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CHILD RIGHTS LAW AND STATE SOVEREIGNTY: THE CURIOUS CASE OF THE NIGERIAN CHILD RIGHTS ACT (CRA)

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ABSTRACT

The aim of this paper is to undertake a critical analysis of the provisions of the Child Rights Act (CRA) *vis-à-vis* the Convention on the Rights of the Child (CRC). The focus of this paper will be limited to the provisions of the CRA that guarantee the substantive rights of children. In making this comparative analysis, reference will also be made to the Constitution of the Federal Republic of Nigeria (1999), the supreme legislative instrument in Nigeria. This will be relevant in determining the extent of the similarity (or difference, as the case may be) between child rights protection systems at the national and international level. This paper will also consider the possibility of harmonising national and international child rights protection standards in the event of a disparity between the two.

Keywords: Convention, Rights, Child, Nigeria

INTRODUCTION

‘State sovereignty is thus no longer an absolute right. Even insofar as it remains a prominent principle in international relations, its implementation, has at least *de facto* if not *de jure*, become subordinate to the values embedded in the human rights doctrine’ (Shelton, 2013).

‘State parties shall undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognised in the present convention’ (Convention on the Rights of the Child 1989, Art. 4).

One major method of determining whether a state has an effective child rights protection framework in place is the extent to which the standards of child rights protection, as outlined in the Convention on the Rights of the Child (CRC), are guaranteed in its domestic legislation. To this end, the Committee on the Rights of the Child has concluded that an obligation exists on the part of states to ensure that Convention provisions are given domestic effect; it has thus particularly ‘welcomed the incorporation of the Convention into domestic law’ (Committee on the Rights of the Child, 2003). This may suggest the undermining of state sovereignty to an extent, with national law and policy being regarded as subservient to international law.

In 2003, Nigeria’s civilian government under Chief Olusegun Obasanjo went a step further in the child rights protection agenda by passing the Child Rights Act. The Act aimed at enshrining the principles entrenched in the Convention on the Rights of the Child in Nigeria. The aim of this paper is to undertake a critical analysis of the provisions of the Child Rights Act (CRA) *vis-à-vis* the CRC. The focus of this paper will be limited to the provisions of the CRA that guarantee the substantive rights of children. In making this comparative analysis, reference will also be made to the Constitution of the Federal Republic of Nigeria (1999), the supreme legislative instrument in Nigeria. This will be relevant in determining the similarity (or difference, as the case may be) between child rights protection systems at the national and international level. This paper will also consider the possibility of harmonising national and international child rights protection standards in the event of a disparity between the two.

THE CHILD RIGHTS ACT 2003 (CRA)

Nigeria ratified the Convention on the Rights of the Child in 1991. This did not, however, automatically imply enforceability of CRC provisions in Nigerian courts. As is the case in all of Commonwealth Africa, Nigeria operates by the dualist system of treaty implementation, which implies that treaties have to be incorporated explicitly into the domestic legal system to become applicable (Viljoen, 2007). For this purpose, a draft Children's Bill was adopted in 1993 but was rejected as it could not be adopted by the military government due to opposition from religious groups and traditionalists (Alemika et al., 2005). A special committee was subsequently set up to "harmonize the Children's Bill with Nigerian religious and customary beliefs" (Alemika et al., 2005). This was following the recommendation by the Committee on the Rights of the Child in its concluding observations on the state report filed by the Nigerian government in 1996 to ensure that the CRC was incorporated into domestic law (Committee on the Rights of the Child, 1996). The Bill, providing for the rights and responsibilities of children in Nigeria, as well as for a renewed system of juvenile justice administration, was rejected by Parliament in October 2002 on the grounds of its incompatibility with Islamic culture, tradition and values (Committee on the Rights of the Child, 1996). Only in 2003, presumably following pressure on legislators generated through the criticisms of national and international non-governmental organisations, did the government finally pass the bill into law (Committee on the Rights of the Child, 1996).

