

Faculty of Law
University of Helsinki
Finland

**Proportionality and Best Interests:
Calibrating the Twin Pillars of Child Justice in Nigeria**

Uchenna Emelonye

Doctoral Thesis

To be presented for public examination by due permission of the Faculty of Law
University of Helsinki in Porthania Hall IV on 28 day of November 2014 at 12 o'clock

Helsinki 2014

Supervisor

Panu Minkkinen
Professor of Jurisprudence
University of Helsinki

Pre-examiner

Matti Joutsen
Professor of Criminal Justice
City University of New York

Pre-examiner

Baderin Mashood
Professor of Human Rights Law
School of African and Oriental Studies
University of London

ISBN 978-951-51-0289-8 (Paperback)
ISBN 978-951-51-0290-4 (PDF)

Table of Contents	ii
Abstract	v
Acknowledgements	vi
Table of Legislation	viii
Table of Cases	x
Abbreviations	xi

Chapter One

General Research Framework	1
1.1 Research Question	1
1.2 Research Methodology	1
1.2.1 Document Analysis	2
1.2.2 Research Limitation	3
1.2.3 Motivation for Research	4
1.3 Contribution to Knowledge	4
1.4 Background on Nigeria	5
1.4.1 Overview of Constitutional Developments in Nigeria	6
1.4.2 Domestic Application of International Treaties in Nigeria	11
1.4.3 The Nigerian Legal System	12
1.4.4 Customary Law	14
1.4.5 Islamic Law	16
1.5 Overview of Nigerian Child Justice System	19
1.5.1 Children and Young Persons Act	20
1.5.2 Legislative History of the Child Rights Act	23
1.6 Overview of Thesis Chapters	27

Chapter Two

Philosophical and Normative Foundation of Child Rights	30
2.1 Introduction	30
2.2 Philosophical Foundation of Child Rights	30
2.2.1 Natural Law	31
2.2.2 Positive Law	35
2.2.3 Other Philosophical Foundations	37
2.2.4 Inclusive Legal Positivism	41
2.3 Normative Foundation of Child Rights	43
2.3.1 United Nations Charter	44
2.3.2 Universal Declaration of Human Rights	46
2.3.3 International Covenants	48
2.3.4 Child-Specific International Instruments	49
2.4 Universality or Relativity of Child Rights	52

2.4.1	Relativity of Child Rights	52
2.4.2	Universality of Child Rights	55
2.4.3	Confluence of Universality and Relativity of Child Rights	56
2.5	Conclusion	59

Chapter Three

	Interpreting Child Justice as Child Rights	61
3.1	Introduction	61
3.2	Evolution of Child Justice	61
3.3	Philosophical Models of Child Justice	67
3.3.1	Welfare Model of Child Justice	68
3.3.2	Justice Model of Child Justice	71
3.3.3	Sub-sets of Justice Model of Child Justice	73
3.3.4	Restorative Model of Child Justice	74
3.4	Child Justice as Child Rights	77
3.5	Principles of Child Rights	81
3.6	Conclusion	83

Chapter Four

	Principle of Proportionality in Child Justice	85
4.1	Introduction	85
4.2	Conceptual Overview of Proportionality	85
4.2.1	Proportionality as a Sentencing Tool	88
4.3	Theories of Proportionality	91
4.3.1	Consequentialist Theory of Proportionality	91
4.3.2	Deontological Theory of Proportionality	94
4.3.3	Deontological Proportionality: Basis for Child Justice	97
4.4	Normative Framework of Proportionality in Child Justice	101
4.5	Conclusion	105

Chapter Five

	Principle of the Best Interests in Child Justice	106
5.1	Introduction	106
5.2	Overview of the Principle of the Best Interests of the Child	106
5.3	The Best Interests of the Child versus the Interest of Justice	111
5.4	Normative Framework of the Best Interests of the Child	116
5.4.1	International Framework for the Best Interests of the Child	117
5.4.2	Regional Framework for the Best Interests of the Child	122
5.5	Conclusion	125

Chapter Six	
Calibrating the Twin Pillars of Child Justice in the Child Rights Act	127
6.1 Introduction	127
6.2 Overview of the Child Rights Act	127
6.3 Twin Pillars of Child Justice in the Child Rights Act	131
6.3.1 Proportionality in the Child Rights Act	131
6.3.2 Best Interests of the Child in the Child Rights Act	134
6.4 Conclusion	138
Chapter Seven	
Application of the Twin Pillars of Child Justice by Family Courts	139
7.1 Introduction	139
7.2 Establishment and Functioning of Envisaged Enablers	139
7.2.1 Family Courts	140
7.2.2 Composition and Competence of Family Courts	142
7.2.3 Child Rights Implementation Committee	145
7.2.4 Funding of the Child Justice System	147
7.3 Effects of the 1999 Constitution on Child Rights Act	150
7.3.1 Legislating Subject to Section 12(3) 1999 Constitution	151
7.4 Multiplicity of Legal Systems in Nigeria	153
7.5 Conclusion	156
Chapter Eight	
Conclusions and Recommendations	157
8.1 Research Summary and Findings	157
8.2 Implication of Research on Child Justice Globally	160
8.3 Implication of Research on Child Justice in Nigeria	161
8.4 Recommendations	163
8.4.1 Establishment of Appropriate Institutions	163
8.4.2 Recruitment, Training and Sensitization of Personnel	164
8.4.3 Creation of Public Awareness and Social Mobilization	165
8.4.4 Improved Funding for the Implementation of the CRA	165
8.4.5 Amendment of Section 12(1) of the 1999 Constitution	167
8.4.6 Other Constitutional Amendments	169
8.4.7 Enhanced Child Rights Sensitivities of the Constitution	170
8.4.8 Child Rights Enforcement Mechanism of the Constitution	171
8.4.9 Amendment of the CRA	172
8.5 Concluding Remarks	172
Bibliography	174

Abstract

This thesis adopted the law in context methodology after due consideration of other legal research methodologies. To situate child justice within the parameters of child rights, this thesis analyzed the normative underpinning of child rights and found that its foundation is traceable to the International Bill of Human Rights. It also examined the philosophical foundations of child rights and adopted the view that it is based on inclusive legal positivism found at the intersection of natural law and positive law. This thesis validated the existing claim that child justice is predicated on the mitigated culpability of children and that whilst human rights extend to children because of their humanity, child-specific rights, including child justice accrue to them specifically due to their age and vulnerability.

Having considered all the principles of child rights, this thesis elevated the principles of proportionality and the best interests of the child as twin pillars of child justice. As a standard for the humane treatment of children in conflict with the law and predicated on the premise that the twin pillars encapsulate all other principles of child rights, this thesis examined to what extent the twin pillars are incorporated and applied in the Nigerian child justice system.

This thesis found that although the 2003 Child Rights Act of Nigeria meets the minimum international legislative standard, child offenders in Nigeria seldom enjoy the protective shield of the twin pillars of child justice. It corroborated the strength of the twin pillars of child justice as judicial sentencing tools and found that whereas child rights may accommodate relative sensitivities, the twin pillars of child justice are immutable and non-derogable principles for the treatment of children in conflict with the law.

To ensure the promotion and protection of the rights of child offenders, this thesis recommended the amendment of the Child Rights Act and the immediate establishment of all the enablers contemplated therein. Although the review of the 1999 Constitution of Nigeria was not the main focus of this thesis, it however found that certain provisions of the constitution inhibit the enjoyment of child rights. Exploring the opportunity presented by the ongoing constitutional reform in Nigeria, this thesis recommended the amendment of some sections of the constitution.

Acknowledgements

In retrospect, I commenced and completed this doctoral program working full time across four country-duty stations; Pristina-Kosovo, Darfur-Sudan, Rome-Italy and Nairobi-Kenya. It also traversed two universities and legal systems: the University of Leicester, United Kingdom and the University of Helsinki, Finland. Recognizing the marathon expedition involved in these processes, I cannot overlook appreciating and thanking God for constantly and continuously supplying me with motivation, perseverance, enthusiasm and most importantly good health.

I am extremely grateful to my supervisor, Professor Panu Minkkinen for first and foremost showing interest in my doctoral proposal even when it was dusty and rusty. I acknowledge his learned supervision and concede that the contribution to knowledge made by this thesis is testimonial to his scholarly guidance and persistent prompt for 'my own voice'. I thank Ms. Jutta Kajander, the Postgraduate Studies Coordinator of Faculty of Law, University of Helsinki, for her support and procedural guidance. I would also like to appreciate Dr. Virginia Mantouvalou who was briefly my alternate supervisor when I commenced and was conducting my doctoral program at the University of Leicester, United Kingdom. I am also grateful to my pre-examiners, Professor Matti Joutsen and Professor Baderin Mashood for their articulate review and insightful comments on my thesis.

Conducting this doctoral program as a full time international civil servant, I was also answerable to several professional supervisors. While thanking all of them for their support and encouragement, I expressly recognize the mentorship of Mr. Aeneas Chuma, Mr. Dodibo Toure and Mrs. Nardos Bekele-Thomas.

Although my dedication and motivation to complete this doctoral program was fanned by the embers of erudite professional and academic supervision, I would not have sustained the momentum without the incredible support of my family. My spouse Abigail Uchenna Emelonye, also a doctoral student, was spectacular in her painstaking love and support. Her selfless generation of matrimonial tranquility before and during my studious days and nights were instrumental to my uninterrupted impetus. Similarly, I am sincerely grateful to the support and sacrifice of my beloved children, Uchenna, Uchechi and Ucheoma. Without the bountiful joy that they bring individually and collectively to my life, my perseverance would have waned and been dissuaded by the unending vicissitudes of life and career.

I am grateful to my mother Lady Christiana Emelonye for nurturing and instilling in me invaluable life shock absorbers. I thank her most sincerely for believing and trusting in my strength even when I considered it frail. I am also thankful to my parents -in-law Mr. and Mrs. John Nimmyel. My unreserved regards are extended to my twin brother, Barrister Obi Emelonye. He peacefully and collaboratively co-habited with me in mummy's womb and has thereafter ignited his candle at both ends to illuminate my strides. To my brothers, Engr. Amasike

Emelonye, Engr. Mezie Emelonye, Engr. Victor Emelonye and Dr. Chiuba Emelonye, I say a big thank you all for availing me of the comfort of your brotherly shoulders whenever and wherever I needed to retreat. My warmest thanks also go to my one and only sister, Mrs. Chioma Ekeh and my brother in-law Dr. Leo Stan Ekeh.

It is not feasible to mention and thank all those friends and colleagues with whom I had the opportunity and privilege of discussing my thesis. The impromptu and insightful exchanges I had with them have been extremely helpful in cross-fertilizing my thoughts. I would like to thank all of you for your encouragement, particularly Professor Uchefula Chukwumaeze, Professor Joy Ngozi Ezeilo, Professor Chidi Odinkalu, Professor Ernest Ojukwu, Professor Nsongurua Udombana, Dr. Ogunniran Iyabode, Dr. Julie Oseku, Dr. Kanario Akunjeh, Barrister Zam Zam Nagujja and Barrister Adebayo Kareem.

I dedicate this thesis to the everlasting memory and remembrance of my mentor, motivator and elder brother, Dr. Herbert Chinda Emelonye (1960 – 2002). Your spirit subsists in me. I also consecrate this thesis to the memory of my inspirational dad, Mr. Linus Osigwe Emelonye (1921 – 1996). Daddy, the propelling force of my life is still lubricated by your inspirational legacies and the philosophy of Ralph Waldo Emerson that you enjoined me to memorize in 1977 when I was ten years. As was customary in those days, and habitually whenever I honor your final resting place, I recite for you once again what you called the secret of success, ‘whatever you vividly imagine, ardently desire, sincerely believe, and enthusiastically act upon, must inevitably come to pass.’

In Helsinki, 28 November 2014

Uchenna Emelonye

Table of Legislation

International

American Declaration on the Rights and Duties of Man
Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment
Convention on the Elimination of All Forms of Discrimination Against Women and its Optional Protocol
Convention on the Rights of the Child and its Optional Protocols
Covenant of the League of Nations
Declaration of the Rights of the Child
Declaration on the Rights and Welfare of the African Child
European Convention for the Protection of Human Rights and Fundamental Freedoms
International Convention for the Protection of All Persons from Enforced Disappearance
International Convention on the Elimination of All Forms of Racial Discrimination
International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990)
International Convention on the Rights of Persons with Disabilities
International Covenant on Civil and Political Rights and its Optional Protocols
International Covenant on Economic, Social and Cultural Rights
United Nations Charter
United Nations 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
United Nations Guidelines for the Prevention of Juvenile Delinquency
United Nations Standard Minimum Rules for the Administration of Juvenile Justice
United Nations Rules for the Protection of Juveniles Deprived of their Liberty
Universal Declaration of Human Rights
Vienna Declaration and Programme of Action

Regional

African Charter on Human and People's Rights
African Charter on the Rights and Welfare of the Child

Nigerian

African Charter on Human and Peoples' Rights (Ratification and Enforcement Act Cap. 10, Laws of the Federation of Nigeria 1990)

Children and Young Persons Act (Cap 32) Laws of the Federation of Nigeria and Lagos, 1958
 Children and Young Persons Act (Cap 21) Laws of Northern Nigeria
 Children and Young Persons Law (Cap 26) of the Laws of Lagos State
 Childs Rights Act of Nigeria, 2003
 Constitution of the Federal Republic of Nigeria, 1979
 Constitution of the Federal Republic of Nigeria, 1999
 Criminal Code Act (Cap 77) Laws of the Federation of Nigeria, 2000
 Criminal Justice Miscellaneous Provisions Act (Cap 78) Laws of the Federation of Nigeria, 2000
 Criminal Procedure Act (Cap 80) Laws of the Federation of Nigeria, 2000
 Criminal Procedure of Northern States Act (Cap 81) Laws of the Federation of Nigeria, 2000
 Laws of Nigeria, 1954
 Laws of Nigeria, 1955
 Laws of the Federation of Nigeria, 1990
 Laws of the Federation of Nigeria and Lagos, 1958
 Nigerian Native Courts (Protectorates) Ordinance No. 44, 1933
 Nigerian Evidence Act (Cap 112) Laws of the Federation of Nigeria, 2000
 Nigerian Independence Constitution, 1960
 Nigerian Ordinance in Council, 1943
 Nigerian Order-in-Council, 1945
 Nigerian Order-in-Council, 1946
 Nigerian Ordinance in Council, 1947
 Nigerian Ordinance in Council, 1950
 Nigerian Republican Constitution, 1963
 Penal Code Act, Chapter 77 Laws of the Federation of Nigeria, 1990
 Penal Code of Northern States (Cap 345) Laws of the Federation of Nigeria, 2000
 Prisons Act (Cap 366) Laws of the Federation of Nigeria, 2000
 Sharia Court of Jigawa State of Nigeria No. 7, 2002
 Sharia Courts in Zamfara State of Nigeria No. 5, 1999

Others

Australian Sentencing Act, 1991
 Declaration of Rights of Man and Citizen, 1789
 Illinois Juvenile Court Act, 1899
 United States Declaration of Independence, 1776

Table of Cases

Eshugbaye Eleko v. Government of Nigeria (1931) AC, 262

Ibidapo v. Lufthansa [1997] 4 NWLR, Pt. 498, 124

Kokkanen v. Finland [1996] FLR, 289

Oyewumi v. Ogunesan (1990) NWLR, 182 at 207

Registered Trustees of the National Association of Community Health Practitioners of Nigeria & Others v Medical and Health Workers Union of Nigeria [2008] 2 NWLR, Pt 1072 575

In re Gault, 387 U.S. 1 (1967)

In re Winship, 397 U.S 358 (1970)

Saude v. Alhaji Halliru Abdullahi, SC, 197/1987

Thompson v. Oklahoma, 487 U.S. 815 (1988)

Abbreviations

ACHPR	African Charter on Human and Peoples' Rights
ACHPRREA	African Charter on Human and Peoples' Rights (Ratification and Enforcement Act Cap)
ACRWC	African Charter on the Rights and Welfare of the Child
ADRDM	American Declaration on the Rights and Duties of Man
ASA	Australian Sentencing Act
CAT	Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment
CC	Sir Clifford Constitution
CCA	Criminal Code Act
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CFRN	Constitution of the Federal Republic of Nigeria
CJMPA	Criminal Justice Miscellaneous Provisions Act
CLN	Covenant of the League of Nations
CPA	Criminal Procedure Act
CPNSA	Criminal Procedure of Northern States Act
CRA	Childs Rights Act
CRC	Convention on the Rights of the Child
CYPA	Children and Young Persons Act
DRC	Declaration of the Rights of the Child
DRWAC	Declaration on the Rights and Welfare of the African Child
ECHR	European Convention on Human Rights
FDRMC	French Declaration of Rights of Man and Citizen
FLAR	Frederick Lugard's Amalgamation Report
FOP-ICCPR	First Optional Protocol to the International Covenant on Civil and Political Rights
ICCPR	International Covenant on Civil and Political Rights
ICEFRD	International Convention on the Elimination of All Forms of Racial Discrimination
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICPPED	International Convention for the Protection of All Persons from Enforced Disappearance
ICPRMW	International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families
ICRPD	International Convention on the Rights of Persons with Disabilities
IJCA	Illinois Juvenile Court Act
JMC	Sir John Macpherson Constitution
LFN	Laws of the Federation of Nigeria

NCO	Native Courts (Protectorates) Ordinance
NEA	Nigerian Evidence Act
NPC	National Population Commission
OHCHR	Office of the High Commissioner for Human Rights
OIC	Order in Council
OLC	Oliver Littleton's Constitution
PA	Prisons Act
PCA	Penal Code Act
PCNN	Penal Code of Northern Nigeria
PCNS	Penal Code of Northern States
RC	Republican Constitution
SCR	Security Council Resolution
SOP-ICCPR	Second Optional Protocol to the International Covenant on Civil and Political Rights
UDHR	Universal Declaration of Human Rights
UNC	United Nations Charter
UNDP	United Nations Development Programme
UNGPJD	United Nations Guidelines for the Prevention of Juvenile Delinquency
UNICEF	United Nations Children's Emergency Fund
UNSMRAJJ	United Nations Standard Minimum Rules for the Administration of Juvenile Justice
UNRPJDL	United Nations Rules for the Protection of Juveniles Deprived of their Liberty
USDI	United States Declaration of Independence
VDPA	Vienna Declaration and Programme of Action

Chapter One

General Research Framework

1.1 Research Question

The overarching framework of this thesis is that child justice is an integral component of child rights and that the principles of proportionality and the best interests of the child are the twin pillars of child justice. On the foregoing premise, this thesis examines to what extent the twin pillars of child justice are incorporated into the 2003 Child Rights Act of Nigeria, and to what degree they are applied by designated family courts in the treatment of children in conflict with the law.

1.2 Research Methodology

There are several methodologies for conducting legal research.¹ Key amongst them is the doctrinal methodology which takes an insider view of the law and the fact that law could be studied in isolation.² As the benchmark for most legal research, doctrinal methodology evaluates the content of law, the critical features of legislation and case laws.³ The Pearce Committee defined doctrinal methodology as ‘research which provides a systemic exposition of the rules of a particular legal category, analyses the relationship between the rules, explains areas of difficulty and, perhaps, predicts future developments.’⁴

Despite the inherent appeal of doctrinal research methodology in legal research,⁵ it has been criticized as limiting the researcher’s view to the confines of strict law without due regard to holistic consideration of external and social factors.⁶ According to Twining, the central weakness of the doctrinal research methodology is that it typically focuses attention on rules of law without systemic or regular reference to the context of the problems it purports to resolve.⁷ The inherent weaknesses of the doctrinal methodology amongst other things occasioned the

¹ Terry Hutchinson, ‘Doctrinal Research: Researching the Jury’ in Dawn Watkins and Mandy Brown (eds) *Research Methods in Law* (Routledge 2003) 7

² S. Bartie, ‘The Linger Core of Legal Scholarship’ (2000) 30 *Legal Studies* 345

³ D. W. Vick, ‘Interdisciplinarity and the Discipline of Law’ (2004) 31 *Journal of Law and Society* 345

⁴ D. Pearce, E. Campbell and D. Harding, *Australian Law School: A Discipline Assessment for the Commonwealth Tertiary Education Commission*, (Australian Government Publishing Service 1987)

⁵ *Law and Learning: Report to the Social Sciences and the Humanities Research Council of Canada (The Arthurs Report)* Information Division of the Social Sciences and Humanities Research Council of Canada 1983) 31

⁶ Pauline Westerman, ‘Open and Autonomous? The Debate on Legal Methodology as a Reflection of the Debate on Law’ in *Mark Van Hoecke (ed) Methodologies of Legal Research Which Kind of Method for What Kind of Discipline* (Oxford: Hart Publishing 2011) 91

⁷ William Twining, *Taylor Lectures - Academic Law and Legal Development* (University of Lagos Faculty of Law 1976) 20; See also William Twining, *Law in Context: Enlarging A Discipline* (Clarendon Press 1997) 36

emergence of alternative research methodologies.⁸ Amongst the competing methodologies that emerged and gained momentum amid legal scholars are empirical legal research, critical legal research and the socio-legal methodology hereafter called the law in context.

Bearing in mind that this thesis examines the status and authority of a law and the degree to which certain standards are integrated in a law and applied by the courts, the doctrinal methodology would have been a feasible methodology. But in view of the fact that this thesis goes beyond ‘working the rules’ and intends to investigate the underlying factors inhibiting the implementation of the law and how it could be improved or reformed, a socio-legal understanding of the context of the prevailing law is necessary. To carry out these tasks which go beyond isolated analysis of the law, the law in context methodology will be adopted to conduct this thesis.

As a paradigm shift in the study of law, this methodology analyses law as a social phenomenon,⁹ and is compatible with resolving the research question of this thesis.¹⁰ This thesis is also mindful of the inherent weaknesses of the law in context methodology, particularly the involvement of the researcher in the real social and political circumstances of the research.¹¹ Furthermore, since law is a reflection of the social values of a society, scientific or quantitative methods of inquiry are somewhat inappropriate and experimental surveys are equally unsuitable for this research.¹²

1.2.1 Document Analysis

In gathering data for this thesis and as recommended by Bloomberg, emphasis is placed on documentary sources, combined with unstructured interviews and observations.¹³ Documents used in this thesis include monographs, journals, statutes, constitutions, government policy papers and United Nations treaties. Others are covenants and conventions, research papers, official and unofficial reports, statistics and web-based materials. Also, relevant documents to be consulted include

⁸ F. Cownie, *Legal Academics: Culture and Identities* (Oxford Hart Publishing 2004) 51

⁹ Atieno Ochieng, ‘An Analysis of the Strengths and Limitation of Qualitative and Quantitative Research Paradigms’ in *Problems Of Education In The 21st Century* (2008) 18; See also C R Kothari, *Research Methodology: Methods and Techniques* (2nd edn, New Age International Publishers 2002)13; ESCR, *Review of Socio Legal Studies: Final Report* (Swindon, ESCR 1994) 1

¹⁰ Carolyn Boyce and Palena Neale, *Conducting In-Depth Interviews: A Guide to Designing and Conducting In-Depth Interviews for Evaluation Input* (2006) 2 Pathfinder International Tool Series 3

¹¹ C.M. Campbell and P. Wiles, ‘The Study of Law in Society in Britain’ (1996) 10 *Law and Society Review* 547

¹² Victor Jupp, *Methods of Criminological Research* (Rutledge 1989) 28; See also Sharlene Hasse-Biber, *Mixed Methods Research: Merging Theory with Practice* (2nd edn, Gilford Press 2008) 127

¹³ Linda Bloomberg, *Completing Your Qualitative Research Dissertation: A Road Map From Beginning to End* (SAGE Publications 2012) Ch 4; See also Hennie Boeije, *Analysis in Qualitative Research* (SAGE Publications 2010) Part 4

both primary and secondary sources, classified as public or private documents.¹⁴ Where the need arises and to complement the dearth of case law, this thesis makes recourse to unstructured interviews conducted in consonance appropriate frameworks.¹⁵

This thesis benefited from access to online and hard-copy resources available at the David Wilson Library and Harry Peach Library at the University of Leicester, United Kingdom. Likewise, the University of Helsinki Library and the Library of the United Nations Office of the High Commissioner for Human Rights provided extremely useful sources of literature. The National Assembly Library Abuja and the High Court Library of several states and judicial divisions in Nigeria equally provided useful materials relating to the legislative history of the CRA.

1.2.2 Research Limitation

The concept of child justice is very broad and ranges from situations where children are in conflict with the law to instances where they require care and protection. Although this thesis appreciates the emerging diverse theories of delinquency and crime, it will neither decode ‘why’ children are in conflict with the law, nor delve into the societal effects of their involvement in crime. Rather, it examines within the framework of the twin pillars of child justice ‘how’ children in conflict with the law in designated states in Nigeria are processed by family courts established pursuant to the CRA.

Similar to the criminal justice system, child justice is based on the interplay of several independent and inter-related justice institutions including the police, courts, remand institutions and prisons. When children are processed through the child justice system, these institutions interface. Regardless of the synergy arising from the complementary and interdependent roles of these institutions, this thesis will deemphasize the role of police and child correction institutions in the child justice system. Despite the extensive scope and the multifarious institutions involved in the child justice system, this thesis adopts a narrow interpretation of child justice in terms of latitude and institutions to be investigated. It focuses specifically on instances where children are in conflict with the law whilst disregarding situations where they need care and protection.

¹⁴ Monageng Mogalakwe, ‘The Documentary Research Method: Using Documentary Sources in Social Research’ (2009) 25 East Africa Social Science Review 43; See also Monique Hennink, Inge Hutter and Ajay Bailey, *Qualitative Research Methods* (SAGE Publications 2011)

¹⁵ UN Office of the High Commissioner for Human Rights, *Professional Training Series No. 7: Training Manual for Monitoring Human Rights* (OHCHR 2001); See also Carolyn Boyce and Palena Neale, *Conducting In-Depth Interviews: A Guide to Designing and Conducting In-Depth Interviews for Evaluation Input* (Pathfinder International Tool Series 2006) 3

In order to critically analyze the role of family courts vis-à-vis the 2003 CRA, this thesis is constrained by the dearth of case laws emanating from the family courts. In addition, academic literature touching on the cardinality and centrality of the twin pillars of child justice is similarly scarce. To ameliorate this limitation, this thesis relies on unstructured interviews conducted between January and July 2013 with five court registrars, ten magistrates, ten barristers practicing in Lagos, Ogun, Oyo, Enugu, Imo, Abia, Rivers, Plateau, Kaduna, Bauchi, Niger, Kano, Sokoto and Adamawa States. These fourteen case study states are divided into two sets. The first set comprises seven states that have adopted the CRA into state-specific child rights law. The second comprises a set of seven states that have not yet adopted the CRA into state law. Where possible, this thesis will extrapolate from other jurisdictions or rely on relevant academic literature in a non-Nigerian context.

Although the effects of legal pluralism impact the child justice system both directly and indirectly in Nigeria, this thesis will focus on calibrating the twin pillars of child justice only in the context of statutory law. Consequently, it will not consider the impact or otherwise of Islamic or customary laws on the child justice system or how they both facilitate or inhibit the enjoyment of child rights.

1.2.3 Motivation for Research

This thesis arose out of the author's two decades of experience as a lawyer and consultant on justice sector reform in several developing and transition countries. During this period, the author was exposed to multifarious drawbacks to child rights, particularly those that accrue to children in conflict with the law. In the case of Nigeria on which this thesis is focused, the author witnessed institutional insensitivity to child rights irrespective of international, regional and national mechanisms for the protection of child rights.

1.3 Contribution to Knowledge

Child justice in Nigeria both during the era of the Children and Young Persons Act (CYPA) and since 2003 after the promulgation of the CRA has been scrutinized academically by national and international scholars. However, there is a dearth of literature examining the principles of proportionality and the best interests of the child within the context of the CYPA or within the framework of the CRA with the sole aim of classifying them as the twin pillars of child justice. Furthermore, while the broad areas of child justice have been given considerable attention in books and articles, these books and articles are seldom situated within the context of the CRA and were not intended to examine the application of the twin pillars of child justice by family courts in Nigeria.

Consequently, this thesis contributes to knowledge by developing what it calls the twin pillars of child justice as a non-derogable standard for the treatment of

children in conflict with the law. This thesis fills a gap in scholarly research by elucidating the challenges of the practical implementation of the CRA and thereby contributes to better understanding of the disconnect of legislative reforms that are not matched with political will and institutional restructuring.

This thesis contributes to discussions on the drawbacks of a non-holistic justice sector reform and also corroborates the fact that the aim of child justice is to ensure that courts take the best interests of children into consideration to such extent that their infraction of the law is not rewarded with disproportionate responses. As an advancement of knowledge and a veritable platform to protect child rights, it is anticipated that the recommendations of this thesis will contribute to the ongoing debate on legislative and constitutional amendment in Nigeria.

1.4 Background on Nigeria

Since this research focuses on Nigeria, it is essential to set out a contextual background of the country's constitutional developments and legal systems. This historical perspective facilitates better understanding of the nature and particulars of the child justice system in the context of which the twin pillars of child justice will be examined.

Nigeria is located in West Africa along the shores of the North Atlantic Ocean, situated between Benin and Cameroon and shaped through a gradual process of British colonial territorial incorporation.¹⁶ According to Suberu, the delimitation of the territory of Nigeria began in 1861 with the annexation of the coastal city of Lagos and culminated in the amalgamation of the two British protectorates of Northern and Southern Nigeria in 1914.¹⁷ The Federal Republic of Nigeria became independent on October 1, 1960 after about 100 years of British colonial rule. It attained a republican status within the British Commonwealth in 1963. According to the Nigeria National Population Commission, Nigeria is estimated to have over 162.5 million citizens, with a population growth of 2.6 percent unevenly distributed among 350 ethnic groups. Presently, Nigeria is administratively delineated into 35 states and the Federal Capital Territory.¹⁸

Prior to and at independence, Nigeria's pluralistic and diverse nature among other factors necessitated the formal adoption of a federal system of government that consisted of Northern, Eastern and the Western regions. The Nigerian federation did not emerge through a contract between states nor as a voluntary union of a number of originally independent states. Rather, it dates from the middle of the nineteenth

¹⁶ Rotimi Suberu, 'Reinventing the Architecture of Nigerian Federalism' (2006) 12 *Brown Journal of World Affairs*. 140

¹⁷ *Ibid*

¹⁸ The states are as follows: Abia, Adamawa, Akwa Ibom, Anambra, Bauchi, Bayelsa, Benue, Borno, Cross-River, Delta, Ebonyi, Edo, Ekiti, Enugu, Gombe, Imo, Jigawa, Kaduna, Kano, Katsina, Kebbi, Kogi, Kwara, Lagos, Nassarawa, Niger, Ogun, Ondo, Osun, Oyo, Plateau, Rivers, Sokoto, Taraba, Yobe and Zamfara

century when parts of what became known as Nigeria came under the British colonial sphere of influence through British conquest in 1903.¹⁹ Apart from the Mid-Western Region which was carved out of the western region in 1964 through the process laid down in the 1963 Republican Constitution, the other five subsequent exercises of state creation that put the current number of states in Nigeria at 36 plus the federal capital territory located in Abuja occurred during military regimes.

1.4.1 Overview of Constitutional Developments in Nigeria

Since the amalgamation of the Northern and Southern protectorate in 1914 into what is the present-day Nigeria, the country has been governed under 8 constitutional dispensations. Nigerian constitutional history began with Frederick Lugard's Amalgamation Report of 1914 followed by the Clifford's Constitution in 1922.²⁰ The third constitution in Nigeria was the Richard's Constitution of 1945 which was succeeded by the McPherson Constitution adopted in 1951.²¹ In 1954, a constitutional arrangement was adopted which led to Oliver Littleton's Constitution, and thereafter the independence Constitution of 1960 and thereafter the Republican Constitution of 1963.²² The 1963 military coup and the resultant suspension of the constitution disrupted the Nigerian constitutional framework for 16 years until the promulgation of the 1979 constitution.²³ In 1984, another *coup d'etat* suspended the 1979 constitution until the promulgation and adoption of the 1986 constitution that was in force until 1993 when another military government toppled the democratically elected government.²⁴

Suberu and Diamond's view is that Nigeria's dizzying political odyssey over five decades of independent statehood has witnessed restive political activity that swung between democratic pluralism and military authoritarianism, and between Westminster-style parliamentary government and an American-type presidential system.²⁵ Similarly, it has been argued that Nigeria's constitutional development was largely shaped and driven by colonial interests based on an exclusionary policy of alienation of the citizenry from any form of popular participation. Omotola argues

¹⁹ Dele Babalola, *The Origins of Nigerian Federalism: The Rikerian Theory and Beyond* (Federal Governance 2013) 43; See also Adiele E. Afigbo, *Background to Nigerian Federalism: Federal Features in the Colonial State* (Publius 1991) 13

²⁰ Egbert Udo Udoma, *History and the Law of the Constitution of Nigeria* (Malthouse Press 1994) 32

²¹ Toyin Falola and Matthew Heaton, *A History of Nigeria*, (Cambridge University Press) 53

²² Ibid

²³ B O Nwabueze, *A Constitutional History of Nigeria* (Longman Publishers 1982) 11

²⁴ Ibid

²⁵ Rotimi Suberu and Larry Diamond, 'Institutional Design, Ethnic Conflict Management, and Democracy in Nigeria' in Andrew Reynolds (ed) *The Architecture of Democracy: Constitutional Design, Conflict Management and Democracy* (Oxford University Press 2002) 400; See also Osita Agbu, 'Re-inventing Federalism in Post-transition Nigeria: Problems and Prospects' (2004) 29 *Africa Journal Online* 7 <http://www.ajol.info/index.php/ad/article/view/22192> accessed 23 October 2013

that while the agitation of nationalists may have led to the move from the Nigerian Council of 1914 to the expanded Legislative Council of the Clifford Constitution of 1922, the Council turned out to be merely a charade, conceding no powers to the subjects.²⁶

The present constitution of Nigeria was adopted by the military provisional ruling council and came into force in May 1999. It is the supreme law of the country and is a collection of rules and principles on the basis of which Nigeria is governed.²⁷ It also regulates the distribution of legislative powers between the bi-cameral National Assembly, which has power to make laws for the federation and the unicameral House of Assembly entitled to legislate for each state of the federation.²⁸

Bearing in mind that the 1999 constitution like other previous constitutions did not expressly authorize states to have state constitutions, it implies that it forbids any constitution by federating states and binds all authorities and persons throughout the federal republic. It also provides the framework for the administration of both the federal and state governments.²⁹ The 1999 Constitution has been amended three times since promulgation with the first two amendments dealing largely with political issues while the third amendment made provisions for the establishment of the national industrial court as a superior court of record.³⁰ Efforts are currently ongoing to further amend the 1999 Nigerian Constitution.³¹

The current federal system of government in Nigeria is modeled after the American system.³² The legislative, executive and the judicial functions are divided between the federal and state governments. The federal legislature referred to as the

²⁶ J Shola Omotola, 'Democracy and Constitutionalism in Nigeria Under the Fourth Republic' (2008) 2 *Africana* 7; See also Simeon Ilesanmi, 'Constitutional Treatment of Religion and the Politics of Human Rights in Nigeria' (2001) 100 *Issue* 401 *African Affairs* 529

²⁷ Joachim Wehner, 'Parliament and the Power of the Purse: The Nigerian Constitution of 1999 in Comparative Perspective' (2002) 2 *Journal of African Law* 216

²⁸ *Ibid*

²⁹ Amina Augie, *Rethinking the Nigerian Constitution* (Nigerian Institute of Advanced Legal Studies 2008) 23

³⁰ Constitution of the Federal Republic of Nigeria (First Alteration) Act 2010 (An Act to alter the provisions of the Constitution of the Federal Republic of Nigeria 1999 and for related matters); Constitution of the Federal Republic of Nigeria (Second Alteration) Act No. 2 of 2010 (An Act to alter the provisions of the Constitution of the Federal Republic of Nigeria, 1999 and the Constitution of the Federal Republic of Nigeria (First Alteration) Act, 2010; and for related matters); Constitution of the Federal Republic of Nigeria (Third Alteration) Act 2010 (An Act to alter the Constitution of the Federal Republic of Nigeria Cap. C.23, Laws of the Federation of Nigeria, 2004 for the establishment of the National Industrial Court under the Constitution)

³¹ Olusola Fabiyi, Kamarudeen Ogundele and Ihuoma Chiedozie, 'Constitution Amendment: Delegates back plan to empower Jonathan' <http://www.punchng.com/news/constitution-amendment-delegates-back-plan-to-empower-jonathan/> accessed 28 April 2014

³² Kelechi Kalu, 'A Constitutionalism in Nigeria: A Conceptual Analysis of Ethnicity and Politics' [2009] *West Africa Review*;

National Assembly is bicameral and is made up of the Senate and House of Representatives.³³ Each of the 36 states of the federation is entrusted with its own law-making organ known as the House of Assembly. The members elected to the Houses of Assembly represent the various state constituencies.

The executive power of the federation is vested in the President.³⁴ These powers can be administered directly or through the Vice-President or Ministers or officers of the government. Similarly, in the respective states, the executive power of a state is vested in the Governor and may be exercised directly by the governor or through the Deputy Governor, Commissioners or other public officers.³⁵ The 1999 Nigerian Constitution governs the composition of government, the structure of governmental powers among federating states and the process by which such powers are exercised.³⁶ Except for the constitutions prior to 1946 which were based on a unitary form of government, the rest of the constitutional structure of Nigeria was characterized by a federal system of government.³⁷

According to Muhammad, in a bid to reconcile diverse ethnic and religious sentiments, these post 1946 constitutions progressively guaranteed substantial autonomy to the then existing regions and by extension states.³⁸ In his view, the realities of the country's historical past and coupled with the perceived economic advantage accruable from decentralization, federalism became an attractive option for Nigeria. While noting several other reasons why federalism as a form of government was attractive and compelling in Nigeria, Muhammad argues that federalism was adopted in Nigeria principally as an institutional arrangement that was aimed at maintaining unity in diversity.³⁹

Reinforced by growing suspicion and fear of domination by majority ethnic groups over minority groups, federalism was considered the system of government that would grant federating units considerable freedom and autonomy in the internal governance of their people. Alapiki and Odondiri hold a different view that the adoption of federalism in Nigeria was an external script meant to advance the

³³ Sections 58 & 59 Constitution of the Federal Republic of Nigeria, 1999

³⁴ Section 5(1)(a) Constitution of the Federal Republic of Nigeria, 1999

³⁵ Section 5(2)(a) Constitution of the Federal Republic of Nigeria, 1999

³⁶ S.A Aghalino, 'Dynamics of Constitutional Development in Nigeria: 1914 – 1999' (2006) 2 *Indian Journal of Politics* 10; See also Dawn Brancati, 'Decentralization: Fueling the Fire or Dampening the Flames of Ethnic Conflict and Secessionism?' (2006) 60 *International Organization* 651; J. Isawa Elaigwu, 'Federalism in Nigeria's New Democratic Polity' (2002) 32 (2) *Publius* 73

³⁷ Rotimi Suberu, 'The supreme Court and Federalism in Nigeria' (2008) 46 *Journal of Modern African Studies* 451; See also N. A Inegbedion and E. Omoregie, 'Federalism in Nigeria: A Reappraisal' (2006) 4 *Journal of Commonwealth Law and Legal Education* 69

³⁸ Abdulrasheed A. Muhammad, Some Comments on Five Decades of Nigerian Federalism available http://scholar.google.com/scholar?q=Abdulrasheed+A.+Muhammad%2C+Some+Comments+on+Five+Decades+of+Nigerian+Federalism&btnG=&hl=en&as_sdt=0%2C5 accessed 12 November 2012; See also Martin Lynn, 'The Nigerian Self-Government Crisis of 1953 and the Colonial Office' (2006)

³⁹ *Ibid*

political and administrative convenience of colonial masters.⁴⁰ They argued further that contrary to the motive of unity in diversity, federalism was introduced in Nigeria as a divide and rule strategy and a divisive colonial heritage that evidences self-interest.⁴¹

Nigerian federalism has rotated between the excessive regionalization that characterized the first republic to the excessive centrality of the military and to some extent, post-military era.⁴² This transition has been accompanied by structural changes, which saw the federation move from its initial three regions at independence to its present 36 state structure and 774 local government councils.⁴³

With federalism being one of the constitutional principles of the 1999 constitution, the distribution of powers across the three-tier federal structure consisting of the federal government, the state government and local government is guaranteed in the constitution.⁴⁴ Each level of government has under the 1999 constitution specified legislative autonomy within its area of operation. Part I of the 1999 Constitution provides for the exclusive legislative list which itemizes issues in respect of which the federal government has exclusive competence to legislate upon.

The subject matter for which the federal government could exclusively legislate upon excludes human rights in general and child rights in particular, but include issues such as awards of national titles, honours and decorations. Others are construction, alteration and maintenance of roads, fishing and fisheries.⁴⁵ While the

⁴⁰ H Alapiki and P.G.O Odondiri, 'Federal State Relations in Nigeria' in E.A Henry (ed) *Human Development Issues in Nigeria* (Spring Fold Publishers 1992) 22

⁴¹ Ibid

⁴² Ladipo Adamolekun, 'The Nigerian Federation at the Crossroads: The Way Forward' (2005) 35 *Publius* 383

⁴³ Rotimi Suberu, 'The Nigerian Federal System: Performance, Problems and Prospects' [2010] *Journal of Contemporary African Studies* 459

⁴⁴ Section 2 Constitution of the Federal Republic of Nigeria, 1999

⁴⁵ Legislative competence under the exclusive remit of the federal government are accounts of the government of the federation, and offices, courts, and authorities thereof, audit of those accounts, arms, ammunition and explosives, aviation including airports, safety of aircraft and carriage of passengers and goods by air, awards of national titles of honour, decorations and other dignities, bankruptcy and insolvency, banks, banking, bills of exchange and promissory notes, borrowing of monies within or outside Nigeria for the purposes of the Federation or of any State, census, including the establishment and maintenance of machinery for continuous and universal registration of births and deaths throughout Nigeria. Others are citizenship, naturalization and aliens, commercial and industrial monopolies, combines and trusts, construction, alteration and maintenance of such roads as may be declared by the National Assembly to be Federal trunk roads, control of capital issues, copyright, creation of states, currency, coinage and legal tender, customs and excise duties, defense, deportation of persons who are not citizens of Nigeria, designation of securities in which trust funds may be invested, diplomatic, consular and trade representation, drugs and poisons, election to the offices of President and Vice-President or Governor and Deputy Governor and any other office to which a person may be elected under the Constitution, excluding election to a local government council or any office in such council, evidence, exchange control, export duties, external affairs, extradition, fingerprints identification and criminal records, fishing and fisheries other than fishing and fisheries in rivers, lakes, waterways, ponds and other inland waters within Nigeria. Others are immigration into and emigration from Nigeria; implementation of treaties relating to matters on this

federal government has the sole competence to legislate on matters on the exclusive legislative list, the subject matter on the concurrent legislative list provided for in Part II of the constitution could be legislated upon by both the federal and state government. However, in the event of conflict between federal and state laws on matters on the concurrent legislative list, the federal law prevails and the state law will be void to the extent of its inconsistency.⁴⁶ Like the exclusive legislative list, the concurrent legislative list omits human rights in general and child rights in particular.⁴⁷

list; incorporation, regulation and winding up of bodies corporate, other than co-operative societies, local government councils and bodies corporate established directly by any Law enacted by a House of Assembly of a State; insurance; labour, including trade unions, industrial relations; conditions, safety and welfare of labour; industrial disputes; prescribing a national minimum wage for the Federation or any part thereof; and industrial arbitration etc. Others are legal proceedings between Governments of States or between the Government of the Federation and Government of any State or any other authority or person; maritime shipping and navigation; meteorology; military (Army, Navy and Air Force) including any other branch of the armed forces of the Federation; mines and minerals, including oil fields, oil mining, geological surveys and natural gas; national parks being such areas in a State as may, with the consent of the Government of that State, be designated by the National Assembly as national parks; nuclear energy; passports and visas; patents, trademarks, trade or business names, industrial designs and merchandise marks; pensions, gratuities and other-like benefit payable out of the Consolidated Revenue Fund or any other public funds of the Federation; police and other government security services established by law; posts, telegraphs and telephones; powers of the National Assembly, and the privileges and immunities of its members; prisons; professional occupations as may be designated by the National Assembly; public debt of the Federation; public holidays; public relations of the Federation; public service of the Federation including the settlement of disputes between the Federation and officers of such service; quarantine; railways; regulations of political parties; service and execution in a State of the civil and criminal processes, judgments, decrees, orders and other decisions of any court of law outside Nigeria or any court of law in Nigeria other than a court of law established by the House of Assembly of that State; stamp duties; taxation of incomes, profits and capital gains, except as otherwise prescribed by this Constitution; the formation, annulment and dissolution of marriages other than marriages under Islamic law and Customary law including matrimonial causes relating thereto; traffic on Federal trunk roads; water from such sources as may be declared by the National Assembly to be sources affecting more than one state; weights and measures; wireless, broadcasting and television other than broadcasting and television provided by the Government of a state; allocation of wave-lengths for wireless, broadcasting and television transmission; etc.

⁴⁶ Section 4(5) Constitution of the Federal Republic of Nigeria, 1999

⁴⁷ The federal and state governments have concurrent legislative competence over division of public revenue, grants or loans from and the imposition of charges upon any of the public funds; antiquities and monuments; archives and public records; tax or duty on; registration of voters and the procedure regulating elections; electricity and the establishment of electric power stations, generation and transmission of electricity; censorship of cinematograph films and to prohibit or restrict the exhibition of such films; health, safety and welfare of persons employed to work in factories; offices or other premises or in inter-State transportation and commerce including the training; supervision and qualification of such persons; regulation of ownership and control of business enterprises; establishment of research centres for agricultural studies; establishment of institutions and bodies for the promotion or financing of industrial, commercial or agricultural projects; trigonometrical, cadastral and topographical surveys; technical, vocational, post-primary and primary education or other forms of education, including the establishment of institutions for the pursuit of such education; and post primary education, university education, technological education or professional education.

Bearing in mind the exhaustive list of issues provided under the exclusive and concurrent legislative lists, legislating on human rights in general and the setting of child rights standards in particular are not included in the catalogue of subjects designated for the legislative competence of the National Assembly and the House of Assembly of respective states. This situation, by default, allows state houses of assembly the jurisdiction to legislate on human rights in general and child rights in particular, because they belong to the residual legislative list which is not expressly reserved for the National Assembly under the exclusive legislative list and those other matters that do not fall under the concurrent legislative list. The implications of this state of affairs on human rights and child rights in general and child justice in particular are elaborated in subsequent chapters.

1.4.2 Domestic Application of International Treaties in Nigeria

International treaties are not automatically applicable in Nigeria unless domesticated.⁴⁸ This is because the 1999 Constitution draws a clear distinction between international law and national law to the extent that while the President can enter into international obligations, such obligations are not enforceable nationally without domestic legislative procedures.⁴⁹ Section 12(1) of the 1999 Constitution stipulates that ‘no treaty between the Federation and any other country shall have the force of law except to the extent to which such a treaty has been enacted into law by the National Assembly’.

By virtue of Section 12(2), ‘the National Assembly may make laws for the Federation or any part thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty’. Limiting the ambit of the legislative authority of the National Assembly on matters not granted under the exclusive legislative lists, Section 12(3) provides that a bill for an Act of the National Assembly passed pursuant to the provisions of Section 2(2) shall not be presented to the President for assent and shall not be enacted unless it is ratified by a majority of all the state houses of assembly.

On the other hand, where the National Assembly intends to adopt a treaty assented to by the President and which touches on a matter within the concurrent or residual legislative lists, the National Assembly must first adopt the bill domesticating the treaty and subject the bill to a similar process by the majority of the state houses of assembly before it can be assented to by the President. Consequently, international law does not apply directly in Nigeria without

⁴⁸ Chileny Nwapi, ‘International Treaties in Nigerian and Canadian Courts’ (2011) 19 African Journal of International and Comparative Law 38; See also Edwin Egede, ‘Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria’ (2007) 51 Journal of African Law 249; A O Enabulele, ‘Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts’ (2009) 17 African Journal of International and Comparative Law 326

⁴⁹ Section 12 Constitution of the Federal Republic of Nigeria, 1999

congruence of the legislative or executive actions of the government. In other words, because of the distinction entrenched in the constitution between international law and municipal law, a treaty cannot be self-executing in Nigeria as its implementation must be by express legislative accent.⁵⁰

While the President is the only person authorized to enter into a treaty, for an international treaty to have the force of law in Nigeria, it must be passed into law by the National Assembly.⁵¹ In the case of *Abacha v Fawehimi*, the Supreme Court of Nigeria held that an international treaty entered into by the Government of Nigeria does not become binding until enacted into law by the National Assembly.⁵² The court further held that where the treaty is enacted by the National Assembly, as was the case with the African Charter which is incorporated into municipal law by the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act of 1983, it becomes binding on Nigerian courts to give effect to it like all other laws falling within the judicial powers of the court.

Supporting the view that treaty, including those dealing with human rights, cannot be applied domestically unless incorporated through domestic legislation, and the fact that it is the enabling statute enacted pursuant to implementation of a treaty rather than the treaty per se which is considered by courts as a source of law, the court in *Ibidapo v. Lufthansa Airlines* held that Nigeria, like any other Commonwealth country, inherited the English Common Law rules governing municipal application of international law.⁵³

1.4.3 The Nigerian Legal System

Before the introduction of colonial rule with its far-reaching ramifications, the regulation of social relations in Nigeria was administered through indigenous legal systems mostly customary in nature and type.⁵⁴ After colonization, the application of English Common Law in Nigeria was consolidated with the

⁵⁰ D Peters 'Domestication of International Human Rights Instruments and Constitutional Litigation in Nigeria' (2000) 18 Netherlands Quarterly of Human Rights 357

⁵¹ Ibid

⁵² *Abacha v Fawehimi* [2000] 4 FWLR 533 SC; See also Chudi Nelson Ojukwu, 'Enforcement of the African Charter on Human and Peoples' Rights as a Domestic Law in Nigeria' (2000) 25 International Legal Practitioner 140; *Registered Trustees of National Association of Community Health Practitioners of Nigeria & Ors v. Medical and Health Workers Union of Nigeria* [2008] 2 NWLR (Pt. 1072) 575; Osai Justina Ojigho 'Evaluating the Application, Implementation and Enforcement of International Human Rights Instruments and Norms in Nigeria' (2005) 31 Commonwealth Law Bulletin 101

⁵³ *Ibidapo v. Lufthansa* [1997] 4 NWLR, (Pt. 498) 124; See also Etefia E Ekanem, 'Institutional Framework for Protection for Consumers Protection in Nigeria' (2011) 2 International Journal of Advance Legal Studies and Governance 33; Edwin Egede, 'The New Territorial Waters (Amendment) Act 1998 – Comments on the Impact of International Law on Nigerian Law' (2000) 12 African Journal of International and Comparative Law 84

⁵⁴ Derek Asiedu-Akrofi, 'Judicial Recognition and Adoption of Customary Law in Nigeria' (1989) 37 American Journal of Comparative Law 571

introduction of Ordinances legitimizing statutory law, including English Common Law, the doctrines of equity and the statutes of general application which were in force in England as at January 1, 1900.⁵⁵ On independence, Nigeria retained its inherited English Common Law, alongside home-grown Islamic and customary laws that are subject to a repugnancy scrutiny.

When colonial authorities assumed power in Nigeria, they abrogated certain norms of Islamic and customary law that were perceived to be barbaric and enforced the remaining norms of Islamic and customary law to the extent that the norms are not repugnant to natural justice, equity and good conscience.⁵⁶ Also, for Islamic and customary norms to be applicable, they must not be incompatible either directly or by necessary implication with any law in force and must not be contrary to public policy.⁵⁷ In the case of *Eshugbaye v. Government of Nigeria*, it was held that the court cannot on its own transform a barbarous custom into a milder one. As such, any custom that with barbarous character must be rejected as repugnant to natural justice, equity and good conscience.⁵⁸

A further validity test in the post-independence era which has survived to date is that the Nigerian Constitution is the supreme law of the land and any other law inconsistent with its provisions is null and void to the extent of its inconsistency.⁵⁹ Nwauche supports this view when he argues that the pre-independence validity test should be dispensed with bearing in mind the elaborate bill of rights provisions of the 1999 Constitution.⁶⁰

Judicial precedent is also part of the regime of statutory law and an important source of law in Nigeria. In terms of binding precedents, the Supreme Court is the highest court in the country, followed by the Court of Appeal which sits in judicial divisions spread throughout the country. The Supreme Court replaced the Judicial Committee of the Privy Council in 1963 as the final appellate court. The Court of Appeal established in 1976 is also the national penultimate court to entertain appeals from the High Courts. The Court of Appeal and all lower courts are bound by the decisions of the Supreme Court. The Federal High Courts and State High Courts and other courts of coordinate and subordinate jurisdiction are equally bound by the decisions of the Court of Appeal.⁶¹

⁵⁵ Ibid

⁵⁶ Section 34(1) High Court Laws of Kwara State, Cap 67

⁵⁷ Section 14(3) Nigeria Evidence Act, Chapter 112; See also Oba, Abdulmumini, 'Administration of Customary Law in a Post-Colonial Nigerian State' (2006) 37 *Cambrian Law Review* 95

⁵⁸ *Eshugbay Eleko v. Officer Administering, the government of Nigeria*, 1931 AC 662.

⁵⁹ E.S Nwauche, 'The Constitutional Challenges of the Integration and Interaction of Customary and Received English Common Law in Nigeria and Ghana' (2010) 25 *Tulane European and Civil Law Forum* 37

⁶⁰ Ibid

⁶¹ By virtue of Section 6 (1) of the 1999 Constitution of the Federal Republic of Nigeria, the following courts have been established in the Federal Republic of Nigeria: the Supreme Court of

As a country with a plural legal system, the first strand of legal pluralism in Nigeria is evident in the multifarious legal traditions and legal cultures derived from customary law, Islamic law and English Common Law.⁶² The second strand arises from the federal arrangement in the country whereby federal and state governments share legislative authority with the possibility of conflict of federal and state laws as well as conflict of state laws. The third strand emanates from the colonial policy of administering the northern and southern protectorates separately until amalgamation in 1914 which was thereafter extended to regionalization in 1954.⁶³

While customary law and Islamic law still exist and are applied in Nigeria, the country is predominantly governed by statutory laws in the form of the constitution and other laws of the National Assembly, House of Assembly of the states or military decrees as the case may be. Legislation is the most important source of law in Nigeria after the constitution. On the coming into force of the 1999 Constitution, all primary and subordinate legislations in force in the country was treated as existing laws and deemed to have been made by the appropriate legislative body with competence to do so under the 1999 Nigerian Constitution.⁶⁴

1.4.4 Customary Law

Customary law is the law arising from the custom and traditions of the people. The distinctive feature of customary law is that it is the rule or body of rules

Nigeria, the Court of Appeal, the Federal High Court, the High Court of the Federal Capital Territory, Abuja, the High Court of a State, the National Industrial Court, the Sharia Court of Appeal of the Federal Capital Territory, Abuja, the Sharia Court of Appeal of a State, the Customary Court of Appeal of the Federal Capital Territory, Abuja, and the Customary Court of Appeal of a State. In Nigeria, the state court structure feeds into the federal court structure at the level of the Court of Appeal. The Court of Appeal entertains appeals from the decisions of the Federal and State High Courts, the Sharia Courts of Appeal and the Customary Courts of Appeal. Appeals from the decisions of the Court of Appeal proceed to the Supreme Court. Incidentally, the customary courts and the Sharia courts occupy the lowest ranking in Nigeria's judicial system. In terms of administrative responsibility, state High Courts play very important roles in each state. Each state of the federation is also entitled to establish a Sharia Court of Appeal or a Customary Court of Appeal or other inferior courts such as magistrate courts, district courts, area/Sharia courts, and customary courts. The High Courts and other specialized courts exercise supervisory and appellate jurisdiction over the inferior courts. See Section 6(1) Constitution of the Federal Republic of Nigeria, 1999

⁶² Ladan, Muhammad Tawfiq, 'Legal Pluralism and the Development of the Rule of Law in Nigeria: Issues and Challenges in the Development and Application of the Sharia' in Jibrin Ibrahim (ed) *Sharia Penal and Family Laws in Nigeria and in the Muslim World: Rights Based Approach*, (Global Rights Partners for Justice 2004) 57; See also Gordon Woodman, 'Customary Law in Common Law Systems' (2001) 32 *Introductory Development Studies Bulletin* 28

⁶³ Ufot B Inamete, 'Federalism in Nigeria: The Crucial Dynamics' (1991) 80 *The Commonwealth Journal of International Affairs* 191

⁶⁴ John Boye Ejobowah, 'Rewriting Nigerian Federal Constitution: A Prescriptive Argument for a Self-Sustaining Arrangement' (2011) 3 *Canadian Journal of African Studies* 507

of human conduct generally accepted by the people it governs and regulated by immemorial practice or usage.⁶⁵ In the case of *Oyewumi v Ogunesan*, Obaseki J. defined customary law as:

[T]he organic or living law of the indigenous people of Nigeria regulating their lives and transactions. It is organic in that it is not static and it is regulatory in the sense that it controls the lives and transactions of the community subject to it. It is a mirror of the culture of the people which goes further to import justice to the lives of those subject to it.⁶⁶

Tracing the origin of customary law to native courts, Makeri argues that before the introduction of the colonial legal system in 1900 with attendant repugnancy screening of native law and custom, customary law was already in existence in the colony of Lagos and its protectorates. With the amalgamation of Northern and Southern Nigeria in 1914, the Native Court Ordinance of 1915 ushered in a system which was consistent with and enhanced the amalgamated structure.⁶⁷ Since there is no single uniform set of customs prevailing throughout Nigeria, customary law is therefore used as a blanket description covering many different legal systems provided it is not contrary to public policy, natural justice, equity and good conscience.⁶⁸ According to the Customary Courts Law of Abia State,⁶⁹ customary law is defined as:

[A] rule or body of customary rules relating to rights and imposing correlative duties being customary rule or body of customary rules which obtains and is fortified by established usage and which is appropriate and applicable to any particular cause, matter, dispute, issue or question.

Prevalent in the Southern part of Nigeria and dominant in the area of personal and family relations like marriage, divorce, guardianship and custody of children and

⁶⁵ E.S. Nwauche, 'Constitutional Challenge of the Integration and Interaction of Customary and the Received English Common Law in Nigeria and Ghana' (2010) 25 *Tulane European and Civil Law Forum* 37

⁶⁶ *Oyewumi v. Ogunesan* (1990) NWLR 182 207; See also Bethel Chuks Uweru, 'Repugnancy Doctrine and Customary Law in Nigeria: A Positive Aspect of British Colonialism' [2008] *African Research Review* 286

⁶⁷ S. H. Makeri, 'Jurisdictional Issues in the Application of the Customary Law in Nigeria', <<http://www.vpn.helsinki.fi/articles/customary%20law%20and%20procedure/,DanaInfo=www.nigerianlawguru.com+JURISDICTIONAL%20ISSUES%20IN%20THE%20APPLICATION%20OF%20CUSTOMARY%20LAW%20IN%20NIGERIA.pdf>> accessed 19 March 2014; See also N Ntlama, 'The Application of Section 8(3) of the Constitution in the Development of Customary Law Values in South Africa's New Constitutional Dispensation' [2012] *Potchefstroom Electronic Law Journal* 2

⁶⁸ Section 14 Evidence Act Chapter 112 Laws of the Federation of Nigeria 1990; See also A. A. Oba, 'Islamic Law as Customary Law: The Changing Perspectives in Nigeria' (2002) 51 *International and Comparative Law Quarterly* 817

⁶⁹ Section 2 Part 1 Customary Law of Abia State, 1979

succession, customary law differs amongst different ethnic groups and is an indigenous law that reflects the culture, customs, values and habits of the people whose activities it intends to regulate.⁷⁰ For instance, within an ethnic group, there are pockets of differences in some aspects of customary law. It is thus not unusual to observe that the marriage customs and inheritance rules of the Ibos of South- East Nigeria are different from those of the Yorubas of South-West Nigeria. Even within the Yoruba ethnic group or the Igbo ethnic group, there are sub-ethnic groups with different customary laws.

