are in the best interests of the child, whereas monitoring of the practical application of the BIC and children's rights should be enforceable rather than mere obligations.

¹ The UNCRC 1989; ACRWC 1999; CRA 2003.

² Michael Freeman, 'The Convention: An English Perspective' in Michael Freeman, *Children's Rights A Comparative Perspective* (Dartmouth Publishing 1996) 93-112 at 108.

The thesis does not take a single approach to children's rights but rather seeks to present a balanced approach through examination of the current state of children's rights globally and States implementation of children's rights with particular focus on Nigeria. It points out the changing familial context of the family and shows that the State party's shift from a traditional perspective to a more acceptable international law standard is necessary even in a multicultural civil society irrespective of the difficulty in applying the best interests' principle in different jurisdictions.

This is a welcome development which although has not reached its peak due to the hindrances identified in the thesis, the shift towards international law provides a guide as to how children's rights are to be implemented and taken seriously, even in a society with divergent legal systems, cultures, socio-economic problems and religious practices.

The inability of the state party to adequately ensure children's rights owing to the identified problems among others have created room for NGOs to participate and get involved in the rights debate. Thus, with the involvement of the international community and NGOs the issue of children's rights is no longer solely within the family domain.

5.1 Public/Private Dichotomy

An identified problem with international human rights law is that of the public/private divide. This distinction lies in the liberal emphasis on civil and political rights, which sought to separate the family and the state into two distinct spheres, namely the public and the private.³ According to Breen, this dichotomy has been carried over into the arena of international human rights law with the effect of placing actions by private individuals, which otherwise may be considered as human rights violations, to be regarded as actions

³ Claire Breen, *The Standard of the Best Interests of the Child: A Western Tradition in International and Comparative Law* (Martinus Nijhoff 2002) 107 (Breen).

involving the state.⁴ Also, the private sphere has been expanded from the basic notion of familial autonomy at the domestic level to include actions perpetrated by private individuals upon one another at the international level. In addition to this, the notion of public/private dichotomy has been expanded to encompass matters of culture and tradition at the international human rights law level.⁵ But it has been noted that much of the public/private debate has been on male dominance over women and children.⁶

Evidently, there is limited State intervention into family life and its regulation of private matters at the domestic level. But the emergence of international human rights law constrains human rights violations by States and has succeeded in prohibiting acts such as torture or slavery that once enjoyed the protection of traditional cultural defences.⁷ Thus, children can now enjoy protection from abuse at the domestic level and violators will cease to be protected by traditional cultural defences. However, legislation will also move children's rights issues from the private domain thereby bridging any policy gap. In Nigeria, this can be enjoyed through the complete passage of the CRA 2003 by all the 36 states.⁸

5.2 Proposing an all-encompassing classification of children's rights

The thesis examined the different classifications of children's rights as proffered by academics and scholars. Having noted the various classifications from Bevan, Campbell, Wald, Buck, Freeman and Fortin, the thesis submits that these classifications together offer a comprehensive classification of children's rights. However, there is need to suggest an all-encompassing classification which should consider the needs of all children especially in multi-cultural societies. Moreover, because the Africa traditional values would hardly recognise children as having autonomy over their lives, the right to basic

⁴ *ibid.*

⁵ *ibid.*

⁶ Breen (n 3) 108; Katherine O'Donovan, *Family Law Matters* (Pluto Press 1993) 288-298.

⁷ Breen (n 3) 109.

⁸ African Peer Review Report (APRM) Report 2007, 30-31.

needs, provision, equal and balanced opportunities and care would seem most apt for this thesis. This would ensure that the BIC principle is applied evenly to all children globally.

This argument is premised on the fact that a child who is hungry in a developing country would need to be provided with food which is the most basic need – *a right to survival*⁹ rather than a right to be educated in a classroom of one teacher per child. This does not mean that education is not regarded as important but in the hierarchy of rights, the right to life is most important. A hungry child if given an opportunity to make choices may readily not choose a right to participate in decision-making but would rank the right to survival first.