Enacted in 2003, The Child Rights Act (CRA) is divided into 23 sections. Under the Act, the best interest of the child is regarded as being the primary consideration in all actions involving the child (CRA 2003, s.1). The child is also expected to be given the protection and care necessary for his well-being, 'taking into account the rights and duties of the child's parents, legal guardians, or other individuals' legally responsible for the child (CRA 2003, s.2). Part II of the act outlines the rights and responsibilities of the child. In addition to the fundamental rights guaranteed under the Constitution of the Federal Republic of Nigeria (CFRN) (CFRN 1999, Chapter IV), the child enjoys the following: the right to survival and development (CFRN 1999, s.4), the right to a name (CFRN 1999, s.5), the freedom of association and peaceful assembly (CFRN 1999, s.6), the right to private/family life (CFRN 1999, s.8), the right to freedom of movement (CFRN 1999, s.9), the right to freedom from discrimination (CFRN 1999, s.10), the right to dignity (CFRN 1999, s.11) and freedom of thought, conscience and religion (CFRN 1999, s.7). The economic and social rights of the child are also guaranteed under the Act, giving the child the right to health and education (CFRN 1999, ss. 13 and 15). The child is also entitled to parental care and protection, to which end a child may not be separated from his parents except for his education and welfare, or where such an action is pursuant to a court order made in the best interest of the child. Unborn children as well as children in need of special protection measures are also protected under this section (CFRN 1999, ss. 16 and 17). The child has responsibilities towards his family, society, the federal republic of Nigeria, and other legally recognised communities, nationally or internationally, with parents and guardians required to provide the necessary guidance, discipline, education and training required for the performance of those responsibilities (CFRN 1999, ss. 19 and 20).

Part III protects the rights of the child, to which effect child marriage and betrothal are expressly prohibited (CFRN 1999, ss. 21 and 22). Making skin marks or tattoos (CFRN 1999, s.24), the exposure of a child to narcotic drugs (CFRN 1999, s.25), the use of children in criminal activities (CFRN 1999, s.26), the abduction of children (CFRN 1999, s.27) and the subjection of children to forced or exploitative labour (CFRN 1999, s.28) are acts banned under part III. Sexual intercourse with children (CFRN 1999, s.31), sexual abuse (CFRN 1999, s.32), the recruitment of children into the armed forces (CFRN 1999, s.34) and the exposure of children to harmful publications (CFRN 1999, s.35) are also prohibited acts. Part III concludes

with the removal of the jurisdictional limitations of magistrates and the applicability of existing criminal law provisions for the protection of the Nigerian child.

Part IV establishes protection measures for children, including child assessment orders and emergency protection orders. Part V makes provisions for children in need of care and protection, to which end certain individuals are empowered to bring children in need of care and protection before the court, with the court being able to make a corrective order with respect to children that are found to be beyond parental control to the court's satisfaction (CFRN 1999, s.50). Part VI regulates the imposition of care and supervision orders, where such is applied for by appropriate authorities. This order causes the child to be in the custody of the authority designated by the order. Education supervision orders may also be made by the court under this part (CFRN 1999, s.53). Part VII grants powers to the court for the use of scientific tests in civil proceedings involving the determination of maternity or paternity of a child. This is, however, subject to the consent of the child or his guardian, as the case may be (CFRN 1999, s.64). Part VIII regulates the possession and custody of children, under which section the parents of the child who were not married at the time of the birth of the child may apply for sole or joint custody (CFRN 1999, s.68). Part IX controls the guardianship of the child, with guardians regarded as having 'parental responsibility'. Under Part X, the court is vested with jurisdiction in all matters pertaining to making a child a ward of court. Other matters incidental to the wardship of a child are also addressed in Part X. Allied to this is Part XI, regulating the fostering of a child. This is also a function of judicial determination. Part XII establishes adoption services and makes the establishment and maintenance of adoption services a responsibility of the state government (CFRN 1999, s.125). Adoption under this section must be with the consent of the parent or guardian of the child, except where there are compelling reasons in the interest of the child for making the adoption order (CFRN 1999, s.132).