Since customary law is mostly unwritten law with possible uncertainty and unpredictability in its application, the inherent flexibility of its usage makes it amenable to social and economic changes without losing its character. As an amalgam of customs and habitual practices accepted by members of a particular community as having the force of law due to long established usage, customary laws are usually enforced in mostly lay customary courts occupying the lowest rung on the hierarchy of courts in Nigeria.⁷¹

1.4.5 Islamic Law

Nigeria is one of the countries where Islamic law survived the colonial era because the 1904 criminal code introduced in Northern Nigeria allowed native courts to try offenses under Islamic law regardless of whether they were punishable under the criminal code.⁷² When the British occupied Northern Nigeria under the policy of indirect rule, they did not, subject to a repugnancy test, interfere with the application of Islamic law in civil and criminal cases.⁷³ According to Peters, the application of pre-independence Islamic criminal law was entirely usurped by the 1959 penal code for Northern Nigeria that remained in force until the reintroduction of Islamic law in some Northern states of Nigeria in 2000.⁷⁴

⁷⁰ A. O Abdulmumini, 'Religious and Customary Laws in Nigeria' (2011) 25 *Emory International Law Review* 881

⁷¹ Ike Ehiribe, 'The Validity of Customary Law Arbitration in Nigeria' (1996) 18 *Comparative Law Year book of International Business* 131

⁷² Abdulmumini A. Oba. 'Islamic Law as Customary Law: The Changing Perspective in Nigeria' (2002) 51 *International and Comparative Law Quarterly* 817; V. O Nmeielle, 'Sharia Law in the Northern States of Nigeria: To Implement or Not to Implement, the Constitutionality is the Question' (2004) 26 *Human Rights Quarterly* 730

⁷³ Ruud Peters, 'The Reintroduction of Islamic Criminal Law in Northern Nigeria' (2001) Study Conducted on behalf of the European Union http://rezaei.typepad.com/hassan_rezaei/files/islamic-criminal-law-nigeria_en.pdf accessed 22 January 2014; See also Rotimi T. Suberu, 'Religion and Institutions: Federalism and the Management of Conflicts over Sharia in Nigeria' (2009) 21 *Journal of International Development* 547

⁷⁴ Ruud Peters, 'The Reintroduction of Islamic Criminal Law in Northern Nigeria' (2001) Study Conducted on behalf of the European Union http://rezaei.typepad.com/hassan_rezaei/files/islamic-criminal-law-nigeria_en.pdf accessed 22 January 2014; Zamfara State enacted the first Shari'a Penal Code in Northern Nigeria. This move was immediately followed in May 2000 by Niger State. Other

Islamic law is based on the Islamic religion and was introduced into Nigeria as a consequence of a successful process of Islamization.⁷⁵ According to Baderin, while Islamic law may not be the sole factor for ensuring the realization of human rights in Muslim states, it is certainly a significant platform for advancing human rights in states where Islamic law is applicable as part of the law.⁷⁶ This system of law is based on the Holy Qur'an and is mostly applicable in Muslim-dominated Northern Nigeria. Unlike customary law, Islamic law is mostly written with clearly defined and articulated principles.⁷⁷ In some areas, Islamic law after its introduction completely supplanted the pre-existing system of customary laws whereas in other areas, it became incorporated into customary law with the two systems fused and jointly administered.⁷⁸

The scope of Islamic law has broadened since the introduction of the Sharia legal system in a number of states in Northern Nigeria. The principal feature of this new development is the introduction of religious-based criminal offenses, especially on matters of morality and the introduction of punishments sanctioned by the Qur'an.⁷⁹ According to Baderin, Sharia refers to the immutable corpus of law contained in the Qur'an and the *Sunnah* of the Prophet Mohammad.⁸⁰

Northern states followed suit (Jigawa 2000, Kano 2000, Kebi 2000, Sokoto 2001, Yobe 2001, Bauchi 2001; See B Babaji and Yusuf Dankofa, 'Assessing the Performance of the Lower Courts in the Implementation of Sharia Penal Laws in Northern Nigeria' in Joy Ezeilo, Muhammed Tawfiq Ladan (eds) *Sharia Implementation in Nigeria: Issues and Challenges on Women's Access to Justice* (Women's Aid Collective 2004) 103; Isa Hayatu Chiroma, 'Development and Application of Sharia (Islamic) Criminal Law in a Constitutional Democracy: Issues and Challenges' in Joy Ezeilo (ed) *Human Rights Protection in Administration of Sharia Justice System* (Women's Aid Collective 2005) 191

⁷⁵ B.A Haruna, 'The Application of the Sharia Penal System: Constitutional and Other Related Issues' in Joy Ezeilo, Muhammed Ladan and Abiola Afolai-Akiyode (eds) *Sharia Implementation in Nigeria: Issues and Challenges on Women's Access to Justice*, (2004) (Women's Aid Collective); See Also A.B Ahmed, 'Administration of Islamic Criminal Law and Justice in a Constitutional Democracy: Problems and Prospects' in Joy Ezeilo, Muhammed Ladan and Abiola Afolai-Akiyode (eds) *Sharia Implementation in Nigeria: Issues and Challenges on Women's Access to Justice*, (Women's Aid Collective 2004) 164

⁷⁶ Baderin A Mashood, 'Islam and the Realization of Human Rights in the Muslim World: A Reflection on Two Essential Approaches and Two Divergent Perspectives' (2007) 4 *Muslim World Journal of Human Rights* 1554, See also Baderin A Mashood, and *et al* (eds). *Islam and Human Rights: Advocacy for Social Change in Local*. (Global Media Publishing 2006).

⁷⁷ A.A. Oba, 'Islamic Law as Customary Law: The Changing Perspective in Nigeria' (2002) 6, *International and Comparative Law Quarterly* 27

⁷⁸ *Ibid*

⁷⁹ As of 2012, the following states in Nigeria have instituted Islamic law: Zamfara State, Kano State, Sokoto State, Katsina State, Bauchi State, Borno State, Jigawa State, Kebbi State, Yobe State. The following three states have also instituted Sharia in some parts with large Muslim populations: Kaduna State, Niger State, Gombe State.

⁸⁰ Mashood Baderin, 'Establishing Areas of Common Ground Between Islamic Law and International Human Rights' (2001) 5 *International Journal of Human Rights* 72

Section 2 of the High Court Law of Northern Nigeria provides that native law and custom includes Islamic law.⁸¹ Also, colonial authorities classified customary law to include Islamic law and this trend continued until 1999 when all the Northern states repealed all the laws that made Islamic Law part of the customary law in their states. Oba has pointed out the inappropriateness of situating Islamic law under customary law,⁸² and his views were supported by the Plateau State Customary Court of Appeal Law which defines customary law as:

[T]he rule of conduct which governs legal relationships as established by custom and usage and not forming part of the Common Law of England nor formally enacted by the Plateau State House of Assembly but includes declaration or modification of customary law but does not include Islamic personal law.⁸³

The customary courts and Islamic courts while interpreting and applying customary and Islamic laws respectively are bound by the precedents of superior courts in cases of the same or similar facts, issues or situations. However, they are not bound by the decision of customary or Sharia courts of coordinate jurisdiction. According to Zubair, precedent is a non-existent judicial mechanism in the administration of Sharia justice because it is predicated on a single, final adjudicator.⁸⁴ According to him, although there is division of jurisdiction of courts for administrative convenience, a stereotyped judgment is unknown to Sharia since each judge is guided by the *Qur'an*, the *Sunnah* and *Ijma*.⁸⁵

Adding his voice that precedent is inconsistent with Islamic law, Yodudu states that accepting the common law doctrine of precedent in the Sharia legal system will amount to turning Sharia upside-down because the kadi's focus is on the just application of the law in an individual case.⁸⁶ Similarly, Fadel opines that, a judge under Islamic law is obliged to consult the text of the law on each fresh question arising from the court's decision and not merely a superior court's ruling.⁸⁷

⁸¹ Section 34, High Court Law of Northern Nigeria, (1963) Cap 49. This definition was also adopted in Section 2 of the Northern Region's Native Courts Law (1963) Cap 78

⁸² A.A. Oba, 'Islamic Law as Customary Law: The Changing Perspective in Nigeria' (2002) 6 International and Comparative Law Quarterly 27

⁸³ Section 2, Plateau State Customary Court of Appeal Law 1979

⁸⁴ A Zubair, 'Reintroduction of Shari'a Courts in Nigeria: Some Perspectives' in Ezeilo, Ladan and Afolabi-Akiyode (eds) *Sharia Implementation in Nigeria, Issues and Challenges on Women's Rights and Access to Justice*, (Women's Aid Collective 2003)

⁸⁵ Ibid

⁸⁶ A H Yadudu, 'Colonization and the Transformation of Islamic Law in Nigeria' [1992] Journal of Law and Religion 131; See also M Umar, 'Gender Issues in Application of Islamic Law in Nigeria' (2007) 45 Al-Jami'ah JIS

⁸⁷ Fadel, Mohammad, 'Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law' (2007) 8 Chicago Journal of International Law; See also Fadel Mohammad, 'Islamic Politics and Secular Politics: Can They Co-Exist' (2009) 25 Journal of Law and Religion 187

1.5 Overview of the Nigerian Child Justice System

Prior to 2003, the child justice system in Nigeria was governed by an array of federal and state legislations.⁸⁸ The child justice system in Nigeria is distinct from the criminal justice system which is regulated by the Criminal Procedure Act applicable in Southern Nigeria and the Criminal Procedure Code applicable in Northern Nigeria. The Criminal Procedure Act came into being as Ordinance No 42 of 1945, re-enacted as Ordinance No 43 of 1948 and was at various times amended by several Ordinances.⁸⁹ The Criminal Procedure Code was enacted by the Northern Region of Nigeria in 1960 and applied only to the Northern Region, and when states were created to all the Northern states.⁹⁰

As a developing country, Nigeria has been struggling to fund its socio-economic structures and services. The 2012 United Nations Human Development Report categorizes Nigeria in the low human development category and places it 153rd out of 187 countries and territories.⁹¹ Also, quantitative information on crime and criminal justice in Nigeria remains scarce and compounded by poor data management.⁹² As such, it is very difficult to determine precisely the number of

⁸⁸ This included the Children and Young Persons Act (CYPA); the Criminal Code Act; the Criminal Procedure Act; the Criminal Code Laws and the Criminal Procedure Laws applicable in Southern Nigeria (except Lagos state); the Penal Code Act and Criminal Procedure Code applicable as federal legislation in the Federal Capital Territory of Abuja and the Penal Code Laws of the state and the Criminal Procedure Codes applicable as state legislations in the Northern Nigeria. These pieces of legislation that delineate the mutually reinforcing powers of the three justice institutions are potentially triggered from any of the 36 states of the federation and the Federal Capital Territory through an infraction of the law.⁸⁸

⁸⁹ Peter A. Anyeba, 'Sentencing in Criminal Cases in Nigeria and the Case for Paradigmatic Shifts' (2012) 1 NIALS Journal of Criminal Law and Justice 131

⁹⁰ J. R Jones, *The Criminal Procedure in the Northern States of Nigeria*, (2nd edn, Gaskiya Corporation 1978) 55; Other legislation with bearing on the criminal procedure in Nigeria include the Police Act which was derived from the Police Ordinance of 1943 and incorporated as Cap 154, Laws of the Federation of Nigeria and Lagos in 1958. The Act was later incorporated as the Police Act Cap 359, Laws of the Federation of Nigeria 1990. It is now Police Act Cap 19 2004.

⁹¹ United Nations Development Programme Human Development Report *The Rise of the South: Human Progress in a Diverse World* (2013) <<http://hdrstats.undp.org/images/explanations/NGA.pdf>> accessed 31 October 2013; Also the population of Nigeria under 18 years is over 45 percent. 54.1 percent of Nigerians are living in multidimensional poverty with an additional 17.8 percent vulnerable to multiple deprivations. See also United Nations Children's Fund (UNICEF), Child Poverty Profile, Global Study on Child Poverty and Disparities, *Nigeria*. <<http://www.devinfolive.info/childdisparities/ChildDisparitiesWebService/stock/RefernceDocuments/AFRNGA.pdf>> accessed 31 October 2013

⁹² Anna Alvazzi del Frate, 'Crime and Criminal Justice Statistics Challenges' in Stefan Harrendorf, Markku Heiskanen, and Steven Malby (eds) *International Statistics on Crime and Justice* (HEUNI-Publication Series No. 64 2010); See also Etannibi Alemika and Innocent Chukwuma, *Criminal Victimization and Fear of Crime in Lagos Metropolis, Nigeria* (CLEEN- Foundation Monograph Series No. 1 2005)

children involved in the child justice system in Nigeria.⁹³ Since existing and accurate child crime statistics in Nigeria only relate to child detention facilities and represent only those children who are deprived of their liberty, the most comprehensive data of children in conflict with the law would be that compiled by the courts, which incidentally is nonexistent at state and national levels.⁹⁴

1.5.1 Children and Young Persons Act

The first child specific legislation is the CYPA passed in 1943 by the British Colonial Government as an Ordinance applicable throughout the Protectorate of Nigeria.⁹⁵ As the major piece of legislation that was dealing with matters affecting children and young persons in Nigeria, the CYPA was promulgated to make provision for the welfare and treatment of young offenders through the establishment of child courts.⁹⁶ Abubakar aptly depicts the slant of the CYPA when he states that it has a very strong focus on penal sanctions and at the same time consolidated institutionalization and punishment as an appropriate response to child offenses.⁹⁷

On the introduction of a federal system of government with a state structure in Nigeria, most states of the federation enacted their own Children and Young Persons Law which were almost an identical reprinting of the 1943 CYPA. These state child laws provided three categories of children subject to child justice. The first are children in conflict with the law, the second are children in need of care and protection, and finally children beyond parental control.⁹⁸ With the passage of time and more specifically, with the advancement in the articulation of child rights in international and regional human rights instruments and laws, the inherent weaknesses of the CYPA began to emerge more visibly.

⁹³ Adepoyu Adedayo and J. O Olaomi, 'An Appraisal of Statistical Data Management in Nigeria: A Case for Reliable and Effective Statistical Information System' [2008] *The Social Sciences* 231

⁹⁴ Isabella Okagbue, 'Children in Conflict with the Law: The Nigerian Experience' <http://www.unicef-irc.org/portfolios/documents/487_nigeria.htm> accessed 26 October 2013

⁹⁵ The 1943 Ordinance was subsequently amended through several pieces of legislation (i.e. Ordinances 44 of 1945); Ordinance 27 of 1947; Ordinance 16 of 1950 as well as its mutation to the Laws of Nigeria 131 of 1954; Laws of Nigeria 47 of 1955) and Order in Council 22 of 1946. The Act was intended as a national law, Cap 32 Laws of the Federation of Nigeria and Lagos 1958, but was eventually adopted as regional laws and subsequently as state laws.

⁹⁶ Isabella Okagbue, 'Children in Conflict with the Law: The Nigerian Experience' <http://www.unicef-irc.org/portfolios/documents/487_nigeria.htm> accessed October 26 2013; See also E.E.Alemika and I.C Chukwuma, *Juvenile Justice Administration in Nigeria: Philosophy and Practice*, (Center for Law Enforcement Education 2001)

⁹⁷ Musa Usman Abubakar, 'Criminal Law and the Rights of the Child in Northern Nigeria' (2010) *Legal Studies Research Paper No 2012* <<http://ssrn.com/abstract=2055162>> accessed 11 April 2014

⁹⁸ Laurent Fourchard, 'Lagos and the Invention of Juvenile Delinquency in Nigeria 1920 – 60' (2006) 47 *Journal of African History* 115; See also Simon Heap, 'Their Days are Spent in Gambling and Loafing, Pimping for Prostitutes, and Picking Pockets: Male Juvenile Delinquents on Lagos Island 1920s-1960s' (2010) 35 *Journal of Family History* 48

The CYPA did not define the word ‘juvenile’ nor was the word defined in any other piece of legislation simultaneously applicable with the CYPA. Like the penal and criminal codes applicable in Northern and Southern Nigeria respectively, the CYPA established two categories of children. The first is a ‘child’ defined as a person under the age of 14, and the second is a ‘young person’ defined as a person who has attained 14 years of age but is under the age of 17.⁹⁹ While the CYPA made provisions relating to children in conflict with the law and children in need of care and protection, it did not specifically set separate standards for the treatment of children in conflict with the law and the treatment of children in need of care and protection.

Alluding to this fact, Abubakar holds the view that as a result of the failure to distinguish between the treatment of children in conflict with the law and children in need of care and protection, the CYPA classified and processed social welfare cases as criminal cases.¹⁰⁰ Another defect of the CYPA in particular, and the rest of the pre-2003 legislation dealing with child rights in general, relates to the discrepancies in the age of criminal responsibility of children in conflict with the law. Rather than adopting a single age of criminal responsibility, the multiplicity of laws applicable at the same time as the CYPA adopted various age demarcations under which responsibility may or may not be assigned depending on the circumstances of the offense.¹⁰¹

Consequently and as argued by Ijaiya, the rule under the pre-2003 legislation dealing with child rights is such that any child above the age of 12 years is deemed fully responsible for any act or omission committed by him or her.¹⁰² In pre-trial procedures, despite the fact that the constitution prohibits torture and inhuman or degrading treatment and requires that every person must be informed in writing within 24 hours of the facts and grounds for his or her arrest,¹⁰³ the CYPA is silent on the mode and procedure for the arrest of children and provides no guidance and obligation for police officers to treat children in a particular way including notifying parents of the arrest of their children. While the gaps of the CYPA enumerated above are not claimed to be exhaustive, suffice it to say that the CYPA was not a very

⁹⁹ Hakeem Ijaiya, ‘Juvenile Justice Administration in Nigeria’ (2009) 2 NUJS Law Review 573; See also L Fourchard, ‘The Making of the Juvenile Delinquent in Nigeria and South Africa, 1930–1970’ (2010) 8 History Compass 129; Olayinka Atiola, ‘Juvenile/Youth Justice Management in Nigeria: Making a Case for Diversion Programmes’ (2013) 3 Youth Justice 3

¹⁰⁰ C. R Nwanna & E.N Akpan *Research Findings of Juvenile Justice Administration in Nigeria* (Constitutional Rights Project 2003); See also Musa Usman Abubakar, ‘Criminal Law and the Rights of the Child in Northern Nigeria’ (2010) Legal Studies Research Paper No 2012 <<http://ssrn.com/abstract=2055162>> accessed 11 April 2014

¹⁰¹ E.E.Alemika and I.C Chukwuma, *Juvenile Justice Administration in Nigeria: Philosophy and Practice* (Center for Law Enforcement Education 2001)

¹⁰² Hakeem Ijaiya, ‘Juvenile Justice Administration in Nigeria’ (2009) 2 NUJS Law Review 573

¹⁰³ Chapter IV Constitution of Nigeria, 1999

child-friendly legislation, although it remained the applicable law in matters relating to child rights for over 60 years in Nigeria.

It was the foregoing gaps in the child justice provisions of the CYPA, coupled with the need to develop national legislation on child rights that is aligned to international and regional human rights standards that triggered efforts to promulgate the CRA. The CYPA and its amendments predate the evolution of contemporary human rights and child rights norms in Nigeria. The CYPA was originally intended to apply in Lagos but was later adopted as a regional law and subsequently as state laws. It was extended to the Eastern and Western Regions of Nigeria in 1946 and the Northern Region of Nigeria in 1958 through Order-in-Council of 1945 and 1958 respectively.¹⁰⁴

Within the six decades of the application of the CYPA, Nigeria was the subject of intense national and international criticism due to its poor child rights record.¹⁰⁵ The reality of Nigeria's ineptitude in the protection of child rights intensified with the ratification of the CRC in 1991, submission of its first country report to the Committee on the Right of the Child in 1996 and ratification of the African Charter on the Rights and Welfare of the Child (ACRWC) in 2001.¹⁰⁶

Owing largely to civil society advocacy and diplomatic pressure from international allies, the federal government proposed a bill on child rights in 1993. According to Alemika and Chukwuma, the bill was not passed into law due to irreconcilable differences between the Senate and House of Representatives on issues of religion and tradition. It has been stated that agreeing on a child rights bill was unsuccessful because certain sections of the country claimed that the bill accommodated provisions inconsistent with Islamic values, traditions and culture.¹⁰⁷ Following the failure of the 1993 draft child rights bill, a special committee was set up in 2002 to reconcile the religious and customary concerns raised by parliamentarians and stakeholders.¹⁰⁸

In view of the yawning gaps in the criminal and child justice systems and the increasing need to repeal the CYPA, the Nigerian National Assembly embarked on promulgating child rights legislation in conformity with regional and international standards and thus passed the CRA in 2003. The aim of the CRA is to improve on

¹⁰⁴ Etannibi Alemika and I.C. Chukwuma, *Juvenile Justice Administration in Nigeria: Philosophy and Practice*, (CLEEN Foundation 2001) 16

¹⁰⁵ Etannibi Alemika, Innocent Chukwuma and others, *Rights of the Child in Nigeria: Report on the Implementation of the Convention on the Rights of the Child by Nigeria*. (WOAT and CLEEN-Foundation 2005) 5

¹⁰⁶ UN Committee on the Rights of the Child: Concluding Observations of the Committee on the Rights of the Child, Nigeria, (U.N. Doc. CRC/C/15/Add. 61 1996) <<http://www1.umn.edu/humanrts/crc/nigeria1996.html>> accessed 15 December 2013

¹⁰⁷ Ibid

¹⁰⁸ Etannibi Alemika, Innocent Chukwuma and others, *Rights of the Child in Nigeria: Report on the Implementation of the Convention on the Rights of the Child by Nigeria* (WOAT and CLEEN-Foundation 2005) 5

the child protection mechanism in the CYPA and align child rights in Nigeria with the framework of the ACRWC and CRC. The promulgation of the CRA was also informed by the need for legislation that incorporates all the rights and responsibilities of children, government, parents and other authorities into a single legislation. The Act prohibits subjecting children to the criminal justice process and further guarantees due process at all stages of the judicial proceedings of children in conflict with the law.¹⁰⁹

1.5.2 Legislative History of the Child Rights Act

There is a dearth of academic and other literature documenting the legislative history of the CRA. This oversight may have caused the legislative history of the CRA to be distorted, under-represented or misrepresented. To attempt an overview of the legislative history of the CRA, this thesis will try to link disjointed narratives on the subject matter.

Predicated on the inherent gaps of the CYPA vis-a-vis international child rights standards in general and child justice in particular, there was a very strong need to strengthen and align the Nigerian child justice legal framework with international human rights standards.¹¹⁰ In Ladan's view efforts to promulgate the CRA were informed by the need for legislation that incorporates all the rights of children as well as articulates the duties and obligations of government, parents and other authorities.¹¹¹ While this expedience accords with the state party obligation under the CRC, the background to the adoption of the Childs Rights Act in Nigeria was much politicized along ethnic, religious and cultural lines.

The first legislative effort to entrench a strong child rights regime that is compliant with international and regional normative standards initiated by the then military government of General Ibrahim Babangida did not result in a decree due to opposition from religious groups and traditionalists across the country.¹¹² The ensuing limbo and disagreements over the content of the child rights legal framework persisted until General Babangida surrendered the country to the short-lived interim government of Ernest Shonekan in 1993. As recounted by Alemika and Chukwuma, at the end of the interim government of Shonekan and during the tenure

¹⁰⁹ Section 151 Child Rights Act, 2003

¹¹⁰ Laurent Fourchard, 'Lagos and the Invention of Juvenile Delinquency in Nigeria 1920 – 60' (2006) *The Journal of African History*; See also Laurent Fourchard, 'The Limits of Penal Reform: Punishing Children and Young Offenders in South Africa and Nigeria 1930s to 1960' (2011) 37 *Journal of Southern African Studies* 517

¹¹¹ Mohammed Tawfiq Ladan, 'The Child Rights Act 2003 and the Challenges of its Adoption By State Governments in the 19 Northern States' (2007) Seminar Paper at the Interactive Forum for Sokoto State House of Assembly Legislators (On file)

¹¹² E.E. Alemika and I.C Chukwuma, *Juvenile Justice Administration in Nigeria: Philosophy and Practice* (Center for Law Enforcement Education 2001); See also Obi Ignatius Ebbe, 'Ecological Distribution of Juvenile Delinquency in Metropolitan Lagos' (1984) 8 *International Journal of Comparative and Applied Criminal Justice* 187

of General Sani Abacha as Head of State, a special committee was set up within the Ministry of Justice in 1995 to harmonize the draft child rights bill with diverse religious and cultural values in the country.

The committee was also seized with the responsibility of analyzing the obstacles to the adoption of a country-wide and uniformly accepted child rights framework in compliance with international and regional standards. Incidentally, no progress was made in this direction throughout the five-year tenure of General Sani Abacha that terminated in 1999.¹¹³ Even the committee designated to articulate the draft child rights bill ended in disagreement and was polarized along religious and tribal lines to the point that no unanimously accepted report was adopted and presented for the consideration of the Head of State.¹¹⁴

In 2002 and under the democratically elected government of President Olusegun Obasanjo, the endeavor to promulgate child rights legislation was resuscitated once again with the preparation and presentation to the National Assembly of a bill providing for the rights and responsibilities of children in Nigeria, as well as for a renewed system of child justice. The difference between earlier endeavors to promulgate the child rights bill and the 2002 initiative was the fact that all the previous efforts happened during a military administration with no democratic posture and no reputation for respecting and observing human rights.

Incidentally, the 2002 attempt at promulgating nationwide legislation on child rights despite being introduced within a democratic dispensation was once again rejected by the National Assembly in October 2002. It was disallowed on the same grounds of religious and cultural concerns akin to those that gave rise to the demise of initial efforts in 1993 and 1995 respectively.¹¹⁵ Citing the inconsistencies of the bill with Islamic values, traditions and cultures, it was stated that the majority of the members of the National Assembly, particularly those from Northern Nigeria objected to the bill on the grounds that it amongst other things sets 18 years as the minimum age for marriage contrary to religious and cultural traditions allowing 'marrying out' girls at a much younger age, in which case the consent of the bride is immaterial and subsumed into family preferences and choices.¹¹⁶

¹¹³ Penal Reform International, 'Report on the National Conference on Juvenile Justice Administration in Nigeria. Abuja (July 2002) <<http://www.penalreform.org/wp-content/uploads/2013/06/rep-2002-nigeria-juvenile-justice-en.pdf>> accessed 12 May 2012; See also Nkoyo Toyo, 'Revisiting Equality as a Right: the Minimum Age of Marriage Clause in the Nigerian Child Rights Act 2003' (2006) 27 Third World Quarterly 1299

¹¹⁴ Iyabode Ogunniran, 'The Child Rights Act Versus Shari'a Law in Nigeria: Issues, Challenges and A Way Forward' (2010) 30 Child Rights Journal 62

¹¹⁵ Nkoyo Toyo, 'Revisiting equality as a right: the minimum age of marriage clause in the Nigerian Child Rights Act, 2003' (2006) 27 Third World Quarterly 1299

¹¹⁶ Penal Reform International, 'Northern Zonal Consultative Conference on Juvenile Justice Administration in Nigeria, Kano' (September 2002) <<http://www.penalreform.org/wp-content/uploads/2013/06/rep-2002-nigeria-juvenile-justice-en.pdf>> accessed 12 May 2012

According to Ogunniran, the Supreme Council for Shari'a in Nigeria pressured states in Northern Nigeria that are implementing Islamic law to keep their representatives in both the Senate and House of Representatives from supporting the draft bill.¹¹⁷ It was also recounted that the Supreme Council for Shari'a in Nigeria opposed the draft bill because of concerns that the bill would destroy the very basis and essence of Sharia and Islamic culture. The Council cited for instance the fact that the draft child rights bill accorded equal rights to male and female children on matters of inheritance, coupled with the fact that the creation of family courts under the bill impinges on the jurisdiction of Sharia court in all matters relating to children.¹¹⁸ Depicting the foregoing stern opposition to the draft child rights bill on religious grounds, Ojielo narrated that other subsidiary Islamic groups opposing the bill argued that as a federal state, Nigerian law, institutions and peoples must respect cultural diversities intrinsic in the nation, including religious beliefs and cultural practices.¹¹⁹

The failure of the legislative efforts in 2002 to adopt a child rights bill, as against widely held expectations of easy passage due to its introduction in a democratically elected government, was not well received by national and international stakeholders.¹²⁰ Both civil society organizations and development partners dissatisfied with the outcome of the child rights legislative process, mounted media pressure and persuaded the National Assembly towards reconsidering its decision not to pass the child's rights bill into law.¹²¹

In response to the progressively growing criticism and out-cry against the non-passage of the child rights bill, the National Assembly of the second tenure of President Obasanjo quickly moved into action, cognizant of the difficulties of

¹¹⁷ Iyabode Ogunniran, 'The Child Rights Act Versus Shari'a Law in Nigeria: Issues, Challenges and A Way Forward' (2010) 30 Child Rights Journal 62

¹¹⁸ E.E. Alemika and I.C Chukwuma, *Juvenile Justice Administration in Nigeria: Philosophy and Practice*, (Center for Law Enforcement Education 2001); See also Obi Ignatius Ebbe, 'Juvenile Delinquency in Nigeria: The Problem of Application of Western Theories' (1992) 16 International Journal of Comparative and Applied Criminal Justice 353

¹¹⁹ Ozonnia M Ojielo, 'Human Rights and Sharia'h Justice in Nigeria' (2003) 9 Annual Survey of International and Comparative Law 135; Pavani Thagirisa, 'Historical Perspective of the Sharia Project and a Cross-Cultural and Self-Determination Approach to Resolving the Sharia Project in Nigeria' (2004) 29 Brooklyn Journal of International Law 459; See also Brabdon Kendhammer, 'Islam and the Language of Human Rights in Nigeria: 'Rights Talk' and Religion in Domestic Politics' (2013) 12 Journal of Human Rights 469

¹²⁰ Penal Reform International, 'Southern Zonal Consultative Conference on Juvenile Justice Administration in Nigeria, Ibadan' (October 2002) <<http://www.penalreform.org/wp-content/uploads/2013/06/rep-2002-nigeria-juvenile-justice-en.pdf>> accessed 12 May 2012

¹²¹ E.E. Alemika and I.C Chukwuma, *Juvenile Justice Administration in Nigeria: Philosophy and Practice*, (Center for Law Enforcement Education 2001); See also Obi Ignatius Ebbe, 'Juvenile Justice System In Southern Nigeria' (1998) 12 International Journal of Comparative and Applied Criminal Justice 194

articulating culturally and religiously agreeable child rights legislation that is applicable to the entire federation.¹²² The National Assembly was also sensitive of the fact that it might not secure the necessary ratification by a majority of the state houses of assembly in the federation as stipulated under Section 12(2) of the Constitution if it were to legislate for the whole federation. To circumvent these challenges, the National Assembly acted under its constitutional powers to legislate exclusively for the Federal Capital Territory pursuant to Section 299(a) of the 1999 Constitution.¹²³

By the sheer fact that the CRA was enacted pursuant to the powers of the National Assembly to make laws applicable only to the Federal Capital Territory, the scope and application of the 2003 CRA was automatically restricted only to the jurisdiction of the Federal Capital Territory Abuja unless adopted by the houses of assembly of the respective states.¹²⁴

Juxtaposing the difficulties of promulgating the CRA with the experiences of other African countries in adopting child rights legislation, it may be argued that the protracted processes leading to the promulgation of the CRA was not an exception limited only to Nigeria. The process of developing and eventually enacting acceptable child rights legislation compliant with international child rights standards seems to be inordinately long and procrastinated in other African countries, particularly those with mixed and somewhat tense Muslim and Christian populations.

The experiences of promulgating child rights legislations in countries such as Namibia, Kenya, Ghana and Uganda are not without challenges congruent with Nigeria.¹²⁵ The process of developing the Namibian Child Rights Bill first began in 1994 and was finalized in 2002. The South Africa Law Commission process which was formally started in 1997 was completed in 2000. In Kenya, the process lasted eight years from the inception of the process to the time the legislation was enacted.

¹²² E.E. Alemika and I.C Chukwuma, *Juvenile Justice Administration in Nigeria: Philosophy and Practice*, (Center for Law Enforcement Education 2001)

¹²³ Iyabode Ogunniran, 'The Child Rights Act Versus Shari'a Law in Nigeria: Issues, Challenges and A Way Forward' (2010) 30 Child Rights Journal 62; See also Iyabode Ogunniran, 'The Lock and Key Phenomenon: Reforming the Penal Policy for Child Offenders in Nigeria' (2013) 10 Justice Policy Journal 1

¹²⁴ The Federal Capital Territory Abuja is the capital of Nigeria and situated in the central region of Nigeria. It is administered by the Federal Capital Territory Administration headed by a Minister appointed by the President. The Federal Capital Territory has a landmass of approximately 7,315 km², of which the actual city occupies 275.3 km² and a total population of 1,405,201 out of the total population of 150 million Nigerians

¹²⁵ Godfrey Odhiambo Odongo, 'The Domestication of International Law Standards on the Rights of the Child With Specific Reference to Juvenile Justice in the African Context' (PhD Thesis University of Western Cape South Africa 2005)

The completion of a similar legislation in Ghana and Uganda took five and four years respectively.¹²⁶

1.6 Overview of Thesis Chapters

This thesis is divided into eight chapters, with chapter one as the introduction and chapter eight the conclusion. Each of the chapters is prefaced with an introduction of the subject under investigation and presented in a logical and complementary sequence. Every chapter concludes with a summary that recapitulates its main findings and sets the tone for the next chapter.

As the introduction, chapter one sets the tone of this thesis and poses the research question. To address the research question and having considered other research methodologies, the chapter adopts the law in context methodology. To provide proper context to this thesis, the chapter presents an overview of Nigeria, its constitutional framework and legal system, with a particular focus on the child justice system.

Chapter two provides the philosophical and normative foundation of child rights as well as an overview of the prevailing international and regional normative frameworks. It argues that the philosophical foundation of child rights is extrapolated from the philosophical foundation of human rights. Noting that restorative justice is the contemporary philosophical paradigm for child justice, the chapter places the philosophical foundation of child rights within the intersection of natural law and positive law described as inclusive legal positivism. Additionally, the chapter traces the normative foundation of child rights from the Covenant of the League of Nations to the International Bill of Rights and further links it to several other international and regional human rights instruments, particularly the CRC and the ACRWC. The chapter concedes that while universal and relative disputation of human rights also applies to child rights, it argues that in the context of child justice, the twin pillars of child justice are universally applicable.

Building on this conceptual analysis, chapter three argues that child justice is an integral component of child rights because it is codified as such in several international and regional human rights instruments. The chapter posits that the rights of children in conflict with the law can only be protected if their reduced culpability is taken into consideration when arriving at a judicial decision against them. In a bid to extract the twin pillars of child justice, the chapter analyses the principles of child rights and concludes that the principles of proportionality and the

¹²⁶ Godfrey Odhiambo Odongo, 'The Domestication of International Law Standards on the Rights of the Child With Specific Reference to Juvenile Justice in the African Context' (PhD Thesis University of Western Cape South Africa 2005); See also Godfrey Odhiambo Odongo, 'The Domestication of International Standards on the Rights of the Child: A Critical and Comparative Evaluation of the Kenyan Example' (2004) 1 *International Journal of Children's Rights* 414

best interests of the child encapsulate all other principles of child rights and converge to form the twin pillars of child justice.

Chapters four and five calibrate the principles of proportionality and the best interests of the child respectively as the twin pillars of child justice. It traces the normative foundation of the twin pillars of child justice to international and regional human rights instruments. Having examined the conceptual overview of the twin pillars and their deontological and consequentialist stands, this chapter posits that since child rights are by their very nature deontological, the twin pillars of child justice are equally deontological. On the other hand, and cognizant that the overriding aim of child justice is to protect the best interests of children in conflict with the law so that they do not receive disproportionate punishment for their offense and culpability, the chapter concludes that the twin pillars of child justice are not in conflict with the interest of justice. It also posits that the flexibility in the definition and application of the twin pillars represents their inherent strength in responding to the multiplicity of child justice cases and scenarios.

Having confirmed that the principles of proportionality and the best interests of the child are mutually reinforcing and complementary, and together form the twin pillars of child justice, chapter six, while noting that the CRA is an improvement on the CYPA, calibrates the extent to which the twin pillars are legislated in the CRA. The chapter argues that the content of the twin pillars of child justice in the CRA meets international and regional standards.

On the basis that the CRA meets the international and regional threshold of the twin pillars of child justice, chapter seven investigates the practical application of the twin pillars by family courts in respect of children in conflict with the law in Nigeria. It observes that despite the strong legal framework for the promotion and protection of child rights in Nigeria through the CRA, children in conflict with the law in Nigeria are not availed the envisaged protection. The chapter points out the drawbacks to the application of the twin pillars to children in conflict with the law in Nigeria. The chapter observes that the distribution of legislative functions between the federal and state governments under the exclusive and concurrent legislative lists of the 1999 Constitution impacts on the implementation of the twin pillars guaranteed in the CRA

Chapter eight concludes that the CRA as promulgated is only applicable to the Federal Capital Territory with an option for states to adopt it into state law. It notes that whilst most states have adopted it into state law, some states of the federation are yet to do so. The chapter concludes that the reason for the limited scope of the CRA within the jurisdiction of the Federal Capital Territory and its optional adoption into state law relates to the fact that the National Assembly promulgated it under Section 299(a) of the 1999 Constitution. This chapter observes that the competence to legislate on human rights issues in general and child rights in

particular are enumerated neither in the exclusive legislative list earmarked for the federal government nor the concurrent legislative list where the federal and state governments share competence. On the basis of these constitutional, legislative, structural and institutional challenges to the implementation of the twin pillars of child justice guaranteed in the CRA, this chapter proffers policy, legislative and constitutional amendments amongst other recommendations.

Chapter Two

Philosophical and Normative Foundation of Child Rights

2.1 Introduction

Based on the research methodology adopted in chapter one and coupled with the fact that the conceptual appreciation of human rights in this thesis is explicitly normative, this chapter sets out the philosophical and normative foundation of human rights as a basis for extrapolating the philosophical and normative foundation of child rights.¹ It notes that prior to the Second World War, child rights discourse was less common when compared to the period after the adoption of the Universal Declaration of Human Rights.² The post 1948 era witnessed increasing political commitment to the promotion and protection of child rights at the national, regional and international levels.³

This thesis views human rights as those broadly recognized fundamental global standards of morality that inhere in human beings by virtue of their humanity and which are normatively instituted. Predicated on the argument that child rights share a philosophical affinity with human rights, this chapter construes child rights as those rights that are normatively established and are specifically and affirmatively applicable to children because of their age, level of mental development, inherent vulnerability and mitigated culpability. This chapter further elaborates on the conflicting arguments between the universality and relativity of human rights in general and child rights in particular and argues that in the context of child justice, the twin pillars are non-derogable and universally applicable.

2.2 Philosophical Foundation of Child Rights

The philosophical foundation of child rights is very contestable. Langlois's postulation that there are several philosophical foundations of human rights could be extended to apply to the philosophical foundation of child rights.⁴ Although the classical philosophical divides of human rights may not specifically speak to child rights, the latter could be extrapolated from the general philosophical foundations of human rights. There is no gainsaying the fact that since child rights are an integral

¹ Samuel Moyn, *The Last Utopian, Human Rights in History* (Harvard University Press 2010) 21; See also Kiyoteru Tsutsui, Claire Whitlinger and Alwyn Lim, 'International Human Rights Law and Social Movements: States' Resistance and Civil Society's Insistence' (2012) 8 *Annual Review of Law and Social Science* 367

² Mark Mazower, 'The Strange Triumph of Human Rights 1933-1950 (2004) 47 *The Historical Journal* 379

³ Martha C Nussbaum, 'Capabilities of Human Rights' (1998) 66 *Fordham L. Rev.* 273

⁴ Anthony J Langlois, 'Normative and Theoretical Foundation of Human Rights' (2009) 25 *Human Rights: Politics and Practice* 990; See also Anthony Langlois, 'Human Rights: the Globalization and Fragmentation of Moral Discourse' (2002) 28 *Review of International Studies* 479

component of human rights, the philosophical foundation of child rights is essentially linked to the broad philosophical foundation of human rights.⁵

There are several philosophical foundations of law that present distinct and most times interrelated heritage of human rights. They include the natural law, positive law, sociological, Marxism, realism, utilitarianism, historical and anthropological foundations. While all of these theoretical foundations have bearing on the conception of law in general and human rights in particular, they are not uniformly relevant to the universalist conception of child rights. Consequently, this thesis will not explore all the available theoretical foundations of human rights but will focus on those deemed very useful in extrapolating the theoretical foundation of child rights and also essential in illuminating and contextualizing the philosophical preferences of this thesis.⁶

2.2.1 Natural Law

There are various strands of natural law with their theoretical underpinning based on the existence of a 'higher law' derived from divine nature as a scale for measuring its validity. The crux of natural law is that law must be propelled by morality. Whilst Blackstone states that 'no human laws are of any validity, if contrary to the law of nature',⁷ Bix argues that natural law is not susceptible to changes due to the passage of time and its standards are uniformly accessible by resort to reason.⁸

According to Bix, one of the renowned ancient writers on natural law is Cicero. He provided an elegant restatement of already established Stoic views that true law is right reason in agreement with nature, universal in application, unchanging and everlasting.⁹ Thomas Aquinas has also been lauded as one of the

⁵ Charlotte Bunch, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 Human Rights Quarterly 486; See also Gayle Binion, 'Human Rights: A Feminist Perspective' (1995) 17(3) Human Rights Quarterly 509

⁶ This thesis excludes the review of the historical and anthropological foundations of human rights because they are amongst other things based on the inner conscience of the people and somewhat opposed to the universal application of human rights in general and child rights in particular. Also, both foundations confine human rights to a culturally motivated micro conception of geographical and biological affinity of right holders.

⁷ William Blackstone, *Commentaries on the Laws of England*, (Vol. 2 Garland Pub. 1978); See also Dennis R Nolan, 'Sir William Blackstone and the New American Republic: A Study of Intellectual Impact' (1976) 51 New York University Law Review 731

⁸ Brain Bix, 'Natural Law: The Modern Tradition' in Jules L Coleman and Scott Shapiro (eds) *Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2001); See also Brain Bix, 'On the Dividing Line Between Natural Law Theory and Legal Positivism' (2000) 75 Notre Dame Law Review 1613

⁹ Brain Bix, 'Natural Law: The Modern Tradition' in Jules L Coleman and Scott Shapiro (eds) *Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2001)

most influential writers on natural law.¹⁰ While classifying law into natural, eternal and divine, and calling for outright disobedience to unjust laws, Lisska recounted Aquinas as stating that positive law inheres from natural law because the latter is the guiding framework for the promulgation and legitimacy of the former.¹¹

Natural law theory was later anchored in natural rights, deepened international law debate and appears to have played a significant role in the constitutions of several countries and the modern civil rights movement.¹² On the other hand, Hugo Grotius and Samuel Pufendorf have been identified as prominent examples of theorists whose writings on natural law had significance in the grounding of human rights on natural rights.¹³ The natural rights approach was further synthesized by Thomas Hobbes, Jean-Jacques Rousseau and John Locke into the 'social contract' theories.¹⁴

Commenting on the social contract theories, Laslett argues that Locke visualized the existence of human beings in the state of nature where human beings are accorded freedom and equality, are not subjected to the will of another and are able to determine their actions.¹⁵ Accordingly, there arose a need to dispense with the hazards and inconveniences of nature in which case a social contract was entered into whereby men mutually agreed to form a community with ground rules.¹⁶ Another leading voice in the natural law school is Beitz. Acknowledged for his hybrid alternative to Locke's theory, he argues that the source of human rights is not the law of God but rather the quest for social justice.¹⁷

Criticizing Locke's social contract theory, Freeman cited Grotius who is also a protagonist of natural law theory as characterizing human beings as possessing the social impulse to coexist harmoniously with one another.¹⁸ He also cited Thomas Hobbes and argued that the latter sought to justify natural law not as a derivative of the law of God but as law ordained on the basis of humanity.¹⁹ On the other hand, Edmund Burke furthered the opposition to Locke's postulation when he argued that

¹⁰ Anthony J. Lisska, *Aquinas's Theory of Natural Law: An Analytic Reconstruction* (Oxford University Press 1996);

¹¹ Ibid

¹² Thomas Aquinas *Political Writings* R W Dyson (trans) (Cambridge University Press 2002)

¹³ Jeremy Waldron, 'John Locke: Social Contract Versus Political Anthropology' (1989) 51 *The Review of Politics* 3

¹⁴ Jean Hampton, *Hobbes and the Social Contract Tradition* (Cambridge University Press 1986)

¹⁵ John Locke, *Two Treatises of Government* Peter Lasslet (ed) (Cambridge University Press 1988) 45

¹⁶ Daniel E. Flage Review of James Tully 'An Approach to Political Philosophy: Locke in Contexts' (1996) 35(4) *Dialogue: Canadian Philosophical Review* 825

¹⁷ Charles R. Beitz, *The Idea of Human Rights* (Oxford University Press 2009) 49; See also Charles R. Beitz, *Human Rights as a Common Concern* (American Political Science Association 2001) 269

¹⁸ Michael Freeman, 'The Philosophical Foundations of Human Rights' (1994) 16 *Human Rights Quarterly* 491; See also Michael Freeman, *Human Rights* (2nd edn Polity Press 2011)

¹⁹ Ibid

‘men’ and by extension children had rights that are not derivable from the state but originating from the ‘organic tradition and institutions of the society’.²⁰

The works of the early theorists on natural law understandably differ from the contemporary discourse of natural law.²¹ Finnis’s contemporary writings on the nexus between natural law and natural rights have been secular, emphasizing ‘the requirements of reason rather than divine command, purpose, will or wisdom.’²² Writing in a similar tone to Aquinas, Finnis founded his claim on ‘self-evident basic goods’ which he described as things one values for their own sake. Negating positive law as a single-track authority where orders are originated from government as a sole source, Fuller called for a certain condition precedent before a rule could in its true sense be titled as law.²³ He proposes complementarity and co-operation between government and citizens so that rules must meet certain criteria to earn the title law. He also substituted a positive law analysis of law based on power, orders and obedience for analysis based on the ‘internal morality’ of law.²⁴

Contrasted to natural law theorists, Fuller’s theory is based on process and function rather than strictly on moral content. Similarly Dworkin challenged positive law and offered an alternative vision of law in which there are abundant resources for resolving disputes ‘according to law’.²⁵ Several other contemporary writers have contributed to the literature on natural law. They include Michael S. Moore,²⁶ Lloyd Weinreb,²⁷ Ernest Weinrib,²⁸ Deryck Beyleveld and Roger Brownsword,²⁹ and Mark

²⁰ Edmund Burke, *Reflection on the Revolution of France* (Manchester University Press 2000) 40

²¹ Brain Bix, ‘Natural Law: The Modern Tradition’ in Jules L Coleman and Scott Shapiro (eds) *Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2001); See also Brain Bix, *Law, Language, and Legal Determinacy* (Oxford University Press 1993); Brain Bix, ‘Can Theories of Meaning and Reference Solve the Problem of Legal Determinacy?’ (2003) 15 *Ratio Juris* 281

²² John Finnis, *Natural Law and Natural Rights*. (2nd edn, Oxford University Press 2011); John Finnis, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press 1988) 227; John Finnis, ‘On the Incoherence of Legal Positivism’ (2000) 75 *Notre Dame Law Review* 1597; John Finnis ‘Grounds of Law and Legal Theory: A Response’ (2007) 13 *Legal Theory* 315

²³ Lon L Fuller, ‘Positivism and Fidelity to Law – A Response to Professor Hart’ (1958) 71 *Harvard Law Review* 630

²⁴ *Ibid*; See also Lon L Fuller, *The Morality of Law* (Yale University Press 1969)

²⁵ Ronald Dworkin, *Taking Rights Seriously* (Library of Congress Cataloging –in-Publication Data 1978); See also Ronald Dworkin, *Law’s Empire* (Library of Congress Cataloging –in-Publication Data 1986); Ronald Dworkin, *Justice in Robes* (Library of Congress Cataloging –in-Publication Data 2006).

²⁶ Michael S Moore, ‘A Natural Law Theory of Interpretation’ [1985] 58 *Southern California Law Review* 277; See also Michael S Moore, ‘Justifying the Natural Law School on Constitutional Interpretation’ (2011) 69 *Fordham Law Review* 2087

²⁷ L L Weinreb, *Natural Law and Justice* (Library of Congress Cataloging –in-Publication Data 1987); See also Brian Bix, *Jurisprudence: Theory and Context* (5th ed, Sweet & Maxwell 2009)

²⁸ E J Weinrib, ‘Legal Formalism: On the Immanent Rationality of Law’ (1988) 97 *Yale Law Journal* 949; See also E J Weinrib, *The Idea of Private Law* (Oxford University Press 2012)

Murphy.³⁰ These series of scholarships on natural law do not expressly allude to child rights except through an expansive reading of ‘people’ to include children.³¹ As such, in a deductive sense, the natural law theory construes child rights as those inherent ingredients of human dignity held universally and equally by children because of their membership in the human race in the first place and because of their age in the second instance.

As a vocal apostle of the natural law school, Locke’s writings infer that natural rights which by deductive inference include child rights are synonymous with natural law and founded on the basis of the law of God.³² The social contract theory of Locke which by extension supports the natural law conception of child rights may be appropriate in the circumstance of its enunciation. However, situating this theory in the contemporary era would conflict with emerging child rights claims based on the elasticity of present day human needs.

Natural law’s age-long conception of human rights made no mention of child rights specifically. Also, contemporary scholars such as Finnis, Freeman and Langlois also omitted any reference to child rights in their discourse of the conception of the philosophical foundation of natural law. While Langlois interprets human rights as natural rights possessed by men by virtue of their humanity and held universally and equally by all people,³³ Freeman opined that human rights are held against the whole world, essential to the maintenance of human dignity and ultimately inevitable for the realization of human worth.³⁴

The different shades of natural law theory and the strains of its philosophers notwithstanding, it emphasizes the basis for the protection of human rights, including child rights, equality and freedom and the presupposition of a value transcendental to the naked power of the state and one of the propelling forces behind the growth of the contemporary child rights regime.³⁵

²⁹ D Beyleveld, and R Brownsword, *Law as a Moral Judgment vs Law as the Rules of the Powerful* (1983) *American Journal of Jurisprudence* 79

³⁰ Mark C Murphy, *Natural Law and Practical Rationality* (Cambridge University Press 2001); See also Mark C Murphy, ‘Natural Law Jurisprudence’ [2003] *Legal Theory* 241; Mark C Murphy, *Natural Law in Jurisprudence and Politics* (Cambridge University Press 2006)

³¹ Donald L. Doernberg, ‘We the People: John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action’ (1985) 73 *California Law Review* 52

³² W. von Leyden, ‘John Locke and Natural Law’ (1956) 31 *Philosophy* 23; See also John W. Lenz, ‘Locke’s Essays on the Law of Nature’ (1956) 17 *Philosophy and Phenomenological Research* 105

³³ Anthony Langlois, ‘Normative and Theoretical Foundation of Human Rights’ (2009) 25 *Human Rights: Politics and Practice* 990

³⁴ Michael Freeman, ‘The Philosophical Foundations of Human Rights’ (1994) 16 *Human Rights Quarterly* 491

³⁵ Jerome J Shestack, ‘The Philosophic Foundations of Human Rights’ (1998) 20 *Human Rights Quarterly* 234; See also John Mahoney, *The Challenge of Human Rights: Origin, Development, and Significance* (Blackwell Publishers 2007)

2.2.2 Positive Law

There is apparently no unitary strand of positive law as disagreements exist within the same theory. Its prominent adherents include important nineteenth century philosophers such as John Austin, as well as twentieth century thinkers such as Hans Kelsen,³⁶ H. L. A. Hart³⁷ and Joseph Raz.³⁸ Hart argues that the central tenet of positive law is the difference between the way the law is and the way it ought to be and its validity as a norm is not necessarily linked to its moral value.³⁹ Positive law is opposed to the natural law theory because of their respective interpretation of the concepts of legality and authority.⁴⁰

While not disagreeing on a possible overlap between law and morality, it has been argued that positive law dispenses with the need for moral validity of a norm.⁴¹ Coleman and Leiter call this 'negative positivism' and state that the mutually reinforcing convergence of law and morality should be the ultimate aspiration of law.⁴² On the other hand, since the threat of sanction accounts for the normativity of law and compels citizens to obey the law, the legality of a law under positive law is a function of its source and not dependent on the merits of its substantive provisions.⁴³ Gardener further argues that the existence of the law is one thing and its merit or demerit is another. As such, law is the order of a sovereign backed by a threat of sanction in the event of non-compliance.⁴⁴

In that case, positive law emphasizes the 'source' and not the 'merit' of the law such that the validity of the law depends on its source.⁴⁵ It therefore follows that the validity of the law is not subject to the morality of the law and it is immaterial

³⁶ Brian Z Tamanaha, 'Contemporary Relevance of Legal Positivism' (2007) 32 *Australian Journal of Legal Philosophy*, 1; See also Brian Bix, 'Positively Positivism' (1999) 85 *Virginia Law Review* 889

³⁷ H L A Hart, *The Concept of Law* (Clarendon Press 1961); See also H L A Hart, *Essays on Jurisprudence and Philosophy* (Clarendon Press 1983)

³⁸ Joseph Raz, *The Authority of Law* (Clarendon Press 1979); See Joseph Raz, 'Authority, Law and Morality' (1985) 68 *The Monist* 295; See also Joseph Raz, 'The Problem of Authority: Revisiting the Service Conception' [2006] *Minnesota Law Review* 1003

³⁹ H L A Hart, *The Concept of Law* (Oxford University Press 2012) 18; See also H L A Hart, *Essays on Jurisprudence and Philosophy* (Oxford University Press 1983); Leslie Green, 'Positivism and the Inseparability of Law and Morals' (2008) 83 *New York University Law Review* 1035

⁴⁰ Jules L. Coleman and Brian Leiter, 'Legal Positivism' in Dennis Patterson (ed) *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Wiley-Blackwell 2010) 228; See also Brian Leiter, 'Legal Realism and Legal Positivism Reconsidered' (2001) 111 *Ethics* 278

⁴¹ J L Coleman, 'Reason and Authority' in R George (eds) *The Autonomy of Law: Essay on Legal Positivism* (Oxford University Press 1999); See also Keith Culver, 'Leaving the Hart-Dworkin Debate' (2001) 51 *University of Toronto Law Journal* 367

⁴² Jules L. Coleman and Brian Leiter, 'Legal Positivism' in Dennis Patterson (ed) *A Companion to Philosophy of Law and Legal Theory* (2nd ed, Wiley-Blackwell 2010) 228

⁴³ John Gardner, 'Legal Positivism: 5 ½ Myths' (2001) 46 *American Journal of Jurisprudence* 199

⁴⁴ *Ibid*

⁴⁵ T Spaak, 'Legal Positivism, Law's Normativity and the Normative Force of Legal Justification' (2003) 16 *Ratio Juris* 469; See also Fredrick Schauer, 'Positivism Before Hart' (2011) 24 *Canadian Journal of Law and Jurisprudence* 455

that such a norm would have been an excellent norm if adopted. Positive law entrusts upon the state the mandate to institutionalize what is considered ‘right’ or ‘wrong’ and establish a legal regime separate from the moral foundation of society. It validates legal obligation regardless of its moral content and irrespective of its repugnancy with any other value system.⁴⁶

The philosophical strand of positive law is identifiable in human rights treaties, declaration and conventions in general and child rights instruments and laws in particular. The existence of a litany of international and regional human rights treaties, conventions and declarations codifying general and thematic human rights standards and articulating its enforcement mechanisms is credited to positive law.

Notwithstanding the affinity of positive law to the philosophical framework of modern child rights instruments, it has been criticized for propagating the force of law over and above human morals and dignity. It has also been criticized for creating the legal platform for obnoxious regimes insensitive to human rights in general and child rights in particular such as the Nazi regime, the apartheid rule in South Africa and suppressive military dictatorships in Africa.⁴⁷ According to Dworkin, positive law has been criticized for lending credence to immoral and obnoxious laws and most times is undeserving of its title as ‘law’.⁴⁸

Regardless of the intrinsic merit of the anti-positivist argument, the enablers of positive law are in consonance with modern day national and inter-state legal architecture whereby international, regional and national parliaments make binding laws on contemporary and emerging issues. Noting that certain norms incompatible with the value system of the citizenry may be smuggled legislatively under the guise of positive law, the antidote to the promulgation of immoral or unjust laws on the altar of positive law is found in the prevailing model of informed public participation.

Under this process, citizens through their elected representatives and member states of the international community through their designated representatives are expected to oversee the promulgation of national legislation, international or regional treaties or conventions that are in tune with the unifying value system of the country or international community. With the active and informed participation of the citizenry in the process of positive law, the likelihood of the promulgation or adoption of democratic laws at variance with the morality and values of the majority of the citizenry is relatively farfetched.

⁴⁶ Jonathan H Turner, ‘In Defense of Positivism’ (1985) 3 Sociological Theory 24

⁴⁷ Brian Leiter, ‘Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence’ (2003) 48 American Journal of Jurisprudence 17; See also Jeffrey D Goldsworthy, ‘Self Destruction of Legal Positivism’ (1990) 10 Oxford Journal of Legal Studies 449

⁴⁸ R Dworkin, *Taking Rights Seriously* (Harvard University Press 1977); See also R Dworkin, *Law’s Empire*. (Harvard University Press 1986); See also John Finnis, ‘On the Incoherence of Legal Positivism’ (2000) 75 Notre Dame Law Review 1597

Positive law is certainly an indispensable tool in modern day efforts to promote and protect child rights. The fact that it allows a certain degree of flexibility in meeting with evolving rights is one of the strengths of positive law. One result of the inherent elasticity of positive law is the fact that child rights which a few decades ago were not articulated as distinct human rights are today legislated internationally, regionally and nationally as discrete rights for specific categories of rights holders.⁴⁹

2.2.3 Other Philosophical Foundations

There are other philosophical foundations that differ from the postulations of natural law and positive law. One of them is the sociological jurisprudence, which stresses the social purpose of law and underlines the fact that law should be aligned with evolving social conditions.⁵⁰ According to Gardner, the forerunner of sociological jurisprudence is Montesquieu who expounded the thesis that natural rights are nothing more than legally protected social interests and recognized only insofar as aiding in securing the welfare of the society.⁵¹ In contrast to legal positivism which focuses on law in books, sociological jurisprudence defines law as a ‘matrix of relationships’ and shifts the focus of attention to the study of the ‘living law’ or ‘law in everyday life.’⁵² It considers the latter as the ‘true law,’ and, consequently, permits the abdication of any law in force, where such a law was, in the opinion of the court, contradictory to the ‘living law.’⁵³

Claiming that every rule of law owes its origin to some predicated motive, this school argues that the purpose of law is to secure the conditions of social life as determined by the social order of the ‘time and place’.⁵⁴ Sociological jurisprudence does not specifically allude to child rights and may be construed to deny any universal body of legal rules or institutions. It also subsumes individual interests to social interests and classifies individual rights as means of the society to realize its social ends.⁵⁵ Postulating that law is relative to the civilization of the ‘time and place’, sociological jurisprudence may be deemed to be compatible with child rights as an evolving trend in human rights. This is because the mission of the law under the sociological perspective is the advancement of civilization and changing with

⁴⁹ For instance and outside the specific boundaries of child rights, gay and lesbian rights which were unknown and maybe unthinkable a few decades ago are today classes of rights among others that are protected contemporarily through the elastic instrumentality of positive law.

⁵⁰ James A Gardner, ‘The Sociological Jurisprudence of Roscoe Pound’ (1961) 7 Vill. L Rev. 1

⁵¹ Ibid

⁵² White G. Edward. ‘From Sociological Jurisprudence to Realism: Jurisprudence and Social Change in Early Twentieth-Century America.’ (1972) *Virginia Law Review* 999.

⁵³ Ibid

⁵⁴ Round, Roscoe, ‘The Scope and Purpose of Sociological Jurisprudence [Concluded] III Sociological Jurisprudence’ (1912) *Harvard Law Review* 489

⁵⁵ William A Westley, *Violence and the Police: A Sociological Study of Law, Custom, and Morality* (Cambridge, MA: Mit Press 1970)

changed conditions.⁵⁶ Since human rights accentuate existing values of civilization, child rights under the sociological perspective are arguably adapted to further the ideals of human dignity.

On the other hand, another philosophical foundation of law in general and human rights in particular is Marxism. It is the critical lens for challenging the wisdom of liberal legal thought and construes law as an instrument through which the capitalist class imposes and perpetuates its will.⁵⁷ Marxism focuses on the nature of human beings and shares borders with natural law theory. It is, however, distinguishable from natural law theory on the grounds that it regards rights accruable to 'citizens' which includes children as not emanating from a divine nature, but as 'species-being'.⁵⁸

Expounded by Karl Marx, this theory of human rights law like other theories did not treat children as a distinct class of rights holders. Preoccupied with the emancipation of the common man and by way of emphasis 'common children', Marxism implies that the essence of a 'person' which supposedly includes a child is to apply one's potential to the fullest and greatest satisfaction of one's needs.⁵⁹ This theory espouses concepts such as 'law', 'justice', 'morality', 'freedom', and 'democracy' as the coefficients of the material conditions and social circumstances of the people in general and by extension children in particular.⁶⁰

In opposition to the fundamental principles of capitalism, Marxism according to Mendus conceives a classless and anti-individualistic society facilitated by the state of social collectivity.⁶¹ Marxist appeal to child rights presupposes an ideology of possessiveness in the sense that when child rights are asserted as claims against the state, the assumption is that there is an endemic tension between the interest of the state and the interest of children. At variance with modern day capitalism and as a denial to an idealistic society, Marxist philosophy was popular in several countries until it was destabilized by the collapse of Communism in Eastern Europe.