5.3 A common ground for the definition of a child

The UNCRC provides a more encompassing definition of a child as compared to other instruments when it stipulates the age of the child at eighteen years unless under the law applicable to the child, majority is attained earlier.¹⁰ The thesis argues that although there seems to be a common ground on the age of a child, unfortunately, there is a lack of consensus on when childhood begins and ends. In spite of this, the UNCRC is remarkable for allowing different national legislations to determine when childhood begins and ends in accordance with the law applicable to the child. In essence this would accommodate varying definitions owing to the differing systems in society.

While various national and international legislations have the age of eighteen as the end of childhood, in Africa age is seen in terms of obligations of support and reciprocity between the parents and the child from childhood to old age. The argument from this perspective is that age is irrelevant because a child does not necessarily depend on his or her age. A child could remain in the care of his parents after he attains adulthood, in which case some factual dependency continues. With this view, there is certainly a variation in the age

⁹ *my italics.*

¹⁰ UNCRC 1989 art 1; ACRWC 1990 art 2.

of maturity. This may also be so in cases of succession and adoption applicants who must be 21 years. Thus, although the UNCRC's intention is to create flexibility when it sets the age of childhood in Article 1, it would appear that this provision rather creates room for uncertainty and lack of uniformity, resulting in difficulties in enforcing violations of children's rights especially in multicultural societies. As noted in the thesis, this has often resulted in inadequate implementation of the BIC as cases of child marriages, child soldiers, and child labourers are witnessed in some jurisdictions that have set an earlier age for the end of childhood.

Notably, the Nigerian government through the CRA 2003 has tried to find a single definition of a child. Section 277 defines a child to mean 'a person under the age of eighteen years'. In an attempt to avoid any inconsistencies, the Act goes further to void any other contrary definition of a child in any previous enactment.¹¹ Mere definition in an enabling Act is inadequate, the state needs to further ensure that other legislations with differing age limits are re-enacted or amended in line with the UNCRC.

5.4 Recommendations

The standard of laws for the protection of the child is difficult to achieve. This has been attributed to the dualism between the received laws and our indigenous laws which have created some complexities and made adherence difficult. It is opined that while some of the borrowed laws lack any local relevance, which explains their vagueness, others are inconsistent and incoherent. There is therefore the need to revise or review the laws on children in Nigeria. In doing this, laws should emanate from within the society which will be very relevant to our situations. As noted by Adegoke, this is largely because, these laws genuinely exist only in statute books and are never applied in reality.¹² Annual reviews and planning meetings on the welfare of the Nigerian child should be undertaken and recommendations emanating from

¹¹ CRA 2003 s 274.

¹² F Adegoke et al, *Proceedings of the 3rd Biennial Conference on the Rights of the Nigerian Child* (Ilorin, Nigeria 1990) 34.

them should be applied when making laws for the best interests of the Nigerian child. However, reference should consistently be made to the UNCRC.

The thesis notes that the difficulty in implementing the UNCRC is explicated by the fact that the Convention's monitoring mechanism involves only mere obligations for States parties to report to the CRC. There is need for enforcement mechanism to ensure strict adherence. Also, in order to foster implementation, there should be cooperation, dialogue and technical assistance.

Education at the primary level should be a priority and made compulsory and mandatory with legal sanctions for anyone who contravenes the law. In this vein, local governments should be provided with adequate subvention to provide free primary education. In agreement with Breen's suggestion, Government and policy makers should make allowances to accommodate the less privileged in the society, by providing social amenities, free transportation, free medical care, free education especially at the primary levels, and support towards education,¹³ for instance in the form of student loans as existing in developed countries like the U.K. Also, the practice of sending out under-aged children to hawk petty items, and giving them out for early marriage or to serve as house-helpers in return for money in order to support the family economically has devastating consequences on these children.¹⁴ Since this has been a form of traditional practice with both positive and negative effects, it would be good to suggest that such a practice should be checked by government so that machineries can be put in place to ensure that it is not abused.