Part XIII establishes a Family Court in every state of the federation, which court has unlimited and exclusive jurisdiction to hear and determine any civil proceedings 'in which the existence or extent of a legal right' of a child is in issue or a criminal proceedings involving an offence committed by a child, against a child or against the interest of a child (CFRN 1999, s.151 and 162.). The child under this section has the right to be represented by a legal practitioner. The identity of the child is to be kept secret and only certain individuals are allowed to attend such proceedings (CFRN 1999, s.157) Under Part XIV, day care centres are to be registered. It also outlines conditions to be complied with by persons providing child-minding or day care services and prescribes offences relating to the provision of such services. The state government is required to provide support for children and families in need within the state under Part XV, which support shall include provision for day-care services for pre-school children, as well as accommodation services for children in police protection detention. Such accommodation services shall not be used for the purpose of restricting liberty. Part XVI regulates the establishment and maintenance of community homes, and Part XVII deals with the provision of accommodation by voluntary organisations for children. Part XVIII requires the registration of children's homes and regulates the welfare of children in such homes.

Part XIX assigns supervisory functions and responsibilities of children's homes to the minister in charge of youth affairs. Such functions include conducting inquiries, the provision of financial support and issuing declarations for state compliance with the duties imposed under the Act (CFRN 1999, s.199). Part XX addresses matters relating to juvenile justice, noting that the child is only to be subjected to the child justice system. Law enforcement and judicial officers are also expected to be trained in handling matters relating to juvenile justice (CFRN 1999, ss. 206 and 207). This part requires that effort is made to ensure that cases should be disposed of without resort to a formal trial (CFRN 1999, s.208). Detention of a child pending trial is only to be used as a measure of last resort (CFRN 1999, s.209) In the adjudication process, the child is guaranteed fair hearing and due process rights with proceedings required

to be conducive to the best interests of the child (CFRN 1999, s.212). No child is to be subjected to a term of imprisonment, corporal punishment or the death penalty pursuant to a judicial determination (CFRN 1999, ss. 214 and 215). The child may however be detained where the child is found to have attempted treason, manslaughter, murder, or robbery, or to have wounded another person with intent to do grievous harm (CFRN 1999, s.221). In other cases where the child is guilty of an offence, there are other methods of dealing with the offender specified under the section, including payment of fines, either by the child or by a parent/legal guardian (CFRN 1999, s.223). The duties of supervision officers and other matters relating to the supervision of children are outlined under Part XXI. Part XXII sets out the nature and operation of approved institutions for child offenders. Part XXIII establishes a child rights implementation committee at federal, state and local government levels. The membership and functions of each committee are also outlined under this section. Part XXIV addresses miscellaneous matters, under which section the provisions of the Act are said to supersede the provisions of all existing enactments relating to children.

IMPLEMENTATION OF THE CRC: THE CRA IN CONTEXT

Under the CRC, the best interest of the child is regarded as ‘a primary consideration’ in all actions undertaken concerning the child (Art 3(1)) and according to the Committee on the Rights of the Child, a ‘threefold concept’ (Committee on the Rights of the Child, 2013). It is a substantive right, in that the child has a right to have his or her best interests assessed and taken as a primary consideration when different interests are concerned (Committee on the Rights of the Child, 2013, para 6). The ‘fundamental principle’ aspect of the best interest concept requires that an interpretation which most effectively serves the child’s best interests be chosen where a legal provision is open to more than one interpretation (Committee on the Rights of the Child, 2013). The threefold concept also implies that decision-making with respect to children must include an evaluation of the possible impact of the decision on the children concerned (Committee on the Rights of the Child, 2013). Pursuant to the obligation created by Article 3(1) of the CRC, states are to review and amend domestic legislation where necessary to protect the best interests of the child, while also ensuring that the requirement is reflected in ‘all national laws and regulations, provincial or territorial legislation’ (Committee on the Rights of the Child, 2013, para 15). The best interest of the child is also described as a complex and flexible concept, the scope of which is determined on a case-by-case basis (Committee on the Rights of the Child, 2013, para 32). Elements such as the child’s views, identity, the preservation of the family environment, and the safety and vulnerability of the child are deemed relevant in making this assessment (Committee on the Rights of the Child, 2013, para 52).