Whereas Marxism recognizes the competence of the international community to establish transnational human rights, including child rights norms, it subjects the

⁵⁶ Penelope Canan, 'SLAPP From a Sociological Perspective' (1989) *Pace Env'tl. L. Rev.* 7

⁵⁷ Alan Hunt, 'The Object of Marxist Theory of Law' in Dennis Patterson, *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Wiley-Blackwell 2010) 350; See also Shahrzad Mojab, 'In the Quagmires of Ethnicity: A Marxist Critique of Liberal 'Exit Strategies'' (2006) 6 *Journal of Ethnicities* 341

⁵⁸ William A. Parent, 'Some Recent Work on the Concept of Liberty' (1974) 11 *American Philosophical Quarterly* 149; Karl Marx: *Selected Writings* David McLellan (ed) (Oxford University Press 2000)

⁵⁹ John William Corrington 'Generalities' (2002) 26 *Legal Studies Forum* 747; See also Kai Nielsen, 'Marxism and the Moral Point of View' (1987) 24 *American Philosophical Quarterly* 295

⁶⁰ *Ibid*

⁶¹ S Mendus, 'Human Rights in Political Theory' (1995) 43 *Political Studies* 24; See also Leszek Kolakowski, 'Marxism and Human Rights' (1983) 112 *Daedalus* 81;

application and implementation of these norms to exclusive domestic jurisdiction. This may account for one of the reasons why governments often on grounds of national sovereignty justify why each country should be free to interpret human rights as it pleases because what is good for the species-being is to be determined by respective states and not a communal decision of the international community.⁶²

Another strand of the philosophical foundation of human rights is legal realism. The increase in the understanding of people and of their different cultures through the evolution of natural and social sciences gave rise to the realist conception of human rights and by extension child rights. According to White, this philosophical school, while departing from abstract and analytical types of jurisprudence, contextualizes behavioral dimensions of law and society.⁶³ Its distinctive feature in the conception of child rights lies in the fact that '[i]t underscores the just equilibrium of interest among competing moral sentiments and in the context of social process identifies the empirical components of human rights system'.⁶⁴

There are numerous approaches to, and several leading philosophers of the realist theory of human rights and by extension child rights. According to James, the birth of the realist conception of child rights is anchored in the pragmatic principle that 'the essence of good is simply to satisfy demand'.⁶⁵ Without distinctly elaborating on child rights, he argues that the realist approach has an affinity with the development of contemporary human rights architecture which is stretching beyond classical civil and political rights, to economic, social and cultural rights. Although the realist conception of rights takes into consideration the realities of surrounding social processes of result-mindedness and process-mindedness, Llewellyn observes that it is weak because when juxtaposed with the realities of the contemporary world, its premise is flawed due to the inconsistencies of its normative conclusion that rights are derived from interest.⁶⁶

Another philosophical foundation of human rights is utilitarianism. The contribution of this philosophical foundation to the discourse of human rights in

⁶² Jerome J Shestack, 'The Philosophic Foundations of Human Rights' (1998) 20 Human Rights Quarterly 234

⁶³ G Edward White, 'From Sociological Jurisprudence to Realism: Jurisprudence of Social Change in Early Twentieth Century America' (1972) 58 Virginia Law Review 999; See also G. Edward White, 'The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change' (1973) 59 Virginia Law Review 279

⁶⁴ Paul Lauren, *The Evolution of International Human Rights: Visions Seen* (3rd edn, University of Pennsylvania Press 2011) 10; See also Reza Afshari, 'On Historiography of Human Rights Reflections on Paul Gordon Lauren's *The Evolution of International Human Rights: Visions Seen*' (2007) 29 Human Rights Quarterly 1

⁶⁵ William James, *Pragmatism* (Harvard University Press 1975) 185; Stanly Appelbaum, *William James Pragmatism* (Dover Publications 1995)

⁶⁶ Karl Llewellyn, *Jurisprudence: Realism in Theory and Practice* (University of Chicago Press 1962) 42

general and child rights in particular is its focus on distributive rather than individualized happiness.⁶⁷ Utilitarianism presupposes that the rightness or otherwise of an action is a function of whether it precipitates the greatest happiness for the majority. Contrary to natural rights theory, utilitarianism predicates every human judgement on the arithmetic of pleasure versus pain of not just an individual but a group of individuals.⁶⁸ As such, the scorecard of the government is not how well it performed in protecting abstract individual rights including those of children but how well it advanced collective rights and ensured the greatest happiness for the greatest number.⁶⁹

Langlois quoted the ‘anarchical fallacies’ of Bentham criticizing natural rights as rhetorical nonsense and argues that they are abstract metaphysical phenomena stemming from an unreal world.⁷⁰ He categorized the rights of men as protective of the upper class citizen, as precipitating the capitalist domination by the wealthy and clogging the achievement of equality and well-being of the collective.⁷¹ Bentham’s underlying communal preference principle, in Langlois’ view, has been criticized for arbitrarily reducing the rightness of an action merely to the arithmetic of individual versus communal benefits. In the contemporary child rights regime, the geometry of Bentham’s happiness theory of classical utilitarianism is inapplicable to the promotion and protection of child rights which is focused on an individual child.

Over time and based on the weaknesses of Bentham’s ‘happiness theory of the majority’, the utilitarian theory was reformed to guide the conduct of government not on the basis of pleasure or happiness, but as a reflection of maximum satisfaction and minimum frustration of wants and preferences.⁷² Even with the readjustment of utilitarian theory from pleasure and happiness to economic decision-making, Rawls contends that it is still unable to plug the conceptual and practical gaps inherent in the formulation of the theory.⁷³

Juxtaposing the economic decision-making theory of reformed utilitarianism to present-day human rights realities in general and child rights in particular, utilitarianism is insensitive to children’s individual autonomy and equality. Utilitarian maximization of aggregate desires or general welfare vis-à-vis individual satisfaction is inherently a weak option for the promotion and protection of child

⁶⁷ Allen Kamp, ‘Between-The-Wars Social Thought: Karl Llewellyn, Legal Realism and the Uniform Commercial Code in Context’ (1996) 59 Albany Law Review 325

⁶⁸ Ibid

⁶⁹ Freeman M. *Human Rights: An Interdisciplinary Approach*, (2nd edn, Polity Press 2011) 61

⁷⁰ Anthony Langlois, ‘Normative and Theoretical Foundation of Human Rights’ (2009) 25 Human Rights: Politics and Practice 990

⁷¹ Ibid

⁷² Jerome Shestack, ‘The Philosophic Foundations of Human Rights’ (1998) 20 Human Rights Quarterly 214

⁷³ John Rawls, *A Theory of Justice* (Harvard University Press 1999) 19

rights because, whilst it treats people as equals, it did not disaggregate ‘persons’ to expressly include children.⁷⁴

2.2.4 Inclusive Legal Positivism

From the analysis of the foregoing philosophical foundations of human rights in general and child rights in particular, it is clear that there are different and somewhat conflicting philosophical lenses for viewing child rights. It is also irrefutable that there are inherent weaknesses in these individual philosophical foundations. As such this thesis, akin to Coleman and Leiter’s postulation, proposes a paradigm that it calls inclusive legal positivism. This hybrid philosophical foundation postulates that while moral principles can be explained by the rule of recognition, the legality of moral norms is not a function of their morality but of their validity under a rule of recognition.⁷⁵

This strand of philosophical foundation of human rights in general and child rights in particular is inclusive because it combines the complementary and mutually reinforcing strengths of natural law and positive law philosophies. A blend of these two philosophies and resultant effects resonates with the realities of present day promotion and protection of child rights and is in tandem with contemporary child rights treaties, convention, legislation etc.

The strength of inclusive legal positivism in the context of child rights is that while natural law’s philosophical strand postulates that child rights accrue to people of a specific age because of their membership in the human race, the legal positivist philosophical strand situates child rights within the parameters of what is prescribed by law. Inclusive legal positivism exhibits and corroborates in child rights the double-barreled effects of natural law and positive law. This is because while natural law emphasizes the inherent dignity, vulnerability and mitigated culpability of children on the basis of their membership of a distinct class of the human race, the positive law expediency is evident in the fact that child rights is what the law has promulgated it to be. As such, the confluence of natural law and positive law in the protection of child rights under inclusive legal positivism manifest in the positive promulgation of moral norms in favor of children.

Where morality is codified into law, it accumulates the individual strengths of natural law and positive law to provide compelling reasons for citizens to demand their rights and for government to implement the rights. According to Coleman and Leiter and in line with their ‘incorporationism and legality argument’, for a law to be authoritative, it must provide citizens with a reason to act that would have otherwise

⁷⁴ Upendra Baxi ‘Voices of Suffering and Future of Human Rights’ (1998) 8 *Transnational Law and Contemporary Problems* 125; See also Dinah Shelton, ‘Protecting Human Rights in a Global World’ (2002) 25 *Boston College International and Comparative Law Review* 273

⁷⁵ Jules L. Coleman and Brian Leiter, ‘Legal Positivism’ in Dennis Patterson (ed) *A Companion to Philosophy of Law and Legal Theory* (2nd edn, Wiley-Blackwell 2010) 228

not been available without codification.⁷⁶ It is only when moral rights that are essential to the enjoyment of child rights are prescribed as law, could such moral rights have the ability to improve the well-being of children that lay claim to them.

Inclusive legal positivism is in line with the United Nations conception of child rights as entitlements codified in international human rights treaties and covenants. The preamble of the Universal Declaration of Human Rights alludes to the point that:

The General Assembly proclaims the Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this Declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of Member States themselves and among the people of territories under their jurisdiction.

Inclusive legal positivism postulated in this thesis may be attacked by ardent protagonists of natural law due to the fact that there is already an ongoing debate regarding the status of human rights or child rights claims prior to legislation. For instance, Dworkin objects to the positivist's attempt to incorporate morality into law through the rule of recognition because a rule of recognition that includes reference to moral principles will violate the separability thesis of positivism.⁷⁷

Conversely, the question is whether legislative codification of child rights through treaties, conventions or national laws is the only process through which moral or any other claims are elevated to the status of child rights. Put differently, could child rights be guaranteed and protected in a country without enabling legislation? In response to these hypothetical questions and in justification of the philosophical foundation of inclusive legal positivism, suffice it to state firstly that child rights accrue to children by the simple fact of their age and their membership in the human race. Secondly, child rights claims could and do exist in isolation of the law, are not exclusively granted by law and do not necessarily require legislation to be effective.

Although child rights are capable of existing in isolation of the law, accruable to children with or without specific legislation, the promotion and protection of child rights require law for vivid description of the rights and for their enforcement in the

⁷⁶ Jules L. Coleman and Brian Leiter, 'Legal Positivism in A Companion to Philosophy of Law and Legal Theory' in Dennis Paterson (ed) *Companion to Philosophy of Law and Legal Theory* (2nd edn, Wiley-Blackwell 2010) 228

⁷⁷ Ronald Dworkin, *Law's Empire* (Harvard University Press 1986); See also Ronald Dworkin, 'In Praise of Theory' (1997) 29 *Arizona State Law Journal* 353

event of imminent threat or breach of the right. The promulgation of child specific and other human rights legislation combines the tripartite complements of legality, authority and morality to make rights enforceable. Conceding that ‘the force of law’ is very important in holding states accountable for respecting child rights, regional and international instruments may not adequately guarantee the observance of child rights unless the proposed enforceable rights connect with the inherent dignity of humanity. As such, the codification of child rights instruments, treaties, conventions or legislation whether at the international or national level that penetrates beyond the legal code and reflects society’s values is inevitable in making child rights protection effective.⁷⁸

Alluding to this postulation is the theory of ‘consensus’ elaborated by Donnelly to the effect that human rights in the contemporary world are unanimously agreed moral obligations cast as universal standards, equipped with a distinctive cross cultural consensus and codified as human rights.⁷⁹ While human rights may exist devoid of legislation and may be protected with or without a legal framework, in the contemporary world, the interest in protecting and promoting child rights is better served if such rights are codified into law via treaties, conventions, national constitutions or other Acts of Parliament. This accounts for the reason why present day child rights are legislatively depicted international, regionally and nationally as binding law.

The effects of the inclusive legal positivism as a philosophical foundation of child rights reinforces as binding and enforceable law what ordinarily would have been mere ethical and moral claims. Therefore, unless moral values are codified into binding law, child rights may imperceptibly degenerate into empty rhetoric. On the basis of inclusive legal positivism, child rights are defined as a set of legally prescribed moral entitlements inherent equally in every child by virtue of their age and membership in the human race. It is immediately enforceable or progressively realizable through the legislative directives of designated national, regional or international institutions.

2.3 Normative Foundation of Child Rights

Following the ill effects of fragmentation, inter-religious and inter-ethnic violence in the twentieth century, states were obliged to commit to guaranteeing to their minorities certain collective rights and the abolition of religious and civil

⁷⁸ Christopher Marsh and Daniel P. Payne, ‘The Globalization of Human Rights and the Socialization of Human Rights Norms’ (2007) *Brigham Young University Law Review* 665

⁷⁹ Jack Donnelly, ‘Cultural Relativism and Universal Human Rights’ (1984) 6 *Human Rights Quarterly* 400; See also Thomas Buergenthal, ‘The Normative and Institutional Evolution of International Human Rights’ (1997) 19 *Human Rights Quarterly* 703

disabilities as a condition precedent to joining the ‘family of nations’.⁸⁰ The then ‘family of nations’ was regulated by the League of Nations established to oversee international protection of rights of racial and religious minorities. Strong confidence was reposed in the League of Nations to amongst other things oversee international protection of minority rights. Incidentally, the operations of the League of Nations resulted in halfhearted support for racial equality and minority rights.

According to Mazower, the League of Nations was also inhibited from commenting on racial segregation in the USA or criticizing the English treatment of Catholics of Chinese origin in Liverpool or the Nazi treatment of German Jews.⁸¹ Although the Covenant of the League of Nations is not strictly a human rights instrument and did not mention human rights or child rights in any of its 26 articles, it did make reference to children in two articles in relation to maintaining fair and humane conditions of labour,⁸² and with regard to supervision of execution of agreements in relation to trafficking of children.⁸³ The ensuing weakness of the League of Nations, the incidental loss of confidence and total distrust of the effectiveness of its protection mechanism under international law among other intervening steps culminated in the demise of the League and the signing of the United Nations Charter by twenty-six member states in January 1942.⁸⁴

2.3.1 United Nations Charter

The present day prominence attached to human rights culminated after the Second World War in a strong reaction to the war-time atrocities.⁸⁵ Although international law recognized some form of international human rights protection prior to the entry into force of the United Nations Charter, the normative foundation

⁸⁰ Mark Mazower, ‘The Strange Triumph of Human Rights, 1933-1950’ (2004) 47 *The Historical Journal* 379; See also Seyla Benhabib, ‘Claiming Rights across Borders: International Human Rights and Democratic Sovereignty’ (2009) 103 *American Political Science Review* 691

⁸¹ Mark Mazower, ‘The Strange Triumph of Human Rights, 1933-1950’ (2004) 47 *The Historical Journal* 379

⁸² Article 23(a) The Covenant of the League of Nations, signed 28 June 1919 at the Paris Peace Conference and entered into force on 10 January 1920; See also Susan Pedersen, ‘Back to the League of Nations’ (2007) 112 *The American Historical Review*

⁸³ League of Nations, *Covenant of the League of Nations*, 28 April 1919. Article 23(c); See also Leland M. Goodrich, *From League of Nations to United Nations. International Organization* (International Organization 1947) 3; F S Northedge, *The League of Nations: Its Life and Times, 1920-1946* (Leicester University Press 1986)

⁸⁴ The original twenty-six signatories were: the United States of America, the United Kingdom of Great Britain and Northern Ireland, the Union of Soviet Socialist Republics, China, Australia, Belgium, Canada, Costa Rica, Cuba, Czechoslovakia, Dominican Republic, El Salvador, Greece, Guatemala, Haiti, Honduras, India, Luxembourg, the Netherlands, New Zealand, Nicaragua, Norway, Panama, Poland, Union of South Africa, Yugoslavia

⁸⁵ Kofi Buenor Hadjor, ‘Whose Human Rights’ (1998) 33 *Journal of Asian and African Studies* 359; David L. Cingranelli and David L Richards, ‘Respect for Human Rights After the End of the Cold War’ (1999) 36 *Journal of Peace Research*

of modern international human rights law and by extension the institutionalization of child rights was consolidated with the adoption of the United Nations Charter in 1945.⁸⁶ Under the Charter, the willingness to commit to the defense of human rights within and outside the borders of member states was highlighted.

The Charter was also unprecedented in its articulation of human rights both in its preamble and its main body, thus making it one of the normative pillars of human rights and by extension child rights. Although the UN Charter is not a child specific instrument and does not expressly mention children as holders of rights, it makes reference to human rights in its preamble and six other articles which, by extrapolation, can be seen to obviously relate to children.⁸⁷ The then member states of the United Nations pledged not only to adhere to the principles contained in the Atlantic Charter, but also to preserve human rights and justice within their respective territories. Article 1(3) of the UN Charter recognizes that one of the

[P]urposes of the United Nations is international cooperation in solving various international problems, including humanitarian problems, and in promoting and encouraging respect for human rights and fundamental freedoms for all without distinction such as race, sex, language, or religion.

The United Nations General Assembly in line with the dictates of the Charter affirms that peace and security, development and human rights are the pillars of the United Nations system and the foundations for collective security and well-being. It also recognizes that development, peace and security, and human rights are interlinked and mutually reinforcing.⁸⁸ The Charter also assigns to member states the responsibility for promoting ‘universal respect for and observance of human rights and fundamental freedoms for all without distinction as to race, language or religion’.

Article 56 provides that all members pledge themselves to take joint and separate action in cooperation with the Organization for the achievement of the purposes set forth in Article 55. Despite the inherent weaknesses of the Charter, particularly in relation to the non-binding nature of its provisions, Buergenthal

⁸⁶ Thomas Buergenthal, ‘The Normative and Institutional Evolution of International Human Rights’ (1997) 19 HRQ 703; See also Edward R Stettinius, ‘Human Rights in the United Nations Charter (1946) 243 The Annals of the American Academy of Political and Social Science; Benjamin V Cohen, ‘Human Rights Under the United Nations Charter’ (1949) 14 Journal Law and Contemporary Problems

⁸⁷ UN, *Charter of the United Nations*, 24 October 1945. Articles 1(3); 13(1)(b); 55(c); 62(2); 68; 76(c); See also Bardo Fassbender, ‘The United Nations Charter As the Constitution of the International Community’ (1998) 36 Columbia Journal of Transitional Law 529

⁸⁸ United Nations General Assembly, Resolution A/RES/60/251 of April 2006

argues that the Charter provides the legal authority for the codification of human rights that ensued in 1948 and thereafter.⁸⁹

2.3.2 Universal Declaration of Human Rights

The bedrock of human rights is the International Bill of Rights adopted by the United Nations General Assembly and which includes the Universal Declaration of Human Rights (UDHR).⁹⁰ UDHR is one of the founding documents of human rights law and is a non-binding declaration adopted in 1948 by the United Nations General Assembly.⁹¹ As one of the greatest aspirational documents and corner-stone of human history meant to guide virtually all human rights, the UDHR urges member states to promote a number of civil, economic and social rights.⁹² An-Na'im postulates that the UDHR is the platform on which other human rights mechanisms are constructed,⁹³ and holds out human rights as 'a common standard of achievement for all peoples and all nations'.⁹⁴

While the UDHR did not articulate any child-specific human rights provision, a deductive reading of the broad spectrum of rights guaranteed in the Declaration disposes it as one of the strongest normative frameworks for the protection of child rights. As 'a first step in a great revolutionary process' the UDHR was intended not to be a binding legal document but instead a declaration of basic principles of human rights and freedoms.⁹⁵ According to the former Secretary-General of the United Nations, Mr. Kofi A Annan,

[T]he principles enshrined in the Universal Declaration are the yardstick by which we measure progress. They lie at the heart of all that the United Nations aspire to achieve ... Human rights belong not to a chosen few, but to all. It is this universality that

⁸⁹ Thomas Buergenthal, 'The Normative and Institutional Evolution of International Human Rights' (1997) 19 Human Rights Quarterly 703

⁹⁰ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948; See also Mary Ann Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*. (Random House Publishing Group 2002); Deaton Matt, *Universal Declaration of Human Rights* (Springer 2011)

⁹¹ Kathleen Renee Cronin-Furman, '60 Years of the Universal Declaration of Human Rights: Towards An Individual Responsibility to Protect' (2010) 25 American University International Law Review 175

⁹² Thio Li-ann, 'The Historical Origins and Contemporary Evolution of International Human Rights Law' (2009) 21 Singapore Academy of Law Journal 261

⁹³ Abdullahi A. An-Na'im and Louis Henkin, 'Islam and Human Rights: Beyond the Universality Debate' (2000) 94 American Society of International Law 95

⁹⁴ *Universal Declaration of Human Rights*, 10 December 1948; See also Johannes Morsink, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press 1999)

⁹⁵ Kathleen Renee Cronin-Furman, '60 Years of the Universal Declaration of Human Rights: Towards An Individual Responsibility to Protect' (2010) 25 American University International Law Review 175

endows human rights with the power to cross any border and defy any force.⁹⁶

The scope of the UDHR is very broad and inclusive. As a seminal instrument that inaugurated a new body of international human rights law, the UDHR has not been eclipsed by the subsequent elaboration of its norms by new treaties. On the contrary, the binding instruments promulgated internationally and as well as in the regional realms have only highlighted the wisdom of the norms contained in the UDHR. The operative paragraph of the opening words of the UDHR indicates overwhelmingly that the drafters of the Declaration thought themselves as directing their attention to all members of the human race. It states that:

Now therefore the General Assembly proclaims this Universal Declaration of Human Rights as a common standard of achievement for all peoples and all nations, to the end that every individual and every organ of society, keeping this declaration constantly in mind, shall strive by teaching and education to promote respect for these rights and freedoms and by progressive measures, national and international, to secure their universal and effective recognition and observance, both among the peoples of the Member States themselves and among the peoples of territories under their jurisdiction.

The UDHR also set out in its preamble the recognition ‘of the inherent dignity and of the equal and inalienable rights of all members of the human family as the foundation of freedom, justice and peace in the world.’⁹⁷ According to Alves, it is an extraordinary statement in the history of mankind that codifies the ‘hopes of the oppressed, supplying authoritative language to the semantics of their claims’.⁹⁸ It also ‘offered a legislative basis for the political struggles for liberty and led national constitutions to transform the notion of citizen’s rights into positive law’.⁹⁹

Through the Declaration, the General Assembly reaffirms the interdependence and interconnectedness of human rights and requested the preparation of a human rights covenant and a draft measure for its implementation as

⁹⁶ Speech of the United Nations Secretary General , Kofi A. Annan on the 50th Anniversary of the Universal Declaration of Human Rights <<http://www.un.org/News/Press/docs/1998/19981201.sgsm6815.html>> accessed 13 January 2012

⁹⁷ UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948; See also Susan Eileen Waltz, ‘Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights’ (2001) 23 *Human Rights Quarterly* 44; Jochen von Bernstorff, ‘The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law’ (2008) 19 *European Journal of International Law* 903

⁹⁸ Jose A. Lindgren Alves, ‘The Declaration of Human Rights in Postmodernity’ (2000) 22 *Human Rights Quarterly* 478

⁹⁹ *Ibid*

a matter of priority. It has been stated that the work of the Human Rights Commission, through the groundbreaking provisions of the Declaration was elaborated into two binding international covenants.¹⁰⁰ The flip side of the UDHR, it has been noted, is the fact that the legal force of its provisions is neither sufficient to effectuate human rights nor does the content of its provisions accommodate any enforcement mechanism in the event of violation.¹⁰¹

2.3.3 International Covenants

In a bid to overcome the weaknesses of the UDHR and create a binding legal instrument, the United Nations Commission on Human Rights drafted a pair of binding covenants, the International Covenant on Civil and Political Rights (ICCPR)¹⁰² and the International Covenant on Economic Social and Cultural Rights (ICESCR).¹⁰³ Having been both adopted in 1966, the ICESCR details the basic civil and political rights of individuals and groups of individuals and the ICESCR commits state parties to granting socio-economic rights to individuals, including labor rights, right to health, education and adequate standard of living.

The ICCPR and ICESCR together with the UDHR form the 'International Bill of Rights' and jointly precipitates the expansion of international human rights and child rights standards in the form of treaties, declarations and conventions. In the context of child justice, Article 10(2)(b) of the ICCPR provides that children accused of being in conflict with the law shall be separated from adults and brought as speedily as possible for adjudication. Article 14 grants equality in the determination of a criminal charge and other due process rights.

While the adoption of both the ICCPR and ICESCR did not generate as much global attention as did the UDHR, it has been argued that both covenants provide a seismic shift that furthered the notion of human rights from one of vague and non-enforceable provisions of the UDHR to a legally binding norm.¹⁰⁴ The ICCPR and the ICESCR guarantee a broad spectrum of rights to all individuals within the

¹⁰⁰ J P Pace, 'The Development of Human Rights Law in the United Nations, Its Control and Monitoring Machinery' (1998) 50 *International Social Science Journal* 499

¹⁰¹ Kathleen Renee Cronin-Furman, '60 Years of the Universal Declaration of Human Rights: Towards An Individual Responsibility to Protect' (2010) 25 *American University International Law Review* 175

¹⁰² UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966; See also Linda Camp Keith, 'The United Nations International Covenant on Civil and Political Rights: Does It Make a Difference in Human Rights Behavior?' (1999) 13 *Journal of Peace Research* 195

¹⁰³ UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966; See also Craven, Matthew, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995)

¹⁰⁴ Kathleen Renee Cronin-Furman, '60 Years of the Universal Declaration of Human Rights: Towards An Individual Responsibility to Protect' (2010) 25 *American University International Law Review* 175

territory or under the jurisdiction of the state parties without discrimination.¹⁰⁵ While the two covenants did not in actual fact provide expressly for child rights, the rights guaranteed to ‘all individuals’ under both covenants deductively apply to children as human beings.

The character of the obligations undertaken by state parties differs from the ICCPR and ICESCR. Under the ICCPR, state parties undertake to respect and to ensure to all individuals within their territory the rights recognized in the covenant. On the other hand, the undertaking of state parties under the ICESCR is to take measures to the extent of available resources with a view to achieving progressively the realization of the rights recognized in the Covenant.¹⁰⁶ The difference in the articulation of these two covenants may have informed the implementation time frames and gaps between the two classes of rights, and may have been the reason why the ICCPR is immediately enforceable whereas the ICESCR is only progressively realizable.

While this thesis will not delve into a detailed description of these two covenants and the working methods of the treaty bodies charged with overseeing their implementation, it is necessary to underline the fact that the elevation of human rights under these covenants as the ‘highest aspiration’ of the common man and ‘common standard’ equally applies to child rights.

2.3.4 Child-Specific International Instruments

As was the case with human rights in general, the post-World War II era consolidated the normative foundation of child rights. It triggered a paradigm shift that precipitated international, regional and national legislation to accord children autonomous and distinct rights from those enjoyed by the rest of humanity.¹⁰⁷ Whereas the International Bill of Rights contains guarantees also applicable to children, there was the need for an international legal framework dealing specifically with children’s particular needs. It was in response to the apparent need for a legally binding instrument focusing exclusively on the specific needs of children that the CRC was adopted.¹⁰⁸

¹⁰⁵ Kristen D.A Carpenter, ‘International Covenant on Civil and Political Rights: A Toothless Tiger?’ (2001) 26 North Carolina Journal of International Law and Commercial Regulation 1

¹⁰⁶ Rajsoomer Lallah, ‘Notes on the International Covenant on Civil and Political Rights and Some of Its Case Law’ (1992) 18 Common Wealth Law Bulletin 1258

¹⁰⁷ Myriam S. Denov, ‘Children’s rights or rhetoric? Assessing Canada’s Youth Criminal Justice Act and Its Compliance with the UN Convention on the Rights of the Child’ (2004) 12 International Journal of Children’s Rights 1

¹⁰⁸ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989; See also Sonia Harris-Short, ‘International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child’ (2003) 25 Human Rights Quarterly 130; McGoldrick Dominic, ‘The United Nations Convention on the Rights of the Child’ [1991] International Journal of Law, Policy and the Family 132

The CRC thus became the first legally binding international instrument to exclusively focus on children and accommodate all classes of rights including the civil, cultural, economic, political and social rights.¹⁰⁹ The CRC has developed into an essential worldwide legal tool and enunciated core principles for the protection of rights of the child in general and particularly those in conflict with the law. To encourage the prompt domestication of the CRC, Article 4 urges member states to take all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the convention.

Prior to the adoption of the CRC and the setting of non-negotiable standards and obligations, one of the first international legal instruments to comprehensively detail child rights in the particular context of the administration of child justice is the Standard Minimum Rules for the Administration of Juvenile Justice, commonly known as the 'Beijing Rules.'¹¹⁰ The normative gains of the CRC and the 'Beijing Rules' were built upon with the adoption of the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.¹¹¹ The purpose of the Rules is to uphold the rights and safety of children and promote their physical and mental well-being. Another international instrument that added to the normative fortress of child rights is the United Nations Guidelines for the Prevention of Juvenile Delinquency popularly called the 'Riyadh Guidelines.'¹¹²

These Guidelines underline preventive policies as a way of facilitating successful socialization and integration of children and young persons. In addition, the Declaration of the Rights of the Child,¹¹³ the World Summit for Children,¹¹⁴ and the United Nations General Assembly Special Session on Children,¹¹⁵ consolidated the normative foundation of child rights. Other relevant instruments for the

¹⁰⁹ Thomas Hammarberg, 'The U.N Convention on the Rights of the Child – and How to Make it Work' (1990) 12 *Human Rights Quarterly* 97

¹¹⁰ UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules')* 29 November 1985; See also Yo Kubota, 'The Protection of Children's Rights and the United Nations' (1989) 58 *Nordic Journal of International Law* 7

¹¹¹ UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* 2 April 1991; See also Ursula Kilkelly, *Youth Justice and Children's Rights: Measuring Compliance with International Standards* (SAGE 2008) 187

¹¹² UN General Assembly, *United Nations Guidelines for the Prevention of Juvenile Delinquency ('The Riyadh Guidelines')* 14 December 1990; See also John Muncie, 'The Globalization of Crime Control—The Case of Youth and Juvenile Justice: Neo-liberalism, Policy Convergence and International Conventions' (2005) 9 *Theoretical Criminology* 134

¹¹³ UN General Assembly *Declaration on the Rights of the Child*, 20 November 1959; See also Sharon Detrick, *A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999)

¹¹⁴ UN General Assembly, *2005 World Summit Outcome*, 24 October 2005; See also Nicholas J Wheeler, 'Victory for Common Humanity - The Responsibility to Protect After the 2005 World Summit' (2006) 2 *Journal of International Law and International Relations*

¹¹⁵ UN General Assembly, *Follow-up to the United Nations Special Session on Children*, 17 August 2004

promotion and protection of child rights include United Nations General Assembly Resolutions 2003/85,¹¹⁶ and 2004/47¹¹⁷ on the abduction of children and Security Council Resolution 1379¹¹⁸ and 1460 on Children in Armed Conflict.¹¹⁹

At the regional level, the CRC has been widely ratified by member states of the United Nations including most African states. The mass ratification of the CRC in the African continent amongst other things influenced to a large extent the African human rights architecture. The contemporary normative architecture of Africa's regional human rights system has been attributed to the coming into force of the Constitutive Act of the Organization of African Unity,¹²⁰ culminating in the adoption of the African Charter on Human and Peoples Rights (ACHPR) in 1981.¹²¹ The African Charter establishes a regional human rights framework in the continent.

Motivated also by the enthusiasm to define and establish child rights within the parameters of the African value system, the African Charter on the Rights and Welfare of the Child was adopted.¹²² It regionalizes the contents of the CRC and interprets universal human rights in the light of the socio-economic realities and traditions of Africa.¹²³ The ACRWC also provides for a separate justice system within which children in conflict with the law are adjudicated for rehabilitative purposes.¹²⁴ At the national level, the legal framework for child rights in Nigeria is embodied in the 1999 Constitution, the CRA, other national legislation, and

¹¹⁶ UN Commission on Human Rights, *Commission on Human Rights Resolution 2003/85: Abduction of Children in Africa*, 25 April 2003

¹¹⁷ UN Commission on Human Rights, *Commission on Human Rights Resolution 2004/47: Abduction of Children in Africa*, 20 April 2004,

¹¹⁸ UN Security Council, *Security Council Resolution 1379 (2001) on the Protection of Children in Armed Conflicts* 20 November 2001

¹¹⁹ UN Security Council, *Security Council Resolution 1460 (2003) on Children in Armed Conflict*, 30 January 2003,

¹²⁰ Chidi Anselm Odinkalu, 'Africa's Regional Human Rights System: Recent Developments and Jurisprudence' (2002) 2 *Human Rights Law Review* 99; See also Ademola Abass and Mashood A. Baderin, 'Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union' (2002) 49 *Netherlands International Law Review* 1

¹²¹ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* ('*Banjul Charter*') 27 June 1981; See also B. Obinna Okere, 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems' (1984) 6 *Human Rights Quarterly* 141

¹²² Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990; See also Dejo Olowu, 'Protecting Children's Rights in Africa: A Critique of the African Charter on the Rights and the Welfare of the Child' (2002) *International Journal of Child Rights* 127

¹²³ Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights* ('*Banjul Charter*') 27 June 1981

¹²⁴ Lloyd Amanda, 'Theoretical Analysis of the Reality of Children's Rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child' (2002) 2 *African Human Rights Law Journal* 11

indirectly through regional and international human rights instruments to which Nigeria is a state party.¹²⁵

2.4 Universality or Relativity of Child Rights

The question whether human rights are universally applicable or subject to cultural sensitivities is a highly debated subject. Equally, the universal or relative applicability of child rights across countries and cultures is also debatable. To construct a basis for deciding whether this thesis will incline towards universal or relative applicability of child rights, the two sides of the divide will be succinctly analyzed.

2.4.1 Relativity of Child Rights

The relativity of child rights presupposes that in view of the diverse and divergent cultures across the globe, child rights principles are not compatible with all cultures.¹²⁶ This argument is inclined to perceive universal child rights as Western cultural artifacts, rationalized in universalist terms and imposed on alien values.¹²⁷ According to Brown, the relativity argument negates attempts to unify cultural specificity of the West with opposing values.¹²⁸ While appealing to culture and at the same time conceding that culture differs often dramatically across times and places,¹²⁹ the relativity of child rights presupposes that since culture provides an absolute standard of evaluation, international or regional child rights instruments lack universal normative force in the face of divergent cultural traditions.¹³⁰

While the universality argument of child rights has been brushed aside as individualistic and as a flag bearer of Western culture,¹³¹ the crux of the relativist argument is that there is usually a nexus between the cultural origins of a value and its validity within a particular culture.¹³² By extension, relativist scholars posit that if

¹²⁵ The details of the Nigerian child rights framework will be discussed in chapter six

¹²⁶ Jerome J Shestack, 'The Philosophical Foundations of Human Rights' (1998) 20 *Human Rights Quarterly* 228

¹²⁷ Christian Reus-Smit, *Human Rights in a Global Ecumene* (Journal of International Affairs 2011) 87

¹²⁸ Chris Brown, *Practical Judgment in International Political Theory: Selected Essays* (Routledge, 2012) 68

¹²⁹ Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 281

¹³⁰ Rhoda Howard-Hassmann, 'Cultural Absolutism and the Nostalgia for Community' (1993) 15 *Human Rights Quarterly* 315

¹³¹ Nicholas Coulton, 'God, the Bible and Human Rights' (2012) 14 *Ecclesiastical Law Journal* 275

¹³² Adamantia Pollis, 'A New Universalism' in Adamantia Pollis and Peter Schwab (eds) *Human Rights: New Perspectives, New Realities* (Lynne Rienner Publishers 2000) 9

human rights in general and child rights in particular are not indigenous to a particular culture, their validity and applicability within that culture would rupture.¹³³

Arguing against any distinct ontological status of human rights in particular and by extension child rights, Howard-Hassmann emphasizes that human rights are a product of a particular kind of society and as such it is implausible to think that they can be de-contextualized and applied uniformly across countries and cultures.¹³⁴ Arguing similarly, Brown underlines the fact that the existence of elaborate international and regional child rights instruments is not in any way suggestive of a global consensus on the subject matter, but rather a manifestation of Western dominance.¹³⁵ The foregoing arguments may have accounted for why Hunt casts human rights and invariably child rights as a ‘trap in the guise of a shelter’.¹³⁶

In the same vein, while Stammers argues that human rights must be situated within a social context,¹³⁷ Gewirth is of the view that the universality of human rights can neither be justified by sheer inter-governmental consensus nor by international human rights law.¹³⁸ Averse to the universality of child rights, Bentley questions the universality of the rights contained in the CRC in light of varying conceptions of childhood across countries and cultures.¹³⁹ In doing this, he distinguished between rights accruable to children because of their age and those that inhere in them because of their membership in the human race.¹⁴⁰

In support of the argument that human rights including child rights are relative and susceptible to local variations and context, Arat brands universality of human rights as an outgrowth of ‘Western thoughts’ and ‘Western cultural imperialism’.¹⁴¹ Whereas An-Na’im and Henkin criticize universal applicability of

¹³³ Michael Goodheart, ‘Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization’ (2003) 25 *Human Rights Quarterly* 935

¹³⁴ Chris Brown, *Practical Judgement in International Political Theory: Selected Essays* (Routledge, 2012) 68

¹³⁵ Christian Reus-Smit, ‘Human Rights in a Global Ecumene,’ (2011) *International Affairs* 87

¹³⁶ Alastair Hunt, ‘Rightlessness: The Perplexities of Human Rights’ (2011) 11 *The New Continental Review* 114

¹³⁷ Neil Stammers, ‘A Critique of Social Approaches to Human Rights’ (1995) 17 *Human Rights Quarterly* 488; See also Neil Stammers, ‘Social Movements and the Social Construction of Human Rights’ (1999) 21 *Human Rights Quarterly*

¹³⁸ Allen Gewirth, *Human Rights: Essays on Justification and Applications* (University of Chicago Press 1982) xiv

¹³⁹ Kristina Anne Bentley, ‘Can there be any universal children's rights?’ (2005) 9 *The International Journal of Human Rights* 107

¹⁴⁰ *Ibid*; See also Eva Brems, ‘Rights and Universality’ in Jen Willems (ed) *Developmental and Autonomy Rights of Children: Empowering Children, Caregivers and Communities* (2nd edn Antwerpen: Intersentia 2007) 21

¹⁴¹ Z F Kabasakal Arat, ‘Forging a Global Culture of Human Rights: Origins and Prospects of the International Bill of Rights’ (2012) 28 *Human Rights Quarterly* 416

human rights as ‘universalization’ of the idea of Western constitutional rights,¹⁴² Pegden brands it as a cultural artifact depicted as universal and immutable values.¹⁴³ Further impinging on the universality of human rights, Pegden cited the comments of the Saudi Arabian delegation to the committee that drafted the UDHR where the delegate maintained that it was not the task of the UDHR ‘to proclaim the superiority of one civilization over all others or to establish uniform standards for all the countries of the world’.¹⁴⁴ The delegate further argued that most if not all the issues taken into consideration during the drafting of the UDHR are standards recognized by Western civilization. Akin to this, Mazower posits that human rights and by extension child rights are an ‘imposition of the tyranny of enlightenment values’ which statesmen ‘pay lip-service to and honor in breach because it represents an alien concept’ that is imposed on diverse cultural sensibilities.¹⁴⁵

Buttressing the relativity of the human rights argument, Hadjor, while not alluding to the particular context of child rights, argues that whereas human rights are presently regarded as an ‘expression of self-evident and unquestionable universal rights’, the reality is that the adoption of the UDHR is averse to any form of consensus about what is considered human rights.¹⁴⁶ This position was corroborated by highlighting that while delegates could agree that some sort of bill of rights was desirable, there was no consensus in prioritizing what should be included. As such, it was the preferences of delegates from the powerful countries that prevailed arbitrarily over the rest to the extent that what was eventually elevated as universal human rights standards and values for the rest of the world were ironically the cultural preferences of the dominant Western nations.¹⁴⁷

In his work on the problem of secularism in human rights theory, Freeman recounted that simultaneous to the drafting of the UDHR, the United Nations Educational, Scientific and Cultural Organization commissioned a study into the philosophical problems of the universality of human rights.¹⁴⁸ He quoted the introductory remarks of Jacques Maritain to the study wherein he held that ‘a

¹⁴² Abdullahi A. An-Na’im and Louis Henkin, ‘Islam and Human Rights: Beyond the Universality Debate’ (2000) 94 *American Society of International Law* 95; See also Heiner Bielefeldt, ‘Muslim Voices in the Human Rights Debate’ (1995) 17 *Human Rights Quarterly* 587

¹⁴³ Anthony Pagden, ‘Human Rights, Natural Rights and Europe’s Imperial Legacy’ (2003) 31 *Political Theory* 171

¹⁴⁴ *Ibid*

¹⁴⁵ Mark Mazower, ‘The Strange Triumph of Human Rights’ 1933-1950 (2004) 47 *The Historical Journal* 379; See also Sunil Amrith, Glenda Sluga, ‘New Histories of the United Nations’ (2008) 19 *Journal of World History* 251

¹⁴⁶ Kofi Buenor Hadjor, ‘Whose Human Rights’ (1998) 33 *Journal of Asian and African Studies* 359

¹⁴⁷ *Ibid*

¹⁴⁸ Michael Freeman, ‘The Problem of Secularism in Human Rights Theory’ (2004) 26 *Human Rights Quarterly* 375; See also Mary Ann Glendon, ‘Foundation of Human Rights: The Unfinished Business’ (1999) 44 *American Journal of Jurisprudence* 1

consensus on the justification of human rights would be impossible because of the diversity of philosophies around the world'. He stated further that while efforts to achieve a global consensus on human rights might be capable of producing an agreed text, the reality is that the different and co-existing philosophies around the world might prove to be an insurmountable obstacle to the implementation of the principles agreed upon and contained in the text.¹⁴⁹

In a similar vein and while contending that human rights as well as child rights must be grounded in local culture and religion, it has been argued on religious sentiments that the universality of human rights in a Muslim context is subject to its compatibility with Islamic heritage.¹⁵⁰ Some writers have also censured human rights, including child rights, by arguing that they raise questions of cultural legitimacy. This is because most human rights instruments were formulated by an exclusive club of privileged lawyers and bureaucrats at a time when Western culture was exclusive and non-receptive of other world views.¹⁵¹ Most recently and inadvertently in support of the relativity argument, Moyn paradoxically argues that human rights were born out of disillusion with utopias and have unwittingly become the last utopia.¹⁵²

2.4.2 Universality of Child Rights

The principle of universality of human rights is the cornerstone of international human rights law as emphasized in the UDHR and reiterated in several other international human rights conventions, declarations and resolutions. Contrary to the relativity argument of child rights, the universality school of thought opines that child rights as articulated in international and regional instruments herald universal rights and provide the collective common platform that overrides any contrary cultural or religious dictates.¹⁵³ This thread of argument presupposes that international and regional instruments are universally negotiated through a codification process that accommodates all rights that children are granted due to their humanity.¹⁵⁴

Articulating his position in favor of the universality of human rights and by extension child rights, Donnelly claims that the key norms within the UDHR constitute 'principles that are widely accepted as authoritative' by the international

¹⁴⁹ Ibid

¹⁵⁰ Norani Othman, 'Grounding Human Rights Arguments in Non-Western Culture: Shari'a and the Citizenship Rights of Women in the Modern Islamic State' in Joanne R. Bauer & Daniel A. Bells (eds) *The East Asian Challenge for Human Rights* (Cambridge University Press 1999) 49

¹⁵¹ Abdullahi A. An-Na'im and Louis Henkin, 'Islam and Human Rights: Beyond the Universality Debate' (2000) 94 *American Society of International Law* 95

¹⁵² Samuel Moyn, *The Last Utopia: Human Rights in History* (Harvard University Press 2010) 11

¹⁵³ Michael Freeman, 'The Problem of Secularism in Human Rights Theory' (2004) 26 *Human Rights Quarterly* 375

¹⁵⁴ R.J Vincent, *Human Rights and International Relations* (Cambridge University Press, 1986) 11

community.¹⁵⁵ In another of his works which did not specifically focus on child rights, Donnelly maintains that universal human rights when properly understood provide a considerable scope for national and regional cultural particularity and other forms of diversity.¹⁵⁶ Lending his voice to the universality of human rights including child rights, Vincent suggests that regardless of the fact that the origin of human rights is traceable to European culture, 'its spread internationally is best understood as the product of a universal social process.'¹⁵⁷ In his view, the affinity of human rights to the Western construct and their proliferation occur due to the globalization of ideas and the legitimization of these ideas by the international community as universal norms.¹⁵⁸

Joining his voice in favor of the universality of human rights, Baderin states that although the impetus of human rights is traceable to Western inclined norms, there are still elements of human rights that are not typically Western oriented.¹⁵⁹ He argues further that while modern internationalization of human rights alludes to the universalism of human rights, it also radiates cultural specificities.¹⁶⁰ In support of the universalist postulation, the Vienna World Conference on Human Rights states that it is the duty of states to promote and protect all human rights and fundamental freedoms regardless of political, economic and cultural systems.¹⁶¹

2.4.3 Confluence of Universality and Relativity of Child Rights

In between the arguments in support of the universality of child rights on the one hand, and opposing arguments in support of relativity on the other hand, this thesis will adopt a middle line posture that situates child rights at the intersection of the universality and relativity arguments. This view was taken after due consideration of the strengths and weaknesses of both the relativity and universality arguments. This opinion is also anchored on the premise that child rights as articulated in international and regional treaties and conventions are evidently universal, while at the same time relative due to the participation in legislative or promulgation debates of regional and international human rights instruments by delegates from countries with vast cultures and histories.

¹⁵⁵ Jack Donnelly, *Universal Human Rights*, (2nd edn, Cambridge University Press 2003) 38

¹⁵⁶ Jack Donnelly, 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly* 281

¹⁵⁷ R.J Vincent, *Human Rights and International Relations* (Cambridge University Press, 1986) 11

¹⁵⁸ Christopher Marsh and Daniel P. Payne, 'The Globalization of Human Rights and the Socialization of Human Rights Norms' [2007] *Brigham Young University Law Review* 665

¹⁵⁹ Mashood Baderin, 'Establishing Areas of Common Ground between Islamic Law and International Human Rights' (2001) 5 *The International Journal of Human Rights* 74

¹⁶⁰ *Ibid*

¹⁶¹ UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993; See also K Boyle, 'Stock-taking on Human Rights: The World Conference on Human Rights Vienna 1993' (1995) 43 *Political Studies* 79

This view does not dispute the fact that the present day child rights regime may have been influenced by Western cultures and values. However, the fact still remains that the normative foundation of contemporary human rights in general and child rights in particular arose out of detailed deliberative engagements organized on the platform of the United Nations and other international or regional intergovernmental bodies.¹⁶² It may not be accurate to deny the connection of human rights with Western philosophy; however, it is one thing to link human rights to Western philosophy and another to extract other cultural stands from within the modern notion of human rights.¹⁶³

Furthermore, since international and regional child rights instruments reflect the combination and conglomeration of negotiated political processes incorporating the cultural sensitivities of participating member states, the normative foundation of child rights lies at the confluence of universality and relativity. International human rights instruments and by extension child rights instruments have been issued in response to violations and constructed through negotiations by state representatives who had different cultural backgrounds and philosophical dispositions. In that case, although the vocabulary of human rights may be reflective of Western philosophy, it is not conclusive that it is alien to other cultures.¹⁶⁴ Corroborating this view, Vincent posits that:

[If] the modernization which was associated at its outset with westernization continues, even in the circumstances of relative western decline, we may call it as universal social process in which it is difficult to identify the particular contribution of this or that culture. In this regard, the international law of human rights may be an expression of this global process, and not merely of the American...¹⁶⁵

On the other hand, the crossroads of universality and relativity of human rights in the contemporary world is evident in the obvious structure of the UDHR. International human rights norms are viewed as sufficiently flexible to allow for differences in emphasis and implementation so that their principles can be applied in a variety of ways within the different cultures of the world.¹⁶⁶ Without disputing the fact that a good portion of the world population was still subject to colonial rule and had no voice in the debates that led to the adoption of the International Bill of Rights, the

¹⁶² R.J Vincent, *Human Rights and International Relations* (Cambridge University Press 1986) 11

¹⁶³ Susan Waltz, 'Reclaiming and Rebuilding the History of Universal Declaration of Human Rights' (2002) 23 *Third World Quarterly* 437

¹⁶⁴ Zehra F. Kabasakal Arat, 'Forging a Global Culture of Human Rights: Origins and Prospects of the International Bill of Rights' (2006) 28 *Human Rights Quarterly* 416

¹⁶⁵ R.J Vincent, *Human Rights and International Relations* (Cambridge University Press 1986) 11

¹⁶⁶ M A Glendon, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights* (Random House LLC 2002) 175

presence of a significant number of non-Western states would suffice to discredit to a reasonable extent, claims that the UDHR is an aggregation of Western philosophy and its individualistic perception of human nature.¹⁶⁷

In the particular context of the CRC and other child specific human rights instruments, while it is true that colonized peoples and several member states of the present day United Nations General Assembly did not participate in the negotiation that culminated in the adoption of the International Bill of Rights, the decolonization that followed enlarged the membership of the United Nations and thus accommodated a far greater number of countries and more diverse views during the debate and adoption of the CRC and subsequent child-specific instruments.

Supporting the close nexus between the universality and relativity debate on child rights is the closing words of the debate on the adoption of the UDHR expressed by Abdul Rahman Kayala representing Syria. He noted that civilization had progressed slowly through centuries of persecution and tyranny until finally the present Declaration had been drawn up. According to him, the Declaration was not the:

[W]ork of a few representatives in the Assembly or in the Economic and Social Council; it was the achievement of generations of human being who had worked towards that end. Now at last the people of the world would hear it proclaimed that their aim had been reached by the United Nations.¹⁶⁸

A more recent boost to the argument of the confluence of universality and relativity of child rights was witnessed in June 1993 at the World Conference on Human Rights in Vienna. Drawing representatives from all cultures and religions across a world virtually without colonies, the Vienna conference was the largest international gathering ever convened on the theme of human rights and produced the most significant human rights document in the last quarter of a century and one of the strongest human rights documents of the past hundred years.¹⁶⁹ The ensuing Vienna Declaration and Programme of Action adopted by consensus without a vote or

¹⁶⁷ The 58 member states of the UN at the time were Afghanistan, Argentina, Australia, Belgium, Bolivia, Brazil, Burma, Byelorussia, Canada, Chile, China, Columbia, Costa Rica, Cuba, Czechoslovakia, Denmark, Dominican Republic, Ecuador, Egypt, El Salvador, Ethiopia, France, Greece, Guatemala, Haiti, Honduras, Iceland, India, Iran, Iraq, Lebanon, Liberia, Luxemburg, Mexico, the Netherlands, New Zealand, Nicaragua, Norway, Pakistan, Panama, Paraguay, Peru, the Philippines, Poland, Saudi Arabia, Siam, Sweden, Syria, Turkey, Ukraine, Union of South Africa, the USSR, the United Kingdom, the USA, Uruguay, Venezuela, Yemen and Yugoslavia

¹⁶⁸ J Morsink, *The Universal Declaration of Human Rights, Origins, Drafting and Intent* (Philadelphia University Press 1999) 4

¹⁶⁹ Markus G Schmidt, 'What Happened to the Spirit of the Vienna? The Follow-Up to the Vienna Declaration and Programme of Action and the Mandate of the UH High Commissioner for Human Rights' (1995) 64 *Nordic Journal of International Law* 591; See also *Tony Evans, The Politics of Human Rights: A Global Perspective* (Pluto Press 2005) 176

reservation crystallized the principle that human rights are universal, indivisible, interdependent and interrelated.

The Declaration firmly committed states to the promotion and protection of all human rights for all people regardless of their political, economic, and cultural systems. Article 1 of the Declaration emphasizes undisputedly the universal nature of rights and freedoms. Evidencing its relativity as well as universality strands, Article 5 of the Vienna Declaration states that:

While the significance of national and regional peculiarities and various historical, cultural and religious backgrounds must be borne in mind, it is the duty of States, regardless of their political, economic and cultural systems, to promote and protect all human rights and fundamental freedoms.

Since the aim of contemporary child rights is not to override traditions except those that are repugnant to the essence of human dignity, it is no longer stylish to respond to accusations of human rights violations within a country's territory by pleading the 'alibi' of Western culture.¹⁷⁰ Whilst conceding that child rights may not have been germinated in an African garden, were not exclusively fertilized with African values and ultimately were not harvested by African farmers with home-made devices, international child rights frameworks domesticated in the continent have yielded abundant fruits that have facilitated the nourishment of Africa's children.¹⁷¹

2.5 Conclusion

This chapter examined more specifically the philosophical strands of natural law and legal positivism, and cursorily, the other philosophical foundations. Based on the inherent weaknesses of natural law and legal positivism as stand-alone philosophies and bearing in mind their potential complementarity if their respective strengths are aggregated, this chapter proposed a paradigm philosophy that is branded as 'inclusive legal positivism'. This chapter argued that the philosophical orientation of child rights is inclusive because it sums up the strengths of natural law and legal positivism in consonance with contemporary international and regional human rights frameworks. This chapter construed child rights are those specific moral rights that inhere in children due to their age and vulnerability and which are normatively protected.

Recognizing the unending debate on the universality or relativity of human rights, this chapter noted that such contestation also relates to child rights to the extent that it is still unresolved whether child rights are relative or otherwise. Based on international and regional instruments including the Vienna Declaration and

¹⁷⁰ Jose A. Lindgren Alves, 'The Declaration of Human Rights in Postmodernity' (2000) 22 Human Rights Quarterly 478

¹⁷¹ Makua Mutua, 'Human Rights in Africa: The Limited Promise of Liberalism; (2008) 51 African Studies Review 17

Programme of Action, this chapter found that child rights are not exclusively universal and at the same time not exclusively relative. Rather, child rights accommodate both universalist and relative traits to ensure uniform applicability in multiplicity of cultures.

On the basis of the foregoing discussion, chapter three focuses on situating child justice as an integral component of child rights and identifies which of the principles of child rights form the twin pillars of child justice.

Chapter Three

Interpreting Child Justice as Child Rights

3.1 Introduction

The preceding chapter examined the philosophical and normative foundation of child rights and predicated its philosophy on inclusive legal positivism which is at the intersection of natural law and legal positivism. This chapter traces the evolution of child justice and analyzes the philosophical contestations between the welfare and justice models of child justice. It also examines the ideological differences of these two models in the conception and treatment of children in conflict with the law and argues that since a stand-alone model is an illusion, the justice and welfare philosophies intersect in restorative justice.

This thesis construes child rights and child justice respectively as the distinct rights and justice system for persons below the age of eighteen. It notes the definition of a child under Article 1 of the CRC and Article 2 of the ACRWC.¹ While situating child justice within the parameters of child rights, this chapter provides an understanding of how child justice forms an integral component of child rights and further argues that children in conflict with the law are special right holders seized with more than the enjoyment of basic human rights.

This chapter reasons that despite the enjoyment of generic human rights, children accrue other explicit rights due to their age, vulnerability and culpability. It further acknowledges the existence of several guiding principles of child rights and having examined the principles of non-discrimination, the best interests of the child, the right to life, survival and development, participation, dignity and proportionality, this chapter extrapolates which of these principles combine to form the twin pillars of child justice.²

3.2 Evolution of Child Justice

Prior to the evolution of child justice, most criminal justice systems were inclined to the classical crime control approach in which crime was considered the rational act of a free-thinking individual and punishable under the law.³ During that era, children in conflict with the law were considered as free-thinking individuals

¹ Furthermore Black's Law Dictionary defines a juvenile as a person who has not reached the age at which one should be treated as an adult by the criminal justice system. The Beijing Rules defines a juvenile as a child or young person who under the respective legal system may be dealt with for an offence in a manner which is different from an adult.

² Articles 2, 3, 6, 12, 40(1) and 40(4) UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989; See also UN Committee on the Rights of the Child (CRC) *CRC General Comment No. 10 (2007): Children's Rights in Juvenile Justice* 25 April 2007

³ Michael Grossberg in Margret Rosenheim, Franklin Zimring and Others (eds.) *A Century of Juvenile Justice* (University of Chicago Press 2002) 3; See also Philip W Harris, Wayne N Welsh and Frank Butler, 'A Century of Juvenile Justice' (2000) 1 *Criminal Justice* 359

and when they contravened the law, were subjected to strict penalties.⁴ The precise time that a distinct justice system for children evolved outside the scope of the criminal justice system is still debatable; however, there is consensus that it evolved as a protective system for children in conflict with the law.⁵ In alluding to the debatable evolution of child justice, it has also been opined that child justice evolved from an accidental confluence of several philosophies of justice.⁶

Zimring writes that, before the introduction of a separate justice system that seeks to mitigate the culpability of children in conflict with the law, the criminal justice system regulated how offenders of specific offenses are dealt with regardless of age.⁷ Extending the frontiers of this account of the evolution of child justice, Friedlander stresses that prior to the establishment of a separate child justice system, the criminal justice framework in existence then required both child and adult offenders to be charged under the same penal codes.⁸ They were both subjected to the same criminal procedure rules, the same jurisdiction of criminal justice institutions and in the case of conviction, the same penalties.

Another version of the evolution of child justice is traceable to the period of industrial revolution and the religious and moral revival of the early 19th century.⁹ This evolution of child justice has been described as a Victorian creation that was developed in the 19th century to differentiate the punishment for juvenile offenders based on their age.¹⁰

In England, one of the earliest visible landmarks of child justice as a distinct legal system and delineating children in conflict with the law as a special category of persons was linked to the creation of Chancery courts in 15th century England to deal with petitions of those in need of aid or intervention especially women and

⁴ Michael A. Corriero, *Judging Children as Children: A Proposal for A Juvenile Justice System* (Temple University Press 2006) 35

⁵ Charles Thomas and Robin Cage, 'The Effect of Social Characteristics on Juvenile Court Dispositions' (1997) 18 *Sociological Quarterly* 237; See also Rodney L Engen; Sara Steen; George S Bridges, 'Racial Disparities in the Punishment of Youth: A theoretical and Empirical Assessment of the Literature' (2002) 49 *Social Problems* 194

⁶ Sanford Fox, *Modern Juvenile Justice: Cases and Materials*, (West Publishing Co 1972) 175; See also Robert W. Drowns, Karen M. Hess, *Juvenile Justice* (3rd edn, Wadsworth Publishing 2000) 1

⁷ Franklin Zimring, 'The Common Thread: Diversion in the Jurisprudence of Juvenile Courts' (2000) 88 *California Law Review* 2477; See also Edwin M. Lemert, 'Diversion in Juvenile Justice: What Hath Been Wrought' (1981) 18 *Journal of Research and Crime Delinquency* 34

⁸ Walter Friedlander, *Concepts and Methods of Social Work* (2nd edn, Prentice-Hall International Inc 1976) 161

⁹ Naomi Akpan, *Research Finding of Juvenile Justice Administration in Nigeria* (CRP Publication 2000) 21; See also Hakeem Ijaiya, 'Juvenile Justice Administration in Nigeria' (2009) 2 *NUJS Law Review* 573

¹⁰ Andrew von Hirsch, Andrew Ashworth and Julian Robert, *Principled Sentencing: Readings on Theory and Policy* (Hart Publishing 2009) 294; See also Michael Tonry, 'Purposes and Functions of Sentencing' (2006) 34 *Crime and Justice* 1

children.¹¹ Through these courts, the king established the principle of *parens patriae* which allows the courts authority over children in need of care and protection, and the principle of *loco parentis* which allows the state to act in place of parents.¹² Kaufman recounts that common law established different treatment for young offenders with the introduction of reformatory and industrial schools for children in the 1850's.¹³

Writing in the context of English Common Law, Hawes conceives that child justice arose out of the practice whereby children in conflict with the law were placed in poorhouses and almshouses and treated as indentured servants.¹⁴ Similarly, it has been recounted that the British Children's Charter of 1889 introduced legal protection for children and enabled the state to interfere in family life on the basis of legislation that excluded them from certain industries.¹⁵ These changes in the perception of childhood in England led to new conceptions of delinquency and the introduction of special courts for children in conflict with the law, through the British Children Act of 1908.¹⁶

The outbreak of the First World War in 1914 created new problems in England for those involved in child justice administration.¹⁷ As one of the ill consequences of the war, the high number of orphans escalated child crime and in response, the children's branch of the British Home Office was established in 1919 with amongst other responsibilities, the management of reformatory and industrial schools, juvenile courts, probation and places of detention.¹⁸ Perkins recounts that in 1927 and in view of the debates regarding the ill-treatment of children in conflict with the law, a committee established by the British government recommended that the welfare of the child or young person should be the primary object of child

¹¹ John H. Fisher, 'Chancery and the Emergence of Standard Written English in the Fifteenth Century' (1977) 52 *Journal of Medieval Studies* 870; J H Baker, *An Introduction to English Legal History* (3rd edn, Butterworths 1992) 57

¹² *Ibid*

¹³ Irving Kaufman, 'The Child in Trouble: The Long and Difficult Road to Reforming The Crazy-Quilt Juvenile Justice System' (1982) 60 *Washington University Law Quarterly* 743

¹⁴ Joseph Hawes, *Children in the Urban Society: Juvenile Delinquency in Nineteen Century America* (Oxford University Press 1971) 315

¹⁵ Kate Bradley, 'Juvenile Delinquency and the Evolution of the British Juvenile Courts, c.1900-1950' (2008) *Institute for Historical Research* 1; See also Monica Flegel, 'Facts and Their Meaning: Child Protection, Intervention, and the National Society for the Prevention of Cruelty to Children in Late Nineteenth-Century England' (2007) 33 *Victorian Review* 87

¹⁶ Gray Clapton, Vivienne E Cree and Mark Smith, 'Moral Panics and Social Work: Towards a Skeptical View of UK Child Protection' (2012) 33 *Critical Social Policy* 197

¹⁷ Barry C. Feld, 'A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed' (2007) 34 *Northern Kentucky Law Review* 189; Prue Rains, 'Juvenile Justice and the Boys' Farm: Surviving a Court-Created Population Crisis 1909-1948' (1984) 31 *Social Problems* 500

¹⁸ Kate Bradley, 'Juvenile Delinquency and the Evolution of the British Juvenile Courts, c.1900-1950' (2008) *Institute for Historical Research*, 1

courts.¹⁹ This Recommendation extended the frontiers of the 1908 Act and served as the precursor to the British Children and Young Persons Act of 1933.²⁰

In the case of the United States, a separate child justice system developed during the 19th century through the creation of special facilities for troubled children.²¹ In 1825, the Society for the Prevention of Juvenile Delinquency established the New York House of Refuge to accommodate child delinquents and in 1885 the Chicago reform school opened in an effort to protect children in conflict with the law by separating them from adult offenders.²² Writing in the context of the United States, it was recounted that the New York House of Refuge established in 1825 to care for ‘novices in antisocial conduct’ underscored the need for minimalistic punishment of children in conflict with the law.²³

Fashioned under the template of English Common Law and based on the *parens patriae* doctrine, the first child court in the United States was established in Cook County, Illinois in 1899.²⁴ The court was established on the philosophy that children are inherently different from adults, less culpable for their acts and more amenable to rehabilitation.²⁵ Rather than punish children in conflict with the law with sentences prescribed for their offenses, child courts were to employ a minimalistic and individualized approach that focuses on rehabilitation and prevention of recidivism.²⁶ Acknowledging that criminalization of delinquency contravenes the basic tenets and justification of a child justice system,²⁷ a child court introduced in the State of Illinois, unlike the adult criminal courts, abolished the formal, open and adversarial process for children in conflict with the law and in its place established a ‘kind and just parent.’²⁸

Founded to loosen the rigidity of the law in respect of how the police, prosecutors and judges are authorized to handle children in conflict with the law,

¹⁹ Rollin Perkins, ‘Criminal Liability Without Fault: A Disquieting Trend’ (1982) 68 Iowa Law Review 1067

²⁰ Ibid

²¹ ABA Division of Public Information, *Dialogue on Youth and Justice, Part 1: The History of Child Justice* (American Bar Association 2004) 5

²² Ibid

²³ Stanford J Fox, ‘Juvenile Justice Reform: An Historical Perspective’ (1970) 22 Stanford Law Review 1187; See also L T Empey, *American Delinquency – Its Meaning and Construction* (Dorsey Press 1978)

²⁴ C E Simonsen, *Juvenile Justice in America* (Macmillan 1991)

²⁵ Ibid

²⁶ Jeffrey Butts and Daniel Mears, ‘Reviving Juvenile Justice in a Get-Tough Era’ (2001) 33 Youth and Society 169

²⁷ Kupchik, Aaron, Fagan Jeffrey and Liberman Akiva, ‘Punishment, Proportionality, and Jurisdictional Transfer of Adolescent Offenders: A Test of the Leniency Gap Hypothesis’ (2003) 14 Stanford Law and Policy Review 57; See also Daniel Mears and Samuel Field, ‘Theorizing Sanctioning in a Criminalized Juvenile Court’ (2000) 38 Criminology 983

²⁸ Rosenbeim, Zimring, Tanenhaus and Dohrn (eds) *A Century of Juvenile Justice* (University of Chicago Press 2002)

child courts were permitted to take custody of children without the need for a criminal conviction and devoid of the bureaucracy and legal restrictions placed on criminal courts.²⁹ The child court emphasized an informal, non-adversarial, non-criminal, flexible approach with few procedural rules with the ultimate goal of guiding children in conflict with the law towards life as a responsible, law-abiding adult.³⁰

Another version of the evolution of child justice in the United States argues that the child justice system evolved because certain institutions were granted intervention powers in respect of delinquent children without regard to due process guarantees.³¹ This practice allowed courts and local officials to place children in their custody on the finding that institutionalization was in their best interests.³² According to ABA Division of Public Education, Judge Julian Mack was one of the first judges to preside over child courts in the United States. He stated that:

The child who must be brought into court should, of course, be made to know that he is face to face with the power of the state, but he should at the same time, and more emphatically, be made to feel that he is the object of its care and solicitude. The ordinary trappings of the courtroom are out of place in such hearings. The judge on a bench, looking down upon the boy standing at the bar, can never evoke a proper sympathetic spirit. Seated at a desk, with the child at his side, where he can on occasion put his arm around his shoulder and draw the lad to him, the judge, while losing none of his judicial dignity, will gain immensely in the effectiveness of his work.³³

Not too long after the establishment of the Illinois child court, the sweeping discretion granted to child courts in the United States, the informality and individualization inherent in the system, coupled with the fact that the due process bar was placed lower than in the adult criminal justice system, worked against the

²⁹ Jeffrey A. Butts and Ojmarrh Mitchell, 'Brick by Brick: Dismantling the Border Between Juvenile and Adult Justice' (2000) *Criminal Justice* 2 167

³⁰ Stanford J. Fox, 'Juvenile Justice Reform: An Historical Perspective' (1970) 22 *Stanford Law Review* 1187

³¹ Jeffrey Butts and Daniel Mears, 'Reviving Child Justice in a Get-Tough Era' (2001) 33 *Youth and Society* 169

³² *Ibid*

³³ ABA Division of Public Education <http://www.americanbar.org/content/dam/aba/migrated/publiced/features/DYJpart1.authcheckdam.pdf> accessed 1 April 2014; See also Clemens Bartollas and Stuart J. Miller, *Juvenile Justice in America* (5th edn, Prentice Hall 2008); S L Schlossman, *Love and the American Delinquent – Theory and Practice of Progressive Juvenile Justice 1825 – 1920* (University of Chicago Press)

enjoyment of due process rights on the part of children.³⁴ To reverse the trend and ensure that child courts upheld the same constitutional protection and evidentiary standards as those required in adult criminal cases, the U.S. Supreme Court intervened to elevate the standard of evidence required for child courts, granted due process rights to children and limited the discretion of child judges.³⁵

In the case of *Kent v. United States*³⁶ and *In re Gault*,³⁷ the US Supreme Court extended many but not all of the due process rights to children in conflict with the law and accorded them legal rights ranging from legal representation, the right to cross-examine witnesses and protection against self-incrimination. These changes eroded the foundation of child courts and led to the enactment of tougher changes to child justice systems. It also enabled the reduction of the confidentiality requirement of court proceedings and allowed increased public access to court records.³⁸ These stringent changes gave rise to debates as to the viability of separate child justice systems.