Also, social welfare officers should be adequately funded and welfare programmes put in place to detect, investigate and monitor child abuse and exploitation. In addition to these, reintegration and interventionist programmes are also needed especially for children rehabilitated.

¹³ Breen (n 3) 92.

¹⁴ *ibid.*

The general principles of the UNCRC as recommended by the CRC should be incorporated in all policies and programmes relating to children in Nigeria. There is also need to reinforce awareness-raising among the public at large as well as introducing educational programmes on the implementation of these principles.

Having noted the UNCRC's impact on the Nigerian child with respect to fulfilling the requirements of Article 3, the thesis acknowledges that the State party has some challenges, therefore with the recommendations earlier made, proposes some solutions which may assist in fulfilling this requirement.

Towards a Solution

There are means and ways to ensure that the BIC is protected. This thesis has submitted different approaches ranging from creating awareness, children's participation in matters concerning them, role of governmental and non-governmental organisations, among others. However, in addition to these, suggesting a radical approach would bring about strict and stringent legislations that would abolish the systems that are not in the BIC.¹⁵ Therefore, in addition to the different approaches (e.g the interventionist approach), a radical approach will bring all children into the general mainstream education system. What this means for Nigeria is that once the State party passes a law on compulsory formal education for every child, then no child should be seen on the streets hawking or begging. Arguably, in practice this might be difficult to achieve owing to the lack of adequate resources. However, the State party can rely on the provisions of art 4 of UNCRC to seek assistance from international agencies.

Secondly, advocating for collective conscience which would help to curb incidences of kidnapping of the most vulnerable in the society and this includes children. This will aid in reminding us of the negative effects of such commercial exploitation. Thirdly, since poverty has been identified as one of

¹⁵ Rehman et al, *Child Labour and Child Rights: A Compendium*, (Manak Publications 2002) 162.

the factors of commercial exploitation of children, the state party should curb child exploitation by providing employment opportunities. This would be an excellent strategy as parents and care givers would gain meaningful employment to cater for their children rather than engage them in commercial exploitation. Fourthly, the law making process for international treaties should include both western and non-western states and take into account their interests. This is necessitated by the fact that non-western states have opined that such laws are not in their interests and do not support their religious and traditional settings. This is also the opinion of the northern states in Nigeria with respect to the domestication of the UNCRC through the CRA 2003. They have opined that the CRA was not passed for the generality of Nigerians and the Act attacks the traditional setting of the North and their tradition.¹⁶ Clearly, this position seems more tilted towards a cultural relativist approach. However, in order to adequately protect the best interests of every child in Nigeria, there is need for a balancing approach – which is a consensus that will help to resolve conflicts.

Clearly, in agreement with Alade, the aim of the CRA 2003 is to curb violations of children's rights in Nigeria, but will need the joint efforts of the judiciary for effective interpretation of the Act, the executive (consisting of the federal, state and local government) to advance its enforcement and the legislature to make laws.¹⁷ Due to its relevance, the CRC reiterated that the best interests' principle should be fully applied and integrated into the implementation policies and programmes of the State party.¹⁸ Notably, the Nigerian government is giving greater recognition to the principle. This is evidenced in its inclusion in the National Health Act 2011 which states that 'where research or experimentation is to be conducted on a minor for a therapeutic purpose, the research or experimentation may only be conducted if it is in the best interests of the minor'.¹⁹ The inclusion of this provision shows to a great extent that the

¹⁶ I Shuaibu 'Child's Right Act Anti-North, Says Kano Speaker' Thisday online newspaper, February 10, 2008 <http://www.thisdayonline.com/nview.php?id=102869> accessed on 10 February 2008.

¹⁷ A Alade, 'The Child Rights Act, 2003 and the Nigerian Child (Pt Two)' The Nation Newspaper, 18 February 2008, 44.