With respect to the CRA, the best interest of the child is regarded as ‘the primary consideration’ (Committee on the Rights of the Child, 2013, s.1), whereas under the CRC it is viewed as ‘a primary consideration’ (Art 3(1)). One may however argue that, given the paramountcy given to the best interests of the child observable in the views of the Committee, the best interests of the child may be regarded as the paramount consideration (Committee on the Rights of the Child, 2013, paras 36-40). The best interests concept, as rightly stated by Freeman, is hardly novel; to this end, it is understood under the Nigerian law on matrimonial causes to encompass a whole range of factors including the emotional attachment of a child to a particular parent and the adequacy of facilities available for the proper upbringing of the child (Matrimonial Causes Act 1970, s.71).

One fundamental issue incidental to the consideration of the best interests of the child is the identification of the institutions responsible for the assessment and determination of a child’s best interests. The CRC does not seem to make any explicit reference to any particular institution in this regard, except to impose an obligation upon all relevant institutions to take into consideration the best interests of the child (Art 3(1)). Inasmuch as there are certain

elements referred to by the Committee comprising the best interests of the child, this does not resolve issues surrounding the agents responsible for making this determination. More importantly, the level of influence exercisable by the child in determining his best interests remains unclear. Although reference is made in the CRC to the right of the child to be heard and for his views to be given ‘due weight’ (Art.12), there is still every indication that the ‘due weight’ given to the views of the child is determined by adult. It may be because of this that Freeman observes the paternalistic nature of the best interest principle, even under the CRC, when viewed from an adult perspective (Freeman, 2007).

The recognition of a child’s best interests as ‘the primary consideration’ under the CRA may, however, give rise to a different understanding. In explaining the concept of ‘a primary consideration’, Freeman observes as follows:

“The use of the language ‘a primary consideration’ instead of the primary consideration suggests that the best of the child are a consideration of first importance among other consideration. They do not, however, have absolute priority over other considerations.” (2007, p.61)

The use of the article ‘the’ in defining these primary considerations suggests that the best interests of the child have absolute priority over all other considerations. Thus, it is arguable that the views of the child being given ‘due weight’, which may have arisen from the notion of the best interests of the child being a ‘primary consideration’, gives way to the views of the child being given ‘paramount weight’ above all other competing views and interests under Nigerian law. Having said that, the likes of Alston have submitted that the use of the term ‘a’ rather than ‘the’ should not be interpreted as a rejection of the overall standard that action should always be taken in the best interests of the child (Alston, 1999). According to Alston, the objective of the drafters in using ‘a’ as opposed to ‘the’ was to ensure sufficient flexibility, at least in certain extreme cases, to enable the interests of people other than the child or children to prevail (ibid). This supposedly alleviates certain interpretative problems which would be compounded by the reference to the best interests of the child being ‘the primary consideration’ (Freeman, 2007). It remains to be seen whether such additional problems will arise in the judicial determination of matters relating to the child under Nigerian law.

PARENTAL RESPONSIBILITY AND THE CRA

Article 5 of the CRC imposes an obligation upon states to ‘respect the rights, responsibilities and duties of parents or, where applicable, the members of the extended family or community ... [and] to provide, in a manner consistent with the evolving capacities of the child, appropriate direction and guidance’ in the exercise of the child’s convention rights. This implies that, while states are generally not expected to interfere with the exercise of parental rights and responsibilities, there is no obligation imposed upon the state to ensure that parents exercise their rights or fulfil their duties guaranteed under Article 5. Article 14 also operates to similar effect, with particular reference to freedom of thought, conscience and religion.