During the 1980's and 1990's and as a result of widespread crime committed by young offenders in the United States, the support for the traditional lenient views regarding child delinquency began to decline. This led the majority of states in the United States to adopt legislative and other changes in their child justice systems so as to enhance the jurisdiction of courts to punish children in conflict with the law.³⁹

In the context of Nigeria and bearing in mind its colonial affinity to Anglo-Saxon Common Law, the evolution of the child justice system is modeled on the British colonial template.⁴⁰ With increased youth delinquency due to political, social and economic challenges in pre-independent Nigeria, the colonial administration

³⁴ Jeffrey Butts and Daniel Mears, 'Reviving Juvenile Justice in a Get-Tough Era (2001) 33 Youth and Society 169

³⁵ See also Kelly M. Angell, 'Regressive Movement: When Juvenile Offenders Are Treated as Adults, Nobody Wins' (2005) Southern California Interdisciplinary Law Journal 125

³⁶ *Kent v. United States*, 383 U.S. 541 (1966)

³⁷ *In re Gault*, 387 U.S. 1 (1967)

³⁸ Shannon F. McLatchey, 'Juvenile Crime and Punishment: An Analysis of the Get Tough Approach' (1999) 10 University of Florida Journal of Law and Public Policy 401; See also Aaron Kupchik, 'Prosecuting Adolescents in Criminal Courts: Criminal or Juvenile Justice?' (2003) 50 Social Problems 439

³⁹ Sera Sun Bale, 'Still Tough on Crime - Prospects for Restorative Justice in the United States' (2003) 26 Utah Law Review 413; See also Christina DeJong and Eve Schwitzer Merrill, 'Getting Tough on Crime: Juvenile Waiver and the Criminal Court' (2001) 27 Ohio Northern University Law Review 175; Danielle R Oddo, 'Removing Confidentiality Protections and the Get Tough Rhetoric: What Has Gone Wrong with the Juvenile Justice System' (1988) 18 Boston College Third World Law Journal 105

⁴⁰ Obi N Ignatius Ebbe, 'Juvenile Justice System in Southern Nigeria' (1998) 12 International Journal of Comparative and Applied Criminal Justice 191; See also Etannibi Alemika and Innocent Chukwuma *Juvenile Justice Administration in Nigeria: Philosophy and Practice* (Centre for Law Enforcement Education 2001) 12

intervened to deal with such anti-social problems through the introduction of social welfare services and penal administration for children.⁴¹

The rise in youth crime emerged as a national issue in Nigeria with the appointment of the first Social Welfare Officer in Nigeria in 1941 and the implementation of new legal and administrative mechanisms that clearly identified child delinquency as a social problem.⁴² According to Okonkwo, the penal administration of children in conflict with the law in Nigeria culminated with the establishment of the Boy's Industrial Home Yaba Lagos in 1925 and thereafter the promulgation of the CYPA of 1946.⁴³ Due to its inherent shortcoming and in a bid to offer further protection and curb incidences of delinquency in Nigeria, the CYPA underwent several amendments during the colonial era, in 1947, 1950, 1954 and 1955.⁴⁴ The CYPA as amended in 1955 was bequeathed to Nigeria on independence in 1960 and remained in force for 43 years until it was partially substituted in 2003 by the CRA.

3.3 Philosophical Models of Child Justice

The philosophical models of child justice, unlike its debatable evolution, are much more settled. Due to the fact that the child justice philosophy is clouded by a lenient societal response to delinquency, a child offender ought not to receive the same punishment as an adult who is guilty of the same offense. As a basis for determining the appropriate punishment for a child offender, the child justice philosophy enjoins conscious analysis of the seriousness of the offense, the degree of violence perpetrated, the injury inflicted and ultimately the resulting harm to the victim.⁴⁵ According to Field, the philosophy of child justice is founded on the notion that the culpability of a child offender ought not to be equated to that of an adult guilty of the same offense.⁴⁶

⁴¹ Etannibi Alemika and Innocent Chukwuma *Juvenile Justice Administration in Nigeria: Philosophy and Practice* (Centre for Law Enforcement Education 2001) 12

⁴² Laurent Fourchard, 'Lagos and the Invention of Juvenile Delinquency in Nigeria 1920 – 60 (2006) 47 *Journal of African History* 115; See also Obi N Ignatius Ebbe, 'Juvenile Delinquency in Nigeria: The Problem of Application of Western Theories (1992) 16 *International Journal of Comparative Law* 353

⁴³ C.O. Okonkwo, *Criminal Law in Nigeria* (2nd edn, Sweet & Maxwell London 1980) 131

⁴⁴ Etannibi Alemika and Innocent Chukwuma *Juvenile Justice Administration in Nigeria: Philosophy and Practice* (Centre for Law Enforcement Education, 2001) 12; Hakeem Ijaiya, 'Juvenile Justice Administration in Nigeria' (2009) 2 *NUJS Law Review* 573

⁴⁵ Barry Feld, 'The Transformation of Juvenile Court' (1991) 75 *Minn. L. Rev.* 691, 724; Daniel P Mears and Others, 'Public Opinion and the Foundation of the Juvenile Court' (2007) 45 *Criminology* 223

⁴⁶ Barry Feld, 'The Transformation of Juvenile Court (1991) 75 *Minnesota Law Review* 691; See also Barry C Feld, 'Race, Politics, and Juvenile Justice: The Warren Court and the Conservative Backlash' (2003) 87 *Minnesota Law Review* 1447

The philosophy behind the establishment of child justice is averse to retribution, but rather predicated on the premise that individuals under a certain age who commit crimes supposedly do not act with the same degree of responsibility as their adult counterparts. As such, they should be treated differently bearing in mind their amenability to rehabilitative support by the state.⁴⁷ The 1990 report of the Massachusetts Juvenile Justice System conducted by the Boston Bar Association rationalized child justice philosophy. It states that the philosophical justification of child justice is founded on the vulnerability of children and the compassionate consideration that their mental and intellectual weaknesses should be weighty enough to excuse them from commensurate punishment for their offense.⁴⁸

The report adduces that the behavior of children is potentially influenced by their social and family environments and as such, their limited mental autonomy and the frailty of their decision-making ability make it unjust to punish them strictly for their infraction of the law without consideration to their age, potential immaturity and prospects for rehabilitation.⁴⁹

Although the philosophy of child justice rationalizes culpability on grounds of age, there are two major strands of the philosophy which when applied to a particular scenario, result in different calibration of the blameworthiness of a child.⁵⁰ The philosophical models of child justice tend to be classified into welfare and justice models.⁵¹ These two key models have emerged due to historical and cultural factors and legal traditions. While the welfare model is a legacy of the North American legal tradition, it contrasts with the justice model that is of European heritage.⁵²

3.3.1 Welfare Model of Child Justice

The welfare model of child justice is an offspring of a welfare state in which the administration of the state is designed to allow market forces to guarantee a minimum level of comfort to everyone and enable them to meet minimum exigencies of life.⁵³ By that same token, this philosophical model of child justice aims at

⁴⁷ Ibid

⁴⁸ *Rethinking A National Model The Massachusetts Juvenile Justice System* (1990) Report of the Boston Bar Association's Task Force in the Juvenile Justice System. <<http://www.bostonbar.org/prs/reports/majuvenile94.pdf>> accessed 1 April 2012; See also Elizabeth S Scott and Laurence Steinberg, *Rethinking Juvenile Justice* (Harvard University Press 2010)

⁴⁹ Ibid

⁵⁰ Fay Gale, Ngaire Naffine and Joy Wundersitz, 'Juvenile Justice: Debating the Issues' (New South Wales: Allen and Unwin 1993) 485

⁵¹ John Pratt, 'Corporatism: The Third Model of Juvenile Justice' (1989) 29 *British Journal of Criminology* 236

⁵² Fay Gale, Ngaire Naffine and Joy Wundersitz, 'Back to Justice for Juveniles: The Rhetoric and Reality of Law Reform' (1990) 23 *Australian & New Zealand Journal of Criminology* 192

⁵³ Asa Briggs, 'The Welfare State in Historical Perspective' in Christopher Pierson and Francis G Castles (eds) *The Welfare State Reader* (2nd edn Polity Press 2006) 16; See also Walter Korpi and

securing the interests of the child offender through the subrogation of the state as the parent of the child.⁵⁴ In Scott's view, the welfare model of child justice confers on the state the responsibility to look out for the welfare of children in conflict with the law.⁵⁵

Calling for the mitigation of the culpability for an offense committed by a child offender on grounds of his or her age, some scholars argue that this philosophy presupposes that a child offender should not be punished, but rather protected to ensure his or her rehabilitation and integration into society.⁵⁶ Rather than use criminal punishment to address delinquency, the welfare philosophy emphasizes rehabilitation as against deterrent punishment and calls for a diminished responsibility of children at all times on grounds of their ameliorated culpability.

According to Ainsworth, the ground rule of welfare philosophy is that punishment should be avoided for child offenses, but where inevitable, it should be designed in such a way that it rehabilitates the child offender and attunes him or her against future reoffending.⁵⁷ The fundamental paternalistic presumption of the welfare philosophy, also referred to as 'protection model', is that even though children engage in deviant behavior, they are viewed as victims of the environment within which they live and can be rehabilitated to become law abiding citizens.⁵⁸

Unlike retribution which seeks justice by looking backwards at past offenses, welfare philosophy is forward-looking, emphasizes rehabilitation and strives to convert children in conflict with the law into law-abiding citizens through rehabilitative interventions.⁵⁹ As postulated by Schissel, the root of the welfare philosophy is more broadly traceable to the English Law doctrine that authorizes the monarchy to protect vulnerable parties in courts of equity.

It was argued further that the welfare philosophy was accentuated with judges assuming wide discretionary powers to cater for children in conflict with the law through orders to authorize removal of children from destitute families.⁶⁰ On this

Joakim Palme, 'The Paradox of Redistribution and Strategies of Equality: Welfare State Institutions, Inequality, and Poverty in the Western Countries' (1998) 63 *American Sociological Review* 661

⁵⁴ Bernard Schissel, 'Youth Crime, Moral Panics and the News: The Conspiracy Against the Marginalized in Canada' (1997) 24 *Social Justice* 165

⁵⁵ Elizabeth Scott, 'The Legal Construction of Childhood' in Margaret Rosenheim, Franklin Zimring and others (eds) *A Century of Juvenile Justice* (University of Chicago Press 2002) 116

⁵⁶ Anthony Bottoms and James Dignan, 'Youth Justice in Great Britain' (2004) 31, *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives* 43

⁵⁷ Janet E Ainsworth, 'Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court' (1991) 69 *North Carolina Law Review* 1083

⁵⁸ Odongo Odhiambo, 'The Domestication of International Law Standards on the Rights of the Child With Specific Reference to Juvenile Justice in the African Context' (PhD Thesis University of Western Cape South Africa 2005)

⁵⁹ Stanford Fox, 'Juvenile Justice Reform: An Historical Perspective' (1970) 22 *Stanford Law Rev* 1187

⁶⁰ Bernard Schissel, 'Youth Crime, Moral Panics and the News: The Conspiracy Against the Marginalized in Canada' (1997) 24 *Social Justice* 165

premise, child courts assumed an important role in protecting children as immature beings with the state playing *parens patriae*. This role places emphasis on treatment, supervision and control of children rather than on punishment and allows the state the power to intervene affirmatively in the lives of young offenders.⁶¹

Parens patriae was introduced into English Common Law through the court of law and equity and became applicable when the intervention of the court is apparently needed to forestall danger to the health and welfare of children and when these dangers seem unlikely to be mitigated by parental responsibility.⁶² Under the role of ‘parents of the child’, the state is morally authorized to step into the shoes of the parent and determine the guidelines for the development and growth of the child. The state also considers the social inadequacies of the situation in which the child is living and reacts to the problem of delinquency not by imposing punishment, but by searching for a treatment plan best suited to the particular needs of the child offender.⁶³

In such circumstances, the court’s verdict must be based on the ‘needs’ and not the ‘deeds’ of the child offender and the potential for his or her rehabilitation.⁶⁴ The rehabilitative ideals of the welfare philosophy demand that the court should consider the social and economic background of each child offender. As advanced by Hymowitz, it must treat child delinquency as a special disease requiring special therapy and consider the child offender as a passive and innocent being devoid of punishable criminal intent.⁶⁵ These considerations ought to compel the court to concentrate on the individualized rehabilitative needs of the child offender notwithstanding the magnitude of his or her offense.

While it has been argued that the welfare philosophy is the dominant philosophy of child justice,⁶⁶ Cauffman, Woolard and Reppucci assert that the philosophy is not without its critics.⁶⁷ As such, Scott and Grisso maintain that the optimism for rehabilitation of children in conflict with the law on which the philosophy is based has been put to the greatest scrutiny particularly in the face of

⁶¹ Douglas R Rendleman, ‘Parens Patriae: From Chancery to the Juvenile Court’ (1971) 23 South Carolina Law Review 205; See also Neil Howard Cogan, ‘Juvenile Law, Before and After the Entrance of Parens Patriae’ (1970) 22 South Carolina Law Review 147

⁶² Lawrence B Custer, ‘Origins of the Doctrine of Parens Patriae’ (1978) 27 Emory Law Journal 195; See also George B Curtis, ‘Checkered Career of Parens Patriae: The State as Parent or Tyrant’ (1976) 25 DePaul Law Review 895

⁶³ Elizabeth Scott, ‘The Legal Construction of Childhood’ in Margaret Rosenheim, Franklin Zimring and Others (eds) *A Century of Juvenile Justice* (University of Chicago Press 2002) 116.

⁶⁴ Mary Clement, *The Juvenile Justice System: Law and Process* (2nd edn. Butterworth-Heinemann 2002) 18

⁶⁵ Kay Hymowitz, ‘Thinkers and Lessons from the Slippery Slope’ (2000) 48 Drake Law Review 547

⁶⁶ Jonathan Simon, ‘Power Without Parents: Juvenile Justice in A Postmodern Society’ (1995) 16 Cardozo Law Rev 1363

⁶⁷ Elizabeth Cauffman, Jennifer Woolard, Dickon N Reppucci, ‘Justice for Juveniles: New Perspectives on Adolescents’ Competence and Culpability’ (1999) 18 QLR 403

rising and violent breach of the law by children.⁶⁸ Lipsitt furthers this criticism by arguing that with expanded constitutional rights and social protection granted to children, there is no unique purpose served by the rehabilitative focus of the welfare philosophy of child justice.⁶⁹

Further accentuating the criticism, Wiese argues that the welfare philosophy of child justice hides several abuses against children because of its limited recognition of due process and the subjectivity of the wide discriminatory powers of the child court.⁷⁰ In criticizing welfare philosophy for its paternalism, Hamilton and Harvey claim that the United States cases of *In re Gault*,⁷¹ *In re Winship*⁷² and other U.S Supreme Court cases undermined the rehabilitative and welfare rhetoric of early child courts.⁷³ Similarly, they criticize the welfare philosophy of child justice as bereft of due process safeguards and grant social workers dominant and overbearing roles.

3.3.2 Justice Model of Child Justice

Another strand of the philosophical model of child justice which is characteristic of accountability for offenses willfully committed by children in conflict with the law is the justice model. Under the justice philosophy of child justice, children are held accountable for all their actions in contravention of the law. According to Schulz and Hamutenya, the thrust of this philosophy is that all individuals, including children, are reasoning agents and ought to be fully accountable for their actions before the law.⁷⁴

In contrast to the welfare philosophy that is swayed by the perceived immaturity and irrationality of children, the justice philosophy advocates strict punishment of children in conflict with the law as a societal retaliation for their misconduct.⁷⁵ The justice philosophy adopts a uniform penalty for both child and adult offenders who have committed the same offense and makes no distinction between the criminal actions of a child and an adult counterpart. Proponents of this philosophy argue that its catalectic factors are that it provides children in conflict

⁶⁸ Elizabeth Scott and Thomas Grisso, 'The Evolution of Adolescence: A Development Perspective in Juvenile Justice Reform' (1997) 88 *Journal of Criminal Law and Criminology* 137

⁶⁹ Paul D Lipsitt, 'Due Process As A Gateway to Rehabilitation in the Juvenile Justice System' (1969) 49 *Boston University Law Review* 62

⁷⁰ Katja Kristina Wiese, 'Juvenile Justice: A Comparison Between the Laws of New Zealand and Germany. (LL.M thesis University of Canterbury 2007) 52.

⁷¹ *Re Gault*, 387 U.S. 1 (1967)

⁷² *Re Winship*, 397 U.S 358 (1970)

⁷³ Carolyn Hamilton and Rachel Harvey 'The Role of Public Opinion in the Implementation of International Juvenile Standards' (2004) 11 *International Journal of Children's Rights* 369

⁷⁴ Stefan Schulz and Marthinus Hamutenya 'Juvenile Justice Namibia: Law Reform Towards Reconciliation and Restorative Justice' <<http://www.restorativejustice.org/>>accessed 15 August 2010

⁷⁵ David A. Shapiro. 'What's Beneath the Graham Cracker?: The Potential Impact of Comparative Law on the Future of Juvenile Justice Reform after *Graham v. Florida*' (2012) 24 *Pace International Law Review* 119

with the law with due process rights and fair hearing guarantees expected to adequately provide protective safeguards to them.⁷⁶ In that case, this philosophy discounts that children require or deserve any paternalistic concessionary measure to mitigate their criminal culpability.⁷⁷

The child justice philosophy focuses on the commensurate incapacitation and punishment of a child offender for purposes of deterrence.⁷⁸ Yeckel elucidated this point when he argued that the reason commonly adduced by protagonists of the justice philosophy for retention of the 'just deserts' response is that a child offender, like an adult offender, is accountable for his or her actions that are in breach of the law.⁷⁹ He argued further that the accountability of the child justice philosophy presupposes that since children are presently maturing earlier and getting involved in crime early, they need to be answerable for their crimes.

On the other hand, where a conscious and independent deviant actor contravenes the law either as a child or an adult, the balance of the scales of justice ought to have been disturbed and can only be restored if and only when the offender is punished in accordance with the law.⁸⁰ Some proponents of the child justice philosophy posit that in the event that there is need for a distinct child justice system, it ought to adopt more of the punitive characteristics of the criminal justice system.⁸¹ In that sense, Schulz and Hamutenya argue that the proper role of child justice as is the case with criminal justice in general is to assess the degree of culpability of the individual child offender and apportion punishment in accordance with the degree of seriousness of the offending behavior.⁸²

In such a circumstance, the child offender ought to be accorded the same full due process rights and fair hearing protection enjoyed by adults instead of the open-ended discretion of child courts exercised under the welfare philosophy.⁸³ Unlike the child welfare philosophy that searches for appropriate treatment, the child justice

⁷⁶ Stefan Schulz and Marthinus Hamutenya 'Juvenile Justice in Namibia: Law Reform Towards Reconciliation and Restorative Justice' <<http://www.restorativejustice.org/>> accessed 15 August 2010

⁷⁷ John Muncie and Barry Goldson (ed) *Comparative Youth Justice* (Sage Publications 2006) 112

⁷⁸ Daniel O'Connor, 'Defining the Strike Zone-An Analysis of the Classification of Prior Conviction Under the Federal 'Three Strikes and You are Out' Scheme' (1995) 36 *Boston College Law Review* 847; See also Desiree M. Cuason, 'Another Three Strikes Law: An In-Depth Look at Florida's Prisoner Release Re-Offender Punishment Act' (1998) 10 *Thomas Law Review* 627

⁷⁹ Joseph Yeckel, 'Violent Juvenile Offender: Rethinking Federal Intervention in the Juvenile Justice' (1997) 51 *Washington University Journal of Urban and Contemporary Law* 331

⁸⁰ *Ibid*

⁸¹ Stefan Schulz and Marthinus Hamutenya 'Juvenile Justice in Namibia: Law Reform Towards Reconciliation and Restorative Justice' <<http://www.restorativejustice.org/>> accessed 15 August 2010

⁸² *Ibid*

⁸³ Robert Davidson, 'The Future of Juvenile Justice: Is it Time to Abolish the System?' (1990) 81 *The Journal of Criminal Law and Criminology* 132

philosophy places emphasis on the predictability and determinateness of criminal responsibility in canvassing for due punishment in accordance with the law.⁸⁴

3.3.3. Sub-sets of Justice Model of Child Justice

The child justice philosophy has two major sub-sets. The first is the deterrent philosophy of child justice which in Dresser's view is adopted along the lines of the utilitarian school of thought.⁸⁵ The deterrent philosophy of child justice presupposes that punishment is not merely a measure to punish the child offender for the present offense, but a mechanism to also compel him or her to refrain from offending in the future.⁸⁶ Justifying the rationale behind deterrent justice, it has been stated that both the child offender and any third party observer will view the infraction of the law and ensuing punishment as undesirable actions and consequences.⁸⁷

Consequently, the goal of deterrent justice is to indirectly manipulate and discourage children contemplating criminal conduct to abstain from such endeavors. While this model of child justice commands respect at face value, von Hirsch argues that in practice, the level of deterrence achieved through it is very debatable and depends extensively on the ability of present and prospective child offenders to comprehend the risks associated with engaging in the prohibited act.

The second strand of the justice model of child justice is the retributive child justice. It presupposes that delinquents who commit crimes deserve adequate punishment in tandem with their moral culpability.⁸⁸ Blackmore and Welsh maintain that the retributive philosophy of child justice, as an integral limb of the child justice philosophy is on the same threshold as the deterrent justice philosophy and supports the intentional infliction of pain and suffering to the extent deserved by delinquents that willingly commit crime.⁸⁹

The 'just-deserts' posture of the child justice philosophy and its retributive and deterrent subsets have been criticized by Akester, Masters and Owers for their

⁸⁴ Joseph Yeckel, 'Violent Juvenile Offender: Rethinking Federal Intervention in the Juvenile Justice' (1997) 51 Washington University Journal of Urban and Cotemporary Law 331; See also Kelly M. Angell, 'Regressive Movement: When Juvenile Offenders Are Treated as Adults, Nobody Wins' (2005) 14 Southern California Interdisciplinary law review 125

⁸⁵ Rebecca Dresser, 'Political Identity and Punishment' (1990) 70 Boston University Law Review 395

⁸⁶ Ibid

⁸⁷ Andrew von Hirsch, 'Recent Trends in American Criminal Sentencing Theory' (1983) 42 Maryland Law Review 6; See also A von Hirsch; A Ashworth, *Principled Sentencing: Readings on Theory and Policy* (2nd edn, Northwestern University Press 1998)

⁸⁸ Korine L. Larsen, 'With Liberty and Juvenile Justice for All: Extending the Right to a Jury Trial to the Juvenile Courts' (1994) 20 William Mitchell Law Review 835; See also Martin Guggenheim and Randy Hertz, 'Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials' (1998) 33 Wake Forest Law Review 553

⁸⁹ John Blackmore and Jane Welsh, 'Selective Incapacitation: Sentencing According to Risk' (1983) 29 Crime and Delinquency 528; See also Kathleen Anerhahn, 'Selective Incapacitation and the Problem of Prediction' (1999) 37 Criminology 703

lack of coherence in balancing two important precepts of child justice.⁹⁰ These two subsets of justice philosophy overemphasize the need to protect society against criminal behavior and at the same time over-look the need to also pay special attention to the age-related circumstances of children in conflict with the law.⁹¹

The reliance of both deterrent and retributive models on the gains of incapacitation of the child,⁹² to put them out of criminal circulation,⁹³ or reduce their overall propensity to commit crime is also debatable as it is not clear to what extent incapacitation actually prevents re-offending in a particular case.⁹⁴ As such, implementing such a system as a mechanism for counteracting child delinquency would compel the court to move out of the realms of law and predict a young offender's future behavior in the event he or she is not incarcerated.⁹⁵

The incapacitation calculation based on the forecasted behavior of a child is not grounded on any procedural rules. Its success depends not only on apprehending and sentencing children in conflict with the law, but also on the accuracy of permuting which of the potential delinquents will offend at a relatively early stage of his or her criminal career.⁹⁶ Certainly, the incapacitation theory of deterrent justice negates equality principles because its application to delinquents is likely to produce different results because of the wide speculative discretion it grants to the court. The deterrent and retributive philosophies of child justice may likely fail the scrutiny of child rights standards because neither of them adequately takes into consideration the sensitivity of the child offender and his or her need for rehabilitation.⁹⁷

3.3.4. Restorative Model of Child Justice

Although welfare and justice models of child justice are widely seen as conflicting and the two leading theoretical philosophies of child justice, the dividing line between these two models is waning gradually. This is because there is a furtherance of welfare concerns in child justice, going on contemporaneously with

⁹⁰ Kate Akester, Guy Masters and Anne Owers 'Restoring Youth Justice: New Directions in Domestic and International Law and Practice' (Justice 2000) 8

⁹¹ Ibid; See also Marygold S Melli, 'Symposium: Juvenile Justice Reform: Introduction: Juvenile Justice Reform in Context' (1996) Wisconsin Law Review 375

⁹² James Hooper, 'Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act' (1991) 89 Michigan Law Review 1951

⁹³ James G Levine, 'Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency' (2009) 46 Harvard Journal of Legislation 537

⁹⁴ John Blackmore and Jane Welsh, 'Selective Incapacitation: Sentencing According to Risk' (1983) 29 Crime and Delinquency 528

⁹⁵ Haapanen, Rudy, 'Selective Incapacitation and the Serious Offender: A Longitudinal Study of Criminal Career Patterns' (1990) Research in criminology 160

⁹⁶ John Blackmore and Jane Welsh, 'Selective Incapacitation: Sentencing According to Risk' (1983) 29 Crime and Delinquency 528

⁹⁷ Joseph Yeckel, 'Violent Children in Conflict with the Law: Rethinking Federal Intervention in Juvenile Justice' (1997) 51 Washington University Journal of Urban and Contemporary Law 362

the consolidation of the justice model.⁹⁸ The confluence of the welfare and justice models is resulting in a robustly emerging model of child justice which encourages child offenders to show penitence for their wrongdoing and the impact on their victim.

This model is popularly known as restorative child justice. It accommodates welfare and justice interests in that it neither dispenses with rehabilitation nor overlooks punishment; rather, it places both within the context of the child offender's responsibility for his or her actions.⁹⁹ Stout notes the varied definitions of restorative child justice as pertaining to any justice process emphasizing the victim in place of the state.¹⁰⁰ Marshall defines restorative child justice as a problem-solving approach to crime involving the parties on the one hand and the community on the other in an active relationship with state institutions.¹⁰¹ Similarly, Johnston argues that the characteristics of child justice are underlined by the fact that responses to a crime should make an offender acknowledge the harm caused to the victims, and ensure that reparation measures are collectively decided between the offender, victim and the community so as to reintegrate the offender back into the community.¹⁰²

The distinctiveness of restorative child justice is the emphasis it places on process as well as outcome. It envisions crime more broadly than other justice models through the recognition of the role and participation of the victim in justice processes. It also co-opts the involvement of stakeholders beyond the national justice institutions and focuses on reparation at the expense of punitive sanctions.¹⁰³

⁹⁸ D Palmer & R Walters 'Crime Prevention Camps for Youth At Risk: Blurring the Boundaries of Care and Control' in C Simpson & R Hil (eds) *Ways of Resistance: Social Control and Young People in Australia* (Hale & Iremonger 1995) 161; See also F McElrea 'Restorative Justice — The New Zealand Youth Court: A Model for Development in Other Courts?' (1994) 4 *Journal of Judicial Administration* 33; H Zehr *Changing Lenses: A New Focus for Crime and Justice* (Herald Press 1990)

⁹⁹ F McElrea 'Restorative Justice — The New Zealand Youth Court: A Model for Development in Other Courts?' (1994) 4 *Journal of Judicial Administration* 33; See also H Zehr *Changing Lenses: A New Focus for Crime and Justice* (Herald Press 1990)

¹⁰⁰ Brian Stout, 'Restorative Justice in South Africa: Resolving Conflict' (2003) 1 *British Journal of Community Justice* 51; See also Margaret Stout and Joao Salm, 'What Restorative Justice Might Learn from Administrative Theory' (2011) 14 *Contemporary Justice Review* 203; Brenda Sims Blackwell and Clark D. Cunningham, 'Taking the Punishment Out of the Process: From Substantive Criminal Justice through Procedural Justice to Restorative Justice' (2004) 67 *Law and Contemporary Problems* 59

¹⁰¹ Tony Marshall, 'Restorative Justice: An Overview Home Office' (1999) Research Development and Statistics Directorate <<http://www.homeoffice.gov.uk/rds/pdfs/occ-resjus.pdf>> accessed 3 April 2014; Andrew Ashworth, 'Responsibilities, Rights and Restorative Justice' (2002) 42 *British Journal of Criminology* 578

¹⁰² G Johnston, *Restorative Justice – Ideas, Values and Debates* (Willan Publishing 2002) 41; Gerry Johnston and Daniel W Van Ness, 'The Meaning of Restorative Justice' in Gerry Johnston and Daniel W Van Ness (eds) *Handbook on Restorative Justice*; See also Belinda Hopkins, 'Restorative Justice in Schools' (2002) 17 *Support for Learning* 144

¹⁰³ Jo-Anne Wemmers, 'Restorative Justice for Victims of Crime: A Victim-Oriented Approach to Restorative Justice' (2002) 9 *International Review of Victimology* 43; See also Jo-Anne Wemmers and Katie Caryl, 'Victims' Perspectives on Restorative Justice: How Much Involvement Are Victims

Restorative child justice like the welfare model of child justice underlines the rehabilitation of the offender; however, it goes much further than the child justice model in emphasizing restitution to the victim and the community. It is attuned to the African conception of the rights of the child by promoting the desirability of balancing child offenders' rights against their responsibilities to the community.

Restorative child justice is a philosophy that embraces a wide range of human emotions and offers a process whereby those affected by the criminal infraction are involved in resolving the issues which flow from the offending. According to Considine, it disregards vengeance and punishment and seeks to heal both the community and the individuals involved by putting the notion of reparation and not punishment at the center.¹⁰⁴

As a radical shift from adversarial trials and unlike retributive justice that focuses on how to punish the offender, restorative child justice places victims at the center of the justice equation. While healing the victim, it attaches responsibility for the crime to the perpetrator.¹⁰⁵ In aiming at reconciliation, rather than punishment, the cardinal philosophy of restorative child justice, according to Wundersitz, is that the infraction of the law by a child offender primarily aggrieves the victim of the offense and where there is an opportunity for reparation by the child, priority should be given to the victim and not the society or state as the case may be.¹⁰⁶

In Bilchick's view, restorative child justice personifies the victim and focuses on crime as harm and justice as mitigation of the harm.¹⁰⁷ He also considers it as the opposite of retributive justice, and notes that it adopts a 'soft' response to crime in comparison with other models of justice.¹⁰⁸ Acknowledging that child infraction of the law inflicts harm on the victim and most times the community, Omale argues that the underlining importance of restorative child justice is to repair or mitigate the harm caused, by using participatory process involving the victim or community.¹⁰⁹

Looking For?' (2004) 11 *International Review of Victimology* 259; Annie Cossins, 'Restorative Justice and Child Sex Offences: The Theory and the Practice' (2008) 48 *British Journal of Criminology* 359

¹⁰⁴ Jim Considine, 'Restorative Justice – Healing the Effects of Crime' Paper Delivered at the Restorative Justice and Probation Conference, Warsaw 2003; Lode Walgrave and G Bazemore, *Restorative Juvenile Justice: In Search of Fundamentals and An Outline for Systemic Reform* (Criminal Justice Press 1999) 45; See also Lode Walgrave, 'Restorative Justice for Juveniles: Just a Technique or a Fully Fledged Alternative?' (1995) 34 *Howard Journal of Criminal Justice* 228

¹⁰⁵ Jim Considine, 'Restorative Justice – Healing the Effects of Crime' Paper Delivered at Restorative the Justice and Probation Conference, Warsaw 2003 (Paper on file with author)

¹⁰⁶ J Wundersitz 'Pre-court diversion: The Australian experience' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* (Longman 1997) 281

¹⁰⁷ Shay Bilchik, *Balanced and Restorative Justice for Juveniles: A Framework for Juvenile Justice in the 21st Century* (OJJDP 1997) ii

¹⁰⁸ Kathleen Daly, 'Restorative Justice: The Real Story' (2002) 4 *Punishment and Society* 55

¹⁰⁹ Don John O Omale, 'Justice in History: An Examination of African Restorative Traditions and the Emerging Restorative Paradigm' (2006) 2 *African Journal of Criminology and Justice Studies* 33; See

Through the platform of restorative child justice, both the victim and offender are accorded central roles in justice-seeking processes with state and legal professionals facilitating a system of accountability and reparation. Zehr argues that restorative child justice emerged from the expedience to take the needs of the immediate victim and the community as the secondary victim more seriously.¹¹⁰

Restorative child justice expands the participants in the criminal justice system beyond the government to include the victim and the community and elevates accountability by ensuring that the offender appreciates the impact of his or her action on the victim and takes steps to assuage them.¹¹¹ Braithwaite considers restorative child justice as a process of limiting the powers of the state and securing dominion of citizens in the criminal justice process through repair, transformation and empowerment of the victim, community and the offender.¹¹²

Having reviewed the justice, welfare and restorative justice philosophies of child justice, it is pertinent to note that while the contemporary move in child justice administration is towards restorative child justice, the inclination of this thesis is on the welfare model of child justice. This choice is made bearing in mind that in the context of Nigeria where this thesis is focused, child justice is predominantly welfare-oriented due to fundamental child justice legislation in Nigeria. The welfare leaning of child justice in Nigeria further consolidated by the adoption of the CRA in 2003 completely omits reference to restorative juvenile justice, but rather reinforces welfarism. The welfare-centered child justice system in Nigeria places a premium on *Parens Patriae* and emphasized informality in the court room. It also underscored the sensitivities of the child justice process and authorizes the insulation of children and family courts from the brand of criminality.

3.4 Child Justice as Child Rights

The specific codification of child justice as child rights in international, regional and national instruments is a recent development.¹¹³ The treatment of children as objects and proprietary interests of their parents remained until 1944 and resulted in the subjection of children in conflict with the law to various forms of

also Don John Otene Omale, 'Restorative Justice as An Alternative Dispute Resolution Model: Opinions of Victims of Crime and Criminal Justice Professionals in Nigeria' (PhD Thesis De Montfort University 2009) 18

¹¹⁰ Howard Zehr, *Little Book of Restorative Justice* (Good Books 2002) 15

¹¹¹ Howard Zehr and Harry Mika, 'Fundamental Concepts of Restorative Justice' (2003) *Restorative Justice: Critical Issues* 40

¹¹² John Braithwaite, 'Setting Standards for Restorative Justice' (2002) 42 *British Journal of Criminology* 563; John Braithwaite, 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' (1999) 25 *Crime and Justice* 1

¹¹³ Myriam Denov, 'Children's Rights or Rhetoric? Assessing Canada's Youth Criminal Justice Act and its Compliance With the UN Convention on the Rights of the Child' (2004) 12 *International Journal of Children's Rights* 1

abuse, neglect and exploitation.¹¹⁴ It has been argued that as one of the positive consequences of World War II, state paternalistic tendencies towards children gave way to the conception of children as individuals and autonomous beings with inherent due process rights.¹¹⁵

This landmark stride was possible on the strength of a plethora of human rights instruments in general and child rights instruments in particular that dramatically altered the articulation and attitude of the law to the extent that children were considered not as parental property or possessions, but as a distinct and special class of immature and vulnerable persons in need of special protection.¹¹⁶

On the premise that child justice is an integral part of child rights, the CRC established standards for the administration of child justice and obliges state parties to provide children in conflict with the law with basic human rights guarantees as well as legal or other assistance for their defense. The convention also enjoins state parties to ensure that judicial proceedings and institutional placement of children in conflict with the law are applied as a last resort.¹¹⁷

The nexus between child rights and child justice is also evident in other child rights instruments such as the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, commonly known as the 'Beijing Rules.' Construing child justice as child rights, the Beijing Rules instituted international norms for the administration of child justice and additionally provided guidance to states for protecting child rights through a separate and specialized child justice system. The Beijing Rules further set out elaborate principles and commentaries on the treatment of children in conflict with the law.¹¹⁸

In addition to the CRC and the Beijing Rules, there are several others child-specific instruments that also situate child justice in the realm of child rights. These instruments include the United Nations Rules for the Protection of Juveniles Deprived of their Liberty.¹¹⁹ The substance of the Rules is to uphold the rights,

¹¹⁴ Deirdre Fottrell, *Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child*. (Martinus Nijhoff, 2000) 54

¹¹⁵ Myriam Denov, 'Children's Rights or Rhetoric? Assessing Canada's Youth Criminal Justice Act and its Compliance With the UN Convention on the Rights of the Child' (2004) 12 *International Journal of Children's Rights* 1

¹¹⁶ *Ibid*

¹¹⁷ Article 40, UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989; See also Lawrence J LeBlanc, *The Convention on the Rights of the Child: United Nations lawmaking on human rights* (University of Nebraska Press 1995)

¹¹⁸ Rule 5, UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules')*; Daniel L. Skoler, 'World Implementation of the United Nations Standard Minimum Rules for the Treatment of Prisoners' (1975) 10 *Journal of International Law and Economics* 453

¹¹⁹ UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* 2 April 1991; Nan D. Miller, 'International Protection of the Rights of Prisoners: Is Solitary

safety and promotion of the physical and mental well-being of children. Under the Rules, deprivation of the liberty of a child should be a disposition of last resort, for the minimum necessary period and should be limited to exceptional cases.¹²⁰

Another international instrument that situates child justice within the remit of child rights is the United Nations Guidelines for the Prevention of Juvenile Delinquency, popularly called the ‘Riyadh Guidelines.’ These Guidelines categorize child justice as child rights by emphasizing on preventive policies for facilitating successful socialization and integration of children and young persons, particularly through the family, community, peer groups and as well as voluntary organizations.¹²¹

In the context of the African continent, the impact of the International Bill of Rights on the promotion and protection of child rights is reflected in the emergence of regional and national legislative frameworks.¹²² These instruments situate child justice within child rights and strongly elaborate specific categories of rights that children are granted when they are in conflict with the law.

The ACRWC was adopted to set continental binding standards in the sphere of child rights, including child justice. Distinct from the CRC, the ACRWC correlates the rights of children with responsibilities.¹²³ It grants children in conflict with the law special rights in a manner consistent with their sense of dignity and worth and interprets the establishment and effective administration of child justice not as a discretionary policy that member states are at liberty to domesticate and implement nationally, but as an obligation.¹²⁴

Confinement in the United States a Violation of International Standards’ (1996) 26 California Western International Law Journal 139

¹²⁰ UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* 2 April 1991; B Goldson ‘Children in Need’ or ‘Young Offenders’? Hardening Ideology, Organizational Change and New Challenges for Social Work with Children in Trouble’ (2000) 5 Child & Family Social Work 255

¹²¹ UN General Assembly, *United Nations Guidelines for the Prevention of Juvenile Delinquency* (*The Riyadh Guidelines*’); John Muncie, ‘The Globalization of Crime Control—the Case of Youth and Juvenile Justice: Neo-Liberalism, Policy Convergence and International Conventions (2005) 9 Theoretical Criminology 35; Equally, the Declaration of the Rights of the Child, the World Summit for Children, United Nations General Assembly Resolutions 2003/85, and 2004/47 on the abduction of children, Security Council Resolutions 1379 and 1460 on Children in Armed Conflict, and the report of the Special Representative of the Secretary-General for Children in Armed Conflict all drew strength from the International Bill of Rights to interpret child justice as a subset of child rights.

¹²² Jose A. Lindgren Alves, ‘The Declaration of Human Rights in Postmodernity’ (2000) 22 Human Rights Quarterly 498

¹²³ According to Article 31 of the ACRWC, every child shall have responsibilities towards his family and society, the state and other legally recognized communities and the international community

¹²⁴ Van Bueren, G *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1998) 169; See also Anne Skelton, ‘Developing a Juvenile Justice System for South Africa: International Instruments and Restorative Justice’ (1996) 17 Acta Juridica 180; Ann Skelton,

The incorporation of child justice as child rights in the ACRWC influenced the Nigerian child justice framework. Domesticating child justice as an integral component of child rights, the CRA represents an important national step in subsuming child justice within the ambit of child rights. It supplanted the paternalistic notion of the juvenile justice regime under the CYPJA with the current good practice of treating children as autonomous human beings afforded rights independent of their parents.

While the evaluation of the actual realization of the rights entrenched in the CRA by children in conflict with the law in Nigeria is the subject for subsequent chapters, at this stage, it is pertinent to note that the CRA is certainly eloquent in interpreting child justice in light of the overall vision of child rights. Like the CRC and ACRWC, the CRA ushered in a veritable normative standard for connecting child justice with child rights in Nigeria. The fact that child justice in Nigeria is clothed with child rights is founded on the premise that since children in conflict with the law are inhibited by unequal mental footing when compared to an adult, they deserve the necessary support that is not ordinarily at the disposal of adult offenders.

Despite the plethora of human rights frameworks linking child justice to child rights, the expectation that children in conflict with the law should be processed through the child justice system derives from the prevailing view that children deserve specific human rights and special treatment due to their age. Consequently, the special treatment of children in the child justice system accrues to them not out of the benevolence of the state and its institutions, but due to the understanding that it is their human rights. On this note, the argument of Freeman that posits that child justice interests of children are best protected if perceived as a fundamental obligation on the part of the state rather than rights inherent in children is contestable.¹²⁵

His view is counteracted by the argument that the best protection of child rights and in the particular context of those in conflict with the law is that their best interests are served better by a child justice system that responds to them as holders of rights entitled to the protection of international and regional human rights norms and standards. It has also been argued that since the underlying purpose of child justice is to treat children in a benevolent way, this derogates from the purview of human rights and realistically borders on charity and magnanimity towards the

'Restorative Justice as a Framework for Juvenile Justice Reform: A South African Perspective' (2002) 42 *British Journal of Criminology* 496

¹²⁵ Michael Freeman, 'Taking Rights More Seriously' (1992) 6 *International Journal of Law and Family* 52; Jaap E Doek, 'The CRC 20 Years: An Overview of Some of the Major Achievements and Remaining Challenges' (2009) 33 *Child Abuse and Neglect* 771; Michael Freeman, 'The Future of Children's Rights' (2000) 14 *Children & Society* 277

child.¹²⁶ The premise of this argument is also frail because, although the processing of children in conflict with the law may be tainted with benevolence, it is more fundamentally predicated on the rights of the child offender as an autonomous being.

Equally, Young's interpretation of the establishment of child justice as an administrative obligation of the state rather than as child rights is contestable and somewhat averse to the autonomy of children. Since child rights are predicated on regional and international instruments and as independent human beings capable of enjoying rights, children in conflict with the law are seized with the humane treatment of the child justice system as part and parcel of their rights, and not necessarily as the benevolence of the state and its institutions.

Cognizant of the lack of mental development and maturity of children which impair their rational sense of judgement, the contemporary practice of adopting affirmative policies, quotas and subsidies accords with the same protective shield that child justice, as an integral part of child rights, provides children in conflict with the law.¹²⁷ To buttress the foregoing arguments that seek to draw a nexus between child justice as child rights, the statement of Roscoe Pound that the child court is one of the most significant advances in the administration of justice since the Magna Carta is very material.¹²⁸

3.5 Principles of Child Rights

The principles of child rights have been articulated by amongst others the committee on the implementation of the CRC. In the course of the first formal session of the committee in 1991, it elaborated on the meaning of child rights and highlighted the general principles that would facilitate the interpretation of the convention as a whole and also guide its implementation.¹²⁹ The first of these principles of child rights that underpin equality of opportunities is 'non-discrimination'. Article 2 of CRC states that:

State parties shall respect and ensure the rights set forth in the present convention to each child within their jurisdiction without discrimination of any kind, irrespective of the child's parents or legal guardian, race, colour, sex, language, religion, political or

¹²⁶ Michael Freeman, 'Taking Rights More Seriously' (1992) 6 International Journal of Law and Family 52

¹²⁷ John Rawls, 'Kantian Constructivism in Moral Theory' (1980) 77 The Journal of Philosophy 560

¹²⁸ Roscoe Pound, 'Organization of Courts' (1928) 11 Journal of American Judicature Society 69; Roscoe Pound, 'The Administration of Justice in the Modern City' (1913) 26 Harvard Law Review 302; Michael Freeman, 'Taking Rights More Seriously' (1992) 6 International Journal of Law and Family 52

¹²⁹ International Child and Youth Care Network (2001) < <http://www.cyc-net.org/today2001/today011120.html>> accessed 4 April 2014; Children's Rights in Wales: United Nations Convention on the Rights of the Child < <http://www.childrensrighswales.org.uk/uncrc-principles.aspx>> accessed 12 January 2014

other opinion, national, ethnic or social origin, poverty, disability, birth or other status.

This principle applies to all child rights and presupposes that all children should be afforded the rights guaranteed in the convention without discrimination of any kind.¹³⁰ In a bid to breathe life into the equality of opportunities envisaged in Article 2 of the convention and underpinning the interpretation of all children's rights and freedoms, the second principle of child rights provides for 'best interests of children' as a primary consideration in all decisions affecting them.¹³¹

The third principle of child rights is 'survival and development.'¹³² It is aimed at securing the economic and social well-being of children and entrusts an obligation on government to ensure the survival and development of children.¹³³ In furtherance of equality of opportunities, the best interests of the child and the promotion of the economic and social well-being of children, the fourth principle of 'participation' enjoins the active and informed involvement of children in all actions and decisions that affect them.¹³⁴ The fifth principle is 'proportionality' and seeks to ensure proportionate treatment of children in conflict with the law.¹³⁵

¹³⁰ Human Rights Brief No. 1 <<http://www.un.org/cyberschoolbus/briefing/children/children.pdf>> accessed 16 January 2014; Michael J. Dennis, 'Current Development: Newly Adopted Protocols to the Convention on the Rights of the Child' (2000) 94 *American Journal of International Law* 789

¹³¹ Article 3(1) of the Convention on the Rights of the Child states 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; UN International Children's Emergency Fund (UNICEF) *Judicial Implementation of Article 3 of the Convention on the Rights of the Child in Europe: The case of migrant children including unaccompanied children* (OHCHR – Europe 2012) <<http://www.refworld.org/docid/5135ae842.html>> accessed 05 April 2014; Stephen Parker, 'The Best Interest of the Child: Principles and Problems' (1994) 8 *International Journal of Law and Family* 26

¹³² Article 6(2) of the Convention on the Rights of the Child states that State parties shall ensure to the maximum extent possible the survival and development of the child; See also Gina Crivello, Laura Camfield & Martin Woodhead, 'How Can Children Tell Us About Their Wellbeing? Exploring the Potential of Participatory Research Approaches within Young Lives' (2009) *Social Indicators Research*, 51

¹³³ Emily Munro and Others, 'The Contribution of the United Nations Convention on the Rights of the Child to Understanding and Promoting the Interests of Young People Making the Transition from Care to Adulthood' (2011) 33 *Children and Youth Services Review* 2417

¹³⁴ Article 12(1) of the Convention on the Rights of the Child states that State parties shall assure to the child who is capable of forming his or her own views the right to express those views freely in all matters affecting the child, the view of the child being given due weight in accordance with the age and maturity of the child; A Stafford and Others 'Having a Say: Children and Young People Talk About Consultation' (2003) 17 *Children & Society* 361

¹³⁵ Article 40(3) of the Convention on the Rights of the Child states that state parties shall seek to promote the establishment of law, procedures, authorities and institutions specifically applicable to children alleged as, accused of, or recognized as having infringed the penal law, and, in particular. Article 40(3)(b) provides that whenever appropriate and desirable, measures for dealing with such children without resorting to judicial proceedings, providing that human rights and legal safeguards are fully respected; Article 40 stipulates that a variety of dispositions, such as care, guidance and

These five principles are not in conflict with one another but are rather complementary and mutually reinforcing. While the principles of best interests of the child and proportionality are substantive principles that establish the objective of achieving the rights of children, the other three principles of the CRC are procedural principles that provide the methodology for reaching the goal of the two substantive principles. While acknowledging that the committee on the implementation of the CRC has classified these five principles as the guiding principles of child rights, but in the particular context of child justice and as a standard for the treatment of children in conflict with the law, this thesis holds the view that the principles of proportionality and the best interests of the child encapsulate all other principles of child rights to form the twin pillars of child justice.

While aiding and abetting the interpretation and implementation of all rights enumerated in the CRC, the twin pillars of child justice contribute to the overall promotion and protection of child rights. Since the aim of child justice is the rehabilitation and integration of child offenders into society after being in conflict with the law, this goal would be meaningless if their best interests are disregarded and if they are subject to punishment disproportionate to the gravity of their offense and culpability.

3.6 Conclusion

This chapter reviewed the evolution of child justice in general and its specific history in the United States, England and Nigeria. It construed child justice as a system of substantive and procedural rules that provides a protective legal framework for children in conflict with the law. To situate child justice within the realm of child rights, the chapter discussed the justice and welfare models of child justice and also the evolving trend of restorative child justice. Noting that the demarcating lines between justice and welfare philosophies of child justice are fluid and the fact that it is not uncommon to identify a confluence of multiple philosophies of child justice operating simultaneously in the one child justice system, the chapter leaned towards welfare philosophy because the child justice system in Nigeria is welfare-oriented.

The chapter predicated the philosophy of child justice on the notion that while children in conflict with the law may be blameworthy for their offense, they should not be considered blameworthy in the same manner as an adult and consequently should not receive the same reproach as an adult offender. The chapter

supervision orders; counselling; probation; foster care; education and vocational training programmes and other alternatives to institutional care shall be available to ensure that children are dealt with in a manner appropriate to their well-being and proportionate both to their circumstances and the offence; See also Human Rights Brief No. 1 <<http://www.un.org/cyberschoolbus/briefing/children/children.>> accessed January 16 2014; Priscilla Alderson, *Young Children's Rights: Exploring Belief, Principles and Practice* (2nd edn, Jessica Kingsley Publishers 2008)

noted that child justice is an integral component of child rights and that irrespective of the plethora of human rights accruable to children by virtue of their humanity, children and particularly those in conflict with the law deserve special human rights due to their age and vulnerability.

Having examined the principles of child rights as enunciated by the committee on the implementation of the CRC the chapter elevated the principles of proportionality and the best interests of the child as the twin pillars of child justice. On the basis that the principles of proportionality and the best interests of the child are the twin pillars of child justice, the next chapter will elaborate on the principle of proportionality as one of the twin pillars of child justice.

Chapter Four

The Principle of Proportionality in Child Justice

4.1 Introduction

The previous chapter recognized child justice as the rights of children in conflict with the law and further postulated that the principles of proportionality and the best interests of the child are the twin pillars of child justice. This chapter examines conceptually the principle of proportionality by narrowing it down to the perspective of child justice and particularly as a sentencing tool.

Acknowledging critical arguments to the effect that proportionality is susceptible to discrepant interpretation and application, this chapter examines consequential and deontological versions of proportionality and argues in favor of deontological proportionality as the overarching and indispensable tool in child justice. As a basis for justifying proportionality as the key plank of child justice and also as a right accruing to children in conflict with the law, this chapter traces the normative framework of proportionality to several human rights and child rights instruments and laws.

4.2 Conceptual Overview of Proportionality

Proportionality in its broad sense is a legal principle which has ancient historical roots in the *lex talionis* of Hammurabi and presupposes that the penalty should fit the crime.¹ The principle is not exclusively associated with any one area of law. It applies and spans the ambit of constitutional law, criminal law, administrative law, public and private international law, human rights law, etc. Transcending many areas of law, the universal and cross-cutting nature of the principle endears it as a judicial sentencing tool for judges determining criminal, constitutional or administrative cases.²

In the context of constitutional law, Kumm holds that the hallmark of the principle is ‘equilibrium’,³ which is applied to the weighing of a judicial remedy

¹ Mirko Bagaric, ‘Proportionality in Sentencing: Its Justification, Meaning and Role’ (2001) 12 *Current Issues in Criminal Justice* 143; See also Michael Davis, ‘How to Make the Punishment Fit the Crime’ (1983) 93 *Ethics* 726; Mirko Bagaric and James McConvill, ‘Giving Content to the Principle of Proportionality: Happiness and Pain as the Universal Currency for Matching Offence Seriousness and Penalty Severity’ (2005) 69 *The Journal of Criminal Law* 50

² Ian Farrell, ‘Gilbert & Sullivan and Scalia: Philosophy, Proportionality and the Eighth Amendment’ (2010) 55 *Vill Law Review* 321; See also Scott W. Howe, ‘Article: The Eighth Amendment As A Warrant Against Underserved Punishment’ (2013) 22 *William & Mary Bill of Rights Journal* 91

³ Mittias Kumm, ‘Democracy is Not Enough: Rights, Proportionality and the Point of Judicial Review’ (2009) *New York University Public Law and Legal Theory Working Papers*, No. 118 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1356793> accessed December 2011

against a perceived wrong and limits the level of permissible retribution.⁴ It has been argued in the area of constitutional and criminal laws that the principle enables the court to analyze whether limits imposed on the realization of certain constitutional guarantees are justified and whether punishment imposed on a particular offense serves ‘traditionally recognized penological goals.’⁵

Whether it is in the area of criminal, constitutional or administrative law, scholars have noted that the principle is fast becoming a universal standard of rationality.⁶ As a universal legal principle that is essential in the adjudication of rights in liberal democracies worldwide,⁷ the principle, according to Singer, first arose out of Anglo American jurisprudence on the basis of the Magna Carta whereby ‘[a] free man shall not be amerced for a small fault, but after the manner of the fault; and for a great crime according to the heinousness of it’.⁸ Supporting the Anglo-American heritage of the principle and while writing on the functions of proportionality in European Union law, Harbo states that the principle reflects the philosophy of the Anglo-American heritage applied in judicial proceedings to manage disputes involving an alleged conflict between two ‘rights claims, or between a rights provision and private or public interests’.⁹

In the context of child justice, the principle implies that child punishment should correspond with the crime and the culpability of the offender.¹⁰ It has also been described as a vital ingredient of modern ‘just deserts’ which underlines the nexus between crime and the moral gravity of its punishment.¹¹ While Bruce argues that the principle is an attempt to ensure that child punishment is as fair and

⁴ Tracy Thomas, ‘Proportionality and the Supreme Court’s Jurisprudence of Remedies’ (2007) 59 *Hasting Law Journal* 73

⁵ Jeremy Waldron, ‘Judges as Moral Reasoners’ (2009) 7 *International Journal of Constitutional Law* 25; Jeremy Waldron, ‘Do Judges Reason Morally?’ https://www.vpn.helsinki.fi/laws/jurisprudence/docs/2008/,DanaInfo=www.ucl.ac.uk+08_waldron.pdf accessed 5 April 2014

⁶ Vicki Jackson, ‘Being Proportional about Proportionality’ (2004) 21 *Constitutional Commentary* 803; See also D.W Greig, ‘Reciprocity, Proportionality and the Rule of Law of Treaties’ (1994) 34 *Virginia Journal of International Law* 295; T. Jeremy Gunn, ‘Deconstructing Proportionality in Limitations Analysis’ (2005) 19 *Emory International Law Review* 465; Elisabeth Zoller, ‘Congruence and Proportionality for Congressional Enforcement Powers: Cosmetic Change or Velvet Revolution?’ (2003) 78 *Indiana Law Journal* 568

⁷ Alice Ristrophe, ‘Proportionality as a Principle of Limited Government’ (2005) 55 *Duke Law Journal* 263; John F. Stinneford, ‘Rethinking Proportionality under the Cruel and Unusual Punishments Clause’ (2011) 97 *Virginia Law Review* 899

⁸ Richard G Singer, ‘Proportionate Thoughts About Proportionality’ (2010) 8 *Ohio State Journal of Criminal Law* 217; William W. Berry, ‘Practicing Proportionality’ (2012) 64 *Florida Law Review* 687

⁹ Tor-Inge Harbo, ‘The Function of the Proportionality Principle in EU Law’ (2010) 16 *European Law Journal* 158

¹⁰ Stone Sweet and J Matthews, ‘Proportionality Balancing and Global Constitutionalism’ (2008) 47 *Columbia Journal of Transitional Law* 90

¹¹ Thomas Balmer, ‘Some Thoughts on Proportionality’ (2008) 87 *Oregon Law Review* 783

proportionate as possible,¹² Kumm stresses the fact that the principle is the foundation of any legitimate system of state punishment and prohibits punishment that is excessive in relation to the crime and the culpability of the child.¹³

As an alleviative penal measure, proportionality is predicated on the three-prong consideration of the offense, culpability and punishment.¹⁴ It ensures that punishment takes into consideration the offense and the culpability of the offender. Describing proportionality as an indispensable tool in sentencing, von Hirsch is of the view that the principle is concerned with how much punishment one deserves.¹⁵ Arguing that punishment not only attempts to express blame and repay the offender, von Hirsch opines that the fundamental element of proportional punishment is that it should be commensurate to the degree of culpability and harmfulness of the conduct.¹⁶

This view was re-emphasized by Poole when he argued that in order to render punishment compatible with justice, the principle demands that punishment for crime ought to be graduated and proportionate to the offense.¹⁷ Elucidating further on the ingredients of proportionality and drawing a link between an offense, the degree of culpability and the degree of punishment deserved, Burgh noted that,

...it is not enough that we restrict punishment to the deserving, but we must, in addition, restrict the degree of punishment to the degree that is deserved. The idea is that, in committing an offense, we do not think of the offender as deserving unlimited punishment; rather we think of him as deserving a degree of punishment that is proportional to the gravity of the offense he committed... Justice, in other words, not only requires a principle of desert, but also requires a principle of proportionality between the gravity of the offense and the punishment deserved.¹⁸

¹² Cynthia Bruce, 'Proportionality Review: Still Inadequate, But Still Necessary' (2002) 14 *Capital Defense Journal* 265

¹³ Mittias Kumm 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2 *International Journal of Constitutional Law* 547

¹⁴ According to Andrew von Hirsch, the three-prong mathematical proposition of proportionality is (P equals O minus C) where 'P' is punishment, 'O' is offence and 'C' is culpability. Based on the (P equals O minus C) formula, several leading writers on proportionality tacitly endorse this formula

¹⁵ Andrew Ashworth and Andrew von Hirsch, 'Desert and the Three Rs' (1994) 5 *Current Issues in Criminal Justice* 9; Jesper Ryberg, *The Ethics of Proportionate Punishment: A Critical Investigation* (Kluwer Academic Publishers 2004)

¹⁶ *Ibid*

¹⁷ Thomas Poole, 'Proportionality in Perspective Law Society Economy' (2010) LSE Law, Society and Economy Working Papers No. 16/2010 <http://eprints.lse.ac.uk/32900/1/WPS2010-16_Poole.pdf> accessed 4 May 2011, p 5

¹⁸ Richard Burgh, 'Do the Guilty Deserve Punishment?' (1982) 79 *Journal of Philosophy* 195

4.2.1 Proportionality as a Sentencing Tool

The principle of proportionality as a sentencing tool is applied by judges in calibrating the extent to which legislation or other administrative actions intrude on the rights of citizens.¹⁹ As the central principle in sentencing and a tool in judicial efforts to balance competing interests, it ensures that the final sentence is commensurate with the totality of the subjective and objective circumstances of the offense.²⁰ In the particular context of child justice, the principle gained ground during the 1970s with the paradigm shift that occurred in common law countries and primarily in the United States from harsh sentences to consideration of other extraneous factors such as the circumstances of the offense and offender.²¹

By allowing for the interplay of extra-judicial considerations in judicial sentencing, the principle seeks to maximize the aggregate satisfaction of offenders and victims,²² and permits the court at the sentencing stage to reckon with the peculiar disadvantages and circumstances of the offender as an excusing and mitigating factor.²³ It is on this basis that Mullender argues that the effect of proportionality in sentencing is to balance the potential and actual penalty based on an empirical analysis of facts personal to the offender.²⁴ Other writers such as Mackenzie, Wyles and Thomas support the view that in sentencing, the court resolves the proportionality question by making a threshold balancing of the crime committed against the sentence imposed,²⁵ and weighs whether the punishment was cruel and unusual under the 'evolving standards of decency'.²⁶

Further light on the role of proportionality in sentencing was shed by Gunn when he argued that in some instances, the principle is equated to a rule of restraint integrating the norm of fairness in judicial remedies and sanctions that fit the legal

¹⁹ Tracy Thomas, 'Proportionality and the Supreme Court's Jurisprudence of Remedies' (2007) 57 *Hasting Law Journal* 73

²⁰ A von Hirsch and A Ashworth, *Proportionate Sentencing: Exploring Principles*, (5th edn Oxford University Press 2005) chapter 3

²¹ Tyrone Kirchengast, 'Proportionality in Sentencing and the Restorative Justice Paradigm: 'Just Deserts' for Victims and Defendants Alike' (2009) 15 *University of New South Wales Faculty of Law Research Series* <<http://law.bepress.com/unswwps/flrps09/art15>> accessed 17 May 2011 25

²² Herbert Morris, 'A Paternalistic Theory of Punishment' (1981) 18 *American Philosophical Quarterly* 263; See also Jeffrie G Murphy, 'Retributivism, Moral Education and the Liberal State' (1985) 4 *Criminal Justice Ethics* 7

²³ Richard Fox, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25 *Moash University Law Review* 7

²⁴ Richard Mullender, 'Theorizing the Third Way: Qualified Consequentialism, the Proportionality Principle, and the New Social Democracy' (2000) 27 *Journal of Law and Society* 493

²⁵ Geraldine Mackenzie, 'Achieving Consistency in Sentencing: Moving to Best Practice' (2002) 22 *University of Queensland Law Journal* 74; See also Tracy Thomas, 'Proportionality and the Supreme Court's Jurisprudence of Remedies' (1997) 57 *Hasting Law Journal* 73

²⁶ Tracy Thomas, 'Proportionality and the Supreme Court's Jurisprudence of Remedies' (1997) 57 *Hasting Law Journal* 73

harm.²⁷ Conceding that the principle sets the lower and upper ceilings of punishment and limits the excessively lenient as well as the overtly severe response, Gunn states that the principle does not prescribe the ‘exact matching of crime and punishment’ but delimits the parameters outside which a punishment may be deemed unjustified.²⁸

The principle of proportionality is distinguishable from the judicial discretion of mercy, which Fox describes as ‘an act of grace and a gift’ subject to an unconstrained discretionary sentiment and devoid of principled application.²⁹ Judicial mercy has been recognized as a mitigating factor that has been allowed in actualizing the principle of proportionality.³⁰ It also aids the determination of the weight to be ascribed to a mitigating factor and gives impetus to certain consideration not visibly captured by criminal law and procedural rules. Unlike judicial mercy, the application of the principle of proportionality in criminal law in general and child justice in particular is guided by procedural rules.