¹⁸ CRC/C/70/Add.24) para 34.

¹⁹ Nigerian National Health Act 2011 (as amended) s 33 (2) (a).

principle is gaining wider recognition and will in future be applied in subsequent national legislations. Having said that, the government should therefore take the following measures:

Legal Measures

Firstly, the on-going review of the Constitution of the Federal Republic of Nigeria 1999 should place the Child Rights Act in the Concurrent Legislative list to make it automatically applicable in all the States of the Federation. Secondly, owing to the duplicity of laws, if a comprehensive review of existing legislations is undertaken, it will ensure that all laws at the federal and state levels including religious and customary laws are in full compliance with the UNCRC.²⁰

Thirdly, States that are yet to adopt the CRA should be encouraged to do so urgently. Also, with the efforts of NGOs, government should strengthen awareness raising activities on the UNCRC and CRA in all States; and ratify other Optional Protocols on Children so that implementation of children's rights will become more effective. Finally, the government through legislation should ensure uniformity in the definition of the child in all the States in Nigeria. The CRC also notes that some States legislation domesticating the CRA set the age of the child at 16 years (for instance Akwa Ibom State) while some others define the child by puberty and not by age (for instance Jigawa). The present author notes that this disparity in the age of the child is what has triggered concern for early marriages as in the case of Yarima which could be rightly termed as 'child abuse' and has its attendant health hazards.

Socio-economic Measures

The government should allocate adequate funding to children and put in place measures and mechanisms to monitor same. Secondly, children should be

²⁰ This is in line with the recommendation of the CRC on Nigeria's Third and Fourth combined Report; CO: Nigeria, CRC, Fifty-Fourth Session, Consideration of Reports submitted to States parties under Art 44 of the Convention, CRC/C/NGA/CO/3-4, 11 June 2010, accessed on 12th September 2010.

consulted in the process of budgetary allocation. For instance, a representative of the Children's Parliament could make input during the budgetary allocation. Thirdly, with the aid and cooperation of civil society, the government should provide a comprehensive list of what constitutes hazardous work in addition to making efforts to prevent children from living and working on the streets or being involved in any commercial activity that would jeopardise their well being.

Religious/Cultural Practices

The government should embark on sensitisation programmes that would create awareness on the dangers of early marriages. Secondly, government should enforce laws prohibiting Female Genital Mutilation. Thirdly, it should strengthen its efforts to integrate religious learning institutions including the *almajiri* schools into the mainstream education and provide teachers education to mallams.

When these recommendations are taken into consideration at the State level, it will become easier to protect children's rights and their best interests. Albeit, these are only recommendations, as such there is need to ensure adequate enforcement in order to promote and put into effect the provisions of Article 3.

Finally, in comparison with Article 4(1) of the ACRWC, Article 3 (1) appears to limit the responsibility to only a set of people in matters concerning children. Alternatively, the provisions of Article 4 (1) of the ACRWC appear more all-encompassing as it states that 'in all actions concerning children undertaken by any person or authority, the BIC shall be *the* primary consideration'. Clearly, this requirement extends to all actions by any individual or person in authority and includes the parents and the state, whereas the provision of Article 3 (1) seems to limit this responsibility by stating that the BIC shall be *a primary consideration* only to actions undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies. Therefore, the thesis maintains that Article 4 (1) is wider and shows that the peculiarity of the region is borne in mind. Such an approach will possibly limit

the arguments on relativism as it will involve everyone without exceptions. This should be the approach to be taken in making laws that would serve in the best interests of every child. While we agree that culture is relevant to people, cultural norms with respect to children's rights should only be taken into consideration in as much as it conforms to the global movement to protect children's rights. More emphatically, cultural variations should not form the basis for deciding what is in the BIC. Thus, where culture conflicts with basic human rights for instance, the right to life, then it should not be accepted because it will conflict with the global advocacy for the protection of children's rights.

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