Section 7 of the CRA directs all persons, bodies, institutions and authorities to respect the duty of parents and, where applicable, legal guardians to provide guidance and direction in the enjoyment of the right to freedom of thought, conscience and religion by the child. There are conflicting opinions on whether Article 5 imposes a duty on parents who are non-state actors. While the likes of Alston are of the view that no such duty exists (Alston, 1999), Kamchedzera asserts that there is no reason to prevent the CRC from imposing duties upon parents and other actors ‘from the perspective of dignified life’ (Kamchedzera, 2007). In a manner distinct from the CRC, the CRA further imposes an obligation on parents and guardians to provide guidance and direction in the exercise of these rights (Kamchedzera, 2007, s.7(2)). The deliberate application of this obligation to freedom of thought, conscience and religion may not be unconnected with the religious setting of the Nigerian society. Research conducted

by the Pew Research Center in 2012 showed that the population of Nigeria was divided along religious lines between Christianity and Islam, with 49.3% of its population being Christian and 48.8% being Muslim. Only about 0.1% of its population had no religious affiliation (Pew Research Center, 2012). The deliberate protection and enhancement of religious beliefs is accorded a great deal of importance under the CRA, in contrast with the CRC, wherein the manifestation of religious beliefs is viewed as a right merely to be respected (Art.14). While Article 14 of the CRC prescribes that states respect the right of the child to freedom of thought, conscience and religion, Section 7 of the CRA provides that ‘every child has a right to freedom of thought, conscience and religion’. It appears to be the case that, while Article 14 considers the exercise of these pre-existing set of rights a matter of discretion by the child beneficiary of the rights, Section 7 of the CRA considers the rights as fundamental rights for which the child has no discretion in their exercise.

CHILD RESPONSIBILITY

Under the CRC, there is no reference whatsoever to children having any responsibilities in their capacity as right holders. However, Section 19 of the CRA regards the child as having responsibilities towards his family, society and the Federal Republic of Nigeria, as well as other legally recognised national and international communities. The child is to (among other things) respect his parents and elders, contribute to the moral well-being of society, preserve the independence and integrity of the Federal Republic of Nigeria and contribute to the best of his abilities to the solidarity of the African people and the human race (CFRN 1999, s.19(2)). The notion of individuals being bearers of responsibilities in their capacity as right holders is also recognised under the African Charter on Human and People’s Rights (ACHPR) (ACHPR 1987, Arts.27-29) and the African Charter on the Rights and Welfare of the child (ACRWC) (ACRWC 1990, Art.31).¹ According to the drafting committee of the ACRWC, this distinction from the CRC may be attributed to the neglect under the CRC of the African conception of the community’s responsibilities and relationships (Viljoen, 2007). It must, however, be noted that these duties may not be enforced against children (Viljoen, 2007, p. 394). In addition, as has been observed by the African Committee on the Rights and Welfare of the Child, there is a function of reciprocity between rights and duties, which implies that children may not be expected to fulfil duties when their rights are being violated (*Institute For Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v The Government of Kenya*, 2011).

This, however, is not taken to mean that the fulfilment of such duties is contingent to the protection of their rights (*Institute For Human Rights and Development in Africa (IHRDA) and Open Society Justice Initiative on Behalf of Children of Nubian Descent in Kenya v The Government of Kenya*, 2011). In any case, the duty to ensure performance of these responsibilities under the CRA is placed upon parents and other societal institutions a rather than children, which implies that duties of the like enumerated under Section 20 of the CRA cannot be used to erode rights (Viljoen, 2007)). One may re-echo Viljoen’s sentiment in stating that the concept of duties on the part of children enhances relations between children and parents and also between children and other societal institutions, which may be necessary to ensure maximum enjoyment of these rights (Viljoen, 2007). In this regard, Section 20 of the CRA suggests an amplification of a general understanding in the CRC that the child should be fully prepared to live an individual life in society, and brought up in the spirit of the ideals proclaimed in the Charter of the United Nations, in particular in the spirit of peace, dignity, tolerance, freedom, equality and solidarity (CRC, Preamble).

¹ Article 31

THE DISPARITY BETWEEN THE CRA AND THE CRC: WHAT ARE THE IMPLICATIONS?