The principle of proportionality has been accorded statutory recognition in the child justice systems of several jurisdictions. In the Australian context, the principle is so important in the particular context of judicial sentencing that it cannot be trumped even by the goal of community protection.³¹ According to the Victorian Sentencing Act of 1991, one of the purposes of sentencing is to impose just punishment and to ensure that the court has regard to the gravity of the offense, the offender’s culpability and the degree of responsibility.³²

In some other jurisdictions, the principle of proportionality has suffered legislative setbacks with deliberate government policy targeting tougher sentences for children in excess of what is proportionate to their offense and culpability. The Australian Sentencing Act of 1991 for instance provides for indefinite jail term for serious offenses where the court is satisfied to a high degree of probability that the offender is a serious danger to the community.³³

²⁷ Jeremy Gunn, ‘Deconstructing Proportionality in Limitations Analysis’ (2005) 19 *Emory International Law Review* 465

²⁸ Geraldine Mackenzie, ‘Achieving Consistency in Sentencing: Moving to Best Practice’ (2002) 22 *University of Queensland Law Journal* 74

²⁹ Richard Fox, ‘When Justice Sheds a Tear: The Place of Mercy in Sentencing’ (1999) 25 *Monash University Law Review* 7

³⁰ Carla Ann Hage Johnson, ‘Entitled to Clemency: Mercy in the Criminal Law’ (1991) 10 *Law and Philosophy* 109; Janice Rogers Brown, ‘Quality of Mercy’ (1993) 40 *UCLA Law Review* 327; Randy E. Barnett, ‘Restitution: A New Paradigm of Criminal Justice’ (1977) 87 *Ethics* 279

³¹ Australian Law Reform Commission Sentencing Report (1998) 44 Canberra 15; New South Wales Law Reform Commission Sentencing Report (196) 33 Discussion Paper 62; Great Britain Home Office White Paper on Criminal Justice and Protecting the Public (1990) HMSO 5

³² UN Human Rights Committee (HRC) *UN Human Rights Committee: Addendum to the Third Periodic Reports of States Parties Due in 1991, Australia* 22 July 1999 CCPR/C/AUS/98/3 <<http://www.refworld.org/docid/3ae6b0510.html>> accessed 5 April 2014

³³ Leonard Curry, ‘Tougher Sentencing, Economic Hardships and Rising Violence’ in L Clayton (ed) (2001) 62 *Corrections Today* 74; Peter J Benekos and Alida V Merlo, ‘Three Strikes and You’re Out:

On the basis of the trend towards tougher sentences, von Hirsch maintains that the primary criterion for punishment should be the gravity of the crime. He defends the proportionality calculus and contradicts the claim that ‘no sacrifice of equity occurs when one relegates the principle of proportionality to the margins’. Accordingly, the principle of parsimony to the effect that doubts about the degree of punishment should be resolved in favor of less punishment ultimately guides the application of desert in the scaling of punishment’.³⁴

Other eminent writers that highlighted ingredients of the principle of proportionality as a tacit support tool in judicial sentencing include Lovegrove. He states that in the case of child justice, the principle should be used in the ‘allocation of sanctions, requiring commensurability between offense seriousness and sanction severity’.³⁵ This tacit endorsement of the proportionality calculus is based on the argument that the principle is not an exclusive consideration, because under certain circumstances prescribed by law, it can be overridden in the interests of crime control or the rehabilitation of the offender.³⁶ Contrary to Lovegrove’s view, crime control and rehabilitation are immaterial results of the application of the principle of proportionality. According to von Hirsch

[T]he more one looks away from the gravity of the conduct towards its predictive features in deciding how much to punish, offenders will be meted with undeserved punishment due to an extraneous and arbitrary interpretation of recidivism.³⁷

Elaborating further on what may be called the ‘injustice’ inherent in disproportionate child punishment, James argues that proportionality is rooted in retribution and questions whether an offender has received a ‘just deserts’ for an offense vis-à-vis the offender’s moral culpability and harm inflicted on the individual or society.³⁸ On the basis of the foregoing and as a core component of just desert, the effects of crime control and rehabilitation are immaterial to the application of the principle of proportionality. This is because the equal treatment of the equally deserving and proportionate treatment of the unequally deserving is clearly inevitable requirements of justice in general and child justice in particular. As a

The Political Sentencing Game’ (1995) 59 Federal Probation 3; Mary Ann Yeats ‘Three Strikes’ and Restorative Justice: Dealing with Young Repeat Burglars in Western Australia’ (1997) 8 Criminal Law Forum 369

³⁴ Andrew von Hirsch, ‘Utilitarian Sentencing Resuscitated: The American Bar Association’s Second Report On Criminal Justice’ (1981) 33 Rutgers Law Review 772

³⁵ Austin Lovegrove, ‘Proportionality, Sentencing and the Multiple Offender: Towards a Numerical Framework’ (2000) 2 Punishment and Society 453

³⁶ Ibid

³⁷ Andrew von Hirsch, ‘Utilitarian Sentencing Resuscitated; The American Bar Association’s Second Report On Criminal Justice’ (1981) 33 Rutgers Law Review 772

³⁸ Mark Alden James, ‘Eighth Amendment Proportionality Analysis: The Limits of Moral Inquiry’ (1984) 26 Arizona Law Review 871

framework that assists child courts in the fair and equitable disposition of cases and as part of the bedrock of fundamental child justice, proportionality obliges the courts to consciously juxtapose the nuanced circumstances of the child offender against the offense.³⁹

4.3 Theories of Proportionality

In its simplistic meaning, proportionality presupposes that punishment must fit the crime. Irrespective of its straight-forward meaning, the application of the principle of proportionality to children in conflict with the law is influenced by the philosophical and conceptual dichotomy inherent in the principle. Two such theories applicable at the legislative and sentencing levels and relevant to the subject of child justice are the consequentialist and deontological theories of proportionality. These two theories play unique roles in interpreting proportionality, particularly in the context of common law legal systems and most especially in the domain of child justice.

The primacy of the consequentialist and deontological theories of proportionality over other theories accords with the view that these are two main sentencing theories with divergent appreciation and application of proportionality as a notion of child justice.⁴⁰ Accentuating the primacy of these two theories, it has been argued that while the consequentialist theory is applied through the utilitarian rationale, the deontological theory is applied through the just desert or retribution rationale.

Accordingly, regardless of the fact that both consequentialist and deontological theories are mutually reinforcing and present twin perspectives on punishment, they do, however, differ due to their divergent posture on the necessity, justification and quantum of punishment deserved by child offenders.⁴¹ The distinguishing feature of both the deontological and consequentialist theories is that they apportion differing weight to the purpose and goal of punishment.⁴²

4.3.1 Consequentialist Theory of Proportionality

The consequentialist theory of proportionality is also called utilitarian proportionality. According to Thomas and in the context of the United States,

³⁹ Andrew Ashworth, *Sentencing and Criminal Justice* (4th edn Cambridge University 2005) 1; Richard G. Fox, 'Meaning of Proportionality in Sentencing' (1994) 19 Melbourne University Law Review 489; Wayne A. Logan, 'Proportionality and Punishment: Imposing Life Without Parole on Juveniles' (1998) 33 Wake Forest Law Review 681

⁴⁰ Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment: From 'Why Punish?' to 'How Much?' (1991) 25 Israel Law Review 549; Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 Crime and Justice 55

⁴¹ Ibid

⁴² R Mullender, 'Theorizing the Third Way: Qualified Consequentialism, the Proportionality Principle, and the New Social Democracy' (2000) 27 Journal of Law and Society 493

consequentialist proportionality supports the proposition that punishment can only be justified or rationalized to the extent that its imposition will secure benefit to the society at large, and that such a benefit must outweigh the harm imposed on and suffered by the wrongdoer.⁴³ As a deterrence-focused theory, it is more concerned with the crime preventive benefits of punishment and derives from the ‘spontaneous human tendency to retaliate against aggression’.⁴⁴ Under this theory, punishment is justifiable if the benefit accruable to society by its imposition outweighs the harm to the individual offender or if the need for crime prevention and control is met.⁴⁵

The consequentialist theory of proportionality as a forward-looking theory of punishment justifies social measures based on the extent to which it promotes aggregate satisfaction. Describing the theory as merely an application of the utilitarian theory of morality to the specific issue of child punishment, Bagaric cites the proposition of Bentham to the effect that punishment is justified because the good consequence it produces to society outweighs the counterpart bad consequences it inflicts on society as well.⁴⁶

The consequentialist theory of punishment is forward-looking to such an extent that the commission of a criminal act does not on its own justify punishment. Rather, punishment is warranted and inevitable if some net good to society is derivable from it. Providing further understanding of consequentialist proportionality as forward-looking, it has been argued that the imposition of punishment is justifiable in so far as its beneficial effects to society at large outweigh the harm it produces on the individual offender.⁴⁷

In other words, the dividend of punishment must include the prospect of preventing future crime and a strong focus on the reduction in crime for the safety and protection of the public.⁴⁸ Corroborating the futuristic lens of consequentialist proportionality and the fact that the moral culpability of the offender on its own does not justify the imposition of punishment, Smith argues that punishment imposed on an offender is only justifiable if it is imposed specifically with the sole aim and as a mechanism of averting future social harm to society at large.⁴⁹

⁴³ Tracy Thomas, ‘Proportionality and the Supreme Court’s Jurisprudence of Remedies’ (2007) 59 *Hastings Law Journal* 73

⁴⁴ Richard G. Singer, ‘Proportionate Thoughts about Proportionality’ (2010) 8 *Ohio State Journal of Criminal Law* 217

⁴⁵ *Ibid*

⁴⁶ Mirko Bagaric, ‘Proportionality in Sentencing: its Justification, Meaning and Role’ (2001) 12 *Current Issues in Criminal Justice* 144

⁴⁷ David Dolinko, ‘Retributism, Consequentialism and the Intrinsic Goodness of Punishment’ (1997) 16 *Law and Philosophy* 509

⁴⁸ David Dolinko, ‘Some Thoughts about Retributivism’ (1991) 101 *ETHICS* 537; David Dolinko, ‘Three Mistakes of Retributivism’ (1992) 39 *UCLA Law Review* 1623

⁴⁹ Stephen Smith, ‘Proportionality and Federalization’ (2004) 91 *Virginia Law Review, Public Law and Legal Theories Working Paper Series* <http://bpress.com/uvalwps/uva_publiclaw/art11>

The consequentialist theory of aggregate satisfaction as propounded by Bentham was later reformulated by subjecting punishment to ‘cost benefit analysis’ which is predicated on the notion that punishment must maximally balance its beneficial and detrimental consequences on the offender, the victim and the society at large.⁵⁰ In consequence thereof, consequentialist proportionality supports the view that the state is justified in imposing punishment on an offender if and only if the said punishment can secure benefits for the society as a whole.

According to Thomas, the punitive goals of deterrence and mere incapacitation are not enough to impose punishment on an offender; rather, punishment must be based on the delicate balancing of the benefits of the positive and negative consequences of punishment.⁵¹ Proportionality in the consequentialist sense seldom focuses retrospectively on the nature of the offense as a determinant of the quantum of punishment, but rather on prospective and future-oriented deterrence and retribution.

Since the harm and benefit equilibrium is the sole determinant of the quantum of punishment for any crime, consequentialist proportionality does not cap the degree of punishment that can potentially be imposed on an offender. Rather it balances the harm and benefit by juxtaposing the harm imposed on the wrongdoer against the benefits secured by the society at large.⁵² Although examined through the lens of the Eighth Amendment to the United States Constitution, it has been argued that the concern of consequentialist proportionality is the achievement of a just outcome and the maximization of some measure of aggregate social benefit through punishment.⁵³

In that vein, Dolinko concludes that a just punishment under the consequentialist platform is one that maximizes the costs of crime and ensures that the criminal conduct must be so atrocious that society’s interest in deterring the offender wholly outweighs any other consideration.⁵⁴ Similarly, punishment is desirable on the sole basis that its imposition must generate beneficial consequences

accessed 15 February 2011; Alice Ristroph, ‘Desert, Democracy, and Sentencing Reform’ (2006) 96 *The Journal of Criminal Law and Criminology* 1293

⁵⁰ Angelo Corlett, *Responsibility and Punishment* (4th edn Springer Netherlands 2013) 61; J. Angelo Corlett, ‘Making More Sense of Retributivism: Desert as Responsibility and Proportionality’ [2003] *Philosophy* 279

⁵¹ Tracy Thomas, ‘Proportionality and the Supreme Court’s Jurisprudence of Remedies’ (2007) 59 *Hasting Law Journal* 73

⁵² Jeremy Waldron, ‘Concept and the Rule of Law’ (2009) 43 *Georgia Law Review* 1; Jeremy Bentham & John Stuart Mill (eds.) *The Utilitarians: An Introduction to the Principles of Morals and Legislation* (Doubleday 1961) 165

⁵³ Ian Farrell, ‘Gilbert & Sullivan and Scalia: Philosophy, Proportionality and the Eighth Amendment’ (2010) 55 *Vill. L. Review* 321

⁵⁴ David Dolinko, ‘Some Thoughts about Retributivism’ (1991) 101 *ETHICS* 537

to the society over and above the harm it inflicts on the offender.⁵⁵ In its original form of ‘aggregate satisfaction’ and its revised version of ‘cost benefit analysis’, the consequentialist theory of proportionality ‘does not aid the determination of the quantum of punishment to be visited on an offender due to the reprehensibility of their conduct’.⁵⁶

The reformulated cost-benefit analysis of consequentialist proportionality still portends an affront to justice and is capable of supporting disproportionate punishment.⁵⁷ This is because punishment is not only predicated on the quantum of punishment or the gravity of the criminal conduct, but more also on the prospects of the offender reoffending. While this theory may achieve some preventive gains, the fact that its goal is to censure and condemn makes it sometimes insensitive to the culpability of the offending conduct.⁵⁸

Negating the consequentialist theory of proportionality as it relates to the jurisprudence of child justice and as an ineffective tool for measuring and apportioning punishment, Wood quotes Bentham as stating that punishment ought to be restricted to those who have voluntarily committed offenses when availed with the requisite mental capacity.⁵⁹ This view is conceded to by von Hirsch who maintains that the preventive efficacy of punishment should not be the sole basis for punishment and that punitive sanctions should be proportionate in severity to the degree of culpability of the offender.⁶⁰

4.3.2 Deontological Theory of Proportionality

The deontological theory of proportionality otherwise known as retributive proportionality or just desert underlines the fact that persons who willfully choose to commit morally blameworthy acts deserve punishment. Deontological proportionality advocates a penal rationale that is humane and not in excess of what

⁵⁵ Dirk van Zyl Smit, ‘Life Imprisonment: Recent Issues in National and International Law’ (2006) 29 *International Journal of Law and Psychiatry* 405

⁵⁶ John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice*, (Oxford University Press 1990) 45

⁵⁷ Andrew von Hirsch, ‘Proportionality in the Philosophy of Punishment’ (1992) 16 *Crime and Justice* 55; Jesper Ryberg, *The Ethics of Proportionate Punishment: A Critical Investigation* (Kluwer Academic Publishers 2004)

⁵⁸ Andrew von Hirsch, ‘Utilitarian Sentencing Resuscitated: The American Bar Association’s Second Report On Criminal Justice’ (1981) 33 *Rutgers Law Review* 772; Andrew von Hirsch, ‘Proportionate Sentences for Juveniles: How Different than for Adults?’ (2001) 3 *Punishment and Society* 221

⁵⁹ David Wood, ‘Retribution, Crime Reduction and Justification of Punishment’ (2002) 22 *Oxford Journal of Legal Studies* 301; James T McHugh, ‘Utilitarianism, Punishment, and Ideal Proportionality in Penal Law: Punishment as an Intrinsic Evil’ (2008) 10 *Journal of Bentham Studies*

⁶⁰ Andrew von Hirsch, ‘Utilitarian Sentencing Resuscitated: The American Bar Association’s Second Report On Criminal Justice’ (1981) 33 *Rutgers Law Review* 772; Elizabeth M. Mills, ‘Eighth Amendment: Cruel and Unusual Punishment: Habitual Offender's Life Sentence without Parole Is Disproportionate’ (1983) 74 *1372*

is necessitated by the crime committed.⁶¹ Although deontological proportionality prescribes punishment, this is only to such extent that such punishment serves the desired end or is necessary for the attainment of its goals.⁶² Corroborating this view which is more pertinent in the context of child justice, Fontaine reasons that a punishment is unjust if its impact is greater than what is required to achieve the desired punitive goal.⁶³

In his contribution to the debate on theories of proportionality, Pinncoffs opines that deontological proportionality is generally based on the premise that ‘the return of suffering for moral evil voluntarily done is itself just or morally good’.⁶⁴ He considers deontological proportionality as a necessary corollary of the principle of desert in which case the moral wrongdoing determines who should be punished and the degree of wrongdoing determines the amount of that punishment.⁶⁵

Similarly, deontological proportionality is particularly concerned with the moral appropriateness of individual punishment in relation to the offender’s culpability.⁶⁶ This contention is relevant in the case of child justice because ‘just’ punishment in the context of deontological proportionality takes into consideration and appropriately balances the offender and the offense.⁶⁷ Along the same lines, Braithwaite and Pettit argue that deontological proportionality is encapsulated in penal desert and opines that child penalties should be scaled to reflect the culpability of the offender.⁶⁸

Emphasizing the strong interconnectedness between culpability and penalty, it was stated that as a basic requirement of fairness, the desert rationale of deontological proportionality accords sentencing its most dominant role.⁶⁹ The double-barreled effects of deontological proportionality is that ‘equally blameworthy conduct be punished equally and that penalties be ranked in severity to reflect the

⁶¹ Reid Fontaine, ‘Social Information Processing, Subtypes of Violence and a Progressive Construction of Culpability and Punishment in Juvenile Justice’ (2008) 31 *International Journal of Law and Psychiatry* 136

⁶² Michael Tonry, ‘Obsolescence and Immanence in Penal Theory and Policy’ (2005) 105 *Columbia Law Review* 1233

⁶³ Reid Fontaine, ‘Social Information Processing, Subtypes of Violence and a Progressive Construction of Culpability and Punishment in Juvenile Justice’ (2008) 31 *International Journal of Law and Psychiatry* 136

⁶⁴ Edmund Pincoffs, *Philosophy of Law: A Brief Introduction* (Wadsworth Publishers 1991) 22

⁶⁵ *Ibid*

⁶⁶ Michael Tonry, ‘Obsolescence and Immanence in Penal Theory and Policy’ (2005) 105 *Columbia Law Review* 1233

⁶⁷ *Ibid*

⁶⁸ John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice*, (Oxford University Press 1990) 45

⁶⁹ Andrew von Hirsch, ‘Proportionality in the Philosophy of Punishment’ (1992) 16 *Crime and Justice* 55

relative seriousness of the criminal behavior'.⁷⁰ Deontological proportionality is a tool for scaling punishments and any deviation from matching the severity of penalties with the gravity of the offense must be adequately justified.⁷¹

In line with this view, if a sentence connotes blame, it should be scaled in accordance with the level of culpability of the conduct,⁷² and thus graduated proportionately to fit the gravity of the criminal conduct.⁷³ When deontological proportionality is distinguished from other future-oriented sentencing theories, the gravity of past conduct and not the likelihood of future behavior should be the determining factor behind punishment.⁷⁴ This argument is subscribed to because the appropriate sentencing framework must reflect deontological considerations.

In response to the criticism of imprecision leveled against deontological proportionality, it is noteworthy that all judgements are approximate and imprecise and that while the law operates in standardized templates, it does permit certain deviations in some circumstances.⁷⁵ Furthermore, bearing in mind that child judges are legally trained and not social scientists and are in a better position to evaluate crime seriousness than they are to gauge reoffending and the treatment potential of children,⁷⁶ deontological proportionality when compared to consequentialism is a veritable tool in child justice sentencing.

Corroborating this view, Wood argues that since the deontological measures are by their very nature necessarily harsh and unpleasant to the recipients, such intrusive measures are solely needed for their backward-looking retributivist and not forward-focused reformatory purposes.⁷⁷ To ensure fair and equal payback for the offender's conduct, the severity of punishment must connote and convey the amount of blame directly in consonance with the alleged misconduct. Unlike any other theory of proportionality, the key question in arriving at a fair punishment from a deontological sense is how much to punish offenders for the crimes committed and not for crimes foreseen to be committed.

⁷⁰ Andrew Von Hirsh, 'Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and their Rationale' (1984) 74 *The Journal of Criminal Law and Criminology* 209

⁷¹ Andrew Von Hirsch, 'Proportionate Sentences for Juveniles: How Different than for Adults?' (2001) 3 *Punishment and Society* 221

⁷² John Braithwaite and Philip Pettit, *Not Just Deserts: A Republican Theory of Criminal Justice*, (Oxford University Press 1990) 45

⁷³ Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime and Justice* 55

⁷⁴ Andrew Von Hirsh, 'Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and Their Rationale' (1984) 74 *The Journal of Criminal Law and Criminology* 209

⁷⁵ Andrew von Hirsch, 'Why Have Proportionate Sentences: A Reply to Professor Gabor' (1990) 32 *Canadian Journal of Criminology* 547

⁷⁶ Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment' (1992) 16 *Crime and Justice* 55

⁷⁷ David Wood, 'Retribution, Crime Reduction and Justification of Punishment' (2002) 22 *Oxford Journal of Legal Studies* 301

Despite the role of deontological proportionality in mitigating the harshness of judicial sentencing and the intrusion of penal sanctions on rights, the principle has been sternly criticized for being prone to varied interpretations, clogged with factual and moral misjudgements and incapable of withstanding scrutiny.⁷⁸ Bagaric argues further that the principle does not facilitate uniform sanctions for like offenses and does not provide a meaningful guide to sentences because of its weak definition and application.⁷⁹

Several proponents of proportionality have countered Bagaric's argument and contend that deontological proportionality focuses attention on the severity of punishment being imposed on the child offender. As a deliberate design and an essential tool in judicial sentencing, the principle is intentionally circumscribed loosely and is non-prescriptive of the exact quantum of punishment in order to enable its application to a multiplicity of scenarios, facts and actors.⁸⁰

4.3.3 Deontological Proportionality: Basis for Child Justice

As a basis for child justice, deontological proportionality has been described as the moral and legal scaffolding for arriving at a just punishment for children in conflict with the law based specifically on their age and maturity.⁸¹ In a similar vein, it has also been observed that deontological proportionality in child justice, also known as the retributive theory of child justice, integrates the principle of proportionality in the administration of child justice and ensures that children in conflict with the law deserve reduced punishment.⁸²

Walgrave postulates that deontological proportionality in the context of child justice draws a balance between treatment and punishment in response to youth crime.⁸³ Akin to this, von Hirsch proposes that at all points on the penalty scale of child offenses, a reasonable proportion should be maintained between the quantum of punishment, the gravity of the conduct and the degree of culpability.⁸⁴ He postulates further that deontological proportionality in the context of child justice

⁷⁸ Mirko Bagaric, 'Proportionality in Sentencing: Its Justification, Meaning and Role' (2001) 12 *Current Issues in Criminal Justice* 144

⁷⁹ Ibid

⁸⁰ Andrew von Hirsch, 'Proportionality and Desert: A Reply to Bedau' (1978) 75 *The Journal of Philosophy* 622

⁸¹ Richard Fox, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25 *Monash University Law Review* 7

⁸² David Dolinko, 'Some Thoughts about Retributivism' (1991) 101 *Ethics* 537

⁸³ Lode Walgrave, 'Restoration in Youth Justice, Crime and Justice' (2004) 31 *Youth Crime and Justice: Comparative and Cross-National Perspectives* 543

⁸⁴ Andrew von Hirsch, 'Proportionate Sentences for Juveniles: How Different' (2001) *Punishment & Society* 221; Andrew von Hirsch, *Past of Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Manchester University Press 1986); Jasper Ryberg, 'Responsibility and capacities: A Note on the Proportionality Assumption' (2014) *Analysis Advance Access* 1

involves the consideration of the 'ordinal' and 'cardinal' ingredients of proportionality.

In the first place, for child punishment to be commensurate with the gravity of the offense and in tune with deontological conception of proportionality, it must be ordinal and ensure parity with the culpability of the child offender. On the other hand, since the culpability of children in conflict with the law differs from that of adult offenders even though they commit similar offenses, the permissible deviation in child justice highlights the mitigated culpability of children in conflict with the law.⁸⁵

Deontological proportionality in the context of child justice is thus inclined towards drawing the boundary of what an adequate punishment for a child offender is. Writing within the context of the African human rights framework, Malley opines that even when equity mitigates the harshness of the law, there may still be a miscarriage of the law for children in conflict with the law through procedural and structural variables.⁸⁶ He postulates that the principle of proportionality is a key modality in averting and mitigating the harshness and potentially the unintended consequences of substantive and procedural laws applicable to child delinquency.⁸⁷

Similarly, Fox maintains that retribution blends with the deontological principle of proportionality to guide the allocation of punishment for child offenses and offenders. Accordingly, although punishment should be commensurate to the seriousness of the offense, there is a pertinent need for a reduction in the severity of the punishment with regard to mitigating factors personal to the child offender.⁸⁸ In so far as retribution justifies punishment for child wrongdoing, it nevertheless requires a deontological consideration of mitigating factors in determining proportionate punishment for the child offender.

By the same token, Burgh noted that retribution in child justice must as a rule evaluate whether its application in a particular case generates results consistent with the deontological principle of proportionality.⁸⁹ von Hirsch is a vehement protagonist of deontological proportionality and is supportive of deontological proportionality in

⁸⁵ Tom O'Malley, 'Sentencing Values and Sentencing Structure' (2003) 3 *Judicial Studies Institute Journal*

<http://www.jsijournal.ie/html/volume%203%20no.%201/3%5B1%5D_o'malley_sentencing%20values%20and%20sentencing%20structures.pdf> accessed 12 December 2012 133; John Gardner, 'Crime: In Proportion and In Perspective' in Ashworth and Wasik (eds.) *Fundamentals of Sentencing Theory*, Chapter 2; Jeremy Horder, 'The Duel and the English Law of Homicide' (1992) 12 *Oxford Journal of Legal Studies* 419

⁸⁶ Tom O'Malley, 'Sentencing Values and Sentencing Structure' [2003] *Judicial Studies Institute Journal*, Vol. 3: 133

⁸⁷ *Ibid*

⁸⁸ Richard Fox, 'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25 *Monash University Law Review* 7

⁸⁹ Richard Burgh, 'Do the Guilty Deserve Punishment?' (1982) 79 *Journal of Philosophy* 193

child justice as well. He argues that for children in conflict with the law to deserve punishment, their lesser culpability and the impact of punishment on them must be thoroughly evaluated.⁹⁰ In actual fact, the reduced punishment of children in conflict with the law ought to be hinged on their lesser degree of culpability exemplified in their lesser capacity to appreciate the harmful effects of criminal action. As such, severe punishment for children in conflict with the law overstates blame because it responds to them with culpability far beyond what is proportionate.

Conversely, and while writing in the context of the United States, von Hirsch's argument for the abolition of separate child courts and in their place courts of general jurisdiction to process child cases and apply separate and milder sentencing standards is contestable.⁹¹ The fact that he may seem to propose courts of general jurisdiction operating equally with special jurisdiction to hear child cases is inconsonant with several legal systems and jurisdictions of developing countries such as Nigeria. In these countries, there is a stark absence of well-defined sentencing guidelines for child justice administration except for the substantive Criminal Procedure Codes.

Other erudite scholars bring additional perspectives to the debate on deontological proportionality in the context of child justice. According to Feld, because the idea of deserved punishment emphasizes culpability, criminal law confronts in a special way the case of those who are criminally responsible, yet manifestly impaired, mentally ill or developmentally different from competent adult offenders.⁹² He argues that the developmental limitation that impinges on the culpability of mentally ill offenders applies to children in conflict with the law because they are less competent decision-makers and thus require greater protection than adults because of their immaturity. In supporting this dictum, the United States case of *Thompson v Oklahoma* held that:

[L]ess culpability should attach to a crime committed by a juvenile than to a comparable crime committed by an adult... Inexperience, less education, and less intelligence make the teenager less able to evaluate the consequences of his or her conduct while at the same time he or she is much more apt to be motivated by mere emotion or peer pressure than an adult. The reasons why juveniles are not

⁹⁰ Andrew von Hirsch, 'Proportionate Sentences for Juveniles: How Different' (2001) *Punishment & Society* 221

⁹¹ In an earlier writing, von Hirsch notes that the justification for penal differentiation between children and adult offenders must be based not just on children's greater sensitivity to punishment, but also on age-related normative expectations for judging the behavior of a young person'. See Andrew von Hirsch, 'Proportionality in the Philosophy of Punishment: From 'Why Punish' to 'How Much'? (1991) 25 *Israel Law Review* 549

⁹² Barry C Feld, 'Competence, Culpability, And Punishment: Implications of *Atkins* For Executing And Sentencing Adolescents' (2003) 32 *Hofstra Law Review* 646

trusted with the privileges and responsibilities of an adult also explain why their irresponsible conduct is not as morally reprehensible as that of an adult.⁹³

This decision accords with the postulation of Barry to the effect that notwithstanding that children are capable of inflicting blameworthy harm by their conduct, their actions connote and carry less culpability than those of adults. The logic behind this argument is that if the law acts paternalistically to impose contractual disabilities on a young person vis-à-vis adults because of his or her inexperience and immaturity, it will amount to a double standard if the law treats the culpability of adults and young offenders equally.

Similarly, due to the fact that children are not endowed with rational cognitive capacity nor self-control and volitional capacity equivalent to that of adults, it is inappropriate to hold them equally accountable and responsible for their conduct as adults. Ristroph added some perspectives to deontological proportionality in child justice. Although his conception of deontological proportionality was adduced in the specific context of the constitutionality of the State of California's 'three strikes' policy, it is, however, relevant to an understanding of deontological proportionality in child justice.

According to him, proportionality in the context of child justice presupposes that all sentences are ameliorable to the extent that punishment which would normally be regarded as commensurate to the gravity of an offense may be alleviated in consequence of the factors personal to the offender's circumstances.⁹⁴ In other words, the principle of proportionality is a mitigating factor in child justice and is generally anchored in the age and immaturity of the child offender.⁹⁵

According to O'Hear, the principle of proportionality shapes the fairness of the child justice system and its response to child delinquency by imposing punishment that is proportionate to the culpability of the child offender.⁹⁶ The principle is also based on the assumption that young offenders are not morally blameworthy or accountable for their faults because of their reduced mental development.⁹⁷

In the context of child justice, deontological proportionality makes a paradigm shift and focuses not only on the offense but most importantly on the

⁹³ *Thompson v Oklahoma*, 487 U.S. 815 (1988)

⁹⁴ A Ristroph, 'Proportionality as a Principle of Limited Government' (2005) 55 *Duke Law Journal* 263; See also Alice Ristroph, 'How (Not) to Think Like a Punisher' (2009) 61 *Florida Law Review* 727; William W. Berry III, 'Promulgating Proportionality' (2011) 46 *Georgia Law Review* 46

⁹⁵ Michael M. O'Hear, 'Is Restorative Justice Compatible with Sentencing Uniformity' (2005) 89 *Marquette Law Review* 306

⁹⁶ *Ibid*

⁹⁷ Franklin E. Zimring, 'Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity and Diminished Responsibility' in Thomas Grisso and Robert Schwartz (eds) *Youth on Trial: A Developmental Perspective on Juvenile Justice* (University of Chicago Press 2000) 462

offender. Accordingly, factors personal to the child offender's circumstances and which serve to mitigate the harshness of retributive justice such as the child's age, immaturity and culpability must be considered. As a derivative of the above-mentioned, consequentialist and deontological theoretical strains of proportionality in the sphere of child justice sometimes intersect to the extent that it is not unusual to observe a mixture of the forward-looking disposition of consequentialist proportionality and the backward-looking thread of deontological proportionality in contemporary child justice systems. In the particular context of child justice, proportional punishment is deontological because amongst other things, human rights standards are by their very nature deontological.

4.4 Normative Framework of Proportionality in Child Justice

The principle of proportionality is a key feature and central plank of child justice jurisprudence. As with other legal principles, scholars contend that the principle is based on a normative framework articulated through several international and regional human rights norms and child specific instruments.⁹⁸ Deontological proportionality in the context of child justice is evident in the CRC. Article 40(4) enjoins state parties to:

[T]reat every child alleged as, accused of, or recognized as having infringed the penal law in a manner appropriate to the well-being of the child and proportionate both to their circumstances and the offense.⁹⁹

The deontological inclination of the CRC's child justice framework lends credence to the primacy of the principle in child justice administration. The convention enjoins state parties to treat every child in an appropriate and proportionate manner having regard for the offense and well-being of the child. According to Balmer, the underlying normative strength of Article 40(4) of the CRC is the phrase 'manner appropriate to the well-being of the child and proportionate both to their circumstances and the offense'. This normative framework enjoins consideration of circumstantial issues by the court including the culpability of the child offender, his or her immediate environment or mental state, the nature of the injury to the victim and ultimately the quantum of the punishment to be imposed.¹⁰⁰

Unlike the CRC, the ACRWC deductively articulated proportionality in a deontological perspective. While proportionality is expressly mentioned in Article

⁹⁸ Ian Farrell, 'Gilbert & Sullivan and Scalia: Philosophy, Proportionality and the Eighth Amendment' (2010) 55 Vill. L. Review 321

⁹⁹ Article 40(4) UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989 article 40(4); J. Sloth-Nielsen, 'Children's Rights in the South African Courts: An Overview Since Ratification of the UN Convention on the Rights of the Child' (2002) 10 International Journal of Children's Rights 137

¹⁰⁰ Thomas Balmer, 'Some Thoughts on Proportionality' (2008) 87 Oregon Law Review 783

40(4) of the CRC, the reverse is the case with respect to all the articles of the ACRWC including the section relating to the administration of child justice. The closest to the principle of proportionality in the ACRWC states that:

Every child accused or found guilty of having infringed the penal law shall have the right to special treatment in a manner consistent with the child's sense of dignity and worth and which reinforces the child's respect for human rights and fundamental freedoms of others.¹⁰¹

Although the ACRWC does not specifically mention proportionality in Article 17(1) and other provisions relating to child justice, deontological proportionality in the African child justice normative framework is inferable. The phrase 'the right to special treatment in a manner consistent with the child's sense of dignity and worth' is arguably an African-centric conception of proportionality. Excavating the reason why the principle was not expressly mentioned in the ACRWC is outside the ambit of this thesis, however, it may be speculated that the age-long and undocumented African traditional belief and practice of mitigated response to childhood misdeed on the basis of their emotional immaturity and development can account for this omission.¹⁰²

Certainly, the omission of proportionality in the ACRWC is by no means suggestive of the unimportance of the principle in the African child justice framework. Bearing in mind that the principle plays a pivotal role in the adjudication of child rights, its significance in the continent cannot be over emphasized. While the express articulation of deontological proportionality under the ACRWC may not be adjudged adequate, the same cannot be said of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice.¹⁰³

The deontological slant of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice is evident in Rule 5 and its commentary. As a mechanism for ensuring deontological proportionality, Rule 5 calls for no less and no more than a fair reaction in any given case of child delinquency and crime. It underlines the well-being of the child and proposes that any reaction to a child offender shall always be in proportion to the circumstances of both the offender and

¹⁰¹ Article 17 (1) Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990, CAB/LEG/24.9/49 (1990)

¹⁰² Agya Boakye-Boaten, 'Changes in the Concept of Childhood: Implications on Children in Ghana' (2009) 3 *Journal of Afro-European Studies* 1

¹⁰³ UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules')* 29 November 1985; See also John Parry-Williams, 'Legal Reform and Children's Rights in Uganda - Some Critical Issues' (1993) 1 *International Journal of Child Rights* 49

offense.¹⁰⁴ Furthermore and in confirmation of the deontological proportionality inclination, commentary 5.1 considers proportionality as an instrument for curbing punitive sanctions and refers to the principle as one of the most important objectives of child justice. The commentary goes further to elaborate on the deontological inclination of the Rule to the effect that:

The response to young offenders should be based on the consideration not only of the gravity of the offense but also of personal circumstances. The individual circumstances of the offender (for example social status, family situation, the harm caused by the offence or other factors affecting personal circumstances) should influence the proportionality of the reactions (for example by having regard to the offender's endeavour to indemnify the victim or to her or his willingness to turn to a wholesome and useful life).¹⁰⁵

By the same token and acknowledging that there is an apparent possibility that certain reactions aimed at ensuring the welfare of young offenders may go beyond necessity and therefore infringe upon child rights, any judicial reaction against children is expected to accommodate the tripartite of the offender, the offense and the victim. Rule 6 (1) of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice provides that:

In view of the varying special needs of juveniles as well as the variety of measures available, appropriate scope for discretion shall be allowed at all stages of proceedings and at the different levels of child justice administration, including investigation, prosecution, adjudication and follow-up dispositions.

The United Nations Standard Minimum Rules for the Administration of Juvenile Justice combine several important, fair and humane features of child justice administration to allow the exercise of discretionary powers and by extension, proportionate balancing at all stages of judicial processing. This is to enable those who are charged with decision-making pertaining to a child to take the necessary actions deemed to be most appropriate in each individual case. To provide deontological guidance to a competent authority in the exercise of its discretionary powers, Rule 16 requires that adequate social services should be available to deliver social inquiry reports of a qualified nature. It states further that:

In all cases except those involving minor offences, before the competent authority renders a final disposition prior to sentencing, the background and circumstances in which the juvenile is living

¹⁰⁴ UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules')* 29 November 1985 Rule 5.1

¹⁰⁵ *Ibid*,

or the conditions under which the offence has been committed shall be properly investigated so as to facilitate judicious adjudication of the case by the competent authority.¹⁰⁶

Deontology proportionality, which in practice is the hallmark of child justice, could be deciphered from Rule 17 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice. It provides that in all cases of adjudication and disposition, the competent authority shall ensure that the reaction taken against a child shall always be in tandem not only with the circumstances and the gravity of the offense, but also with the circumstances and the needs of the child as well as the needs of the society.

While the proportionality principle under the foregoing instruments and laws under consideration may have taken account of the child's individual levels of responsibility, the finding is that in all these instruments and laws, their inclination to deontology is evident. This conclusion is based on the premise that the above instruments and laws impose an obligation on the courts to evaluate and analyze the idiosyncratic characteristics of every child offender. According to Fontaine, the consideration of the extraneous characteristics and circumstances of the offender presuppose that, to the extent possible, child sanctions should view desert as necessary but not sufficient to justify punishment that is without recourse to the culpability of child offenders.¹⁰⁷

In this sense and to ensure that the finding of delinquency is in accordance with the law, punishment is expected not to exceed the maximum or jurisdictional limits prescribed by enabling law, having regard for the totality of the child offender's circumstances and the prerequisite need for his/her rehabilitation. Consequently, and in line with Frase's argument, the normative basis of the principle of proportionality which is equated to equilibrium,¹⁰⁸ enjoins the courts in delinquency proceedings to closely consider any and all mitigating factors that may potentially reduce the subjective culpability of the delinquent.¹⁰⁹

Defining proportionality as a limitation on the scope and quantum of penal options available to a court in delinquency proceedings, and on the basis of the analysis of the foregoing human rights instruments, the normative framework of proportionality in child justice is deontological. Also, the centrality of deontological proportionality in the normative framework of child justice is further buttressed by

¹⁰⁶ UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules')* 29 November 1985, Rule 16 (1)

¹⁰⁷ Reid Griffith Fontaine, 'Social Information Processing, Subtypes of Violence, and a Progressive Construction of Culpability and Punishment in Juvenile Justice' (2008) 31 *International Journal of Law and Psychiatry* 136

¹⁰⁸ Richard Frase, 'Excessive Prison Sentences, Punishment Goals and the Eighth Amendment, 'Proportionality' Relative to What?' (2005) 89 *Minnesota Law Review* 571

¹⁰⁹ Tracy Thomas, 'Proportionality and the Supreme Court's Jurisprudence of Remedies' (2007) 57 *Hasting Law Journal* 73

the fact that child justice is within child rights which are by their very nature inherently deontological. On grounds of deontological proportionality, the culpability of children in conflict with the law should not be measured only by the amount of harm caused by the child offender or the impact of his or her offense on the victim or society, but also on his or her mitigated culpability.

Thus, in determining the culpability of children in conflict with the law, the issue confronting the court is how to determine to what extent and in what ways the immaturity of the child offender could be taken into consideration in arriving at an appropriate and mitigated punishment. The tool for navigating this delicate balance is proportionality. As one of the twin pillars of child justice, proportionality directs that punishment meted to a child offender should be proportionate not only to the latitude prescribed by law and the amount of harm caused to the victim and society at large, but also to the culpability of the offender.

4.5 Conclusion

Having examined the principle of proportionality in the particular context of child justice and also as an invaluable sentencing tool, the chapter found that the conceptual overview of proportionality presupposes that punishment must fit the crime and the culpability of the offender. After examining the backward-looking and forward-looking classification of proportionality, this chapter found that deontological proportionality is the overarching principle and basis for child justice.

In rationalizing proportionality as the key plank of child justice and also as rights of children in conflict with the law, the chapter traced the normative foundation of proportionality and its deontological strand to international and regional child specific instruments. Comparing the proportionality provisions in the CRC and other child rights instruments, vis-à-vis the ACRWC, this chapter observed that even though the ACRWC provision of proportionality is comparatively weak and merely deductive, the relevance of the principle in the African child justice framework is nevertheless important. The chapter found that in the supervening interest of justice, children in conflict with the law should not be held to the same evaluative standards by which adult culpability and punishment are judged. Rather, children in conflict with the law should receive proportionately less punishment than adults for the same crimes because of their immaturity and vulnerability.

Having established the importance of proportionality in child justice and bearing in mind that the principle has been elevated to one of the twin pillars of child justice, this thesis will therefore move to examine the other principle of child rights that complements the principle of proportionality to form the twin pillars of child justice.

Chapter Five

The Principle of the Best Interests of the Child

5.1 Introduction

While the preceding chapter examined the principle of proportionality as one of the twin pillars of child justice, this chapter examines the principle of the best interests of the child as the second pillar of child justice. It also identifies the normative foundation of the principle of the best interests of the child particularly in the context of child justice. The chapter acknowledges the arguments that impinge on the application of the principle of the best interests of the child and the possibility that it may entertain diverse interpretations of a single fact. However, after due exploration of the principle, particularly in the context of child justice, this chapter argues that the principle of the best interests of the child is the second pillar of child justice and a worthwhile balancing tool at the disposal of courts while processing children in conflict with the law.

5.2 Overview of the Principle of the Best Interests of the Child

In the nineteenth century, children were not considered as independent right holders, and as such, the concept of child rights and its promotion and protection both within the family and society were almost nonexistent.¹ The twentieth century paradigm shift enabled the state to protect children as independent beings and on the basis of their best interests.² The emergence of the twentieth century came with dedicated laws to protect children on the basis of their best interests.³ In Goonesekere's view, the introduction of the law of equity mitigated the harshness of common law by boosting the notion of child rights through the intervention of the crown on the grounds of the best interests of the child.⁴

Whilst the principle of the best interests of the child is an age-long notion in family law traceable to both English and French laws,⁵ it delimits, in the context of child justice, how courts are to treat children in conflict with the law. According to Archard, the principle of the best interests of the child has featured in diverse areas

¹ Christian Reichel Van Deusen, 'The Best Interest of the Child And the Law' (1991) 18 *Pepperdine Law Review* 417; Christian Reichel Van Deusen, *The Best Interest of the Child And the Law* (Twayne Pub 1991); Theresa Glennon and Robert G Schwartz, 'Foreword: Looking Back, Looking Ahead: The Evolution of Children's Rights' (1995) 68 *Temple Law Review* 1557

² Philip Alston and Bridget Gilmour-Walsh, *The Best Interests of the Child: Towards A Synthesis of Children's Rights and Cultural Values* (Innocenti Studies 1996)

³ Savitri Goonesekere, 'The Best Interests of the Child: A South Asian Perspective' (1994) 8 *International Journal of Law, Policy and the Family* 117

⁴ *Ibid*

⁵ David Archard, 'Children's Rights' (2013) *The International Encyclopedia of Ethics* 1

of law but more pivotally in family law, particularly in custody disputes.⁶ Wayne, among several authors, has tried to give meaning to the principle of the best interests of the child. Even though he did so in the context of family law, he described it as a prediction of what among available alternatives, holds the most promise for meeting the child's holistic needs.⁷

Also linking the history of the principle of the best interests of the child to family law, it has been argued that the principle is used in the sphere of child protection and child rights to influence decisions relating to children.⁸ Accentuating and clarifying on the principle further, Joyce considered it to be a method of making decisions that requires the decision-maker to think what the best course of action is for the child.⁹ In her opinion, the principle does not presuppose the personal views of the decision-maker, but rather, compels the decision-maker to consider both the current and future interests of the child, weigh them up and decide which course of action is, on balance probabilities is in the best interests of the child.¹⁰

Elucidating further the principle outside the boundaries of family law, Parker argues that the principle of the best interests of the child provides the framework for evaluating the laws and practices of state parties where the matter is not governed by positive rights in the convention.¹¹ Despite its origin in family law and by extension its incidental welfare inclination, the content and significance of the principle of the best interests of the child has transited over the years out of the family law domain. At present, the principle, having become entrenched in several international and regional human rights instruments and laws, is prevalent in several areas of law but is particularly more dominant in the area of human rights generally and child justice in particular.

According to Ihua-Maduenyi, the principle presupposes that the best be done for the child,¹² and for Buchanan and Brock, the principle maximally promotes the good of the child.¹³ Writing within the framework of the CRC, Kohem argues that the principle of the best interests of the child has been elevated to a fundamental

⁶ David Archard, *Children: Rights and Childhood* (2nd edn, Routledge 1993); Robert Van Krieken, 'The Best Interests of the Child and Parental Separation: On the Civilizing of Parents' (2005) *Modern Law Review* 68

⁷ Raymie Wayne, 'The Best Interests of the Child: A Silent Standard – Will You Know It When You Hear It' (2008) 2 *Journal of Public Child Welfare* 33

⁸ Meda Couzens, 'The Best Interests of the Child and its Collective Connotations in the South African Law' (2010) 73 *Journal of Contemporary Roman-Dutch Law* 266

⁹ Theresa Joyce, 'Best Interests Guidance on Determining the Best Interests of Adults Who Lack the Capacity to Make a Decision (or Decisions) for Themselves' (2005) *British Psychological Society* 7

¹⁰ *Ibid*; See also Theresa Joyce, 'Best Interests' (2009) 8 *Psychiatry* 481

¹¹ Stephen Parker, 'The Best Interests of the Child; Principles and Problems' (1994) 8 *International Journal of Law and the Family* 26

¹² Fortune Ihua-Maduenyi, *Considering the Rights and Best Interests of a Child in a Multi-Cultural Civil Society with Special Reference to Nigeria* (PhD Thesis, University of Leicester 2011) 73

¹³ Allen Buchanan and Dan W. Brock, 'Deciding for Others' (1986) 64 *The Milbank Quarterly* 17

element of the CRC.¹⁴ In calibrating the weight to be ascribed to the best interests principle and postulating within the framework of the CRC, Archard opines that the terms ‘paramount’ and ‘primary’ are used with either the definite or indefinite articles and the words ‘a’ and ‘the’ are key in construing the weight to be accorded to the best interests of the child.

Archard identifies five possible weightings of the best interests of the child as ‘the paramount’, ‘a paramount’ ‘the primary’, ‘a primary’ and ‘a consideration’. He argues that a consideration that is primary ranks first whereas a consideration that is paramount will trump all other considerations as the overarching determining factor.¹⁵ Lending his voice to the utmost importance of the principle, particularly in the context of child justice, Kaime argues that as a guiding principle of child justice, the principle of the best interests of the child has been a cardinal and heavily relied upon standard in the interpretation of state party obligations under the CRC.¹⁶ The principle is relied upon because it espouses the best and highest standards for the protection of children in conflict with the law.¹⁷

Regardless of the inherent strengths of the principle of the best interests of the child, there are numerous criticisms against it. For instance, using the sociological theory of rational argumentation, Skivenes argues that the application of the principle has weakened the legal protection of children and parents and resulted in arbitrary and subjective decisions.¹⁸ He also posited that the principle is fluid and provides little guidance and guidelines on decision making.¹⁹

Other legal writers such as Mnookin have faulted the principle of the best interests of the child on the grounds that what is best for any child or even children in general is often vague, speculative and requires a highly individualized choice between alternatives.²⁰ He argues that determining the child’s best interests is synonymous with predicting results and consequences that are difficult to access.²¹ Along the same lines, Freeman also argues that the indeterminacy of the principle is derived from the fact that while the best interests standard is upheld, other

¹⁴ Jean Zermatten, ‘The Best Interests of the Child Principle: Literal Analysis and Function’ (2010) 18 *International Journal of Children’s Rights* 483

¹⁵ David Archard, ‘Children’s Rights’ (2013) *The International Encyclopedia of Ethics* 1

¹⁶ Thoko Kaime, ‘The Convention of the Rights of the Child and the Cultural Legitimacy of Children’s Rights in Africa: Some Reflections’ (2005) 5 *African Human Rights Law Journal* 221; See also D.M Chirwa, ‘The Merits and Demerits of the African Charter on the Rights and Welfare of the Child’ (2002) 10 *International Journal of Children’s Rights* 157

¹⁷ Lynne Kohem, ‘Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence’ (2007) 10 *Journal of Family Law and Studies* 338

¹⁸ Marit Skivenes, ‘Judging the Child’s Best Interests: Rational Reasoning or Subjective Presumptions?’ (2010) 53 *Acta Sociologica* 339

¹⁹ *Ibid*

²⁰ Robert Mnookin, ‘Child Custody Adjudication; Judicial Functions in the Face of Indeterminacy’ (1975) 39 *Law and Contemporary Problems* 226

²¹ *Ibid*

considerations can permeate the ‘smoke screen’ and corrupt the application of the principle.²²

Criticizing the principle further on cultural and religious grounds, Buchanan and Brock argue that the universal application of the principle may not produce similar results because the best interests interpretation in the case of two different children may be discordant with regard to the cultural and future interests of the children.²³ Arguing also on the grounds of the cultural frailties of the principle, Eekelaar noted that the principle of the best interests of the child is subject to cultural relativity.²⁴ Alluding to this, Freeman posits that the principle is incongruous because it neither creates rights nor imposes duties and is subject to unpredictable interpretation.²⁵

Arguing that the principle is pregnable with prejudices and susceptible to swaying influence of contemporary dominant meanings, Freeman maintains further that the principle could easily be limited by other rights and principles since the best interests of the child is not the determining consideration, but only a primary consideration which permits of other considerations.²⁶ Mnookin added a skeptical voice to the principle when he observed that the principle is indeterminate, fraught with formidable preference problems. He noted that:

The conditions that make a person happy at age seven to ten may have adverse consequences at age thirty. Should the judge ask himself what decision will make the child happy in the next year? Or at thirty? Or at seventy? Should the judge decide by thinking about the decision the child as an adult looking back would have wanted to make? In this case, the preference problem is formidable, for how is the judge to compare ‘happiness’ at one age with ‘happiness’ at another age?²⁷

While there may be valid points in the antagonism of these writers towards the principle of the best interests of the child, it is pertinent to emphasize they are made in the context of family law in general and custody disputes and medical decisions affecting children in particular. Since none of these criticisms was made in

²² Michael Freeman, *A Commentary on the United Nations Convention on the Rights of the Child: Article 3 The Best Interest of the Child*, (Martinus Nijhoff Publishers 2007)

²³ Allen Buchanan and Dan Brock, *Deciding for Others: The Ethics of Surrogate Decision Making* (Cambridge University Press 1989) 247

²⁴ John Eekelaar, ‘The Interests of the Child and the Child’s Wishes: The Role of Dynamic Self Determinism’ (1994) 8 *International Journal of Law, Policy and the Family* 42

²⁵ Michael Freeman, *A Commentary on the United Nations Convention on the Rights of the Child: Article 3 The Best Interests of the Child*, (Martinus Nijhoff Publishers 2007); See also Philip Alston, ‘The Best Interests Principle: Towards A Reconciliation of Culture and Human Rights’ (1994) 8 *International Journal of Law, Policy and Family* 1

²⁶ *Ibid*

²⁷ Robert Mnookin, ‘Child Custody Adjudication; Judicial Functions in the Face of Indeterminacy’ (1975) 39 *Law and Contemporary Problems* 226

the explicit situation of child justice, the alleged drawbacks of the principle by the writers in question cannot be extended to erode the potency of the best interests of the child specifically at the sentencing stage, and as a sentencing tool. Conceding that the *travaux préparatoires* of the CRC envisaged exceptions to the application of the principle of the best interests of the child on certain grounds such as medical emergencies, the same cannot be said in the particular context of child justice for children in conflict with the law.

Consequently and in the context of child justice in general and sentencing in particular, it is erroneous to argue that the best interests of the child are capable of being overridden by other circumstances and considerations, including the interest of justice. As a standard-setting principle for the exercise of the court's discretionary powers in multifarious situations, the principle does not need to be stiffly determinate, rigidly specific or certain. In the context of child sentencing, the best interests of the child is the universal principle that traverses multiple cultures and guides judicial sentencing of children in conflict with the law.²⁸

On the basis of the foregoing, the principle of the best interests of the child, particularly in the context of sentencing is the framework that guides child courts in the application of the rights of children in conflict with the law. Likewise, the principle is the framework through which courts are guided in the determination of the least detrimental cause of action for the survival and development of the child offender.²⁹ This principle applies to the extent that any outcome of such hearing including the sentence imposed by the court ought not to offend the letter and spirit of relevant international and regional child justice instruments and laws.

Consequently, the principle of the best interests of the child in the context of child justice in general and sentencing in particular is defined as those written, unwritten and extraneous long and immediate term considerations, which the court must explore in determining and arriving at an informed decision on a course of action for or against a child offender. Such a course of action in the best interests of the child must be appropriate for a child in conflict with the law, and would unavoidably facilitate his or her eventual positive development as an independent being.

This working definition accords with the position of the concluding observation of the committee overseeing the implementation of the CRC, which suggests that the determination of the best interests of the child involves a holistic

²⁸ David Archard, 'Children's Rights' (2013) *The International Encyclopedia of Ethics* 1; David William Archard, *Children, Family and the State* (Ashgate 2003); Jon Elster, 'Judgments: Against the Best Interest of the Child' (1987) 54 *University of Chicago Law Review*; Annette Ruth Appell, 'Uneasy Tensions between Children's Rights and Civil Rights' (2005) 5 *Nevada Law Journal* 141

²⁹ Michael Freeman, *A Commentary on the United Nations Convention on the Rights of the Child: Article 3 The Best Interests of the Child*, (Martinus Nijhoff Publishers 2007)

assessment and evaluation of all legislation and policy directives.³⁰ Akin to this postulation, Tobin posits that a proposed outcome for a child cannot be said to be in his or her best interests where it conflicts with the provisions of the convention.³¹ Accentuating this fact, Freeman states that, since the best interests principle in Article 3 of the CRC is preceded by Article 2, the application of the best interests principle is the overarching framework of rights recognized in the CRC.³²

5.3 The Best Interests of the Child versus the Interests of Justice

Under the CRC, the best interests of the child permit other considerations since it is 'a primary consideration' rather than 'the primary' or 'the paramount' consideration. As such, there are circumstances in which other interests including the interests of justice might collide with the child's best interests. In the context of child justice, the best interests principle is the child rights framework to protect children in conflict with the law because of their vulnerability. As a principle that presupposes a focus on the need and circumstances of the child offender rather than on the characteristics of the penal sanction, the best interests of the child in the just-deserts worldview entails the balancing of two important precepts for protecting society against criminal behavior and paying special attention to the personal circumstances of the child offender.³³

Conversely, the thrust of the interest of justice is that individuals, including children, are reasoning agents and should be responsible and accountable for their actions before the law. As an exception to the interests of justice, the best interests of the child allows particularly in the context of child justice, the treatment of children in a special way due to their mitigated culpability. Hence, when a child enters the child justice system, one of the most important considerations of the court is what impact would the child justice proceedings have on the rest of the child's life. Therefore, and in affirmation of Arteaga's postulation, the court or any administrative agency must be mindful of delicately balancing the interests of justice and by necessary extension, the necessity for society to be protected against crime and the overarching best interests of the child to have a fulfilling life post-offense.³⁴

³⁰ UN Committee on the Rights of the Child (CRC) *General Comment No. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child* 27 November 2003 CRC/GC/2003/5 45

³¹ J. Tobin, 'Beyond the Supermarket Shelf: Using a Rights Based Approach to Address Children's Health Needs' (2006) 14 *International Journal of Children's Rights* 275

³² Michael Freeman, *A Commentary on the United Nations Convention on the Rights of the Child: Article 3 The Best Interests of the Child*, (Martinus Nijhoff Publishers 2007) 25

³³ Lode Walgave, 'Restoration in Youth Justice' in Michael Torny and Anthony N. Doob (eds) *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives* (2004) 31 *Crime and Justice: A Research Review* 543

³⁴ Juan Arteaga, 'Juvenile (In)Justice: Congressional Attempts to Abrogate the Procedural Rights of Juvenile Defendants' (2002) 102 *Columbia Law Review* 1082

As an exception to the interests of justice, the principle of the best interests of the child has been criticized from numerous fronts. LaFave posits that the principle is ‘raising more questions than answers and counterproductive in some respects’.³⁵ Equally, Wolfson argues that without a consensus as to a clear dividing line between the two interests, the courts are inclined to excuse their own viewpoints on what is best for the child.³⁶ It has also been postulated that the best interests principle is susceptible to the personal values, beliefs and biases of the judge and is thus capable of diverting the cause of justice.³⁷

Furthermore and vis-à-vis the interests of justice, the principle of the best interests of the child is adjudged to be subjective, difficult to uniformly articulate and applied in the problematic ‘know it when I see it’ fashion.³⁸ The principle has also been described as a nebulous and ill-defined standard that negates justice and opens a plethora of considerations and priorities.³⁹ It has also been advocated that the principle of the best interests of the child vis-à-vis the interests of justice is so difficult to define to the extent that it has been omitted from the sixth edition of Black’s Law Dictionary and from other reference tools designed to translate legal terms into everyday language.⁴⁰

Appreciating the difficulties of understanding the meaning of the principle of the best interests of the child as a legal standard, Millar argues that the courts in seeking to achieve justice have been challenged by the fact that what is in the best interests of the child is fraught with unknown possibilities that are dependent on the unpredictable future vagaries of the child’s development.⁴¹ It was on this basis that Arteaga argues that the multiplicity of possible applications of the principle may likely pervert justice.⁴² Challenging the practical application of the best interests

³⁵ LeAnn Larson LaFave, ‘Origins and Evolution of the ‘Best Interests of the Child’ Standard’ (1989) 34 South Dakota Law Review 459; See also Marsha Kline Pruett, Kathy Hoganbruen and Tamara Jackson ‘The Best Interests of the Child: Parents’ versus Attorneys’ Perspectives’ (2000) 33 Journal of Divorce & Remarriage 47; Antoinette L. Harmer & Jane Goodman-Delahunty, ‘Practitioners’ Opinions of Best Interests of the Child in Australian Legislation’ (2014) Psychiatry, Psychology and Law 251

³⁶ Susan Wolfson, ‘Children’s Rights: Theoretical Underpinning of the ‘Best Interests of the Child’ in Michael Freeman and Philip Veerman (eds) *The Ideologies of Children’s Rights* (Martinus Nijhoff Publishers 1992) 7

³⁷ Marlee Kline, ‘Child Welfare Law, ‘Best Interests of the Child’ Ideology and First Nations’ (1992) 30 Osgoode Hall Law Journal 375

³⁸ Raymie Wayne, ‘The Best Interests of the Child: A Silent Standard – Will You Know It When You Hear It’ (2008) 2 Journal of Public Child Welfare 33

³⁹ Ibid

⁴⁰ Marsha Kline Pruett, Kathy Hoganbruen and Tamara Jackson ‘The Best Interest of the Child: Parents’ versus Attorneys’ Perspectives’ (2000) 33 Journal of Divorce & Remarriage 47

⁴¹ Paul Millar, *The Best Interests of Children: An Evidence Based Approach* (University of Toronto Press 2009) 45

⁴² Juan Arteaga, ‘Juvenile (In)Justice: Congressional Attempts to Abrogate the Procedural Rights of Juvenile Defendants’ (2002) 102 Columbia Law Review 1059

principle as ‘the’ or ‘a’ primary consideration in actions concerning children, Smith argued that while the overarching goal of the principle is treatment and rehabilitation,⁴³ in practice, the courts while adjudicating child offenders fail to meet the interest of justice.⁴⁴

Some other critical writers on the principle, such as Van Deusen, consider it to be an indeterminate standard without established legislative and judicial guidelines for its application, which thus leaves the courts with much unfettered discretion that accounts for undesirable and unpredictable justice outcomes.⁴⁵ Lending a critical voice against the principle vis-à-vis the interests of justice, Sarkwo also describes the best interests of the child as belonging to the category of the ‘test of a reasonable man’ or ‘reasonable person’ which disposes several judges to reach different results on what the reasonable man in law should or should not have done in a given factual circumstance.⁴⁶

As the antithesis of the interests of justice, the best interests of the child has been argued to be more of a sociological paradigm than a concrete juridical standard, the reason being that courts cannot assume what is in the best interests of the child without straying into the realm of assumptive, moral, social and attitudinal disposition of the child in question.⁴⁷ In support of this view, it has been noted that in the delicate balancing of the best interests of the child and the interests of justice, legislative and judicial standards and guidance are not very clear cut,⁴⁸ and that child courts are very speculative of what the best interests of the child are in practical terms.⁴⁹

Similarly, Wlster argues that the principle of the best interests of the child when applied by courts has the propensity to generate unjust decisions because child

⁴³ Erin Smith, ‘In a Child’s Best Interest: Juvenile Status Offenders Deserve Procedural Due Process’ (1992) 10 *Law & Inequality* 253

⁴⁴ Barry Feld, ‘The Juvenile Court Meets the Principle of Offence: Punishment, Treatment, and the Difference it Makes’ (1988) 68 *Boston University Law Review* 821

⁴⁵ Christian Reichel Van Deusen, ‘The Best Interest of the Child and the Law’ (1991) 18 *Pepperdine Law Review* 417; See also Michael J Dale, ‘State Court Jurisdiction Under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test’ (1992) 27 *Gonzaga Law Review* 353

⁴⁶ Harvey Sorkow, ‘Best Interests of the Child: By Whose Definition’ (1991) 18 *Pepperdine Law Review* 383; See also Emile R Kruzick and David H. Zemans, ‘In the Best Interests of the Child: Mandatory Independent Representation’ (1992) 69 *Denver University Law Review* 605; Lynn M Akre, ‘Struggling with Indeterminacy: A Call for Interdisciplinary Collaboration in Redefining the Best Interest of the Child Standard’ (1992) 75 *Marquette Law Review* 628

⁴⁷ Marcia Reisman, ‘Where to Decide the ‘Best Interests’ of Elian Gonzalez: The Law of Abduction and International Custody Disputes’ (2000) 31 *University of Miami Inter-American Law Review* 323

⁴⁸ LeAnn Larson LaFave, ‘Origins and Evolution of the ‘Best Interest of the Child’ Standard’ (1989) 34 *South Dakota Law Review* 459; See also Wanda Uhlich, ‘Best Interests of the Child: Considering the Effects of Passive Smoking When Making a Custody Adjudication’ (1992) 68 *North Dakota Law Review* 727

⁴⁹ Ellen Marrus, ‘Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime’ (2003) 62 *Maryland Law Review* 288

courts will most likely not have the skills to be able to accurately predict acceptable preferences for children when they grow up.⁵⁰ He argues further that in practice, the best interests principle is often formulated in a way that allows some scope for other criteria to the extent that the principle is deemed to be an unhelpful tool in reaching decisions.⁵¹

The foregoing criticism against the principle of the best interests of the child may have been accentuated by the lack of legal literature and jurisprudence that have elaborated on the principle as is the case with the interests of justice. The above arguments against the principle of the best interests of the child notwithstanding, the principle is not impotent particularly in the context of child justice. As a cardinal principle in child justice and to mitigate the harshness of the interests of justice, the principle of the best interests of the child is pivotal and a useful tool in giving clear direction and guidance on what needs to be done by the courts in the treatment of children in conflict with the law.

Although criticized in its generic application, the principle of the best interests of the child as applied in the context of child justice to mitigate the harshness of the interests of justice is undoubtedly an article of faith intentionally and elastically couched to capture the multiplicity of circumstances evident in delinquency proceedings. While remaining the best principle in navigating the maze of issues around delinquency proceeding due to its fact-driven focus, the principle presupposes that all relevant factors in the determination of delinquency are to be contextualized, considered and evaluated.⁵²

In that sense, the value added advantage of the principle of the best interests of the child has a flip side and ironically, it is this flip side that is inadvertently misconstrued to be its weakness. The indeterminacy of the principle is at the same time its potential strength in being a universally adaptable and applicable tool in child justice. Essentially, the principle is a deliberate and concrete effort to evade the problems which arise in every-day legal practice when a crucial element of the law is inelastic. To present the principle in any other form, would precipitate falling into the trap of overt rigidity of legislative and sentencing guidelines that is devoid of ample room for the human element inherent in judicial decision making.

There is no doubt that rigid legislative guidance or an inflexible application of the principle of the best interests of the child will constrain judges from considering the context of a case or the individual characteristics of the child offender. As a very well-known philosophy, one of the aims of child justice is to ascertain the most effective way of rehabilitating the child into a productive law-

⁵⁰ Ibid

⁵¹ Jon Elster, 'Solomonic Judgments: Against the Best Interest of the Child' (1987) 54 *University of Chicago Law Review* 1

⁵² LeAnn Larson LaFave, 'Origins and Evolution of the 'Best Interest of the Child' Standard' (1989) 34 *South Dakota Law Review* 459

abiding citizen. In realizing this goal, the interests of justice may differ from the best interests of the child because the needs and circumstances of children differ dramatically.

As such, judges presiding over delinquency hearings require the kind of flexibility inherent in the principle of the best interests of the child so as to enable them to formulate particularized treatment that, although may not seemingly serve the interests of justice, should certainly serve the best interests of the child.⁵³ Bearing in mind the lack of coherent legislative and judicial sentencing guidelines in balancing the somewhat irreconcilable interests of justice and the best interests of the child, the courts are duty-bound to make extensive finding of fact in regard to every point canvassed and in sentencing, delicately subject the interests of justice to the best interests of the child.

Elster's argument buttresses this view. He argues that there are no permissible instances where the courts will knowingly and deliberately jettison what is in the best interests of the child on the grounds that more general public interests such as interests of justice, the greater good of all and public policy considerations override the singular best interests of the child.⁵⁴ On the above premise, the view that there are circumstances where compensatory and retributive reasoning suggest that the interests of justice cannot be overlooked in the consideration of the best interests of the child is contestable.⁵⁵

While the committee on the implementation of the CRC recommends that the application of the best interests may require the prioritization of other interests,⁵⁶ it is implicit in the jurisprudence of the committee that the need to balance other competing interests particularly in the context of child justice takes second place *vis-à-vis* the application of the best interests principle. While noting that the best interests principle is not stipulated in absolute terms, the United States Federal Juvenile Delinquency Act⁵⁷ (FJDA) provides the best known legislative effort at providing practical guidance in balancing what would be in the interests of justice and the best interests of the child. The guidance requires federal judges to consider certain statutory criteria of rehabilitative potential including the age and social

⁵³ Juan Arteaga, 'Juvenile (In)Justice: Congressional Attempts to Abrogate the Procedural Rights of Juvenile Defendants' (2002) 102 Columbia Law Review 1078; See also Jenny E Carroll, 'Rethinking the Constitutional Criminal Procedure of Juvenile Transfer Hearings: Apprendi, Adult Punishment, and Adult Process' (2010) 61 Hastings Law Journal 175; Enrico Pagnanelli, 'Children as Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of Roper v. Simmons' (2007) 44 American Criminal Law Review 175

⁵⁴ Jon Elster, 'Solomonic Judgments: Against the Best Interest of the Child' (1987) 54 University of Chicago Law Review 1

⁵⁵ Juan Arteaga, 'Juvenile (In)Justice: Congressional Attempts to Abrogate the Procedural Rights of Juvenile Defendants' (2002) 102 Columbia Law Review 1066

⁵⁶ UN Committee on the Rights of the Child (CRC) *UN Committee on the Rights of the Child: Concluding Observations: Bolivia* 18 February 1993

⁵⁷ United States Federal Juvenile Delinquency Act, 18 U.S.C. S5032 (1994)

background of the child, the nature of the alleged offense, the extent and nature of the child's prior delinquency record, etc.⁵⁸

In other words, for the purpose of a rehabilitative-orientated child justice system and in the event of tension between the best interests of the child and the interests of justice, the courts should in the absence of preconceived guidelines be enjoined to favor the best interests of the child as there is no safer way of ensuring and protecting the rights of children in conflict with the law. Similarly, although international and regional instruments and laws may not have provided clear-cut practice guidance as to how the courts should construe and balance the best interests of the child and the interests of justice in delinquency proceedings, the best interests of the child should, where there is a conflict, override the interest of justice.

5.4 Normative Framework of the Best Interests of the Child

The principle of the best interests of the child, unlike the principle of proportionality discussed in the previous chapter, lacks academic literature classifying it into deontological or consequential philosophies. While the reason for the gap in academic research is outside the scope of this thesis, it may be related to the origin of the principle of the best interests of the child, which is traceable to family law where sentencing and punishment is not usually applicable. Furthermore, the principle of the best interests of the child has seldom been analyzed academically from the perspective of its role in the retention and justification of punishment and the key literature relating to the principle is seldom focused on its theoretical perspective.

Based on the peculiar nature of human rights and the way and manner in which international and regional human rights instruments and laws have articulated the principle of the best interests of the child, this thesis will situate the principle within the deontological philosophical framework. One of the reasons for situating the principle of the best interests of the child within the deontological theory is that human rights in general and child rights in particular are by their very nature deontological. The principle of the best interests of the child in its stand-alone form provides a self-sustaining tool for analyzing and ensuring that children in conflict with the law receive equitable and fair judicial treatment. This view is supported by the postulation of Kaime to the effect that the principle of the best interests of the child sets out the legal parameters and what decisions affecting children should entail and consider.⁵⁹

⁵⁸ Ibid: See also Bureau of Justice Statistics Special Report, 'Juvenile Delinquents in the Federal Criminal Justice System (1997) < <http://www.bjs.gov/content/pub/pdf/Jdfcjs.pdf> > accessed 10 April 2014

⁵⁹ Thoko Kaime, *The African Charter on the Rights and Welfare of the Child: A Socio-legal Perspective* (Pretoria University Law Press 2009) 59; See also Thoko Kaime, 'The Foundation of the

5.4.1 International Framework for the Best Interests of the Child

The introduction of the principle of the best interests of the child in international law dates back to 1924 when the Geneva Declaration of the Rights of the Child was adopted.⁶⁰ The declaration recognized that mankind owes to the child the best that it has to give and that in the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.⁶¹ After 1924 and prior to the promulgation of the CRC, several international treaties dealing with human rights generally and child rights in particular captured cursorily, the best interests of the child through protective languages such as promoting the ‘greatest well-being of the child’ and the ‘welfare of the child’.

The flavor of the principle of the best interests of the child could also be tasted slightly in the 1948 Universal Declaration of Human Rights.⁶² Although the UDHR mainstreams the rights of children within its overall framework, Article 2 states that the rights set out in the declaration are for all ‘without distinction of any kind’. Whilst age was not part of the distinctions mentioned, the UDHR went further to provide that motherhood and childhood are to be entitled to special care and assistance and children born out of wedlock are to enjoy the same social protection. After the adoption of the UDHR, the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESCR) were adopted. None of these instruments mentioned the best interests of the child except for the inferences that could be drawn from the provisions generally relating to children.

Setting aside the superficial consideration of the principle of the best interests of the child by the above-mentioned instruments and laws, the first human rights instrument to specifically employ the term the ‘best interests of the child’ is the 1959 Declaration of the Rights of the Child. The declaration while proclaiming that mankind owes to children the best it has to give states in its principle 2 that:

The child shall enjoy special protection, and shall be given opportunities and facilities, by law and by other means, to enable him to develop physically, mentally, morally, spiritually and socially in a healthy and normal manner and in conditions of

Rights in the African Charter on the Rights and Welfare of the Child: A Historical and Philosophical Account’ (2009) 3 African Journal of Legal Studies

⁶⁰ Geneva Declaration of the Rights of the Child, League of Nations Document Adopted 26 September, 1924,

⁶¹ League of Nations, Geneva Declaration of the Rights of the Child, September 26 1924; See also Dominique Marshall, ‘ The Construction of Children as an Object of International Relations: The Declaration of Children’s Rights and the Child Welfare Committee of League of Nations 1900-1924’ (1997) 7 International Journal of Children’s Rights 103

⁶² UN General Assembly, *Universal Declaration of Human Rights* 10 December 1948

freedom and dignity. In the enactment of laws for this purpose, the best interests of the child shall be the paramount consideration.⁶³

Thereafter, the principle of the best interests of the child was strengthened through the adoption of the Convention on the Elimination of All Forms of Discrimination Against Women.⁶⁴ Article 16(1)(d) of the CEDAW requires state parties to ensure that the interests of children are paramount and the primordial consideration in all cases. Furthermore, and in the context of adoption and foster placement, the 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, proposed the best interests of the child as a paramount consideration.⁶⁵

The principle of the best interests of the child further gained renewed prominence specifically in the context of child justice through the adoption of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, otherwise known as the 'Beijing Rules'.⁶⁶ Adopting the 'well-being' language, the 'Beijing Rules' provide that the child justice system shall emphasize the well-being of the juvenile offender and further call for adequate attention towards full mobilization of all resources for the purpose of promoting their well-being. The 'Beijing Rules' also used the term 'wellbeing' in the context of investigation and prosecution of children in conflict with the law and provide that contact between the law enforcement agencies and a child offender shall be managed in such a way as to promote the well-being of the juvenile.⁶⁷

Also, the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, adopted after the 'Beijing Rules', also did not use the phrase the 'best interests of the child'. Rather, they interchangeably used the phrase 'well-being' of juveniles and provide that the child justice system should uphold the rights and

⁶³ UN General Assembly, *Declaration of the Rights of the Child* 10 December 1959; See also Philip Alston and Bridget Gilmour-Walsh, *The Best Interests of the Child: Towards A Synthesis of Children's Rights and Cultural Values* (Innocenti Studies 1996)

⁶⁴ UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women* 18 December 1979 Article 5(b)

⁶⁵ UN General Assembly, *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* 3 December 1986 Article 5

⁶⁶ UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules')* 29 November 1985; See also Ursula Kilkelly, 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' (2001) 23 *Human Rights Quarterly* 308

⁶⁷ UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules')* 29 November 1985 Rule 10.3

promote the physical and mental well-being of children.⁶⁸ Unlike the United Nations Standard Minimum Rules for the Administration of Juvenile Justice and the United Nations Rules for the Protection of Juveniles Deprived of their Liberty which uses the phrase ‘well-being of the juvenile’ respectively, the United Nations Guidelines for the Prevention of Juvenile Delinquency, otherwise known as ‘The Riyadh Guidelines’, uses both the ‘wellbeing of young persons’ and ‘best interests of young persons.’

In the context of the ‘best interests’ language, the Riyadh Guidelines provide that the institutionalization of young persons should be a measure of last resort, for the minimum necessary period and the best interests of the young person should be of paramount importance. In adopting the phrase ‘wellbeing’ the Riyadh Guidelines also provides as its fundamental principles, the safeguarding of the overall interest and well-being of young persons, the physical and mental well-being of children and the promotion of the rights and well-being of all young persons.⁶⁹

The adoption of the United Nations Conventions on the Rights of the Child in 1990 consolidated the normative framework of the principle of the best interests of the child as the predominant language of the convention.⁷⁰ As an omnibus clause, Article 3(1) permeates the length and breadth of the CRC and prescribes the general rule to be followed in all actions concerning children. These include all actions that affect children directly or indirectly and even when the child is not the object of the decision. While the best interests of the child are a primary consideration in all actions concerning children, they extend to decision-making by legislative, administrative, judicial authorities and other institutions. There is no right recognized in the CRC that is not impacted by the best interests of the child principle.

Also, the committee on the implementation of the CRC has declared that the best interests of the child is a guiding principle of the entire convention with a pervading effect on the application and interpretation of the convention.⁷¹ In describing the permeating effect and importance of the principle in all matters

⁶⁸ UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of their Liberty* 14 December 1990; See also A.D. Viccica, ‘Promotion and Protection of Children's Rights through Development and Recognition of an International Notion of Juvenile Justice and Its Child-Centered Perspective in the United Nations’ (1989) 58 *Nordic Journal of International Law* 68

⁶⁹ UN General Assembly, *United Nations Guidelines for the Prevention of Juvenile Delinquency*, 14 December 1990 Guidelines 5(c)(d), 12, 46 and 52; See also Barry Goldson and Gordon Hughes, ‘Sociological Criminology and Youth Justice: Comparative Policy Analysis and Academic intervention’ (2010) 10 *Criminology and Criminal Justice* 211

⁷⁰ UN General Assembly, *Convention on the Rights of the Child* 20 November 1989; See also David A. Balton, ‘Convention on the Rights of the Child: Prospects for International Enforcement’ (1990) 12 *Human Rights Quarterly* 120; Jonathan Todres, ‘Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law’ (1999) 30 *Columbia Human Rights Law Review* 159

⁷¹ UN Committee on the Rights of the Child (CRC) *UN Committee on the Rights of the Child: Report on the Forty-first Session* 12 May 2006 12

concerning children, the United Nations Human Rights Committee describes the principle of best interests of the child as ‘the paramount interests of the child’⁷²

The first paragraph of Article 3 of the CRC enunciates the best interests principle, whereas the second paragraph imposes an obligation on state parties to take all appropriate legislative and administrative measures to ensure children’s well-being. Equally, the third paragraph imposes an obligation on state parties to ensure that those responsible for the care and protection of children conform to the standards established by competent authorities. Article 3(1) of the CRC which is deontological in nature because it focuses on the moral appropriateness of any intervention against children and the achievement of a just outcome, 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

The formulation of Article 3(1) of the CRC according to Couzens suggests that the best interests of the child principle apply to both cases concerning individual children as well as to decisions concerning children as a group.⁷³ This position is supported by legal commentators as well as the committee on the implementation of the CRC on the basis that using the plural ‘children’ as opposed to the singular ‘child’ in the first part of Article 3(1) suggests the applicability of the principle to children as a group as well as to an individual child.⁷⁴ According to Alston, the use of the plural word seems to indicate an intention to achieve a broad rather than narrow coverage for the best interests principle. He postulated further that Article 3(1) supports, justifies and clarifies issues arising out of the convention.⁷⁵ The committee on the implementation of the CRC endorses this interpretation and further holds that the principle of the best interests of the child is a mediating principle and a tool for resolving competing rights within the framework of the convention.⁷⁶

On the strength of the above Articles of the CRC and because of the fact that the best interests of the child shall be of primary consideration in all actions concerning children, it may thus be argued that the consideration of the best interests of the child in the treatment of children in conflict with the law is a CRC right as well as a cardinal principle in child justice. Being that it is a convention right, state

⁷² UN Human Rights Committee (HRC) *CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses* 27 July 1990

⁷³ Meda Couzens, ‘The Best Interests of the Child and its Collective Connotations in the South African Law’ (2010) 73 *Journal of Contemporary Roman-Dutch Law* 266

⁷⁴ UN Human Rights Committee (HRC) *CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses* 27 July 1990

⁷⁵ Philip Alston. ‘The Best Interests Principle: Towards a Reconciliation of Culture and Human Rights’ (1994) 8 *International Journal of Law, Policy and the Family* 5

⁷⁶ UN Committee on the Rights of the Child (CRC) *General Guidelines for Periodic Reports* May 1996

parties are to undertake all appropriate legislative and any other measures for its implementation.⁷⁷ The committee on the implementation of the CRC accedes to this interpretation and requires that states provide information:

On how the best interests of the child have been given priority consideration in family life, school life, social life and in areas such as: Budgetary allocations, including at the central, regional and local levels, and where appropriate at the federal and provincial levels, and within governments departments; Planning and development policies, including housing, transport and environmental policies; Adoption; Immigration; asylum-seeking and refugee procedures; The administration of child justice; The placement and care of children in institutions; Social Security.⁷⁸

In the consideration of a state party report, the committee on the implementation of the CRC interpreted Article 3(1) as a general measure applicable for the implementation of all the provisions of the CRC. It states that:

Every legislative, administrative and judicial body or institution is required to apply the best interest principle by systematically considering how children's rights and interests are or will be affected by their decision or actions – by, for example, a proposed or existing law or policy or administrative action or court decision, including those which are not directly concerned with children, but indirectly affect children.⁷⁹

Indeed, Article 3 of the CRC has enumerated the institutions, administrative authorities and legislative bodies that must make the best interests of the child a primary consideration in all matters affecting children. On the basis of this article, it has been argued that although the principle applies to all actions, it is however limited to only official actions of those institutions or persons that come within its purview, thus excluding parents from its contemplation.⁸⁰ This thesis argues that since the enumerated bodies under Article 3 are all inclusive without any exception, it is an untenable argument that certain bodies or agencies not mentioned in the CRC are exempted from adherence to the best interests of the child principle. The best interests of the child principle as it relates to parents is additionally found in Article

⁷⁷ UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989 Article 4

⁷⁸ UN Committee on the Rights of the Child (CRC) *General Guidelines for Periodic Reports* May 1996 Para 35

⁷⁹ UN Committee on the Rights of the Child (CRC) *UN Committee on the Rights of the Child: Concluding Observations: Chile*, 25 April 1994

⁸⁰ Michael Freeman, *A Commentary on the United Nations Convention on the Rights of the Child: Article 3 The Best Interest of the Child*, (Martinus Nijhoff Publishers 2007) 25

18(1) of the CRC which enjoins states parties to use their best efforts to ensure recognition of the principle of the best interests of the child as a basic concern.

Based on the scope of Article 3 of the CRC and although no specific provision exists regarding the implications of derogation and non-compliance with the best interests of the child principle, it is trite to argue that the ambit of the principle is expansive. In addition to the key formulation of the principle of the best interests of the child in Article 3 of CRC, it should be pointed out that the principle appears in seven specific contexts in the CRC such as the separation of the child from the family (CRC Article 9), parental responsibility for the upbringing and development of the child (CRC Article 18), foster placement (CRC Article 20), adoption (CRC Article 21), deprivation of liberty (CRC Art. 37), and child justice (CRC Art. 40) where it is stated that every child accused of having infringed the penal law shall have his or her matter determined without delay in accordance with due process of the law in the presence of a legal representative unless the interests of the child determine otherwise.

5.4.2 Regional Framework for the Best Interests of the Child

The international instruments and laws described above positively influenced the European normative framework in the application of the principle of the best interests of the child and gave rise, for example, to child-specific provisions of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The ECHR makes specific references to children in Article 5(1)(d), Article 6 and the First Optional Protocol of 1952. The ECHR is not couched specifically in the language of the best interests of the child except that in its preamble, it refers to ‘the inherent dignity and ... equal and inalienable rights of all members of the human family.’⁸¹ However the jurisprudence of the European Court of Human Rights enjoins domestic courts to consider the interest and rights of all concerned and that in circumstances where the balancing of interests is necessary, the interests of the child must prevail.⁸²

Within the African continent, the ACRWC is influenced in its conception of rights of a child by the CRC because it adopts the language of the ‘best interests of the child’ and reaffirms adherence to the principles of the rights and welfare of the child.⁸³ The omnibus Article of ACRWC on the principle of the best interests of the child is Article 4(1) which provides that ‘in all actions concerning the child

⁸¹ Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms as amended by Protocols Nos. 11 and 14*, 4 November 1950

⁸² *Kokkanen v Finland* [1996] FLR 289

⁸³ Organization of African Unity (OAU) *African Charter on the Rights and Welfare of the Child* 11 July 1990; See also Lloyd Amanda, ‘A Theoretical Analysis of the Reality of Children’s Rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child’ (2002) 2 *African Human Rights Law Journal*, 11

undertaken by any person or authority the best interests of the child shall be the primary consideration.’ The ACRWC mentions the phrase ‘best interests of the child’ in Article 20(1)(a) which tasks parents and other persons responsible for the upbringing and development of children to ensure that their best interests are their basic concern at all times.

In respect of adoption, Article 24 of the ACRWC enjoins state parties to ensure that the best interests of the child is a paramount consideration. The principle is also provided in Article 9, in relation to freedom of thought, conscience and religion. It is also provided in Article 19 relating to parental care and protection and Article 25, in relation to separation from parents. Compared to the CRC, the language and scope of the principle of the best interests of the child in the ACRWC is broader and more elastic because it is couched in such generic and all-inclusive language. While the ACRWC considers the best interests of the child as the overarching consideration, the CRC regards it as ‘a primary consideration’, suggestive that it admits of other considerations.⁸⁴ Contrasted with the CRC, which limits the application of the principle and excludes some domains such as family from the reach of the best interests principle, Article 4(1) of the ACRWC provides better protection for children since it captures the actions of any person or authority without making any distinction.⁸⁵

It should be emphasized that the principle of the best interests of the child is not mentioned in the Article of the ACRWC relating to the administration of child justice. Article 17(1) of the Charter states that:

Every child accused or found guilty of having infringed penal law shall have the right to special treatment in a manner consistent with the child’s sense of dignity and worth and which reinforces the child’s respect for human rights and fundamental freedoms of others.⁸⁶

Furthermore, Article 17(2) of the ACRWC prohibits torture, inhuman or degrading treatment or punishment. It also requires that state parties ensure that children are separated from adults in their place of detention or imprisonment and are presumed innocent until duly recognized guilty. Also, children are to be afforded

⁸⁴ Danwood Mzikenge Chirwa, ‘The Merits and Demerits of the African Charter on the Rights and Welfare of the Child’ (2002) 10 *International Journal of Children’s Rights* 157

⁸⁵ Thoko Kaime, *The African Charter on the Rights and Welfare of the Child: A Socio-Legal Perspective* (Pretoria University Press 2009) 11

⁸⁶ Organization of African Unity (OAU) *African Charter on the Rights and Welfare of the Child* 11 July 1990 Article 17(1); See also Frans Viljoen, ‘Supra-national Human Rights Instruments for the Protection of Children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child’ (1998) 31 *The Comparative and International Law Journal of Southern Africa* 199; Karin C.J.M Arts, ‘International Protection of Children’s Rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child’ (1993) 5 *African Journal of International and Comparative Law* 139

legal and other appropriate assistance in the preparation and presentation of their defense and shall have the matter determined as speedily as possible by an impartial tribunal. Article 17(3) stipulates that the essential aim of treatment of every child during the trial and also if found guilty of infringing the law shall be his or her reformation, re-integration into his or her family and social rehabilitation.⁸⁷

The reason for the omission of the principle of the best interests of the child in the child justice provision of the ACRWC is outside the immediate consideration of this thesis. However, it may be extrapolated that this was an unintentional oversight on the part of the drafters of the ACRWC, bearing in mind the importance accorded to the omnibus provisions of the principle in Article 4 of the ACRWC. Be that as it may, the oversight of not mentioning the best interests of the child in the article dealing with child justice under the ACRWC does not in any way undermine the importance of the principle in the administration of justice in the continent. Like the committee on the implementation of the CRC, the committee on the implementation of the ACRWC has substantively expatiated on the scope of the principle of the best interests of the child.

The committee on the implementation of the ACRWC mentioned specifically that the ACRWC is grounded on four main principles, including the principle on the best interest of the child. The committee specifically noted in its general comment three important aspects of the principle that should be upheld by all officials, including the justice official who might come into contact with a child or deal with a matter in which a child is involved. The committee stipulates that the principle of the best interests of the child relates to all actions concerning children and enjoins states parties to respect, protect and fulfil the best interests of children in all actions. Secondly, the committee interprets the principle of the best interests of the child as an obligation on all officials or persons that might come into contact with a child or deal with a matter in which a child is involved. Lastly, the committee opines that persons dealing with matters involving children should ensure the best interest of the child as the final outcome.⁸⁸

The normative conclusion that flows from the ambit of Article 4 of the ACRWC is that the principle permeates and impacts the interpretation and application of other articles of the charter and as such need not be specifically mentioned in the child justice provision to be operational and applicable thereto. According to Miller, the effect of Article 4 of the ACRWC vis-à-vis Article 17 is

⁸⁷ Organization of African Unity (OAU) *African Charter on the Rights and Welfare of the Child* 11 July 1990 Article 17(3)

⁸⁸ General Comment on Article 30 of the African Charter on the Rights and Welfare of the Child ACERWC/GC/01 (2013) adopted by the Committee at its twenty-second Ordinary Session in November, 2013

that the principle of the best interests of the child connotes that any judicial decision taken against a child must protect him or her from harm.⁸⁹

5.5 Conclusion

This chapter examined the principle of the best interests of the child in the particular context of child justice and found that irrespective of the flexible manner in which the principle is articulated in international and regional instruments, it is the overarching juristic tool at the disposal of courts in the treatment of children in conflict with the law. Whilst rationalizing the best interests of the child as the second pillar of child justice, and also as rights of children in conflict with the law, its normative foundation was traced to international and regional instruments.

The chapter also examined the conceptual overview of the principle and noted the critical view that there is no consensus regarding the interpretation of the principle and the standards which a sentence must meet to be in the best interests of the child. This chapter argued that the principle of the best interests of the child is more efficacious in its loosely couched form because it makes it applicable to varied contexts and legal systems. The chapter noted that the needs and circumstances of children in conflict with the law differ, and the institution of child justice is committed to a theory of individualized justice. It argued that the human rights based approach to child justice requires that the discretionary powers of the child court are defined elaborately and extensively to respond to the needs and not the deeds of the child offender.

In conjunction with chapter four, this chapter found that the twin pillars of child justice regulate the treatment of children in conflict with the law and are an essential tool in the adjudication of rights of children in conflict with the law. It noted that the penal alleviative measures of the principle of proportionality combined with child-centric consideration of the principle of the best interests are the overarching rights-based juristic tool at the disposal of courts in the determination of delinquency.

This chapter found that the principle is amply provided for in international and regional instruments and laws as an obvious manifestation of its importance in child rights generally and child justice in particular. Juxtaposing the general strength of the best interests provisions in CRC and the ACRWC, the chapter found that the latter provides a more elastic content than the former, because whilst the ACRWC considers the best interests of the child as the overarching consideration, the CRC regards it as a primary consideration invariably admitting of other considerations.

In the particular context of child justice, the chapter found that the best interests provision of the ACRWC is weaker than the CRC because the principle was

⁸⁹ Robyn Miller, *Best Interests Principles: Conceptual Overview* (Victorian Government Department of Human Services 2007) 1

not expressly mentioned in the ACRWC. This chapter also argued that the broad and expansive meaning of the best interests principle in Article 4 of the ACRWC extends to and strengthens the frail articulation of the principle in the child justice provision of the ACRWC.

Having situated the twin pillars of child justice as encapsulating all other principles of child rights and also as the overarching rights-based juristic tool at the disposal of courts in the determination of delinquency, this thesis moves to the next chapter to calibrate the degree to which these twin pillars of child justice are legislated in the 2003 CRA of Nigeria.

Chapter Six

Calibrating the Twin Pillars of Child Justice in the Child Rights Act

6.1 Introduction

Prior to 2003, the legal framework in Nigeria for child rights in general and child justice in particular was sprinkled across several federal and state laws, most especially the Children and Young Persons Act. The CYPA was initially a federal law but was later adopted as Children and Young Persons Laws of various states of the federation. Apart from the CYPA, other laws with an impact on children before 2003 include the criminal code of various states of Southern Nigeria¹ and the penal code of states of Northern Nigeria.²

The first criminal code was introduced in Northern Nigeria in 1904. With the 1914 amalgamation of the Northern and Southern protectorates, it was made applicable to all the protectorates in Nigeria.³ Thereafter, in 1959, a specific penal code applicable only to the Northern Protectorate was enacted in consideration of their predominant and majority Muslim interests, values and standards.⁴ Other laws with an impact on child rights include the adoption, custody, guardianship, and matrimonial causes laws of the respective states.

The above laws individually and collectively support one aspect of child rights or the other and make specific provision relating to the administration of child justice. Regardless of the inherent weaknesses and limited scope of the CYPA on the protection of child rights, it was, before the promulgation of the Child Rights Act in 2003, the most comprehensive and authoritative law regulating issues relating to child rights in general and child justice in particular. During the era of the CYPA, the effects of the inherently un-unified body of laws dealing with children and the inevitable legal uncertainty created by the plurality of laws with impact on child rights fashioned a situation of legal unpredictability.

6.2 Overview of the Child Rights Act

As an attempt to consolidate all laws relating to children into one single piece of legislation, the enactment of the CRA in 2003 also amounts to the implementation of Nigeria's commitment under international law to domesticate, recognize and enforce within its territory, the provisions of the CRC and the ACRWC. According to its preamble, the essence of the CRA is to provide and protect the rights of Nigerian children, and to secure their rights and interests irrespective of their

¹ Criminal Code Act, Chapter 77 Laws of the Federation of Nigeria 1990

² Penal Code Act, Chapter 77 Laws of the Federation of Nigeria 1990

³ Victor L.K. Essien, 'Northern Nigerian Penal Code: A Reflection of Diverse Values in Penal Legislation' (1984) 5 New York Law School Journal of International and Comparative Law 87

⁴ G.N.K Vukor-Quarshie, 'Criminal Justice Administration in Nigeria: Saro Wiwa in Review' (1979) 8 Criminal Law in Review 87

parents' or guardian's state of origin, ethnic nationality, sex, race and circumstances of birth, political opinion or religion.

Abubakar supports the view of the CRA when he posits that the CRA is aimed at boosting and extending the frontiers of existing legislation contained in different federal and state laws protecting the interest of Nigerian children.⁵ Structurally, the CRA is divided into twenty four parts and eleven schedules. Apart from providing for specific rights for children in conflict with the law, the CRA, while adopting all the fundamental rights in Chapter IV of the 1999 Constitution, creates a host of other child rights. In line with Africa-centric balancing of rights and responsibilities and in a bid to channel the energy of children towards building a healthy and prospective Nigerian nation, Section 19 of the CRA imposes on the child corresponding duties towards his or her family, community and the Federal Republic of Nigeria.

The Act also contains 16 distinct human rights for children including the right to survival and development, the right to a name, freedom of association and peaceful assembly, freedom of thought, conscience and religion, the right to private and family life, the right to freedom of movement, and freedom from discrimination. Others are the right to dignity of the child, the right to leisure, recreation and cultural activities, the right to health and health services, the right to parental care, protection and maintenance, and the right to free, compulsory and universal primary education.⁶

In terms of administration of child justice, the CRA replaced the hitherto juvenile justice administration in place in Nigeria since independence in 1960 with the child justice administration. As an agglomeration of many international human rights instruments and laws and in a bid to grant due process of the law to any child in conflict with the law, the CRA prohibits the subjection of any child to the criminal justice process and lays down procedures for dealing with children in conflict with the law from the point of arrest, investigation, to final adjudication.⁷

Emphasizing a child-oriented justice system which underlines the reintegration of the child offender into society so that he or she can play a constructive role thereafter, the CRA articulates non-custodial dispositions including a placement under care order, a guidance order and a supervision order, etc.⁸ In this

⁵ Musa Usman Abubakar, 'Criminal Law and the Rights of the Child in Northern Nigeria' (2010) Legal Studies Research Paper No 2012 – 11 <<http://ssrn.com/abstract=2055162>> accessed 11 April 2014

⁶ Section 3 - 17 Child Rights Act 2003; See also Nkoyo Toyo, 'Revisiting Equality as a Right: the Minimum Age of Marriage Clause in the Nigerian Child Rights Act 2003' (2006) 27 *Third World Quarterly* 1299

⁷ Section 204-246 Child Rights Act 2003; See also Muhammed Tawfiq Ladan, 'The Child Rights Act 2003 and the Challenges of its Adoption by State Governments in the 19 Northern States (Paper presented at an interactive forum for Sokoto State Legislators 23 July 2007. (On file)

⁸ Section 152 Child Rights Act 2003

respect, Ogunniran argues that the CRA recognizes the need for correcting the child offender within the family and community so that such a child can easily be reintegrated back into society.⁹

The CRA provides for certain procedural rights for children in conflict with the law and forbids the imposition of a death sentence against a child who is below the age of 18.¹⁰ Section 151 of the CRA confers upon family courts the responsibility to administer the child justice system and grants them unlimited jurisdiction to entertain civil and criminal matters relating to children. In exercising their powers, the family courts are enjoined to encourage reconciliation and promote out of court settlement of matters between the parties involved. As a practical approach towards peaceful and non-adversarial resolution of disputes, the CRA while not mentioning restorative justice, encourages quick disposition of cases and also creates room for restoring long-lasting relationships between the parties.

Section 277 of the CRA provides that no child shall be subjected to the traditional criminal justice process or to criminal sanctions. As such, a child who is alleged to have committed any prohibited act which constitutes a criminal offense if it were to be committed by an adult shall be subjected to the child justice system and the processes set forth in the Act. The protection of this section extends to every person below the age of 18 years, since the CRA defines a child to mean a person under the age of 18.

The CRA stipulates what the family courts should do at the conclusion of a case. By virtue of Section 223, if the case against the child is not proved, the court will dismiss the charge or discharge the child offender. Where the case is proved against the child, the court could place the child under a care order, guidance order or supervision order. The family courts could also commit the child to the care of a relative or guardian or any other fit person by a care order or send the child to approved accommodation by a corrective order.

Other measures at the disposal of family courts include an order for the child offender to participate in group counseling, an order for the parents of the child to pay a fine, damages, compensation or costs, or give security for the child's good behavior, or to undertake community service under supervision. The child offender could be committed to custody, foster care, guardianship, or hospital order, etc. Similarly, a detention order may be called as a disposition of last resort when there is compelling reason to do so. This compelling reason must as a matter of procedure be placed on the record of the family courts. Section 155 of the CRA provides for the

⁹ Iyabode Ogunniran, *The Child Rights Act Versus Shari'a Law in Nigeria: Issues, Challenges and a Way Forward* (2010) *Children's Legal Rights Journal* Volume 30 Number 1; See also Iyabode Ogunniran, 'The Lock and Key Phenomenon: Reforming the Penal Policy for Child Offenders in Nigeria' (2013) 10 *Justice Policy Journal* 1

¹⁰ Sections 204 – 206 and 222(1)(b) Child Rights Act 2003; See also E.E.O Alemika and Others, *Rights of the Child in Nigeria* (Organization Against Torture 2005) 11

procedure that must be adopted while proceedings are pending in court, including the right to counsel of the child's choice.

The CRA also provides for judicial officers and other court personnel to receive professional training in subjects such as sociology and behavioral sciences through in-service, refresher courses and other modes of education.¹¹ It specifically established specialized children police to be manned by highly trained police officers in the prevention, control, apprehension and investigation of child offenders. Ultimately, the CRA prescribes that police investigation and court proceedings shall only be used as a last resort. To ensure the friendly disposition of cases of children in conflict with the law, Section 149 of the CRA established two levels of family courts.

The first level is a family high court composed of a judge and two assessors knowledgeable on matters relating to children, especially in child psychology. The jurisdiction of the family high court includes hearing applications for the enforcement of the fundamental rights of children, dealing with offenses punishable with death or imprisonment for a term of 10 years and above, and claims involving a certain amount of money, divorce and custody of children. Decisions of the family high court are not final as appeal can be filed to the court of appeal. The family high court is also charged with powers to hear appeals from the family courts at the magistrate level.

At the magistrate court level, the family court is composed of a magistrate appointed by the Chief Judge of the state, who shall sit with two assessors, one of whom shall be a woman knowledgeable in child psychology, and proficient in dealing with matters relating to children. It has the power to try offenses not assigned specifically to the family high court under Section 152 of the Act. At both family high court and family magistrate court levels, there are three members including a judge and two other members, at least one of whom has been trained in child psychology.¹²

At the family magistrate court level, a further requirement of having a female member is prescribed. The inclusion of a woman in the composition of the family magistrate court is not a mere gender-affirmative action, but the fact that the presence of a female will provide a conducive atmosphere for child offenders to feel at ease during the hearing of their case. The CRA, while encouraging amicable resolution of non-serious cases, empowers family courts at both the high court and magistrate court levels to employ a series of diversion methods at the point of apprehension without recourse to formal trial. Notwithstanding these laudable

¹¹ Section 154 and 206, Child Rights Act, 2003; See also Yemi Akinseye-George, *Juvenile Justice in Nigeria: A Study of the Laws and Practices Relating to Juvenile Justice in Nigeria with Special Focus on the Federal Capital Territory Abuja, Kano, Lagos, Plateau, and Rivers State* (Center for Socio-Legal Studies 2009)

¹² Section 152 and 153 Child Rights Act 2003

provisions of the CRA in relation to child justice, its downside is that it did not expressly provide the minimum age of criminal responsibility and also did not provide for the enforcement mechanisms of its orders.

6.3 Twin Pillars of Child Justice in the Child Rights Act

As enunciated in chapters four and five, the principles of proportionality and the best interests of the child combine to form the twin pillars of child justice. Although the twin pillars of child justice are cardinal and ought to be integrated into any decision affecting children in conflict with the law, the extent to which they are articulated in the 2003 CRA has seldom been reviewed academically. As conceded in the research limitation of this thesis,¹³ the calibration of these twin pillars in the CRA by this thesis is one of the initial studies in this area and is thus constrained by the dearth of relevant academic literature.

6.3.1 Proportionality in the Child Rights Act

As a vital ingredient of 'just desert' and underscoring the fact that punishment should fit the crime,¹⁴ the principle of proportionality as one of the twin pillars of child justice is provided for in the CRA.¹⁵ Section 215 (1) (b) of the CRA which is deontological in nature mandates the family courts to ensure that the reaction to the infraction of a child offender must always be proportionate not only to the circumstances and the gravity of the offense but also to the circumstances and needs of the child and the needs of the society. Contrary to the consequentialist rationale adduced by Thomas whereby the crime preventive benefits of punishment are justifiable to the extent that its imposition adds value to society in excess of the harm suffered by the wrongdoer, the CRA exhibits a deontological inclination and prescribes that the well-being of the child is the guiding factor in the consideration of any case against him or her.¹⁶

To ensure proportionate treatment of a child offender, the CRA provides that the deprivation of liberty should be the last resort and with minimal restriction after careful consideration of the entire circumstances of the case and the offending child.¹⁷ Such proportionate social inquiries are expected to reveal the child's background, his or her living environment and circumstances under which he or she committed the offense. There is also the need to consider the child's social and family background, educational experience and school career.

¹³ Sub-chapter 1(2)(2) of this thesis at page 4

¹⁴ Stone Sweet & J Matthews, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 Columbia Journal of Transitional Law .90

¹⁵ Thomas Balmer, 'Some Thoughts on Proportionality' (2008) 87 Oregon Law Review 783

¹⁶ Tracy Thomas, 'Proportionality and the Supreme Court's Jurisprudence of Remedies' (2007) 57 Hasting Law Journal 73

¹⁷ Section 215 (1)(b) Child Rights Act 2003

The deontological importance of such facts cannot be overemphasized as they would go a long way in helping the court to determine how to integrate the circumstances of the child in reacting proportionately to the offense and offender. True to its deontological proposition that punishment should be humane, not in excess of what is necessitated by the crime committed, and in a bid to ensure fairness in the treatment of children in conflict with the law, the CRA clearly subscribes to the principle of proportionality as prescribed in international human rights instruments and laws.

Comparing Section 215 of the CRA with Article 40(4) of the CRC, the provision of the CRA relating to proportionality is much more fleshed-out than that of the CRC because it predicates the application of proportionality not only as a response to the infraction of a child offender, but also as a consideration of the circumstances and gravity of the offense, and of the circumstances and the needs of the child vis-à-vis the needs of the society. In the African context and particularly in Nigeria, the ‘circumstances and gravity of the offense and of the circumstances and the needs of the child offender’ are usually swayed by cultural beliefs that a child is not yet mature, under the guidance and surveillance of parents and as such should not be held accountable for crimes committed apparently in an immature state of mind. It is on this note that the elaborate provision of the CRA enjoins the family courts to go outside the culpability consideration to circumstantial issues including the immediate environment of the child offender.

Recalling that proportionality as a principle of child justice was not expressly mentioned in the ACRWC, particularly in the section relating to the administration of child justice, the inference to proportionality in the ACRWC would be through a deductive reading and meaning of the phrase ‘the right to special treatment in a manner consistent with the child’s sense of dignity and worth’. As such, the provision of proportionality in the CRA equally surpasses the proportionality standard in the ACRWC.

The elasticity of the proportionality provision in the CRA can only be equated with that prescribed by the United Nations Standard Minimum Rules for the Administration of Juvenile Justice. As a mechanism for ensuring proportionality, the Rules provide that there should be no less or more than fair reaction in any given case of child delinquency and crime.¹⁸ It also provides that child justice shall emphasize the well-being of the child and shall ensure that any reaction to children in conflict with the law shall always be in proportion to the circumstances of both the offender and offense.

Comparing the proportionality provision of the CRA with three other common law jurisdictions in Africa, the strength of the CRA is evident. In the

¹⁸ Rule 5.1, UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice* (‘*The Beijing Rules*’)

context of Kenya, Children's Act No. 8 of 2001 domesticated the CRC and in its Section 186 provides guarantees to a child accused of an offense without expressly mentioning proportionality.¹⁹ Overall, there is no express mention of proportionality in any of the 199 Sections of the Kenyan Children's Act.²⁰ Rather, the principle could be deciphered through a deductive and conjunctive reading of Section 186.²¹ The entirety of this section ensures that to achieve proportionate sanctions, the procedure and all other elements of the child justice system should factor in the situation of the child, his or her rights, his or her family situation and his or her willingness to reform.²²

While the Children's Act of Uganda also did not provide for proportionality in any of its sections,²³ the Ghanaian Child Justice Act articulated proportionality

¹⁹ Chapter 59 Laws of Kenya; See also Section 94(1) (b and g) which provides that a family and children court shall have the power to make any of the following orders where the charges have been admitted or proved against a child: (b) Caution, (g) Detention for a maximum of three months for a child under sixteen years of age and a maximum of twelve months for a child above sixteen years of age. Also, the Children Act imposes a maximum punishment of imprisonment of three years to a juvenile who commits any offence that attracts a death penalty. Section 94(1g) provides that in the case of an offence punishable by death, the family and children court may sentence the child to imprisonment for a maximum period of three years.

²⁰ Although not expressly mentioned, in order to ensure that juveniles are not given disproportionate sentences upon arraignment before a Juvenile Court for an offence, the Kenyan Children's Act provides that the Juvenile Court shall order a social enquiry report to be submitted to the court. This report which shall be prepared by a Probation Officer shall be taken into account by the court in the making of an order. As a mitigating platform, the report shall include particulars on the background of the juvenile, the present circumstances of the juvenile, the conditions under which the offence was committed etc. In addition to the report, the court may request an oral report from the probation officer in addition to the social enquiry report. To ensure proportionality in sentencing a juvenile offender, the Court is mandated to take into account the recommendations contained in the social enquiry report in determining what punishment to impose. Where the court does not follow the recommendations given in the report, written reasons shall be given as to why the recommendations were not complied with.

²¹ Article 186 of Kenyan Children's Act No. 8 of 2001 provides that every child accused of having infringed any law shall- (a) be informed promptly and directly of the charges against him; (b) if he is unable to obtain legal assistance be provided by the Government with assistance in the preparation and presentation of his defense; (c) have the matter determined without delay; (d) not be compelled to give testimony or to confess guilt; (e) have free assistance of an interpreter if the child cannot understand or speak the language used; (f) if found guilty, have the decisions and any measures imposed in consequence thereof reviewed by a higher court; (g) have his privacy fully respected at all the proceedings; (h) if he is disabled, be given special care and be treated with the same dignity as a child with no disability.

²² The tiny strands of the principle of proportionality could also be extracted from the Kenyan Children's Act through its Section 186 that provides that matters involving children should be determined without delay; Section 190 that outlines the restrictions on punishment; Section 191 that outlines the methods of dealing with offenders and Section 194 detailing proceedings in respect of a child accused of having infringed any law.

²³ Ugandan Children's Act Cap 59

better than its East African counterparts.²⁴ The Ghanaian Child Justice Act protects the rights of children, and ensures appropriate and individual response to children in conflict with the law. Section 1(2) provides for separate treatment of children in conflict with the law except under exceptional circumstances.²⁵ Vis-à-vis the Kenyan, Ugandan and Ghanaian child justice framework, the principle of proportionality is properly and more expressly articulated in the CRA. While the identification of the reasons for this proportionality gap in the legal framework of these African countries may be a subject for separate research, the fact that proportionality was not expressly mentioned in these laws does not in any case dispense with proportionality as one of the twin pillars of child justice.

With pervasive poverty in Africa in general and Nigeria in particular, the external factors to be considered by the family courts in proportionately reacting to a child offense include but are not limited to the environment of the child offender, parental background, the nature of the injury to the victim and ultimately, the quantum of the punishment that is compliant with the developmental opportunities of the child offender.

6.3.2 Best Interests of the Child in the Child Rights Act

As stated in chapter 5 of this thesis, the best interests of the child is the second pillar of child justice and fundamental in interpreting and applying child rights. In the particular context of child justice, it is a veritable juristic tool for balancing the weight of a court decision against its impact on a child offender. The normative foundation of the principle in Nigeria is Section 1 of the CRA which provides that:

[I]n every action concerning a child, whether undertaken by an individual, public or private body, institutions of service, court of

²⁴ Juvenile Justice Act, 2003 (Act 653)

²⁵ In the case of Ghana, in order to ensure that juveniles are given punishments which are not only in consonance with the offences they are proven beyond reasonable doubt to have committed or which they have pleaded guilty to, upon arraignment before a Juvenile Court for an offence, the Juvenile Court shall order a social enquiry report to be submitted to the court which shall be taken into account by the court in the making of an order. This report shall be prepared by a probation officer who shall visit the home of the juvenile. The report shall include particulars on the background of the juvenile, the present circumstances of the juvenile, the conditions under which the offence was committed and recommendations for sentence. In respect of minor offences, the social enquiry report may include a recommendation that the matter before the juvenile court be referred to a child panel established under the Children's Act, 1998 (Act 560). The court shall ensure that the contents of the report are made known to the juvenile and a copy shall be made available to the juvenile or the legal representative of the juvenile. In terms of diversion, Section 27(c) and (e) of the Act requires that it must be appropriate according to the age and maturity of the juvenile and give useful skills to the juvenile where possible. According to Section 27 (b) and (d), diversion shall also not be exploitative, harmful or hazardous to the physical and mental health of the juvenile and must not interfere with their schooling.

law, or administrative or legislative authority, the best interests of the child shall be of paramount consideration.

The provisions of the CRA are aligned to international best practice whereby, in the best interests of the child, the feebleness of infancy demands the continual protection of children by society. The principle presupposes that in dealing with a child and particularly a child offender, his or her well-being should trigger the consideration of circumstantial and non-circumstantial factors connected with the child. Section 1 of the CRA also enumerates institutions, administrative authorities and legislative bodies that must hold fast to the best interests of the child as the primary consideration in all matters affecting children.

It is therefore trite to say that no agency or organ of government or non-governmental entity in Nigeria is insulated from the pervading observance of the best interests of the child in all actions and interventions. As formulated under the CRA, the principle applies to all children whether as a group or individually. This position accords with the concluding observations of the committee on the implementation of the CRC where it pointed out that the use of the plural 'children' as opposed to the singular 'child' in the CRC suggests the applicability of the principle to children as a group and not just to an individual child.²⁶

Section 1 of the CRA or any of its other 278 sections does not define or enumerate the ingredients of the principle of the best interests of the child. Arguably, the reason behind the non-definition of what clearly amounts to the best interests of the child may not be unrelated to the fact that the principle is best applied elastically and universally if it does not lend itself to any precise and regimented definition or description. Without stirring the unending debate for and against the precise definition of the principle of the best interests of the child, and the one-size-fits-all enumeration of its ingredients, the principle in the context of child justice aggregates all considerations which if applied when making decisions affecting children in conflict with the law would promote their survival, protection, rehabilitation and development.

Outside the parameters of child justice and while incorporating fundamental human rights inherent in the constitution, Section 7(2) of the CRA provides for the observance of the best interests of the child by guardians in directing the child's freedom of thought, conscience and religion in line with the child's evolving capacities. Another aspect of the best interests of the child guaranteed under the CRA relates to parental care and protection. Section 44 mandates a specialized police unit into whose custody a child may be placed to ensure that in the best interests of the child, contact must be established between the child and parents or anybody who has such responsibility from the very first time the child comes into contact with the

²⁶ Michael Freeman, *The Best Interests of the Child: A Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 2007) 46

officers of the law. Further predicating all actions on the reasonability test and in the best interests of the child, the CRA contemplates that all necessary assistance must be rendered to a child at each point a decision affecting him or her is about to be taken by judicial or other authorities.

The CRA also captures aptly the spirit of the child justice administration as evidenced in the CRC, ACRWC as well as other international human rights instruments and laws relating to children. The vision mutually evident in the CRA, CRA and ACRWC is that the aim of the child justice system is not to investigate, prosecute, convict and punish children, but rather, it is to salvage, rehabilitate and reintegrate them into their family, community and the larger society. As mentioned earlier, there is no academic literature that discusses and situates the principle of the best interests of the child into the deontological or consequentialist philosophical schools.²⁷ However, and as aforesaid, the deontological connotation will be ascribed to the principle of the best interests of the child. The deontological inclination of the principle of the best interests of the child under the CRA is also evident in the fact that it provides a self-sustaining tool for analyzing and ensuring that children in conflict with the law receive equitable and fair justice. Drawing extensively from Article 3 of the CRC and Articles 3 and 4 of the ACRWC, the deontological slant of the best interests principle is manifest in Section 1 of the CRA because it focuses on a just outcome and moral appropriateness of any intervention against children.

In terms of child justice, Sections 159 and 215(1) of the CRA provides that every institution or agency in the child justice administration has a legal duty to ensure that the best interests of the child are safeguarded. It mandates family courts to ensure that proceedings are conducive to the best interests of the child and are conducted in an atmosphere of understanding which allows children to participate and express themselves freely. In further promoting the best interests of the child in the context of child justice, Section 89(1) of the CRA provides that family courts may for the purpose of specified proceedings, appoint a guardian *ad litem* for the child, unless it is satisfied that it is not necessary to do so. Where appointed, the guardian *ad litem* is under a duty to safeguard the interests of the child in the manner required by the rules of the court.²⁸

As can be deduced from the above analysis of the CRA, the elasticity of the principle of the best interests of the child in the CRA accords with the normative standard set by the CRC. Compared to the best interests provision of the ACRWC which merely reaffirmed adherence to the principles of the rights and welfare of the child, the scope of the best interests of the child principle in the CRA surpasses the ACRWC template due to the fact that the principle was not expressly mentioned in the child justice provisions of the ACRWC.

²⁷ See chapter 5(4)

²⁸ Section 89(4)(c) Child Rights Act 2003

Comparatively, the Kenyan Children's Act No. 8 of 2001 interchangeably uses the 'best interests' and 'welfare' phrases to underscore that the best interests of the child are to be taken into account by any judicial institution seeking to determine the criminal responsibility of a child. The Kenyan Act No. 8 establishes a special court that exclusively deals with cases relating to children and mandates the courts to take into account the best interests of the child.²⁹ In Uganda, the Children's Act Cap 59 does not use the 'best interests' terminology, rather it resorts to the 'child welfare' phrase which to all intents and purposes seeks to achieve the best interests requirement. The first schedule to the Ugandan Children Act lays down guiding principles for its implementation and provides that whenever the state, a court, a local authority or any person determines any question with respect to the upbringing of the child, the child's welfare shall be of paramount consideration.³⁰

In the case of Ghana, the Juvenile Justice Act provides that in deciding on or dealing with any matter concerning a child, his or her best interests shall be paramount and shall be the primary consideration by a child court, institution or other body.³¹ The Ghanaian Act further provides that where a child court is not constituted for a place, district or area concerned, any court of summary jurisdiction may, in the interests of the child, assume jurisdiction to hear such cases.³² In dealing with the best interests of the child, Section 3 of the Ghanaian Act seeks to protect children from public identification through the maintenance of their privacy and confidentiality. This extends to the right to privacy during arrest, investigation of an offense, trial for the offense, and at any other stage of the cause or matter.

In Nigeria, Kenya, Uganda and Ghana respectively, the important role of the principle of the best interests of the child in the administration of child justice is adequately appreciated and legislatively guaranteed. In these four countries, the

²⁹ Section 188 Children's Act No. 8 of 2001. According to this principle and in keeping with the adherence to the best interests of the child principle and more so with due regard to the conservation and promotion of the welfare of the child, the Act shields the child from the mental anxiety related to formal court sentencing procedure and effects that may arise there from. It ensures that the words 'conviction' and 'sentence' shall not be used in relation to a child dealt with by the Children's Court. See also Section 189 of the Children's Act No. 8 of 2001

³⁰ The Ugandan Children's Act also sets out the principle of the best interests of the child as the paramount consideration in any decisions concerning treatment, trial and custody of children. Principle 3 of the Children's Act of Uganda while underlining the need to protect the best interests of the child further provides that in determining any question relating to circumstances set out in Principle 1, the court shall have regard in particular to the child's physical, emotional and educational needs and the likely effects of any changes in the child's circumstances. Equally, to ensure that welfare needs of children are considered in sentencing, section 20(2) of the Ugandan Children Act requires the probation and social welfare officer to prepare a welfare report before the hearing of every juvenile case. The social welfare report includes the background information on the child which in the best interests of the child is taken into account before making an order or sentence.