Having observed certain distinctions between the provisions of the CRA and the CRC, the question arises as to the effect of such distinctions on the prospect of harmonisation of universal child rights protection standards. In the view of the Committee on the Rights of the Child ('the Committee'), incorporation of the CRC into domestic law should mean that the provisions of the Convention can be directly invoked before the courts and applied by national authorities and that the Convention will prevail where there is a conflict with domestic legislation or common practice (Committee on the Rights of the Child, 2003). This in essence implies that, to the extent that the CRA is inconsistent with the CRC, the provisions of the CRC should be enforced directly in the Nigerian courts.

However, this approach is highly problematic for certain reasons. Firstly, the similarity of the substantive rights provisions of the CRA with the CRC may not in itself give rise to the conclusion that the CRA is an 'incorporation of the CRC into domestic law' as envisaged by the Committee. In many respects, the CRA bears a greater similarity to the United Kingdom's Children Act 1989 than the CRC. Having said this, an observation of the concluding observations by the Committee appears to create an understanding that the CRA serves the purpose of incorporation, in which case it is expected that the CRA operates in the manner envisaged under the CRC (Committee on the Rights of the Child, 2005). Secondly, the CRC is not itself an infallible instrument. There are, as noted by Fortin, 'compromises and internal inconsistencies within the convention' (Fortin, 2009). Thus, where for instance the CRA is in conflict with the CRC with respect to a provision which is in itself inconsistent with other provisions of the CRC, the validity of an insistence on the harmonisation of the CRA with the CRC becomes highly questionable.

One may regard these conceptual problems as being somewhat trivial in the wider context of ensuring that Article 4 of the CRC is complied with. This, however, depends on the nature and extent of the differences between the CRA and the CRC. As it stands at present, it does not appear to be the case that such differences have been deemed so fundamental as to regard these problems as crucial. The Committee has made no references to any inconsistencies between the CRA and the CRC, instead focusing on the need to ensure that the CRA is 'duly adopted' in all states in Nigeria, which is arguably a greater need. It may also be the case that room is given for a certain level of discretion in the implementation of the CRC, especially in terms of striking an effective balance between cultural pluralism and the overall protection of the interests of the child. As observed by Van Beuren, the CRC offers greater opportunities than most human instruments for balancing traditional values and international rights, a peculiarity attributed to the fact that it was not primarily the product of the industrialised west (Van Beuren, 1998). Van Beuren, however, notably highlights an inherent paradox in the CRC: it seeks to promote universal opportunities for children, but does not advance a 'single fixed universal image of childhood' (ibid). Such a paradox may give rise to problems in instances where there is a conflict between both standpoints. This, it is submitted, is reasonably foreseeable in the context of the differences between the CRA and the CRC.

Nevertheless, these issues may not be regarded as precluding the possibility of harmonisation between the standards of child rights protection set out in the CRC and the CRA. First, as already stated with respect to the CRC, states can propose amendments to certain provisions and as such, there is the possibility of the CRC being reviewed to incorporate provisions necessary to give practical effect to the realisation of the rights of the child, which may be present in regional instruments or national legislation such as the CRA. Legislative amendments may also apply to the CRA for harmonisation with the CRC, where same may be deemed necessary 'in the best interests of the child'.

CONCLUSION

In this paper, the method of incorporating the Convention on the Rights of the Child into Nigerian law has been examined in the context of the Child Rights Act 2003. While both documents enumerate similar sets of substantive rights, there are marked differences in terms of the nature of the rights and the framework of implementation. This is particularly observable in the context of the best interests of the child and parental responsibilities under the child rights protection system. These differences, it has been argued, could give rise to certain conceptual problems, particularly with respect to the harmonisation of the standards of child rights protection set out in the CRC and the CRA. The prospect of textual and interpretative amendments nevertheless gives rise to the conclusion that provisions necessary to give effect to the realisation of the rights to the child can be incorporated where a lacuna exists in either piece of legislation.

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