³¹ Section 2 Juvenile Justice Act 2003 (Act 653)

³² Section 17(2) Juvenile Justice Act 2003 (Act 653)

articulation of the principle in the child rights frameworks and particularly in the child justice provisions of the respective laws is in tandem with the normative standard established by the CRC and surpasses the regional standard set by the ACRWC.

6.4 Conclusion

This chapter calibrated the extent to which the twin pillars of child justice are legislatively accommodated in the Child Rights Act. It found that the twin pillars of child justice are adequately legislated in the CRA in accordance with CRC and other international child rights instruments and conventions, and higher than the regional standard of ACRWC. Regardless of the controversies and eventual trade-offs surrounding its adoption, this chapter noted that the CRA is the most comprehensive child rights instrument in the history of Nigeria. Compared to some select common law countries in Africa, this chapter found that the articulation of the twin pillars of child justice in the CRA is stronger than in most of the countries examined.

Having noted that the twin pillars of child justice are legislatively articulated in the CRA, and appreciating their mutually reinforcing roles in ensuring that punishment meted out to children in conflict with the law is not only proportionate to the offense committed, but also in his or her best interests, the next chapter examines how family courts apply the twin pillars of child justice when determining issues involving children in conflict with the law.

Chapter Seven

Application of the Twin Pillars of Child Justice by Family Courts

7.1 Introduction

Having found that the twin pillars of child justice are adequately legislated in the CRA, this chapter examines to what extent family courts integrate these twin pillars in the treatment of children in conflict with the law, and to what degree the internationally compliant legislative success of the CRA translates in the protection of child rights. As alluded to when setting out the limitations of this thesis in chapter one, this chapter takes cognizance of the dearth of academic literature in Nigeria or elsewhere specifically examining the extent to which the twin pillars of child justice are legislatively articulated in the CRA.

This chapter also underlines the seemingly acute absence of academic literature and case law jurisprudence that explicitly examines the extent to which these twin pillars of child justice are applied by the family courts in arriving at decisions relating to children in conflict with the law. As such, this chapter will seldom make reference to academic literature to buttress or rebut its findings as to how these twin pillars of child justice are implemented by family courts in Nigeria.¹

The chapter argues that while the child justice framework of the CRA may not have fallen short of international normative standards and thus adequately articulates the principles of proportionality and the best interests of the child as the twin pillars of child justice, there are numerous institutional and legislative obstacles negating the application of these principles by family courts established pursuant to the CRA. This chapter argues that irrespective of the integration of proportionality and best interests of the child in the CRA, children in conflict with the law in Nigeria still fall outside the protective shield of the twin pillars of child justice.

7.2 Establishment and Functioning of Enablers

There are several institutions enumerated under the CRA that seek to ensure that child rights in general and child justice in particular are promoted and protected through the application of the twin pillars of child justice.² Specifically, Sections 215 and 217 of the CRA provide guidance for the treatment of children in conflict with the law. Also, Section 203 provides that a child who is accused of committing an offense envisaged under Section 209 of the CRA shall be tried in a distinct way by a designated institution composed uniquely of specialist personnel.

¹ As stated earlier and as a mitigatory measure, this chapter will rely on interviews conducted with five court registrars, ten magistrates and ten barristers practicing in ten states of the federation; See chapter 1(2) on methodology

² Yemi Akinseye-George, *Juvenile Justice in Nigeria: A Study of the Laws and Practices Relating to Juvenile Justice in Nigeria with Special Focus on the Federal Capital Territory Abuja, Kano, Lagos, Plateau and River States* (Center for Socio-Legal Studies 2009) 31

In compliance with Section 230 of the CRA, such institutions must ensure that the proceeding is conducted in an atmosphere of understanding and conducive to the best interests of the child. Such institutions must also ensure that any decision or orders issued in the process with respect to the child must be proportionate not only to the circumstance and gravity of the offense but also to the circumstances and needs of the society.³

7.2.1 Family Courts

One of the institutions created under the CRA for the integration of the twin pillars of child justice in the treatment of children in conflict with the law is the family court. For the purpose of hearing and deciding on matters of children in conflict with the law, the CRA provides for the establishment of family courts in each state of the federation and the Federal Capital Territory Abuja. The family courts envisioned under Section 149 of the CRA are granted exclusive jurisdiction to hear matters of children in conflict with the law and must be composed of designated and specialist trained officers with proficiency in child rights.⁴

A review of judicial divisions of most states of the federation, unstructured interviews with magistrates hearing cases of children in conflict with the law and interaction with legal practitioners and court users all point to the non-establishment and non-functionality of the family courts in the Federal Capital Territory and some states of the federation. In Imo State for instance, which is one of the states in South East Nigeria to have adopted the CRA into state law,⁵ family courts contemplated under the CRA to apply the twin pillars of child justice in the treatment of children in conflict with the law have not been established in any of the magisterial divisions of the state.⁶

Consequently, children in conflict with the law in Imo State despite the safeguard provided in the CRA and international and regional child rights instruments and laws, are still being processed by regular magistrates courts and high courts devoid of all the inbuilt safeguards and protection envisaged by the CRA.⁷ In Abia State which is also in the South-East, family courts have not been established. As such, conventional magistrate courts are designated once a week to hear matters pertaining to children in conflict with the law. Although this situation is still not in

³ Okoye, Uzoma Odera, 'Knowledge and Awareness of the Child's Rights Act among Residents of a University Town in Enugu State Nigeria' (2011) 2 Educational Research 159

⁴ Sections 149 – 154 Child Rights Act 2003

⁵ The Childs Right Law of Imo State of Nigeria No. 6 2004. This law provides for the rights and responsibilities of a child in Imo State of Nigeria and a system of child justice administration and matters connected therewith. It also provides that the best interests of the child shall be the primary consideration in all actions concerning them

⁶ Interviews with registrars, magistrates and barristers practicing in Imo State on 14 January 2013

⁷ Interviews conducted with magistrates and barristers practicing in Imo State between 14 to 18 January 2013

tune with the expectations of the CRA, it is nevertheless an improvement on the situation in the other four South-East states of Nigeria.⁸

While it may be conceded that Lagos State is the only state to establish and adopt the Rules of Procedure for the family courts as envisaged in Section 40(1) of the CRA and certainly advanced in the implementation of the CRA, the child justice framework even in Lagos State still falls short of the envisioned standards of the CRA.⁹ Comparing the extent to which family courts pursuant to the CRA integrate the twin pillars of child justice in the treatment of children in conflict with the law in Imo and Lagos States respectively, the treatment of children in conflict with the law through the assimilation of the twin pillars of child justice is relatively improved in Lagos State vis-à-vis Imo State. Findings from the interviews indicate that while Lagos State domesticated the CRA in 2008 four years after Imo State, it has taken several steps ahead of Imo State in formally constituting the family courts as contemplated under the CRA.

The impact of the non-establishment of family courts in most states of the federation and the Federal Capital Territory eleven years after the entry into force of the CRA is that children in conflict with the law in Nigeria are still tried by conventional magistrate courts or high courts granted such powers under the partially repealed CYP. Not being the specific family courts designated under the CRA, the hearing of cases of children in conflict with the law by non-family courts impacts negatively on the child justice bedrock and the meaningful integration of the principles of proportionality and the best interests of the child in the treatment of children in conflict with the law in Nigeria. These non-family courts are usually not attuned to the peculiar sensitivities required for the treatment of children in conflict with the law and seldom make recourse to the twin pillars of child justice in the determination of cases involving children.¹⁰

Irrespective of the foregoing institutional gaps that permeate most states of the federation, it is essential to underline the fact that assuming that the family courts are physically established pursuant to the CRA, it is nonetheless important to note that it would not entirely be insulated from obvious challenges faced by other justice institutions in Nigeria. The family courts like other arms of the judiciary, when established would certainly depend on the interplay of different justice institutions such as the police, the prosecutor's office, and social works department amongst

⁸ Interviews conducted with registrars, magistrates and barristers practicing in Abia State between 21 to 25 January 2013

⁹ Interviews conducted with registrars, magistrates and barristers practicing in Lagos between 28 to 31 January 2013; See also Yemi Akinseye-George, *Juvenile Justice in Nigeria: A Study of the Laws and Practices Relating to Juvenile Justice in Nigeria with Special Focus on the Federal Capital Territory Abuja, Kano, Lagos, Plateau and River States* (Center for Socio-Legal Studies 2009) 55

¹⁰ Interviews conducted with registrars, magistrates and barristers practicing in Bauchi, Enugu, Kaduna, Kano and Niger States respectively between March and April 2013

others. As such, a holistic overhaul of justice institutions is required for effective and efficient administration of child justice through the family courts.

On the other hand and in line with the indivisibility and interdependence of human rights, if child rights in Nigeria are to be realized through the intervention of family courts, equal emphasis must be given to the effective implementation of economic, social and cultural rights provided for in Chapter II of the 1999 Constitution of the Federal Republic of Nigeria.¹¹ It is only through an all-inclusive promotion and protection of all rights that the implementation of the twin pillars of child justice could be effectively and efficiently applied in the treatment of children in conflict with the law in Nigeria.

In the same vein, with paternalistic perceptions and interpretations of child rights vis-à-vis the socio-economic and political realities in Nigeria, it is only by awareness, appreciation and application of the twin pillars of child justice by the specialist family courts entrusted with the administration of child justice that the spirit and letters of the twin pillars of child justice could be provided to children in conflict with the law.

Examining a few common law countries in the continent, it can be seen that the situational hiccups experienced in the functioning of the CRA are not exclusive to Nigeria but extend to other countries in the continent. For instance, four years and nine years respectively after the enactment of the Kenyan and Ugandan Children's Law, the provision of these two pieces of legislation regarding the establishment of child specialist courts and processes is yet to be realized.¹²

7.2.2 Composition and Competence of Family Courts

Section 152 of the CRA provides for the composition of the family courts both at the high court and the magistrate court levels. At the high court level, the family courts shall consist of a judge and two assessors one of whom must be

¹¹ *Report on Promoting Human Rights and Fundamental Freedoms through a Better Understanding of Traditional Values of Humankind: Best Practices*, Mandated by Human Rights Council Resolution A/HRC/RES/21/3. This report states that best practice in the promotion of human rights and fundamental freedoms requires encouraging understanding and acceptance of those very principles that inform developing human rights framework - the universality and indivisibility of rights, non-discrimination in the enjoyment of rights, and fairness and equality in efforts to ensure and implement those rights < <http://www.ohchr.org/Documents/Issues/HRValues/JointSubmissionII.pdf>> accessed 30 October 2013; See also

UN Commission on Human Rights, *Effects on the Full Enjoyment of Human Rights of the Economic Adjustment Policies Arising from Foreign Debt and, in Particular, on the Implementation of the Declaration on the Right to Development*, 22 February 1991, E/CN.4/RES/1991/13 <<http://www.refworld.org/docid/3b00f0d5c.html>> accessed 18 April 2014

¹² Odongo Godfrey Odhiambo, 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context' (Phd Thesis University Western Cape South Africa 2005) 65

proficient in dealing with children and incidental matters preferably in the area of child psychology; and the other shall be an officer not below the rank of chief child development officer. For the family courts at the magisterial level, it shall consist of a magistrate not below the rank of chief magistrate and assessors one of whom shall be an officer not below the rank of senior child development officer; and the other a woman who has attributes in dealing with children and matters relating to them.

Section 206 of the CRA clearly laid out the competence, training and professionalism of all magistrates and judges designated to deal with children in conflict with the law, including officers of the specialized children police and child development office. The CRA also stipulates the professional education, in-service training, refresher courses and other appropriate courses to strengthen the capacity of these child justice personnel and ensure effective integration of the twin pillars of child justice in the treatment of children in conflict with the law.

Despite the clarity of the CRA regarding the composition and competence of family courts both at the high court and magistrate court levels, the composition and competence criteria for judicial officers dealing with children in conflict with the law in the Federal Capital Territory where the CRA is exclusively enforceable fall below the CRA threshold.¹³ Apart from the fact that the Federal Capital Territory is working on the Rule of Procedures for the CRA, its judicial officers dealing with children in conflict with the law are bereft of prerequisite competence, not appropriated composed and most importantly seldom conversant with the pivotal role of the twin pillars of child justice.

Interviews conducted with stakeholders in Lagos, Ogun, Oyo, Imo, Abia, Rivers and Plateau states in January and February 2013 indicate that most of the judicial officers dealing with issues of children in conflict with the law in these states are yet to receive the professional training and acquire the competence prescribed in the CRA.¹⁴ Also, the recruitment of personnel in the child justice system that will reflect the diversity of children who come into contact with the system as stipulated under the CRA has also been observed more in breach in the Federal Capital Territory and most of the states.¹⁵

On the other hand, a majority of the existing judicial officers operating in conventional magistrate courts and high courts have not had the opportunity through

¹³ Interviews conducted with registrars, magistrates and barristers practicing in the Federal Capital Territory Abuja between 4 to 8 February 2013

¹⁴ Interviews conducted with registrars, magistrates and barristers practicing in Lagos, Ogun, Oyo, Imo, Abia, Rivers and Plateau States between January to July 2013

¹⁵ Under Section 154(1) of the Child Rights Act, the personnel of the Court shall be afforded professional education, in-service training, refresher courses and other modes of instruction to promote and enhance the necessary professional competence they require.(2) The contents of the education, training and courses referred to in Subsection (1) of this section shall be such as shall reflect the diversity of the children who come into contact with and the diversity and complexity of matters dealt with by the Court.

further training to familiarize themselves with the provisions of the CRA principles relating to the twin pillars of child justice.¹⁶ The seeming lack of knowledge and sensitivity on the provisions of the CRA generally and the twin pillars of child justice more particularly, prevalent amongst child justice personnel, is not just limited to the Federal Capital Territory but is a widespread phenomenon in most states of the federation.¹⁷

In majority states of Nigeria, the presiding magistrate and all other functionaries of the family courts as contemplated under the CRA are yet to be equipped with the prerequisite skill set and do not sit in a panel of three experts including a female knowledgeable in child psychology.¹⁸ The ostensible lack of appreciation of the twin pillars of child justice by judicial officers is averse to the dictates of the CRC and the ACRWC enjoining state parties to undertake measures to make the principles and provisions of these instruments widely known and applied by appropriate and active means.

On the other hand, an inquiry into some states of the federation yet to adopt the CRA into state law also presents a more daunting scenario. Recalling that most states of Northern Nigeria have not yet adopted the CRA into state law and as such are yet to establish appropriate child rights friendly institutions and mechanisms anticipated for the treatment of children in conflict with the law, the prevailing capacity and competence of judicial officers in those states fall short of the prescription of the CRA.¹⁹ In that case, child justice personnel in most Northern states of Nigeria appointed without the skills, qualification, competence and quorum stipulated under the CRA do not possess the requisite and specialized skills for determining proportionate and the best interests treatment of children in conflict with the law.

Judicial officers in those states of the federation that are yet to adopt the CRA into state law do not sit in a gender-balanced panel envisioned under the

¹⁶ See also Yemi Akinseye-George, *Juvenile Justice in Nigeria: A Study of the Laws and Practices Relating to Juvenile Justice in Nigeria with Special Focus on the Federal Capital Territory Abuja, Kano, Lagos, Plateau and River States* (Center for Socio-Legal Studies 2009) 55

¹⁷ Interviews conducted with registrars, magistrates and barristers practicing in the Federal Capital Territory Abuja between 4 to 8 February 2013

¹⁸ Section 152(3) of the Child Rights Act provides that the Family Court at the High Court level shall be duly constituted if it consists of a judge and two assessors one of whom has attributes of dealing with children and matters relating to children preferably in the area of child psychology education. Section 153(3) of the Child Rights Act also provides that the court at the magisterial level shall be duly constituted if it consists of a magistrate and two assessors one of whom shall be a woman and the other person with proficiency in dealing with children and matters relating to children, preferably in the area of child psychology education.

¹⁹ The states that are yet to adopt the Child Rights Act into Law except for Enugu State are mostly the Islamic Northern states of Adamawa, Borno, Bauchi, Gombe, Kaduna, Katsina, Kano, Kebbi, Sokoto, Yobe, Zamfara etc

CRA.²⁰ Similarly, in Enugu State, which incidentally is the only Christian-majority state that is yet to adopt the CRA into state law, and whereby the treatment of children in conflict with the law is regulated by the CYP, magistrates hearing cases of children in conflict with the law are seldom aware of the importance and existence of the twin pillars of child justice.²¹ Equally, in Bauchi, Enugu, Kaduna, Kano and Niger states which are yet to adopt the CRA into state law, child courts are expectedly manned by regular magistrates without the requisite skill set and structure envisaged under the CRA.²²

In the absence of the establishment of family courts coupled with the dearth of requisite skills of such officers, the gains of the CRA and essentially the integration of the twin pillars of child justice in the treatment of children in conflict with the law remain a far-fetched dream in most of the states of the federation and the Federal Capital Territory. Also, the lack of case law authorities on CRA in general and on the twin pillars of child justice in particular after more than ten years of entry into force of the CRA is certainly related to the non-recruitment of expert personnel anticipated under the Act.

Whilst advocating the training and sensitization of child justice functionaries, it should be borne in mind that although the capacity building of these officers is necessary, it is not sufficient on its own to guarantee committed implementation of the twin pillars of child justice contained in the CRA. A holistic and multifaceted intervention must be tailored to deal with the establishment, functionality and capacity of the family courts in order to ensure that such a capacity-building process benefits the child justice system in the short and long run.

7.2.3 Child Rights Implementation Committee

To facilitate the realization of rights granted to children in conflict with the law, the CRA created the child rights implementation committee at the federal, state and local government levels. These implementation committees are charged with initiating actions that shall ensure the observance and popularization of the rights and

²⁰ Interviews conducted with registrars, magistrates and barristers practicing in Bauchi, Enugu, Kaduna, Kano and Niger states respectively between March and April 2013; See also Yemi Akinseye-George, *Juvenile Justice in Nigeria: A Study of the Laws and Practices Relating to Juvenile Justice in Nigeria with Special Focus on the Federal Capital Territory Abuja, Kano, Lagos, Plateau and River States* (Center for Socio-Legal Studies 2009) 55

²¹ Interviews conducted with registrars, magistrates and barristers practicing in Enugu State between 11 to 15 March 2013: See also *National Prison Audit* (National Human Rights Commission, UNDP and NORAAD 2008) 15

²² Interviews conducted with court registrars, magistrates and barristers practicing in Bauchi, Enugu, Kaduna, Kano and Niger states respectively between March and April 2013; See also Olayinka Silas Akinwumi, 'Legal Impediments on the Practical Implementation of the Child Right Act 2003' (2009) 37 *International Journal of Legal Information* 10

welfare of a child as provided for in the CRA and other regional and international human rights instruments and laws.²³

By extension, the three-tier implementation committees of the CRA are expected to ensure that the twin pillars of child justice are integrated in the treatment of children in conflict with the law. They are also charged with continuous review of the implementation of the CRA and to make recommendations to the national, state and local government on specific programs and projects that shall enhance the implementation of child rights. The implementation committees are also mandated to oversee the collection and documentation of all matters relating to children.

Despite the above laudable and essential roles of the child rights implementation committees created under the CRA, these committees envisaged at the national, state and local government levels have not, except for Lagos State, been established eleven years after the entry into force of the CRA. While the reasons for the non-establishment of the child rights implementation committee are outside the scope of this thesis, it does represent a setback to the enjoyment of child rights in general and child justice in particular.

The logical inference that could be made for the non-establishment of the child rights implementation committees and other structural enablers envisaged under the CRA is that child rights in general and particularly the proportionate and the best interests treatment of children in conflict with the law apparently do not enjoy financial priority by most states of the federations. In that vein, the possible claim of lack of resources by states and the federal government is not very cogent because those states that have adopted the CRA into state laws and the Federal Capital Territory willingly committed to the CRA knowing well the incidental financial implications.

With the non-establishment of the three-tier child rights implementation committee envisaged under the CRA, jurisprudence akin to those developed by the committee on the implementation of the CRC and the committee on the implementation of the ACRWC is non-existent with regard to the CRA in Nigeria.²⁴ In addition, the absence of the child rights implementation committee established to monitor the execution of the CRA accounts for amongst other things the lackluster treatment of children in conflict with the law despite the protection contained in the twin pillars of child justice. The practical realization of the goals of child justice administration depends in part on the establishment of the implementation committee to monitor and supervise the implementation of the CRA. Otherwise the protective

²³ Section 260(1) Child Rights Act 2003; See also Section 264(1) Child Rights Act 2003; Section 264(1) Child Rights Act 2003

²⁴ UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007

shields of the twin pillars of child justice would not be extended to children in conflict with the law in Nigeria.

7.2.4 Funding of the Child Justice System

As part of the overall justice system in Nigeria, the child justice envisioned under the CRA is impacted by the socio-economic issues plaguing judicial and non-judicial institutions in Nigeria.²⁵ Key amongst the challenges facing judicial institutions in Nigeria is the relatively poor funding that has perennially weakened the Nigerian justice system and systemically undermined the efficiency of justice delivery in the country.²⁶ Like most other developing countries, many Nigerians, particularly children, subsist below the poverty line.²⁷

Lending his voice to the debate on the interrelationship between the enjoyment of human rights and socio-economic status, Aguda argues that the practical actualization of most of the fundamental rights cannot be achieved in a country where millions are living below starvation level and where the fundamental rights provisions enshrined in the constitution are meaningless to all those people living below the poverty line or just at starvation level.²⁸

Although the CRA created a separate and independent child justice system to ensure proper and effective administration of child justice, this commendable initiative on paper has not been translated into action through the physical establishment and adequate funding of necessary enablers. The integrated resource support to several justice institutions, particularly those that work in the area of child justice needs to be improved. Hammad aptly argues that achieving child rights in the

²⁵ Yemi Akinseye-George, *Juvenile Justice in Nigeria: A Study of the Laws and Practices Relating to Juvenile Justice in Nigeria with Special Focus on the Federal Capital Territory Abuja, Kano, Lagos, Plateau and River States* (Center for Socio-Legal Studies 2009) 55

²⁶ Olayinka Silas Akinwumi, 'Legal Impediments on the Practical Implementation of the Child Right Act 2003' (2009) 37 *International Journal of Legal Information* 10; See also the report of the UN Secretary-General, 'In Larger Freedom: Towards Development, Security and Human Rights For All', where it was stated that the citizenry will not enjoy development without security, will not enjoy security without development, and will not enjoy either without respect for human rights. Certainly, the economic and social well-being of the citizenry impact profoundly on the enjoyment of human rights and by extension the enforcement of human rights standards by the courts.

²⁷ A report released by National Bureau of Statistics indicated that about 112 million Nigerians live below the poverty line. <<http://www.nigerianstat.gov.ng/>> accessed October 30 2013. This is also corroborated by similar disclosure by the World Bank which shows that 67 percent of Nigerians live in poverty. Nigeria is also ranked 153 out of 186 countries by the 2013 United Nations Human Development Index <<http://hdrstats.undp.org/en/countries/profiles/NGA.html>> accessed October 30 2013

²⁸ T. Akintola Aguda, *Judicial Process and Stability in the Third Republic* (National Concord Nov. 7 1988) 7

full sense of the word would necessitate a number of parallel strategies and resources.²⁹

Similarly and on the nexus between resources and the enjoyment of human rights, Oputa recognizes the problem which the condition of under-development poses to the realization of human rights. He states that one of the best tests of the efficacy of the fundamental rights provisions of the Nigerian constitution should be whether the rights enshrined therein are accorded to the poor, the unemployed, the weak, the oppressed or the defenseless. While the Constitution aspires to promote the welfare of all persons on the principles of freedom, equality and justice, Oputa holds the view that in actual practice, 'it is often the powerful, the rich and the dominant class that seem to have all the rights, while the only right left to the poor, the weak and the down-trodden seems to be their rights to suffer in silence, to be patient and wait for their reward in heaven'.³⁰

The combined implications of Aguda and Oputa's arguments as outlined above are very strong validation of the premise that in view of the inter-dependence, indivisibility and inter-relatedness of all human rights, the socio-economic and resource challenges in Nigeria directly or indirectly impact on the overall treatment of children in general and the extension of the protective shields of the twin pillars of child justice to those in conflict with the law. Writing on how minimized government support is to child justice, Yemi Akinseye-George argues that although the justice system is generally not well funded, the child justice system is the most neglected aspect of the justice system in Nigeria. The neglect is prevalent at both the state and federal levels and thus accounts for why the budget of the Federal Ministry of Justice in the last three years had no budget line specifically for child justice.³¹

In a developing country such as Nigeria, commitment of the executive arm of government and the availability or otherwise of financial resources to implement a legislative aspiration inevitably assumes a fundamental and prominent role. The Federal Capital Territory and those states that have domesticated the CRA have overlooked the critical need to secure the necessary commitment from the executive arm of governments. In the absence of a proactive buy-in by the executive and a commitment on its part to institute the enabling socio-economic climate for the implementation of the CRA, the goals and aspirations of the twin pillars of child justice will be oblivious to children in conflict with the law.

²⁹ S Hammad, 'The CRC: 'Words on Paper or a Reality for Children – A Case Study of Jordan' (1999) 1 *International Journal of Children's Rights* 215

³⁰ C. A Oputa, *Human Rights in the Political and Legal Culture of Nigeria* (Nigerian Law Publications 1989) 34; See also Jacob Abiodun Dada, 'Impediments to Human Rights Protection in Nigeria' (2012) 18 *Annual Survey of International and Comparative Law* 67

³¹ Yemi Akinseye-George, *Juvenile Justice in Nigeria: A Study of the Laws and Practices Relating to Juvenile Justice in Nigeria with Special Focus on the Federal Capital Territory Abuja, Kano, Lagos, Plateau and River States* (Center for Socio-Legal Studies 2009) 55

The political goodwill on the part of the executive as the implementing arm of government is therefore critical as an enabler of child justice in Nigeria. As was argued by Skelton, lawmakers should be free to come up with highly innovative legislation to address problems facing children. However, legislators should make sure that they develop such legislative strategies with realistic expectations, since empty promises whether echoing the provisions of the CRC or the ACRWC will certainly not protect children unless the prerequisite physical and financial enablers are simultaneously instituted.³²

While it may be argued that the CRA could not have come into force without presidential assent, in which case it is invariable that the executive arm of government participated in its promulgation, the fact still remains that in the circumstance of the promulgation of the CRA, the Executive arms of both the national and state governments were merely involved at the point of assenting to the Bill and not in the cost-benefit analysis that ought to characterize its promulgation debates.

Unlike the promulgation history of the South African Child Justice Bill that was subjected to a costing process and involved preparation of estimates of the potential cost of implementing the provisions of the Bill, or the promulgation history of the Ugandan 1996 Children Statute that involved preparatory work on the situational analysis and affordability of the proposals in the statute, neither the CRA nor the domesticated versions by respective states were promulgated based on a clear understanding of the cost implication of its implementation.

As shown by the foregoing analysis, efforts invested in the promulgation of the CRA as a mechanism for the domestication of the CRC and the ACRWC have yielded little or no results for children in conflict with the law because the resources to support the establishment of prerequisite enablers have not been mobilized. The resource chasm between the vision of the CRA on the one hand and the establishment of implementation enablers including the family courts by the executive arm of government on the other is comparable to the situation that challenged the Namibian Child Justice Bill which has been described as too ambitious and requiring structural re-adjustment of government spending.³³

³² A Skelton, 'The Child Justice Bill: Implementing the UN Convention Through the Process of Law-Making' (Unpublished Paper Delivered at the International Society for the Prevention of Child Abuse and Neglect (ISPCAN) Conference on 'Implementing the UN Convention on the Rights of the Child: Myth or Reality' (2000) Durban; See also CRC General Comment No. 5 General Measures of the Implementation for the Convention on the Rights of the Child (CRC/GC/2003/5 Adopted at the 34th session on 27 November 2003) Paragraphs 5

³³ Stefan Schultz, 'Juvenile Justice in Namibia: A System in Transition' in John Winterdyk (ed) *Juvenile Justice Systems: International Perspectives* (Canadian Scholars' Press 2002) 353

7.3 Effects of the 1999 Constitution on Child Rights Act

The enactment of the CRA under Section 299(a) of the 1999 Nigerian Constitution represents a drawback to the nationwide application and enjoyment of the protective shields of the twin pillars of child justice by children in conflict with the law. As has been noted in chapter one, the 1999 Constitution allocates legislative functions and autonomy in certain areas of legislative operations between the National Assembly and House of Assembly of states.³⁴ Also pointed out earlier was that the exclusive legislative list of the constitution itemizes those subject matters for which the federal government has exclusive competence to legislate upon, and the concurrent legislative list enumerates the shared competence for both the federal and state governments.³⁵

Bearing in mind that the issues of children in most common law countries in Africa are considered welfare issues,³⁶ this may have been the reason why the drafters of the 1999 Constitution and other constitutions before it may have perceived child rights as synonymous with welfare issues which are best situated within the subsidiary basket of the residual legislative list devolved to state legislative competence. Assuming, but not conceding that the rationale for situating child rights as welfare issues suitable for the residual legislative list of the 1999 Constitution is tenable, what was the logic used by the drafters of the constitution in also omitting legislating for human rights from the priority exclusive legislative list and at the very least the concurrent legislative list?

Even if there is a justification behind the omission of child rights in particular and human rights in general from the exclusive legislative list reserved for the National Assembly, exploring the legitimacy of this reason is beyond the remit of

³⁴ B.O. Nwabueze, *Ideas and Facts in Constitution Making* (Spectrum Publishers 1993) 34; See also S.O. Aghalino, 'Dynamics of Constitutional Development in Nigeria: 1914 – 1999' (2006) 2 *Indian Journal of Politics*; L. Adele Jinadu, 'State Constitutional Design in Federal Systems' (1982) 12 *The Journal of Federalism* 155

³⁵ The powers to legislate and set human rights standards broadly and for child rights in particular are not included in the list of matters in the exclusive legislative list ascribed to the Federal Government. They are also not included in the concurrent legislative list where the National Assembly and state Houses of Assembly share jurisdiction. Rather they fall under the purview of the residual list accommodating all such matters that are not mentioned in either the exclusive or concurrent legislative lists. See also Eghosa E Osoghae, 'The Status of State Governments in Nigeria's Federalism' (1992) 22 *The Journal of Federalism* 181; Eghosa E Osoghae, 'Purpose and Functioning of the Senate' in Bertus de Villiers, Frank Delmartino and Andrea Allen (eds) *Institutional Developments in Divided Societies* (Human Sciences Research Council 1998)

³⁶ Marie-Antoinette Sossou and Joseph A Yogtiba, 'Abuse of Children in West Africa: Implications for Social Work Education and Practice' (2009) 39 *British Journal of Social Work* 1218; J Hagen-Zanker and R Holmes, 'Social Protection in Nigeria: Synthesis Report'. (2012) ODI/UNICEF Nigeria; See also R Holmes and Others 'Social Protection in Nigeria: Mapping Programmes and Their Effectiveness' (2012) ODI/UNICEF Nigeria; N Jones and Others, 'Promoting Synergies Between Child Protection and Social Protection in Nigeria' (2012) ODI/UNICEF Nigeria

this thesis. Certainly, such a practice of de-emphasizing human rights issues in general and child rights in particular is inconsonant with the priority status that ought to be placed on human rights and by extension child rights.³⁷ The present blanket classification of matters of child rights as welfare issues that are arbitrarily relegated to the third-class residual legislative list is certainly untenable. This is because child rights and by extension child justice, are human rights issues extracted from and predicated on fair hearing guarantees enshrined in international, regional and national human rights instruments and laws, especially the 1999 Constitution.

Nkoyo acknowledges the tension inherent in the process of negotiating among plural legal possibilities and she argues that state houses of assembly are seized with the remit of child protection because the constitution did not put the matter under the exclusive or concurrent legislative lists.³⁸ Her argument is certainly contestable. She did not advance any reason why a matter as important as child rights should not be included in the first class exclusive legislative list nor did she adduce any reason why child rights is best suited for the residual legislative list.

Regardless of whatever logic supports allocating the setting of child rights standards to the residual legislative list, the preferred inclination is that legislating for a matter as important as child rights should have been made the prerogative of the Federal Government of Nigeria, in which case such legislative powers ought to have been allocated to the exclusive legislative list.

7.3.1 Legislating Subject to Section 12(3) of 1999 Constitution

For the purposes of domesticating a treaty, Section 12(2) of the 1999 Constitution authorizes the National Assembly to make laws for the federation or any part thereof with respect to matters not included in the exclusive legislative list. Limiting the scope of Section 12(2) and Section 12(3) of the 1999 Constitution provides a further caveat that a law passed by the National Assembly outside matters enumerated on the exclusive legislative list shall not be enacted into law unless it is ratified by a majority of all the House of Assembly of states of the federation.

The condition precedent to Section 12(3) of the 1999 Constitution is that the National Assembly requires two-thirds of the state houses of assembly to promulgate legislation on a matter outside the exclusive legislative list. Realizing that issues relating to child rights are outside the legislative competence of the National Assembly because it is not enumerated on the exclusive legislative list, and cognizant of the unlikelihood of securing the constitutionally required two-thirds of

³⁷ Jim Ife, *Human Rights and Social Work: Towards Rights Based Practice* (3rd edn Cambridge University Press 2012) 17; See also Jim Ife and Lucy Fiske, 'Human Rights and Community Work. Complementary Theories and Practices' (2006) 49 *International Social Work* 297; UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989

³⁸ Nkoyo Toyo, 'Revisiting Equality as a Rights: The Minimum Age of Marriage Clause in the Nigerian Child Rights Act 2003' (2006) 27 *Third World Quarterly* 1299

the state houses of assembly if the CRA was to be applicable throughout the federation, the National Assembly enacted the CRA pursuant to Section 299(a) of the 1999 Constitution.³⁹

Thus the restrictive scope of the CRA to only the Federal Capital Territory because it was promulgated under Section 299(a) of the 1999 Constitution has created the opportunity for states to disregard the CRA or at best adopt state versions which then permit them to take into consideration their respective cultural and religious sensitivities. The adoption of the CRA by the National Assembly under Section 299(a) is a minimalistic approach at domesticating international and regional child rights frameworks. While the CRA meets international and regional thresholds for the treatment of children in conflict with the law, the drawbacks relating to the limited scope of the CRA having been promulgated under Section 299(a) of the 1999 Constitution severely impact the nationwide application of the twin pillars of child justice by family courts. This situation also allows states the liberty of not domesticating the Child Right Act into state law in which case children in conflict with the law are still processed under the CYPA which the CRA intended to repeal.

The unintended effects of Section 12(3) of the Constitution are that it slows down the realization of the gains of the CRA. It also facilitates the possibility of state-specific standards that are not always in consonance with the national and international standards. The potential lack of uniformity in a state-centric child rights framework would likely breed discrepant standards that would lead to unequal enjoyment of human rights in general and child rights in particular.

In such a situation that is unstandardized, children in conflict with the law in some states may possibly enjoy the protective shield of the twin pillars of child justice provided in the CRA, whereas in some other states, they would be vulnerable to the outdated and unfriendly framework of the CYPA. The ensuing inequity arising from the potential for discrepant laws and treatment of children in conflict with the law amongst states of the federation may not augur well for Nigerian children and defeats the child justice standards established by the CRC, the ACRWC and ultimately the CRA.

The simultaneous application of the CRA and CYPA at the same time in Nigeria constitutes an obstacle to achieving nation-wide, the child justice objectives

³⁹ Section 299(a) Constitution of the Federal Republic of Nigeria 1999 provides that all the legislative powers, the executive powers and the judicial powers vested in the House of Assembly, the Governor of a State and in the courts of a State shall, respectively, vest in the National Assembly, the President of the Federation and in the courts which by virtue of the foregoing provisions are courts established for the Federal Capital Territory, Abuja. It should also be noted that owing to the promulgation history of the Child Rights Act which was fraught with polarization based on manifest cultural and religious diversities of the country, securing the participation of the State Houses of Assembly as envisaged under the Constitution for the enactment of a Child Rights Act that is uniformly applicable country wide was apparently impossible.

of the CRC and ACRWC domesticated through the CRA.⁴⁰ Since its promulgation in 2003, most of the states that adopted the CRA into state law did so within the first five years of its entry into force. Bearing in mind the lull in the adoption of the CRA over the last six years, it may be inferred that the states, particularly the Muslim Northern states, that are yet to adopt the CRA into state law may not be doing so any time soon. On a positive note, it is pertinent to note that the states that have adopted the CRA into state law did not make any substantial modification to the provisions relating to the twin pillars of child justice.

In that sense and in order to ensure that children in conflict with the law receive humane treatment irrespective of state of domicile, the CRA ought to be applicable to the entire federation or at least adopted by all the 36 states of the federation into a state law. The reason why the National Assembly settled for the promulgation of the CRA under Section 299(a) of the 1999 Constitution and not under Section 12(3) appears to be a quick fix that is not necessarily a durable fix. If the processes enumerated in Section 12(3) of the 1999 Constitution requiring ratification by the majority of the state houses of assembly were followed successfully, the CRA would have been automatically applicable throughout the entire country and the present situation which requires express adoption of the CRA into state laws by state houses of assembly would have been avoided.⁴¹

7.4 Multiplicity of Legal Systems in Nigeria

Despite the lack of manpower and institutional structures for the implementation of the twin pillars of child justice, another impediment to the implementation of the CRA in general and its child justice framework in particular is the fact that there are three concurrent and most times conflicting legal systems applicable in Nigeria. As was stated in chapter one, the three legal systems with equal force in Nigeria are the statutory law applicable throughout Nigeria, the Islamic law mostly applicable in the Muslim-majority states of Northern Nigeria and the customary law applicable in Christian majority states of Southern Nigeria.⁴²

⁴⁰ The following states have adopted the Child Rights into a State law, Anambra, Akwa Ibom, Adamawa, Abia, Bayelsa, Benue, Cross River, Delta, Ebonyi, Edo, Ekiti, Imo, Kogi, Kwara, Lagos, Nasarawa, Ogun, Ondo, Osun, Oyo, Plateau and Rivers

⁴¹ A close examination of the CRA reveals that the National Assembly initially expected the Act to be applicable throughout the Federation. For instance, Section 149 of Part XIII of the CRA dealing with the establishment of the Family Court amongst other things provides that 'there shall be established for each State of the Federation and the Federal Capital Territory Abuja a court to be known as the family court for the purpose of hearing and determining matters relating to children.' By mentioning that a court shall be established for each state of the federation and the Federal Capital Territory Abuja, the National Assembly intended originally and rightly so for the CRA to be applicable throughout Nigeria

⁴² A.O. Obilande, *The Nigerian Legal System* (Sweet & Maxwell 1979) 5; M.U Abubakar, 'Childs Rights Act: Critical Analysis from the Islamic Perspective' paper presented at the 7th Annual Scientific Conference of the Islamic Medical Association of Nigeria July 2005

While there may be simmering tensions arising from the cohabitation of statutory law and customary law in Nigeria,⁴³ the gulf between Islamic law and statutory law, particularly in the case of child rights is much more pronounced.⁴⁴ While most of these tensions relate to issues such as child marriages, child adoption and the custody rights of parents,⁴⁵ the conflict of law tension between the provisions of Islamic law and the CRA include the unlimited jurisdiction of Sharia courts over Muslim children vis-à-vis the exclusive jurisdiction granted to family courts under the CRA.⁴⁶

Under the CRA, family courts are created and granted exclusive jurisdiction at the high court and magistrate court levels over issues relating to children in conflict with the law. They have unlimited jurisdiction to hear and determine civil proceedings in which the existence of a legal right, power, duty, liability, privilege, interest, obligation or claim of a child is in issue. They also have jurisdiction over criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect to an offense committed by a child, in the interests of a child or against a child.⁴⁷

Furthermore, the CRA entrusts family courts with exclusive jurisdiction by providing that no other court except the family courts shall exercise jurisdiction in any matter relating to children. Providing for the child justice administration to replace the juvenile justice administration of the CYP, the CRA prohibits the subjection of any child to the criminal justice process. It also guarantees that due process be accorded to any child subjected to the child justice system, at all stages of the child justice process, including investigation, adjudication and disposition of any case against such a child.

The foregoing powers exercisable by family courts under the CRA are contradictory to the unlimited jurisdiction equally granted to the Sharia court over all other issues including children in conflict with the law.⁴⁸ The Zamfara State Sharia

⁴³ Nmehielle, Vincent Obisienunwo Orlu, 'Sharia Law in the Northern states of Nigeria: To Implement or Not to Implement, The Constitutionality is The Question' (2004) 26 Human Rights Quarterly 730

⁴⁴ Ojielo, M. Ozonnia, 'Human Rights and Sharia'h Justice in Nigeria' (2003) 9 Annual Survey of International and Comparative Law 135

⁴⁵ Shabnam Ishaque, 'Islamic Principles On Adoption: Examining The Impact Of Illegitimacy And Inheritance Related Concerns In Context Of A Child's Right To An Identity' (2008) 22 International Journal of Law, Policy and Family 393

⁴⁶ Sharia Court of Jigawa State Law No. 7 of 2002; See also Sharia Courts in Zamfara State Law No. 5 1999

⁴⁷ Sections 149 and 150 of the Child Rights Act 2003; See also M.U Abubakar, 'Childs Rights Act: Critical Analysis from the Islamic Perspective' a paper presented at the 7th Annual Scientific Conference of the Islamic Medical Association of Nigeria (On File)

⁴⁸ Pavani Thagirisa, 'Historical Perspective of the Sharia Project: A Cross-Cultural and Self-Determination Approach to Resolving the Sharia Project in Nigeria' (2004) 29 Brooklyn Journal of International Law 459; Ubaka Iwobi, 'Tiptoeing Through a Constitutional Minefield: The Great

law, like most other Northern States of Nigeria that have adopted Islamic law, provides for the establishment of Sharia courts to exercise exclusive civil and criminal jurisdictions including over issues relating to children.⁴⁹ Assuming that the CRA is to be adopted into state law in the Sharia Northern states of Nigeria, there is no guarantee that in view of the exclusive jurisdiction already granted to Sharia courts under the prevailing Islamic laws, the state versions of the CRA in the Sharia-implementing Northern states of Nigeria would create and grant family courts unlimited jurisdiction envisaged in the CRA.

While it may be possible that strands of proportionality and the best interests of the child could be evident in Sharia jurisprudence such as the Sharia Court Law of Jigawa State and the Sharia Court Law in Zamfara State etc, the twin pillars of child justice are not articulated under the Islamic laws applicable in Northern Nigeria in the same elastic manner as the CRA. Similarly, the implementation of the twin pillars of child justice in Islamic-majority states in Northern Nigeria will nevertheless be watered down by the premium Islamic law places on the obligation of a child and on parental authority over a child. The twin pillars of child justice in the Sharia Northern States will also be confronted with challenges, including questions of its compatibility with Islamic tenets and the fact that it conglomerates personal and public law issues. Also, the fact that the jurisdiction of family courts may have ousted the constitutional jurisdiction of the Sharia Court of Appeal is also a point of tension.⁵⁰

While Islamic law is applicable with statutory law in Northern Nigeria, customary law is in force alongside statutory law in Southern Nigeria. Akin to the situation in Northern Nigeria, the impact of plural legal systems on the application of the twin pillars of child justice with children in conflict with the law in Southern Nigeria is equally obstructed. As is the case with most of the Islamic states of Northern Nigeria that are yet to adopt a state version of the CRA, some other states in the Christian-dominated Southern Nigeria are equally yet to domesticate the CRA into state law. For instance, Enugu State, like the Sharia Northern states is yet to adopt the CRA into a state law and thus children in conflict with the law in Enugu State are processed under the six-decade-long CYPA.⁵¹

Sharia Controversy in Nigeria' (2004) 48 *Journal of African Law* 111; Abdulmumini Adebayo Oba, 'The Sharia Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction' (2004) 52 *The American Journal of Comparative Law* 859

⁴⁹ Sharia Courts in Zamfara State Law No. 5 1999

⁵⁰ M.U Abubakar, 'Childs Rights Act: Critical Analysis from the Islamic Perspective' a paper presented at the 7th Annual Scientific Conference of the Islamic Medical Association of Nigeria (On File)

⁵¹ Interviews conducted with registrars, magistrates and barristers practicing in Bauchi, Enugu, Kaduna, Kano and Niger States respectively in March and April 2013. While the CRA has not been domesticated in Enugu state for instance, the state has adopted a guiding principle evident in the CRA to formulate the Enugu State Judiciary Plan of Action for Strengthening Justice Sector Integrity and

Although the reluctance to pass the CRA into state law in the Muslim-majority Northern states in Nigeria may be related to Sharia considerations, there is no clear presumption as to why Enugu State has not adopted the CRA into state law. The possible inference to be made is that successive governments in Enugu State and particularly successive houses of assembly in the state have not prioritized the need to legislate for child rights in general and child justice in particular.

7.5 Conclusion

The chapter found that despite the inclusion of the twin pillars of child justice in the child justice framework of Nigeria, the situation is that children across the country are still being tried as adults outside the child-friendly and child-specific family courts established pursuant to the CRA. It observed that since regular courts are ill-disposed to apply the twin pillars of child justice, it also found that the time and energy invested in the domestication of the CRC and the ACRWC through the promulgation of the CRA are not yielding optimal results due to the fact that in most cases, the upstream and downstream enablers required for the integration of the twin pillars of child justice in Nigeria have not been established.

The chapter found that one of the setbacks to the application of the twin pillars of child justice is that conventional non-family courts are still hearing cases of children in conflict with law a decade after that function was arguably legislated out of their jurisdiction. These non-family courts do not ordinarily possess the skill set and are not best suited with the sensitivity to make a determination as to what would be proportionate or in the best interests of the child. It argued that to be able to effectively and efficiently apply the twin pillars of child justice in the treatment of children in conflict with the law, all the enablers envisaged under the CRA must be established. The chapter also found that the allocation of legislative functions between the federal and state governments, and the plurality of laws in Nigeria impacts negatively on the nationwide child rights framework.

On the basis of the findings of this chapter, the next and final chapter of this thesis will set out the general conclusions and recommendations with the aim of improving the child justice system generally, and in Nigeria in particular.

Capacity. See also Enugu State Judiciary Plan of Action for Strengthening Justice Sector Integrity and Capacity (2008 – 2010) <
https://www.unodc.org/documents/nigeria/publications/Actionplans0810/Enugu_Judiciary_Action_Plan_2008_201011.pdf> accessed 13 December 2013

Chapter Eight

General Conclusions and Recommendations

8.1 Research Summary and Findings

This thesis was prompted by long standing concern about the extent to which judicial treatment of children in conflict with the law in Nigeria is proportionate to their offenses and is also in consonance with their best interests. In a bid to contextualize child justice within the sphere of child rights, and ultimately within the broader parameter of human rights, this thesis investigated the philosophical and normative foundation of human rights, as well as an overview of the prevailing international and regional child rights normative framework. It found that child justice is an integral component of child rights because it is codified as such in international and regional human rights instruments and laws.

It was found also that the philosophical foundation of child rights is situated at the interface of natural law and positive law referred to in this thesis as inclusive legal positivism. The rationale behind placing the philosophical foundation of child rights on inclusive legal positivism is due to the fact that while child rights could exist in isolation of the law and be inherent in human beings without specific legislation, they still need to be couched within legislation to be enforceable. Furthermore, the thesis found that child justice, as an integral component of child rights, congregates both the welfare and justice philosophies into a paradigm of restorative justice.

This thesis observed that the philosophy of child justice is grounded on the notion that children in conflict with the law may be blameworthy for their offense. However, their culpability should not be on the same degree as an adult who commits the same offense, and as such, they should not be made to receive the same reprehension as an adult offender. Noting that child justice is an integral component of child rights and provides a specific and protective framework for children in conflict with the law, this thesis found that despite those human rights accruable to children by virtue of their humanity, children and particularly those in conflict with the law deserve special human rights due to their age and vulnerability. This thesis posited that the rights of children in conflict with the law can be protected only if their reduced culpability is taken into consideration when arriving at a judicial decision affecting them.

To ensure that the reduced culpability of children in conflict with the law becomes the overarching framework for any judicial intervention against them, this thesis developed what it called the twin pillars of child justice. It found that the twin pillars of child justice are cardinal to child rights because both principles jointly encapsulate all other principles of child justice in particular, and child rights in general. Arguing that the twin pillars form the bedrock of child justice, it declassified

the twin pillars of child justice as the principles of proportionality and the best interests of the child.

Considering that proportionality is a tool in the adjudication of the rights of children in conflict with the law and a tool to ensure that punishment fits the crime and the culpability of the offender, this thesis found that proportionality is one of the twin pillars of child justice. It argued that in the interest of justice, children in conflict with the law should not be held to the same evaluative standards by which adult culpability and punishment are judged.

This thesis identified that the second pillar of child justice is the principle of the best interests of the child. Confirming that this principle is amply enunciated in regional and international child rights instruments and laws, it found that in the context of child justice, all actions concerning children must be guided by what is in their best interests. Having elevated the principles of proportionality and the best interests of the child as the twin pillars of child justice, this thesis discredited the claim that these two principles of child justice are not clearly defined, uniformly applicable and open-ended in nature.

This thesis rationalized the flexible manner in which the principles of proportionality and the best interests of the child are couched and argued that such inherent flexibility makes them suitable tools in a multiplicity of child justice scenarios. It noted that while there may not be one-size-fits-all universal criteria for determining a judicial intervention that is proportionate and in the best interests of the child, this thesis argued that a universal principle such as the best interests of the child need not be defined rigidly. Rather, it posited that the flexibility in the definition and application of both principles is their elasticity in responding to the multiplicity of child cases and scenarios.

Having provided content and context to the twin pillars of child justice, the thesis argued that the twin pillars of child justice are deontological because amongst other rationale, human rights in general and child rights in particular are by their very nature deontological. It adduced that since the overriding aim of child justice is to protect the best interests of the children in conflict with the law to the extent that they do not receive disproportionate punishment for their offense and culpability, the twin pillars of child justice in their deontological perspectives reinforce one another, particularly in the treatment of children in conflict with the law.

The thesis postulated that the normative foundation of child rights is not domiciled in a single legal instrument, but rather traceable across several international and regional human rights instruments and laws. They include the Covenant of the League of Nations, the International Bill of Rights and particularly to the CRC and the ACRWC. In examining the normative foundation of child rights, this thesis conceded that the debate on the universality and relativity of human rights is also applicable to child rights. It noted that while child rights accommodate

relative sensitivities, the twin pillars of child justice are immutable and their standards ought to be interpreted internationally regardless of the religious and cultural differences of respective countries.

Having confirmed that the principles of proportionality and the best interests of the child are mutually reinforcing and complementary, and together form the twin pillars of child justice, this thesis calibrated to what degree the twin pillars of child justice are legislated in the CRA. It found that the CRA is an improvement on the CYPA, and when compared to the CRC and the ACRWC, the articulation of the twin pillars of child justice in the CRA is stronger than the regional and international framework. Also, comparing the CRA with the child rights legislation of other common law countries in Africa, the 2003 CRA provides stronger protection for children in conflict with the law.

Having validated the argument that the CRA effectively adopts the twin pillars of child justice, this thesis examined the extent to which the twin pillars as legislated in the CRA are applied by family courts in the treatment of children in conflict with the law. It found that despite the sufficient legal framework for the promotion and protection of child rights in Nigeria through the incorporation of the principles of proportionality and the best interests of the child as the twin pillars of child justice, children in conflict with the law in Nigeria are not availed the protection envisaged under the CRA.

Analyzing why the twin pillars of child justice are not applied in the treatment of children in conflict with the law, this thesis found that family courts envisaged under the CRA have not been established and that the designated judicial personnel with specialist skills equally enumerated under the CRA have not been recruited or trained. It found that the present situation in Nigeria is such that children across the country are still processed in adult regular courts which are not sensitive to the twin pillars of child justice, and do not have at their disposal the specific skills and personnel envisioned for family courts under the CRA. It observed also that in conjunction with the challenges of a plural legal system, adequate financial resources have not been provided for the implementation of the child justice provisions of the CRA.

This thesis noted that the application of the twin pillars of child justice in the treatment of child offenders in Nigeria is ineffective because of the non-establishment of the downstream and upstream enablers enumerated under the CRA. As a setback to the implementation of the CRA, the thesis found that magistrate and high courts presently hearing cases of children in conflict with the law in the absence of family courts do not possess the required skill set and are not best suited in the absence of necessary training to make a determination as to what would be proportionate or in the best interests of the child. This thesis found that to be able to effectively and efficiently apply the twin pillars of child justice in the treatment of

children in conflict with the law, family courts with the appropriate personnel enumerated under the CRA must be established.

This thesis noted that the competence to legislate on human rights issues in general and child rights in particular is not in the exclusive legislative lists earmarked for the legislative competence of the federal government. The competence is also not listed in the concurrent legislative lists where both the state and federal governments share competence. Rather, it is relegated to the residual legislative lists allocated to the state houses of assembly. On the basis of this constitutional structure, this thesis pointed out that the present constitutional allocation of legislative functions between the federal and state governments impinge on the nationwide enforcement of the twin pillars of child justice adequately legislated in the CRA.

This thesis buttressed the fact that the National Assembly promulgated the CRA under Section 299(a) of the constitution, in which case its scope is limited to the jurisdiction of the Federal Capital Territory. It found that the effects of adopting the CRA under Section 299(a) of the constitution impede the nationwide impact of the twin pillars of child justice in the treatment of children in conflict with the law. This is so because in the absence of a nationwide application of the CRA, not all the states of the federation have adopted it into state law. As such, children in conflict with the law in some states of the federation are processed under the CYPA of 1945 as amended.

8.2 Implication of Research on Child Justice Globally

Although this thesis is situated in Nigeria and within the framework of the CRA, its global implication resonates with the fact that it demonstrated that child justice is an integral component of child rights, and that the philosophical foundation of child justice is tied to the philosophical foundation of child rights. As an original contribution to knowledge and fresh input to the international debate on child rights in general and child justice in particular, this thesis enunciated and elevated the principles of proportionality and the best interests of the child as the twin pillars of child justice. It classified them as a universal standard for evaluating not just the child justice system of Nigeria but any other child justice system.

It noted that the twin pillars of child justice is the key mechanism in ensuring the mitigated culpability of child offenders and moves sentencing consideration from the traditional focus on the ‘offense’ to a paradigm of considering also the ‘offender’ and the ‘victim’. The thesis also highlighted the fact that the global quest for a humane child justice system is only achievable if the twin pillars of child justice are applied to mitigate the culpability of children in conflict with the law. The thesis suggested that on the dictates of the twin pillars of child justice, proportionate and the best interests treatment of children in conflict with the law is a right that inheres in children in conflict with the law.

This thesis also bridged the gap between child justice and child rights through the instrumentality of international and regional norms. It recalled that the CRC enjoins states parties to undertake all appropriate legislative, administrative and other measures for the implementation of the rights recognized in the convention.¹ It noted also that the ACRWC calls on member states to recognize the rights, freedoms and duties enshrined in the charter and take necessary steps to adopt such legislative or other measures as may be necessary to give effect to the provisions of the charter.² On the basis of these provisions of the CRC and ACRWC, this thesis emphasized that appropriate legislative, administrative and other measures for the implementation of the rights of children in conflict with the law are captured in the twin pillars of child justice.

8.3 Implication of Research on Child Justice in Nigeria

This thesis examined the child justice system in Nigeria using the standard of the twin pillars of child justice. It highlighted the child rights neutrality of the bill of rights provisions of the 1999 constitution, mirrored the strength of the CRA vis-à-vis these twin pillars, and pointed out inherent obstacles to the realization of the rights of children in conflict with the law. This thesis corroborated that the intrinsic weaknesses of the CYPAs of 1945 was the basis for the promulgation of the CRA in 2003. Examining the legislative history of the CRA, this thesis also disputed the prevailing assumption that once the CRA is adopted, children in general and those in conflict with the law will begin to enjoy all the rights and protection recognized in international and regional human rights instruments and laws. While making some exceptions, it impinged on the assumption that once a law is passed, it is automatically implemented, particularly in a country like Nigeria with abundant instances of non-implementation of laws and policies.

Examining the extent to which the CRA incorporated the twin pillars of child justice, this thesis found that the twin pillars of child justice are robustly guaranteed in the CRA. However, it noted that while this legislative stride is important in order to protect the rights of children in conflict with the law, it is not sufficient if the legislative framework is not supported by infrastructural, institutional and necessary manpower to translate the gains of the CRA into real and improved experiences for children in conflict with the law. Apart from the promulgation of the CRA in 2003 and its eventual domestication by some states of the federation, this thesis found that not much has happened in terms of its implementation and subsequent enjoyment of the rights guaranteed therein by children in conflict with the law.

¹ Article 4 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989

² Article 1 Organization of African Unity (OAU), *African Charter on the Rights and Welfare of the Child*, 11 July 1990

As a reality check for policy makers and legislators, the thesis pointed out that in spite of the legislative progress in the promotion and protection of child, the full enjoyment of the twin pillars of child justice by children in conflict with the law is an illusion that requires several non-legislative measures to make it effective. It found that children in conflict with the law even after the promulgation of the CRA and its state versions are not in any way treated proportionately or their best interests better protected than those in conflict with the law before 2003 when the CRA was adopted.

Given the laudable gains made through the adoption of the CRA, this thesis underlined the need for urgent development of the CRA implementation strategy in order to stimulate, guide and effectuate the rights guaranteed therein. Such strategy will also ensure that children in conflict with the law receive from family courts proportionate punishments that take into consideration the individual and collective best interests of child offenders.

The finding of this thesis also highlighted the fact that the same degree of advocacy and lobby invested by national and international civil society groups and development partners in the period leading to the adoption of the CRA should be repeated and adopted as a deliberate strategy in order to ensure that both the federal and state governments put all the necessary measures in place to implement the CRA. A decade since the adoption of the CRA, public education and public debates on obstacles to the implementation of the CRA similar to those hosted by various stakeholders during the advocacy stages leading to the passage of the CRA, would potentially facilitate government sensitivity to the allocation of the necessary human and material resources for the implementation of the CRA.

While commending the efforts of the CRA to address child rights in general and child justice in particular, this thesis elucidated the fact that the goals and aspirations of the CRA including its twin pillars of child justice will remain elusive to children in conflict with the law if the enabling environment for the full implementation of the CRA is not put in place. As an impact of this thesis to the child justice system in Nigeria, it highlighted the need to educate legal practitioners representing children in conflict with the law on the role of the twin pillars of child justice as a culpability mitigating tool. It also underlined the urgency to sensitize judges and magistrates hearing child cases of children in conflict with the law on the role of the twin pillars of child justice as a lenient sentencing tool.

This thesis recalled that Article 40 (3) of CRC calls on states parties to seek to promote the establishment of laws, procedures, authorities and institutions specifically applicable to children in conflict with the law. It therefore becomes inevitable that in order to ensure the full implementation of the principles of proportionality and the best interests of the child elaborated in the CRA, the Federal Capital Territory and all states of the federation should as a matter of urgency

establish the family courts and all other institutions with requisite competences envisaged in the CRA.

Also, to accord children in conflict with the law with the proportionate and the best interests treatment, this thesis emphasized the need for those states of the federation that are yet to domesticate the CRA into state law to do so urgently and in such a manner that would not water down the twin pillars of child justice robustly guaranteed in the 2003 CRA. This thesis validated the claim that while the government of Nigeria has taken the appropriate legislative step in the promulgation of the CRA in accordance with the CRC and ACRWC, it has failed to take appropriate administrative and other measures for the implementation of the rights recognized in these regional and international instruments and law.

8.4 Recommendations

This thesis aims at improving child justice more broadly but with particular focus on the CRA. As such, it makes the following recommendations for the improvement of child justice in Nigeria.

8.4.1 Establishment of Appropriate Institutions

The key institutions envisaged for the implementation of the CRA have not been established. Noting that it is not sufficient to merely domesticate international human rights norms into a national human rights standard, further efforts in terms of practical commitment and action towards the realization of the enshrined rights should be undertaken as a matter of necessity. It is on that basis that this thesis recommends the immediate establishment without further delay of conciliatory-oriented family courts envisaged under the CRA at both the high court and magistrate court levels, and within the Federal Capital Territory and all the states of the federation that have adopted the CRA into state law.

The establishment of family courts is very important in order to interpret elaborately the human rights content of the CRA in such a way that it robustly gives children in conflict with the law the full measure of the twin pillars of child justice. Without the immediate establishment of the family courts that are properly composed of personnel with the requisite skills and that are gender balanced, children in conflict with the law in Nigeria will still be subject to the jurisdiction of regular courts under the CYPJA juvenile justice framework that is devoid of the inbuilt child rights sensitivities of the child justice system.

In addition to the need for immediate establishment of the family courts, the CRA also envisaged and created a formidable role for the child rights implementation committee as an oversight authority to monitor the implementation of the rights guaranteed under the CRA. Since these committees have not been created in the Federal Capital Territory and most states of the federation that have

domesticated the CRA, this thesis calls for the immediate establishment of the CRA implementation committee composed of representatives of non-governmental organizations and the national human rights commission.

It also underlines the critical advocacy and monitoring role of the CRA implementation committee specifically in respect to child justice apart from its general child rights monitoring role. It is recommended that the monitoring role of the CRA implementation committee should not be limited to non-compliance with the provisions of the CRA, but should extend to the adequacy of budgetary and manpower allocation to child justice administration in Nigeria.

8.4.2 Recruitment, Training and Sensitization of Personnel

This thesis notes that the implementation of the CRA requires specialist personnel with specific competences, and that legislation alone cannot produce well-trained, committed and motivated personnel. Consequently, it recommends that as an important element in the implementation of the CRA, there is an urgent need for the recruitment and training of professionals charged with the administration of child justice in Nigeria. While this thesis emphatically recommends the immediate training and sensitization of all actors in the child justice system, it is however mindful of the fact that generic capacity building of child justice actors alone is not sufficient to guarantee a holistic implementation of CRA.

To ensure that such a capacity-building process benefits the child justice system in the short and long run, this thesis proposes the further encouragement of the specialization and technical expertise articulated under the CRA for all the judicial officers, probation officers, police and prosecutors involved in the administration of child justice. Bearing in mind the discretionary powers of family courts in interpreting and applying the principles of proportionality and the best interests of the child, the specialized training of magistrates and judges to effectively apply these principles is indispensable.

On the other hand, this thesis recommends that the terms of reference for these judicial officers dealing with children should be clearly set out bearing in mind the sensitivities and peculiarities of child justice, and most importantly those officers should be rewarded with competitive remuneration that could retain them in the child justice system. Furthermore, this thesis recognizes the fact that there is bound to be unavoidable turnover of personnel working in the child justice system with the resultant effect that moving staff may be most likely replaced by new, untested and untrained hands. This thesis recommends that a constant mechanism of training and retraining of staff be instituted to ensure that the goals and objectives of the child justice system envisaged in the CRA are adequately met.

8.4.3 Creation of Public Awareness and Social Mobilization

Eleven years after the promulgation of the CRA, its existence and provisions are not well known by the citizenry including legal practitioners. In line with CRC's call on state parties to undertake making the principles and provisions of the convention widely known by appropriate and active means,³ there is a strong need to create public awareness of the CRA. This is to ensure that the lack of awareness of the child-centered provisions of the CRA does not hinder its realization. As was stated by Odhiambo,⁴ the need for creating such awareness is because of the prevalent paternalistic perceptions and interpretations of child rights against the socio-economic and political backgrounds within the African context.

If children and adults alike are not aware of the protections inherent in the CRA, there is the likelihood that they will not be able to make appropriate demands on duty bearers. In that case, this thesis calls for the strengthening of the capacity of right holders to demand the rights guaranteed in the CRA. While the demand side of this recommendation focuses on appropriate institutional strengthening of right holders, it is also not oblivious of the need for public awareness and social mobilization on the supply side of the equation. This involves strengthening the capacity of duty bearers to perform their obligation.

In that sense, this thesis recommends that a concerted effort be undertaken to create awareness and public enlightenment of the provisions of the CRA amongst the citizenry and child justice actors in particular. This is with a view to promoting a better understanding and appreciation of the fundamental and mitigating effects of the principles of proportionality and the best interests of the child as twin pillars of child justice.

8.4.4 Improved Funding of the Child Rights Act

The implementation of the foregoing recommendations is not budget neutral but rather requires the allocation of adequate human and financial resources. As such, in a resource constrained country such as Nigeria, the availability or otherwise of resources to implement the humane child justice system envisaged in the CRA is of utmost importance. Generally, the importance of resources in the implementation of a legislative aspiration has been emphasized by the committee on the implementation of the CRC.⁵

³ Article 42 UN General Assembly, *Convention on the Rights of the Child*, 20 November 1989

⁴ Odongo Godfrey Odhiambo, 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context' (Phd Thesis University Western Cape South Africa 2005) 65

⁵ See also Committee on the Rights of the Child, General Comment No. 5 General Measures of the Implementation for the Convention on the Rights of the Child (CRC/GC/2003/5 Adopted at the 34th session on 27 November 2003) Paragraph 5-7. Resources are used in this context to refer to financial and human resources at a government's disposal, both domestic and external

It should be noted that legislation such as the CRA domesticating and echoing the laudable provisions of the CRC and ACRWC will not protect children in conflict with the law or further the promotion of their rights unless legislators commit themselves to aspirations that the executive arm of government can realistically finance. Regarding the prevailing socio-economic situation in the country and on the premise that the socio-economic situation in Nigeria is vibrant enough to fund the effective implementation of the CRA, this thesis recommends that the federal and state governments should provide adequate resources for its implementation. This includes the immediate establishment of the family courts with expert skills for proportionate and the best interests treatment of children in conflict with the law.

Although Nigeria is a developing country, it is certainly better endowed than most African countries and as such should be doing better in child rights in general and child justice in particular. This thesis concludes that the prevailing inadequate funding of the child justice system in Nigeria shows insensitivity and the low prioritization of issues of children in general and child rights in particular. Since children are disadvantaged in respect of promoting their own interest, the government should prioritize and allocate required resources to the implementation of child rights in Nigeria.

While the federal and state ministries of justice may in principle be sensitive and sympathetic of child justice, the absence of specific legislative or policy framework that designates specific percentage of the budget of the ministry to child justice results in the discretionary use of funds which is inclined against child justice. To actualize one of the CRA's goals in respect of a humane child justice system in Nigeria, both resources and political commitment are required by governments at all levels to turn the CRA's loadable provisions into concrete benefits for children. With a strong political will, additional resources for this venture could be saved by minimizing corruption, and the effective and efficient use of scarce resources.

Despite the fact that a critical performance assessment of the Nigerian child justice system vis-a-vis other African countries is not the focus of this thesis, suffice it to state that compared to the abundant resources of Nigeria, its child rights record lags behind reasonable expectations. This thesis reminds national and state legislators that they have an inherent duty in the exercise of their law-making powers to ensure that the laws that they make have the best possible chance of being properly implemented through amongst other things appropriate funding by the executive.⁶

As stated earlier in chapter seven, unlike the South African Child Justice Bill that was subjected to a costing process that involved preparation of brief estimates of

⁶ Ibid A Skelton, 'The Child Justice Bill: Implementing the UN Convention Through the Process of Law-Making

the cost of implementing the bill or the Ugandan law reform process that involved preparatory work on the situational analysis and affordability of the proposals in the 1996 Children Statute,⁷ the same cannot be said of the CRA. As such, this thesis recommends that any other legislation in Nigeria should as a precondition to its adoption be subjected to cost analysis of the implementation of such laws. It is viewed that promulgating legislation in Nigeria with an idea of the possibility or otherwise of funds for its implementation will help forestall such cash-trap situation inherent with the CRA.

The family courts, the child rights implementation committees and other enabling institutions envisioned under the child justice framework of the CRA are not stand-alone institutions that are insulated from other broader substantive and support institutions of the broader justice system. As such, this thesis proposes that for proper functioning of the child justice system, an integrated and inter-sectoral approach between governmental institutions that work within the remit of child justice needs to be harmonized and coordinated. This thesis notes that the child justice system envisaged in the CRA is obviously dependent on the interplay of different governmental institutions such as the police, the prosecutor's office, social works department and judiciary amongst others.

As part of the overall justice system of Nigeria, the child justice system under the CRA is certainly impacted by perennial challenges that are undermining the efficiency of justice delivery in the country. As such, it recommended that the child justice sector reform in Nigeria takes a holistic view of the justice sector coupled the support and ancillary roles of related institutions. As Hammad aptly puts it, achieving child rights in the full sense of the word often necessitates a number of parallel strategies.⁸

8.4.5 Amendment of Section 12(1) of the 1999 Constitution

This thesis recommends the amendment of the 1999 Constitution by excluding treaties relating to human rights in general and child rights in particular from the ambit of Section 12(1) of the 1999 Constitution. This section reinforces in Nigeria the notion of legal dualism that is traditional to common law countries. It provides that treaties between the federation and any other country shall have the force of law to the extent to which such treaty has been enacted into law by the National Assembly.

This thesis notes the importance of child rights as an instrument of good governance and that the treaty domestication process of the National Assembly is further impinged by the division of legislative functions between the federal and

⁷ C Barberton and J Stuart, 'Costing the Implementation of the Child Justice Bill: A Scenario Analysis' (1999) Research Monograph No. 14 Applied Fiscal Research Center (AFReC) 21

⁸ S Hammad, 'The CRC: 'Words on Paper' or a Reality for Children – A Case Study of Jordan' (1999) 1 International Journal of Children's Rights 215

state governments. It thus recommended that treaties relating to human rights in general and child rights in particular adopted between the federation and any other country or the international community should not be subjected to this second layer of domestication by the National Assembly and endorsement by state houses of assembly where the matter is not listed on the exclusive legislative list.

This proposition is based on the fact that the dichotomy between international human rights law and national human rights law is becoming more fluid by the day to the extent that international human rights treaties adopted by countries are automatically beginning to have the force of law nationally. For instance, in the context of Kenya which is also a common law country, the 2010 Kenya Constitution supports this recommendation. Article 2(5) of the 2010 Kenyan Constitution provides that the general rules of international law shall form part of the law of Kenya.

Sub-section 2(6) provides further that any treaty or convention ratified by Kenya shall form part of the law of Kenya under its constitution. Also Article 21(1) of the 2010 Kenyan Constitution makes it a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights and to take legislative, policy and other measures, including the setting of standards, to achieve the progressive realization of the rights guaranteed under the constitution. Equally, Article 21(4) enjoins the state to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.

This thesis recommends express incorporation of Nigeria's international and regional human rights obligations into applicable national laws and devoid of the need for domestication. The ongoing constitutional amendment process in Nigeria is a veritable opportunity to institute this type of constitutional arrangement thereby dismantling the age-long dualist legal systems in place in the country. On the other hand, this constitutional amendment would exclude child rights from the provisions of Section 12(1) of the 1999 which requires the National Assembly to expressly domesticate treaties to which Nigeria is a party into law before they become binding and enforceable.

On the strength of this recommendation, any international or regional child rights instrument to which Nigeria is a party will automatically be binding and enforceable without the necessity of the same being enacted into law by the National Assembly. By this argument and on the basis of *pacta sunt servanda*, Nigeria will be bound by all human rights instruments and laws it ratifies including the CRC and the ACRWC. From a comparative perspective, if a provision similar to Article 2(6) of the 2010 Kenyan Constitution is introduced into the draft amendment of the 1999 Constitution of Nigeria and eventually adopted, the existing discrepancy between international human rights standards of the country and its national human rights

framework would be reconciled in favor of the former. Also, if this amendment was to happen, the politicized, religious and culturally influenced debates that overshadowed the debates leading to the domestication of the CRC through the CRA and which obviously weakened the applicability and spread of the CRA would be avoided.

8.4.6 Other Constitutional Amendments

Another Section of the constitution that impinges on child rights and was proposed for amendment by this thesis is Section 4 of the 1999 Constitution which vests the legislative powers of the Federal Republic of Nigeria in the National Assembly consisting of the Senate and House of Representatives and the House of Assembly of the 36 states of the federation. By virtue of Section 4, the National Assembly and House of Assembly of the 36 states of the federations shall have powers to make laws for the peace, order and good government of the federation or any part thereof with respect to the distribution of powers under the exclusive and concurrent legislative lists.

This thesis does not question the rationale behind the allocation of legislative powers between both tiers of government in Nigeria. Rather it points out that the powers to legislate for human rights generally and child rights particularly in accordance with the prevailing international framework are neither enumerated in Part I nor Part II of the second schedule to the constitution itemizing matters under the exclusive and concurrent legislative lists respectively. In view of this constitutional structure, legislating and the setting of important normative standards such as human rights in general and child rights in particular are presently relegated to less prioritized and residual lists somewhat reserved for the legislative competence of the state houses of assembly.

While there may be cogent justifications why the drafters of the 1999 Constitution and other previous constitutions before it chose to allocate legislating for human rights outside the purview of the first class exclusive legislative list and the second class concurrent legislative lists, this thesis also notes that the justification for this allocation of legislative functions has seldom been canvassed academically and is certainly outside its purview. However, this thesis criticizes the existing state of affairs emphasizes the imperativeness to conduct research to further highlight the drawbacks or otherwise of assigning legislative competence on human rights and child rights to the residual legislative list earmarked solely for state houses of assembly.

The ongoing opportunity for constitutional reform in Nigeria is a viable platform to add legislating to set human rights and child rights standards in the long list of issues on the highly rated exclusive legislative list. This thesis notes the strong call for the downward review of the legislative list of the 1999 Constitution so as to

devolve to the state houses of assembly many of the powers presently concentrated on the National Assembly. However, it recommends that legislating for human rights and child rights in particular should be introduced to the exclusive legislative list so as to ensure that the National Assembly can exclusively legislate on human rights and as such any law made towards domesticating an international human rights obligation would automatically be applicable to the entire country.

With the opportunity presented by the ongoing constitutional reform in Nigeria, the domestication of international human rights treaties, enacting laws for the fulfillment and implementation of international human rights obligations subscribed to by Nigeria and ultimately the setting of national human rights standards should not be subject to Section 12 (1) of the 1999 Constitution requiring the concurrence of the majority of the state houses of assembly before the National Assembly would enact such a treaty into law.

Ultimately, if legislating for human rights and child rights were within the remit of the exclusive legislative list, the CRA as promulgated by the National Assembly should have automatically had the force of law in all the states of the federation. It is expedient to amend the 1999 Constitution by adding a section in tandem with Article 21(4) of the 2010 Kenya Constitution that empowers the state to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.

There is strength in the argument in favor of allocating law-making responsibility on issues relating to human rights in general and child rights in particular to the exclusive domain of the National Assembly applicable throughout the entire country. This is based on the premise that since the National Assembly is bicameral with equal representation of the thirty-six states at the level of the Senate and staggered representation of every state in the House of Representative, depending on the population of the state, religious and cultural sensitivities of various ethnic divides within the states of the federation are bound to be reflected in such human rights standards articulated and legislated upon by the National Assembly.⁹

8.4.7 Enhanced Child Rights Sensitivities of the Constitution

The 1999 Constitution guarantees expansive fundamental human rights which are equally applicable to children. However, these bill of rights provisions of the 1999 Constitution do not expressly mention children as distinct rights holders outside the generic fundamental human rights applicable to all. This constitutional

⁹ The Senate is the upper house of the National Assembly of Nigeria. It consists of 109 senators from the 36 states of the federation with the Federal Capital Territory electing only one senator. The House of Representatives has a total of 360 members distributed according to the population of the respective states.

position does not support the effective prioritization and enforcement of child rights by state institutions and authorities and may have accounted for the lackluster implementation of the CRA. This position is also not in consonance with the contemporary trend of mainstreaming child rights through express mention in the bill of rights provisions of the constitution.

The 2010 Constitution of Kenya, which is the most recent constitution of a common law African country, makes it a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the bill of rights. It also entrusts on all state organs and all public officers, the duty to address the needs of vulnerable groups within society, including women, older members of society, persons with disabilities, children, youth, members of minority or marginalized communities, and members of particular ethnic, religious or cultural communities.¹⁰

The constitution also enjoins the state to enact and implement legislation to fulfil its international obligations in respect of human rights and fundamental freedoms.¹¹ Bearing in mind the hierarchy of the constitution vis-à-vis other national laws in Nigeria, express mention of child rights in the bill of rights provisions of the 1999 Constitution portends inherent advantages. As such, this thesis recommends on the basis of the veritable opportunity presented through the ongoing amendment of the 1999 Constitution, the introduction into the Nigerian constitutional framework of a provision similar to Article 21 of the Kenyan Constitution.

8.4.8 Child Rights Enforcement Mechanism of the Constitution

As noted earlier, despite providing for human rights in Chapter IV of the 1999 Constitution, there is no other provision of the constitution that urges state institutions and other authorities to ensure the creation of an enabling environment for the enforcement of the child rights in particular and human rights in general. The nearest to calling for the proactive enforcement of the bill of rights provisions of the constitution is chapter VII which establishes the judicature. Compared to the 2010 Constitution of Kenya, the 1999 Nigerian Constitution is weak in terms of urging executive, legislative and judicial institutions to enforce fundamental human rights in general and child rights in particular. This thesis therefore recommends that the opportunity for constitutional amendment in Nigeria be explored to the fullest through amongst other things, the introduction of provisions similar to Article 21 of the 2010 Constitution of Kenya.

¹⁰ Article 21 (1) Constitution of Republic of Kenya

¹¹ Ibid

8.4.9 Amendment of the CRA

This thesis is not immediately advocating for the amendment of the CRA because it holds the view that the CRA should be made applicable to the entire federation, or at a minimum be adopted into a state law by those states that are yet to do so. However, it is pertinent to note that for purpose of further research, the CRA should be scrutinized so as to identify its weaknesses. In the context of child justice, the downside of the CRA amongst other things is that it did not expressly provide the minimum age of criminal responsibility and also did not provide for the enforcement mechanisms of orders of its family courts. While it is recommend that the lacuna in child justice provisions of the CRA be amended by those states that have adopted the CRA into a state law, this thesis calls on those other states that are yet to adopt the CRA to take these and other factors into consideration as they legislate the CRA into a state law.

8.5 Concluding Remarks

The promotion and protection of child rights in particular and human rights in general have assumed global appeal and also gained remarkable attention. Both are topical discourses globally and in the African continent through the instrumentality of several international and regional child rights and human rights instruments and laws. As a member of the United Nations and the African Union, Nigeria has subscribed to virtually all international and regional child rights instruments and laws.

With increasing interest globally and regionally in improving child rights in general and child justice in particular, the CRA domesticated these international and regional child rights standards and provided the legislative framework for addressing the practical constraints and deficiencies of the CYPA. While contemporary international and regional child rights legal frameworks have been ratified and domesticated in Nigeria through the promulgation of the CRA in 2003, violations of child rights in general and of children in conflict with the law in particular are still prevalent.

The political will demonstrated by the government in promulgating the CRA in compliance with international and regional human rights standards, although belated and procrastinated, is commendable. However, the position of children in conflict with the law is such that the non-establishment of the institutions and other enablers envisaged under the CRA and charged with the implementation of the CRA impedes the realization of the gains of both the CRA and other international instruments and laws which the CRA sought to domesticate.

At present, one of the major challenges confronting the child justice system in Nigeria is to move beyond enactment of legislation to practical measures towards the implementation of the reforms proposed in the CRA. It is against this background

that one can best appreciate the apparent contradiction between provisions in a legal instrument and actual enjoyment of the rights by the citizenry. The findings of this thesis allude to the empirical hypothesis that domesticating an international human rights instrument in developing and transition countries would not necessarily improve the enjoyment of human rights by the citizens of the country unless adequate and effective implementation and enforcement mechanisms are instituted and functional.

Without subjecting the child rights bill and others to a costing process, situational analysis and affordability of the incidental cost of implementing the bill, aspirations captured legislatively might remain elusive and out of reality. Suffice it to conclude that without adequate funding, the plethora of child rights guaranteed in the CRA will not be enjoyed, particularly by children in conflict with the law. As such, further research should be focused on the relationship between law and its implementation mechanism in Nigeria. Further research could also analyze the effectiveness of legislative intervention vis-à-vis oscillating political will in promoting and protecting child rights in a country with resource constraints. The findings of this thesis corroborate the need to decipher alternative ways of creating a culture of respecting human rights that is cost-neutral.

Bibliography

Books

- Afigbo A E, *Background to Nigerian Federalism: Federal Features in the Colonial State* (Publius 1991)
- Aguda A, *Judicial Process and Stability in the Third Republic*, (National Concord, Nov. 7 1988)
- Afolabi A A, *Sharia Implementation in Nigeria: Issues and Challenges on Women's Access to Justice* (2004) WACOL
- Akester K, Guy M G and Owers A, *Restoring Youth Justice: New Directions in Domestic and International Law and Practice*. (Justice 2000)
- Akinseye G Y, *Juvenile Justice in Nigeria: A Study of the Laws and Practices Relating to Juvenile Justice in Nigeria with Special Focus on the Federal Capital Territory Abuja, Kano, Lagos, Plateau and River States* (Center for Socio-Legal Studies 2009)
- Akpan N, *Research Finding of Juvenile Justice Administration in Nigeria* (CRP Publication 2000)
- Alderson P, *Young Children's Rights: Exploring Belief, Principles and Practice* (2nd edn, Jessica Kingsley Publishers 2008)
- Alemika E O, *Rights of the Child in Nigeria* (Organization Against Torture 2005)
- Alemika E O and Chukwuma I C, *Juvenile Justice Administration in Nigeria: Philosophy and Practice*, (CLEEN Foundation 2001)
- *Criminal Victimization and Fear of Crime in Lagos Metropolis, Nigeria* (CLEEN- Foundation Monograph Series No. 1 2005)
- *Rights of the Child In Nigeria: Report on the Implementation of the Convention on the Rights of the Child by Nigeria*. (WOAT and CLEEN-Foundation 2005)
- Appelbaum S, *William James Pragmatism* (Dover Publications 1995)
- Archard D W, *Children, Family and the State* (Ashgate 2003)
- *Children: Rights and Childhood* (2nd edn, Routledge 1993)
- Ashworth A, *Sentencing and Criminal Justice* (4th edn Cambridge University 2005)
- Babalola D, *The Origins of Nigerian Federalism: The Rikerian Theory and Beyond* Vol. 8 (Federal Governance 2013)
- Bagaric M, *Punishment and Sentencing: A Ritual Approach* (Cavendish Publishing 2001)
- Baker J H, *An Introduction to English Legal History* (3rd edn, Butterworths 1992) 57
- Bartollas C, and Miller S J, *Juvenile Justice in America*, (5th edn, Prentice Hall 2008)
- Beitz C R, *Human Rights as a Common Concern* (American Political Science Association 2001)
- *The Idea of Human Rights*, (Oxford University Press 2009)

- Bentham J, and John S M, (eds.) *The Utilitarians: An Introduction to the Principles of Morals and Legislation* (Doubleday 1961)
- Beyleveld D and Brownsword R, *Law as a Moral Judgment vs Law as the Rules of the Powerful* (American Journal of Jurisprudence 1983)
- Bilchik S, *Balanced and Restorative Justice for Juveniles: A Framework for Juvenile Justice in the 21st Century* (OJJDP 1997)
- Bix B, Natural Law: The Modern Tradition in Jules L Coleman and Scott Shapiro (eds) *Oxford Handbook of Jurisprudence and Philosophy of Law* (Oxford University Press 2001)
- *Law, Language, and Legal Determinacy* (Oxford University Press 1993)
- 'Positively Positivism' (1999) 85 Virginia Law Review
- *Jurisprudence: Theory and Context* (5th ed, Sweet & Maxwell 2009)
- Blackstone W, *Commentaries on the Laws of England*, (Garland Pub 1978)
- Bloomberg L, *Completing Your Qualitative Research Dissertation: A Road Map From Beginning to End* (SAGE Publications 2012)
- Boeije H, *Analysis in Qualitative Research*, (SAGE Publications 2010)
- Boyce C and Neale P, *Conducting In-Depth Interviews: A Guide to Designing and Conducting In-Depth Interviews for Evaluation Input* (2006) 2 Pathfinder International Tool Series
- Braithwaite J and Pettit P, *Not Just Deserts: A Republican Theory of Criminal Justice*, (Oxford University Press 1990)
- Brems E, *Rights and Universality Developmental and Autonomy Rights of Children : Empowering Children, Caregivers and Communities* (Antwerpen: Intersentia 2002)
- Brown C, *Practical Judgement in International Political Theory: Selected Essays* (Routledge, 2012)
- Buchanan A and Brock D W, *Deciding for Others: The Ethics of Surrogate Decision Making* (Cambridge University Press 1989)
- Burke E, *Reflection on the Revolution of France*, (Manchester University Press 2000)
- Clement M, *The Juvenile Justice System: Law and Process* (2nd edn. Butterworth-Heinemann 2002)
- Corlett J A, *Responsibility and Punishment* (4th edn Springer 2013)
- Corriero M A, *Judging Children as Children: A Proposal for Juvenile Justice System* (Temple University Press 2006)
- Craven M, *The International Covenant on Economic, Social and Cultural Rights: A Perspective on its Development* (Clarendon Press 1995)
- Deaton M, *Universal Declaration of Human Rights* (Springer 2011)
- Detrick S A, *Commentary on the United Nations Convention on the Rights of the Child* (Martinus Nijhoff Publishers 1999)

- Donnelly J, *Universal Human Rights*, (2nd edn, Cambridge University Press 2003)
- Drowns R W and Hess K M, *Juvenile Justice* (3rd edn, Wadsworth Publishing 2000)
- Dworkin R M, *Justice in Robes* (Library of Congress Cataloging in Publication Data 2006)
- *Taking Rights Seriously*. (Library of Congress Cataloging in Publication Data 1978)
- *Law's Empire* (Harvard University Press 1986)
- Dyson R W (ed) *Aquinas: Political Writings* (Cambridge University Press 2002)
- Empey L T, *American Delinquency – Its Meaning and Construction* (Dorsey Press 1978)
- Falola T and Heaton M, *A History of Nigeria*, (Cambridge University Press)
- Finnis J, *Aquinas: Moral, Political, and Legal Theory* (Oxford University Press 1988)
- Natural Law and Natural Rights*. (2nd edn, Oxford University Press 2011)
- Fottrell D, *Revisiting Children's Rights: 10 Years of the UN Convention on the Rights of the Child*. (Martinus Nijhoff, 2000)
- Fourchard L, *Modern Juvenile Justice: Cases and Materials*, (West Publishing Co 1972)
- Freeman M, *A Commentary on the United Nations Convention on the Rights of the Child: Article 3 The Best Interest of the Child*, (Martinus Nijhoff Publishers 2007)
- Human Rights* (2nd edn Polity Press 2011)
- Human Rights: An Interdisciplinary Approach*, (2nd edn, Polity Press 2011)
- Friedlander W, *Concepts and Methods of Social Work* (2nd edn, Prentice-Hall International Inc 1976) 161
- Fuller L L, *The Morality of Law* (Yale University Press 1969)
- Gale F, Naffine N and Wundersitz J, *Juvenile Justice: Debating the Issues* (New South Wales: Allen and Unwim 1993)
- Gewirth A, *Human Rights: Essays on Justification and Applications* (University of Chicago Press 1982)
- Glendon M A, *A World Made New: Eleanor Roosevelt and the Universal Declaration of Human Rights*. (Random House LLC 2002)
- Goodrich L M, *From League of Nations to United Nations. International Organization* (International Organization 1947)
- Hampton J, *Hobbes and the Social Contract Tradition* (Cambridge University Press 1986)
- Hart H L A, *Essays on Jurisprudence and Philosophy* (Oxford University Press 1983)
- The Concept of Law* (Oxford University Press 2012)

- Hasse-Biber S, *Mixed Methods Research: Merging Theory with Practice* (2 edn, Gilford Press 2008)
- Hawes J M, 'Christian Reichel Van Deusen, *The Best Interest of the Child And the Law* (Twayne Pub 1991)
--*Children in the Urban Society: Juvenile Delinquency in Nineteen Century America*
(Oxford University Press 1971)
- Hunt A, 'The Object of Marxist Theory of Law' in Dennis Patterson A *Companion to Philosophy of Law and Legal Theory* (2nd edn, Wiley-Blackwell 2010)
- Ife J and Fiske L, *Human Rights and Social Work: Towards Rights Based Practice* (3rd edn Cambridge University Press 2012)
- Ihua-Maduenyi F, 'Considering the Rights and Best Interests of a Child in a Multi-Cultural Civil Society with Special Reference to Nigeria' (PhD Thesis, University of Leicester 2011)
- James W, *Pragmatism* (Harvard University Press 1975)
- Jones J R, *The Criminal Procedure in the Northern States of Nigeria*, (2nd edn, Gaskiya Corp 1978)
- Jupp V, *Methods of Criminological Research*, (Rutledge)
- Kaime T, *The African Charter on the Rights and Welfare of the Child: A Socio-Legal Perspective* (Pretoria University Press 2009)
- Kilkelly U, *Youth Justice and Children's Rights: Measuring Compliance with International Standards* (SAGE 2008)
- Kothari C R, *Research Methodology: Methods and Techniques* (2nd edn, New Age International Publishers 2002)
- Laslett P, (ed) *Locke: Two Treatises of Government* (Cambridge University Press 1988)
- Lauren P, *The Evolution of International Human Rights: Visions Seen* (3rd edn, University of Pennsylvania Press 2011)
- LeBlanc L J, *The Convention on the Rights of the Child: United Nations lawmaking on human rights* (University of Nebraska Press 1995)
- Lisska A J, *Aquinas's Theory of Natural Law: An Analytic Reconstruction* (Oxford University Press 1996)
- Llewellyn K, *Jurisprudence: Realism in Theory and Practice* (UCP 1962)
- Mahoney J, *The Challenge of Human Rights: Origin, Development, and Significance* (Blackwell Publishers 2007)
- Marsh I, (ed) *Theories of Crime* (Routledge 2006)
- Mashood B A, *Islam and Human Rights: Advocacy for Social Change in Local*.
(Global Media Publishing 2006)
- McLellan D, *Karl Marx: Selected Writings* (Oxford University Press 2000)
- Millar P, *The Best Interests of Children: An Evidence Based Approach* (University of

- Toronto Press 2009)
- Morsink J, *The Universal Declaration of Human Rights: Origins, Drafting and Intent* (University of Pennsylvania Press 1999)
- Moyn S, *The Last Utopia: Human Rights in History*, (Harvard University Press 2010)
- Muncie J and Goldson B, (ed) *Comparative Youth Justice* (Sage Publications 2006)
- Murphy M C, *Natural Law and Practical Rationality* (Cambridge University Press 2001)
- Northedge F S, *The League of Nations: Its Life and Times, 1920-1946* (1986) Leicester University Press
- Nwabueze B O, *A Constitutional History of Nigeria*,(Longman Publishers 1982)
--*Ideas and Facts in Constitution Making* (Spectrum Publishers 1993)
- Okonkwo C O *Criminal Law in Nigeria* (2nd edn, Sweet & Maxwell London 1980)
- Oputa C A, *Human Rights in the Political and Legal Culture of Nigeria* (Nigerian Law Publications 1989)
- Pincoffs E, *Philosophy of Law: A Brief Introduction* (Wadsworth Publishers 1991)
- Rawls J, *A Theory of Justice* (Harvard University Press 1999)
- Raz J, *The Authority of Law*. (2nd edn, Oxford University Press 2009)
--*The Authority of Law*. (Clarendon Press 1979)
- Ryberg J, *The Ethics of Proportionate Punishment' A Critical Investigation* (Kluwer Academic Publishers 2004)
- Sarah J, Jenny S, and Melissa C, *International Covenant on Civil and Political Rights: Cases, Commentary, and Material* (Oxford University Press 2004)
- Schlossman S L, *Love and the American Delinquent – Theory and Practice of Progressive Juvenile Justice 1825 – 1920* (University of Chicago Press)
- Scott E S and Steinberg L, *Rethinking Juvenile Justice* (Harvard University Press 2010)
- Scott E, 'The Legal Construction of Childhood' *A Century of Juvenile Justice* (Chicago: University of Chicago Press 2002)
- Simonsen C E, *Juvenile Justice in America* (Macmillan 1991)
- Thoko K, *The African Charter on the Rights and Welfare of the Child: A Socio-legal Perspective* (Pretoria University Law Press 2009)
- Thornberry T P (ed) *Developmental Theories of Crime and Delinquency*. (Transaction Publishers 2004)
- Tony E, *The Politics of Human Rights: a Global Perspective* (Pluto Press 2005)
- Udo U E, *History and the Law of the Constitution of Nigeria*, (Malthouse Press 1994)
- Van B G, *The International Law on the Rights of the Child* (Martinus Nijhoff Publishers 1998)
- Vincent R J, *Human Rights and International Relations* (Cambridge University

Press, 1986)

von Bernstorff J, *Proportionate Sentencing: Exploring Principles*, (5th edn 2005)

von Hirsch A, *Past or Future Crimes: Deservedness and Dangerousness in the Sentencing of Criminals* (Manchester University Press 1986)

von Hirsch A, Ashworth A and Roberts J V (eds), *Principled Sentencing: Readings on Theory and Policy* (2nd edn, Northwestern University Press 1998)

Walgrave L and Bazemore G, *Restorative Juvenile Justice: In Search of Fundamentals and an Outline for Systemic Reform* (Criminal Justice Press 1999)

Weinrib E J, *The Idea of Private Law*. (Oxford University Press 2012)

Zehr H, *Changing Lenses: A New Focus for Crime and Justice* (Herald Press 1990)

-- *Little Book of Restorative Justice* (Good Books 2002)

Conventions/Treaties

Council of Europe, *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, November 4 1950

Organization of African Unity (OAU), *African Charter on Human and Peoples' Rights ('Banjul Charter')* 27 June 1981

UN Commission on Human Rights, *Commission on Human Rights Resolution 2003/85: Abduction of Children in Africa*, 25 April 2003

UN Commission on Human Rights, *Commission on Human Rights Resolution 2004/47: Abduction of Children in Africa*, 20 April 2004,

UN Committee on the Rights of the Child (CRC) *General Guidelines for Periodic Reports* May 1996

UN Committee on the Rights of the Child (CRC), *CRC General Comment No. 10 (2007): Children's Rights in Juvenile Justice*, 25 April 2007

UN Committee on the Rights of the Child (CRC), *General Comment No. 5 (2003) General Measures of Implementation of the Convention on the Rights of the Child*, 27 November 2003, CRC/GC/2003/5 45

UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Bolivia*, 18 February 1993

UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Report on the Forty-first Session* 12 May 2006

UN Committee on the Rights of the Child (CRC), *UN Committee on the Rights of the Child: Concluding Observations: Chile*, 25 April 1994

UN General Assembly *Declaration on the Rights of the Child*, 20 November 1959

UN General Assembly, *2005 World Summit Outcome*, 24 October 2005

UN General Assembly, *Convention on the Elimination of All Forms of Discrimination against Women*, 18 December 1979

- UN General Assembly, *Convention on the Rights of the Child* 20 November 1989
- UN General Assembly, *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* 3 December 1986
- UN General Assembly, *First Optional Protocol to the International Covenant on Civil and Political Rights* 16 December 1966 and *Second Optional Protocol to the International Covenant on Civil and Political Rights*, 15 December 1989
- UN General Assembly, *Follow-up to the United Nations Special Session on Children*, 17 August 2004
- UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966
- UN General Assembly, *International Covenant on Economic, Social and Cultural Rights*, 16 December 1966
- UN General Assembly, *United Nations Guidelines for the Prevention of Juvenile Delinquency ('The Riyadh Guidelines')* 14 December 1990
- UN General Assembly, *United Nations Rules for the Protection of Juveniles Deprived of Their Liberty* 2 April 1991
- UN General Assembly, *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ('The Beijing Rules')*
- UN General Assembly, *Universal Declaration of Human Rights*, 10 December 1948
- UN General Assembly, *Vienna Declaration and Programme of Action*, 12 July 1993
- UN Human Rights Committee (HRC), *CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990
- UN Human Rights Committee (HRC), *CCPR General Comment No. 19: Article 23 (The Family) Protection of the Family, the Right to Marriage and Equality of the Spouses*, 27 July 1990
- UN Secretary-General, 'In Larger Freedom: Towards Development, Security and Human Rights For All', 2005
- UN Security Council, *Security Council Resolution 1379 (2001) on the Protection of Children in Armed Conflicts* 20 November 2001
- UN Security Council, *Security Council Resolution 1460 (2003) on Children in Armed Conflict*, 30 January 2003
- UN, *Charter of the United Nations*, 24 October 1945

Journal Articles

- Abass A, and Mashood B A, 'Towards Effective Collective Security and Human Rights Protection in Africa: An Assessment of the Constitutive Act of the New African Union' (2002) 49 *Netherlands International Law Review*

- Abdumumini A O, 'Religious and Customary Laws in Nigeria' (2011) 25 EILR
- Adamolekun L, 'The Nigerian Federation at the Crossroads: The Way Forward' (2005) 35 *Publius*
- Adedayo A, and Olaomi J O, 'An Appraisal of Statistical Data Management in Nigeria: A Case for Reliable and Effective Statistical Information System' [2008] *The Social Sciences*
- Afshari R, 'On Historiography of Human Rights Reflections on Paul Gordon Lauren's *The Evolution of International Human Rights: Visions Seen*' (2007) 29 *Human Rights Quarterly*
- Aghalino S O, 'Dynamics of Constitutional Development in Nigeria: 1914 – 1999' (2006) 2 *Indian Journal of Politics*
- Ahmed A B, 'Administration of Islamic Criminal Law and Justice' in Joy Ezeilo, Muhammed Ladan and Abiola *Constitutional Democracy: Problems and Prospects*
- Ainsworth J E, 'Re-Imagining Childhood and Reconstructing the Legal Order: The Case for Abolishing the Juvenile Court' (1991) 69 *North Carolina Law Review*
- Ake C, 'The African Context of Human Rights' (1987) 34 *Africa Today*
- Akinwumi O S, 'Legal Impediments on the Practical Implementation of the Child Right Act 2003' (2009) 37 *International Journal of Legal Information* 10
- Akre L M, 'Struggling with Indeterminacy: A Call for Interdisciplinary Collaboration in Redefining the Best Interest of the Child Standard' (1992) 75 *Marquette Law Review*
- Alston P and Gilmour-Walsh B, 'The Best Interests of the Child: Towards A Synthesis of Children's Rights and Cultural Values' (*Innocenti Studies* 1996)
- Alston P, 'The Best Interests Principle: Towards A Reconciliation of Culture and Human Rights' (1994) 8 *International Journal of Law, Policy and Family*
- Alvazzi del Frate A, 'Crime and Criminal Justice Statistics Challenges' in Stefan Harrendorf, Markku Heiskanen, Steven Malby (eds) *International Statistics on Crime and Justice* (HEUNI- Publication Series No. 64 2010)
- Alves J A L, 'The Declaration of Human Rights in Postmodernity' (2000) 22 *Human Rights Quarterly*
- Amanda L, 'A Theoretical Analysis of the Reality of Children's Rights in Africa: An Introduction to the African Charter on the Rights and Welfare of the Child' (2002) 2 *African Human Rights Law Journal*
- Amrith S and Sluga G, 'New Histories of the United Nations' (2008) 19 *Journal of World History*
- Anerhahn K, 'Selective Incapacitation and the Problem of Prediction' (1999) 37 *Criminology*

- Angell K M, 'Regressive Movement: When Juvenile Offenders Are Treated as Adults, Nobody Wins' (2005) 14 Southern California Interdisciplinary Law Review
- An-Na'im A A and Henkin L, 'Islam and Human Rights: Beyond the Universality Debate' (2000) 94 American Society of International Law
- Anyeba P A, 'Sentencing in Criminal Cases in Nigeria and the Case for Paradigmatic Shifts' (2012) 1 NIALS Journal of Criminal Law and Justice
- Appell A R, 'Uneasy Tensions between Children's Rights and Civil Rights' (2005) 5 Nevada Law Journal
- Archard D W, 'Children's Rights' (2013) The International Encyclopedia of Ethics
- Arteaga J, 'Juvenile (In)Justice: Congressional Attempts to Abrogate the Procedural Rights of Juvenile Defendants' (2002) 102 Columbia Law Review
- Arts K C J M, 'International Protection of Children's Rights in Africa: The 1990 OAU Charter on the Rights and Welfare of the Child' (1993) 5 African Journal of International and Comparative Law
- Ashworth A, 'Responsibilities, Rights and Restorative Justice' (2002) 42 British Journal of Criminology
- Ashworth A, and von Hirsch A, 'Desert and the Three Rs' (1994) 5 Current Issues in Criminal Justice
- Asiedu-Akrofi D, 'Judicial Recognition and Adoption of Customary Law in Nigeria' (1989) 37 AJCL
- Atiola O, 'Juvenile/Youth Justice Management in Nigeria: Making a Case for Diversion Programmes' (2013) 3 Youth Justice
- Babaji B and Dankofa Y, 'Assessing the Performance of the Lower Courts in the Implementation of Sharia Penal Laws in Northern Nigeria' in Joy Ezeilo, Muhammed Ladan and Abiola Afolai-Akiyode (eds) *Sharia Implementation in Nigeria: Issues and Challenges on Women's Access to Justice*, (2004) WACOL
- Bagaric M, 'Proportionality in Sentencing: Its Justification, Meaning and Role' (2001) 12 Current Issues in Criminal Justice
- Bagaric M, and McConvill J, 'Giving Content to the Principle of Proportionality: Happiness and Pain as the Universal Currency for Matching Offense Seriousness and Penalty Severity' (2005) 69 The Journal of Criminal Law
- Bale S S, 'Still Tough on Crime - Prospects for Restorative Justice in the United States' (2003) 26 Utah Law Review
- Balmer T, 'Some Thoughts on Proportionality' (2008) 87 Oregon Law Review
- Balton D A, 'Convention on the Rights of the Child: Prospects for International Enforcement' (1990) 12 Human Rights Quarterly
- Barborton C and Stuart J, 'Costing the Implementation of the Child Justice Bill: A

- Scenario Analysis' (1999) Research Monograph No. 14 Cape Town: Applied Fiscal Research Center (AFReC)
- Barnett R E, 'Restitution: A New Paradigm of Criminal Justice' (1977) 87 Ethics
- Baxi U, 'Voices of Suffering and Future of Human Rights' (1998) 8 Transnational Law and Contemporary Problems
- Benekos P and Merlo A V, 'Three Strikes and You're Out: The Political Sentencing Game' (1995) 59 Federal Probation
- Benhabib S, 'Claiming Rights across Borders: International Human Rights and Democratic Sovereignty' (2009) 103 American Political Science Review
- Bentley K A, 'Can there be any universal children's rights'? (2005) 9 The International Journal of Human Rights
- Berry III W W, 'Promulgating Proportionality' (2011) 46 Georgia Law Review -- 'Practicing Proportionality' (2012) 64 Florida Law Review
- Bielefeldt H, 'Muslim Voices in the Human Rights Debate' (1995) 17 Human Rights Quarterly
- Binion G, 'Human Rights: A Feminist Perspective' (1995) 17.3 Human Rights Quarterly
- Bix B, 'Can Theories of Meaning and Reference Solve the Problem of Legal Determinacy'? (2003) 15 Ratio Juris -- 'On the Dividing Line Between Natural Law Theory and Legal Positivism' (2000) 75 Notre Dame Law Review
- Blackmore J and Welsh J, 'Selective Incapacitation: Sentencing According to Risk' (1983) 29 Crime and Delinquency
- Blackwell B S and Cunningham C D, 'Taking the Punishment out of the Process: From Substantive Criminal Justice through Procedural Justice to Restorative Justice' (2004) 67 Law and Contemporary Problems
- Boakye-Boaten A, 'Changes in the Concept of Childhood: Implications on Children in Ghana' (2009) 3 Journal of Afro-European Studies
- Bottoms A and James D, 'Youth Justice in Great Britain' (2004) 31, Youth Crime and Youth Justice (2004)
- Boyle K, 'Stock-taking on Human Rights: The World Conference on Human Rights, Vienna 1993' (1995) 43 Political Studies
- Bradley K, 'Juvenile delinquency and the evolution of the British Juvenile Courts, c.1900-1950' (2008) Institute for Historical Research
- Braithwaite J, 'Restorative Justice: Assessing Optimistic and Pessimistic Accounts' (1999) 25 Crime and Justice -- 'Setting Standards for Restorative Justice' (2002) 42 British Journal of Criminology
- Brancati D, 'Decentralization: Fueling the Fire or Dampening the Flames of Ethnic Conflict and Secessionism'? (2006) 60 International Organization

- Brian S, 'Federal-State Relations in Nigeria' (1981) 80 *African Affairs*
- Brian T Z, 'Contemporary Relevance of Legal Positivism' (2007) 32 *Australian Journal of Legal Philosophy*
- Briggs A, 'The Welfare State in Historical Perspective' in Christopher Pierson and Francis G Castles' (eds) *The Welfare State Reader* (2nd edn Polity Press)
- Brown J R, 'Quality of Mercy' (1993) 40 *UCLA Law Review*
- Bruce C, 'Proportionality Review: Still Inadequate, But Still Necessary' (2002) 14 *Capital Defense Journal*
- Buchanan A and Brock D W, 'Deciding for Others' (1986) 64 *The Milbank Quarterly*
- Buergethal T, 'The Normative and Institutional Evolution of International Human Rights' (1997) 19 *Human Rights Quarterly*
- Burgh R, 'Do the Guilty Deserve Punishment'?' (1982) 79 *Journal of Philosophy*
- Butts J A and Mitchell O, 'Brick by Brick: Dismantling the Border Between Juvenile and Adult Justice' (2000) *Criminal Justice* 2
- Butts J and Mears D, 'Reviving Juvenile Justice in a Get-Tough Era' (2001) 33 *Youth and Society*
- Carpenter K D A, 'International Covenant on Civil and Political Rights: A Toothless Tiger'?' (2001) 26 *North Carolina Journal of International Law and Commercial Regulation*
- Carroll J E, 'Rethinking the Constitutional Criminal Procedure of Juvenile Transfer Hearings: Apprendi, Adult Punishment, and Adult Process' (2010) 61 *Hastings Law Journal*
- Cauffman E, Woolard J and Reppucci D, N, 'Justice for Juveniles: New Perspectives on Adolescents' Competence and Culpability' (1999) 18 *QLR*
- Charlotte B, 'Women's Rights as Human Rights: Toward a Re-Vision of Human Rights' (1990) 12 *Human Rights Quarterly*
- Chiroma I H, 'Development and Application of Sharia (Islamic) Criminal Law in a Constitutional Democracy: Issues and Challenges' in Joy Ezeilo (ed) *Human Rights Protection in Administration of Sharia Justice System*, (2005) WACOL
- Chirwa D M, 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights*
- Christopher H, 'The Status of the International Covenant on Civil and Political Rights (ICCPR) in the Domestic Law of State Parties: An Initial Global Survey Through UN Human Rights Committee Documents' (2000) *Human Rights Quarterly*
- Cingranelli D L and Richards D L, 'Respect for Human Rights After the End of the Cold War' (1999) 36 *Journal of Peace Research*
- Clapton G, Cree V E and Smith M, 'Moral Panics and Social Work: Towards a

- Skeptical View of UK Child Protection' (2012) 33 Critical Social Policy
- Cogan N H, 'Juvenile Law, Before and After the Entrance of Parens Patriae' (1970) 22 South Carolina Law Review
- Coleman J L, 'Reason and Authority in R George' (ed) *The Autonomy of Law: Essay on Legal Positivism* (Oxford University Press 1999)
- Coleman J L and Leiter B, 'Legal Positivism' in Dennis Patterson' (ed) *Companion to Philosophy of Law and Legal Theory* (2nd edn, Wiley-Blackwell 2010)
- Considine J, 'Restorative Justice – Healing the Effects of Crime, Paper Delivered at Restorative Justice and Probation Conference, Warsaw' 2003 (Paper on file with author)
- Cohen B V, 'Human Rights Under the United Nations Charter' (1949) 14 Law and Contemporary Problems
- Corlett J A, 'Making More Sense of Retributivism: Desert as Responsibility and Proportionality' [2003] Philosophy
- Corrington J W, 'Generalities' (2002) 26 Legal Studies Forum
- Cossins A, 'Restorative Justice and Child Sex Offenses: The Theory and the Practice' (2008) 48 British Journal of Criminology
- Couzens M, 'The Best Interests of the Child and its Collective Connotations in the South African Law' (2010) 73 Journal of Contemporary Roman-Dutch Law
- Crivello G, Camfield L and Woodhead M, 'How Can Children Tell Us About Their Wellbeing? Exploring the Potential of Participatory Research Approaches within Young Lives' (2009) Social Indicators Research
- Cronin-Furman K R, '60 Years of the Universal Declaration of Human Rights: Towards An Individual Responsibility to Protect' (2010) 25 American University International Law Review
- Cuason D M, 'Another Three Strikes Law: An in Depth Look at Florida's Prisoner Releasee Reoffender Punishment Act' (1998) 10 Thomas Law Review
- Culver K, 'Leaving the Hart-Dworkin Debate' (2001) 51 University of Toronto Law Journal
- Curry L, 'Tougher Sentencing, Economic Hardships and Rising Violence' in L Clayton (ed) (2001) 62 Corrections Today
- Curtis G B, 'Checkered Career of Parens Patriae: The State as Parent or Tyrant' (1976) 25 DePaul Law Review
- Custer L B, 'Origins of the Doctrine of Parens Patriae' (1978) 27 Emory Law Journal
- Dada J A, 'Impediments to Human Rights Protection in Nigeria' (2012) 18 Annual Survey of International and Comparative Law
- Dakas D C J, 'Judicial Reform of the Legal Framework for Human Rights Litigation in Nigeria: Novelties and Perplexities' (2012) NIALS Journal on Criminal Law and Justice

- Dale M J, 'State Court Jurisdiction Under the Indian Child Welfare Act and the Unstated Best Interest of the Child Test' (1992) 27 *Gonzaga Law Review*
- Daly K, 'Restorative Justice: The Real Story' (2002) 4 *Punishment and Society*
- Danwood M, 'The Merits and Demerits of the African Charter on the Rights and Welfare of the Child' (2002) 10 *International Journal of Children's Rights*
- Davidson R, 'The Future of Juvenile Justice: Is it Time to Abolish the System' (1990) 81 *The Journal of Criminal Law and Criminology*
- Davis M, 'How to Make the Punishment Fit the Crime' (1983) 93 *Ethics*
- DeJong C and Merrill E S, 'Getting Tough on Crime: Juvenile Waiver and the Criminal Court' (2001) 27 *Ohio Northern University Law Review*
- Dele P, 'Domestication of International Human Rights Instruments and Constitutional Litigation in Nigeria' (2000) 18 *Netherlands Quarterly of Human Rights*
- Dennis M J, 'Current Development: Newly Adopted Protocols to the Convention on the Rights of the Child' (2000) 94 *American Journal of International Law*
- Denov M S, 'Children's Rights or Rhetoric? Assessing Canada's Youth Criminal Justice Act and its Compliance with the UN Convention on the Rights of the Child' (2004) 12 *International Journal of Children's Rights*
- Doek J E, 'The CRC 20 Years: An Overview of Some of the Major Achievements and Remaining Challenges' (2009) 33 *Child Abuse and Neglect*
- Doernberg D L, 'We the People: John Locke, Collective Constitutional Rights, and Standing to Challenge Government Action' (1985) 73 *California Law Review*
- Dolinko D, 'Retributivism, Consequentialism and the Intrinsic Goodness of Punishment' (1997) 16 *Law and Philosophy*
- 'Some Thoughts about Retributivism' (1991) 101 *ETHICS*
- 'Three Mistakes of Retributivism' (1992) 39 *UCLA Law Review*
- Donnelly J, 'Cultural Relativism and Universal Human Rights' (1984) 6 *Human Rights Quarterly*
- 'The Relative Universality of Human Rights' (2007) 29 *Human Rights Quarterly*
- Dresser R, 'Political Identity and Punishment' (1990) 70 *Boston University Law Review* 395
- Drowns R W and Hess K M, 'In Praise of Theory' (1997) 29 *Arizona State Law Journal*
- Ebbe O I, 'Juvenile Delinquency in Nigeria: The Problem of Application of Western Theories' (1992) 16 *International Journal of Comparative and Applied Criminal Justice*
- 'Ecological Distribution of Juvenile Delinquency in Metropolitan Lagos' (1984) 8 *International Journal of Comparative and Applied Criminal Justice*

- 'Juvenile Justice System In Southern Nigeria' (1998) 12 International Journal of Comparative and Applied Criminal Justice
- 'Juvenile Delinquency in Nigeria: The Problem of Application of Western Theories (1992) 16 International Journal of Comparative Law
- Eekelaar J, 'The Interests of the Child and the Child's Wishes: The Role of Dynamic Self-Determinism' (1994) 8 International Journal of Law, Policy and the Family
- Egede E, 'Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria' (2007) 51 Journal of African Law
- 'The New Territorial Waters (Amendment) Act 1998 – Comments on the Impact of International Law on Nigerian Law' (2000) 12 African Journal of International and Comparative Law
- Ehiribe I, 'The Validity of Customary Law Arbitration in Nigeria' (1996) 18 Comparative Law Yearbook of International Business
- Ejobowah J B, 'Rewriting Nigerian Federal Constitution: A Prescriptive Argument for a Self-Sustaining Arrangement' (2011) 3 Canadian Journal of African Studies
- 'Territorial Pluralism: Assessing the Ethnofederal Variant in Nigeria' (2010) 20 Regional and Federal Studies
- Ekanem E, 'Institutional Framework for Protection for Consumers Protection in Nigeria' (2011) 2 International Journal of Advance Legal Studies and Governance
- Elaiwu J I, 'Federalism in Nigeria's New Democratic Polity' (2002) 32 Publius
- Elster J, 'Solomonic Judgments: Against the Best Interest of the Child' (1987) 54 University of Chicago Law Review
- 'Judgments: Against the Best Interest of the Child' (1987) 54 University of Chicago Law Review
- Enabulele A O, 'Implementation of Treaties in Nigeria and the Status Question: Whither Nigerian Courts' (2009) 17 African Journal of International and Comparative Law
- 'Reflections on the ECOWAS Community Court Protocol and the Constitutions of Member States' (2010) 12 International Community Law Review
- Enabulele A O and Ewere A O, 'Can the Economic Community of West African States Community Court of Justice Enforce the African Charter Replicas of the Non-Justiciable Chapter II Human Rights Provisions of the Nigerian Constitution against Nigeria?' (2012) 1 International Human Rights Law Review
- Engen R L, Steen S and Bridges G S, 'Racial disparities in the punishment of youth:

- A theoretical and Empirical Assessment of the Literature' (2002) 49 *Social Problems*
- Essien L K, 'Northern Nigerian Penal Code: A Reflection of Diverse Values in Penal Legislation' (1984) 5 *New York Law School Journal of International and Comparative Law*
- Farrell I P, 'Gilbert & Sullivan and Scalia: Philosophy, Proportionality, and the Eighth Amendment.' *Vill. L. Rev.* 55 (2010)
- Fassbender B, 'The United Nations Charter As the Constitution of the International Community' (1998) 36 *Columbia Journal of Transitional Law*
- Feld B C, 'Competence, Culpability, And Punishment: Implications of Atkins For Executing And Sentencing Adolescents' (2003) 32 *Hofstra Law Review*
- 'Race, Politics, and Juvenile Justice: The Warren Court and the Conservative Backlash' (2003) 87 *Minnesota Law Review*
- 'A Century of Juvenile Justice: A Work in Progress or a Revolution that Failed' (2007) 34 *Northern Kentucky Law Review*
- 'The Juvenile Court Meets the Principle of Offense: Punishment, Treatment, and the Difference it Makes' (1988) 68 *Boston University Law Review*
- 'The Transformation of Juvenile Court' (1991) 75 *Minnesota Law Review*
- Finnis J, 'Grounds of Law and Legal Theory: A Response' (2007) 13 *Legal Theory*
- 'On the Incoherence of Legal Positivism' (2000) 75 *Notre Dame Law Review*
- Fisher J H, 'Chancery and the Emergence of Standard Written English in the Fifteenth Century' (1977) 52 *Journal of Medieval Studies*
- Flage D E, 'Review of James Tully: 'An Approach to Political Philosophy: Locke in Contexts' (1996) 35 *Dialogue*
- Flegel M, 'Facts and Their Meaning: Child Protection, Intervention, and the National Society for the Prevention of Cruelty to Children in Late Nineteenth-Century England' (2007) *Victorian Review*
- Fontaine R G, 'Social Information Processing, Subtypes of Violence, and a Progressive Construction of Culpability and Punishment in Juvenile Justice' (2008) 31 *International Journal of Law and Psychiatry*
- Fourchard L, 'The Making of the Juvenile Delinquent in Nigeria and South Africa, 1930–1970' (2010) 8 *History Compass*
- 'The Limits of Penal Reform: Punishing Children and Young Offenders in South Africa and Nigeria 1930s to 1960' (2011) 37 *Journal of Southern African Studies*
- 'Lagos and the Invention of Juvenile Delinquency in Nigeria 1920 – 1960' (2006) 47 *Journal of African History*
- Fox R G, 'Meaning of Proportionality in Sentencing' (1994) 19 *Melbourne*

- University Law Review
 --'When Justice Sheds a Tear: The Place of Mercy in Sentencing' (1999) 25
 Moash University Law Review
 --'Juvenile Justice Reform: An Historical Perspective' (1970) 22 Stanford
 Law Review
- Frase R S, 'Excessive Prison Sentences, Punishment Goals, and the Eights
 Amendment: Proportionality Relative to What'? (2004) 89 Minnesota Law
 Review
- Freeman M, 'The Problem of Secularism in Human Rights Theory' (2004) 26
 Human Rights Quarterly
 --'Taking Rights More Seriously' (1992) 6 International Journal of Law a
 and Family
 --'The Future of Children's Rights' (2000) 14 Children & Society
 --'The Philosophical Foundations of Human Rights' (1994) 16 Human
 Rights Quarterly
- Fuller L L, 'Positivism and Fidelity to Law – A Response to Professor Hart' (1958)
 71 Harvard Law Review
- Gale F, Naffine N and Wundersitz J, 'Back to Justice for Juveniles: The Rhetoric and
 Reality of Law Reform' (1990) 23 Australian & New Zealand Journal of
 Criminology
- Gardner J, 'Crime: In Proportion and In Perspective' in Ashworth and Wasik (eds.)
Fundamentals of Sentencing Theory
 --'Legal Positivism: 5 ½ Myths' (2001) 46 American Journal of
 Jurisprudence
- Geneva Declaration of the Rights of the Child*, League of Nations Document
 Adopted 26 September, 1924,
- George L, 'Two Concepts of the Margin of Appreciation' (2006) 26 Oxford Journal
 of Legal Studies
- Glendon M A, 'Foundation of Human Rights: The Unfinished Business' (1999) 44
 American Journal of Jurisprudence
- Glennon T, and Schwartz R G 'Foreword: Looking Back, Looking Ahead: The
 Evolution of Children's Rights' (1995) 68 Temple Law Review
- Goldson B 'Children in Need or Young Offenders? Hardening Ideology,
 Organizational Change and New Challenges for Social Work with Children
 in Trouble' (2000) 5 Child & Family Social Work
 --'Sociological Criminology and Youth Justice: Comparative Policy
 Analysis and Academic intervention' (2010) 10 Criminology and Criminal
 Justice
- Goldsworthy J D, 'Self-Destruction of Legal Positivism' (1990) 10 Oxford Journal
 of Legal Studies

- Goodheart M, 'Origins and Universality in the Human Rights Debates: Cultural Essentialism and the Challenge of Globalization' (2003) 25 *Human Rights Quarterly*
- Goonesekere S, 'The Best Interests of the Child: A South Asian Perspective' (1994) 8 *International Journal of Law, Policy and the Family*
- Green L, 'Positivism and the Inseparability of Law and Morales' (2008) 83 *New York University Law Review*
- Greig D W, 'Reciprocity, Proportionality and the Rule of Law of Treaties' (1994) 34 *Virginia Journal of International Law*
- Guggenheim M and Hertz R, 'Reflections on Judges, Juries, and Justice: Ensuring the Fairness of Juvenile Delinquency Trials' (1998) 33 *Wake Forest Law Review*
- Gunn J, 'Deconstructing Proportionality in Limitations Analysis' (2005) 19 *Emory International Law Review*
- Haapanen R, 'Selective Incapacitation and the Serious Offender: A Longitudinal Study of Criminal Career Patterns' (1990) *Research in Criminology*
- Hadjor K B, 'Whose Human Rights' (1998) 33 *Journal of Asian and African Studies*
- Hamilton C, and Harvey R, 'The Role of Public Opinion in the Implementation of International Juvenile Standards' (2004) 11 *International Journal of Children's Rights*
- Hammad S, 'The CRC: 'Words on Paper or a Reality for Children – A Case Study of Jordan' (1999) (1) *International Journal of Children's Rights*
- Hammarberg T, 'The U.N Convention on the Rights of the Child – and How to Make it Work' (1990) 12 *Human Rights Quarterly*
- Harmer A L and Goodman-Delahunty J, 'Practitioners' Opinions of Best Interests of the Child in Australian Legislation' (2014) *Psychiatry, Psychology and Law*
- Harris P W, Wayne N W, Frank B, 'A Century of Juvenile Justice' (2000) 1 *Criminal Justice*
- Harris-Short S, 'International Human Rights Law: Imperialist, Inept and Ineffective? Cultural Relativism and the UN Convention on the Rights of the Child' (2003) 25 *Human Rights Quarterly*
- Haruna B.A, 'The Application of the Sharia Penal System: Constitutional and Other Related Issues' in Joy Ezeilo, Muhammed Ladan and Abiola Afolai-Akiyode (eds) *Sharia Implementation in Nigeria: Issues and Challenges on Women's Access to Justice*, (2004) WACOL
- Heap S, 'Their Days are Spent in Gambling and Loafing, Pimping for Prostitutes, and Picking Pockets': Male Juvenile Delinquents on Lagos Island, 1920s-1960s' (2010) 35 *Journal of Family History* 48
- Hennink M, Hutter I and Bailey A, *Qualitative Research Methods*, (SAGE

- Publications 2011)
- Hooper J, 'Bright Lines, Dark Deeds: Counting Convictions Under the Armed Career Criminal Act' (1991) 89 Michigan Law Review
- Hopkins B, 'Restorative Justice in Schools' (2002) 17 Support for Learning
- Horder J, 'The Duel and the English Law of Homicide' (1992) 12 Oxford Journal of Legal Studies
- Howard-Hassmann R, 'Cultural Absolutism and the Nostalgia for Community' (1993) 15 Human Rights Quarterly
- Howe S W, 'Article: The Eighth Amendment As A Warrant Against Underserved Punishment' (2013) 22 William & Mary Bill of Rights Journal
- Hunt A, 'Rightlessness: The Perplexities of Human Rights' (2011) 11 The New Continental Review
- Hutchinson M R, 'The Margin of Appreciation Doctrine in the European Court of Human Rights' (1999) 48 International and Comparative Law Quarterly
- Hymowitz K, 'Thinkers and Lessons from the Slippery Slope' (2000) 48 Drake Law Review
- Ife J and Fiske L, 'Human Rights and Community Work. Complementary Theories and Practices' (2006) 49 International Social Work 297; UN General Assembly, *Convention on the Rights of the Child*, November 20 1989
- Ijaiya H, 'Juvenile Justice Administration in Nigeria,' (2009) 2 NUJS Law Review
- Ilesanmi S, 'Constitutional Treatment of Religion and the Politics of Human Rights in Nigeria' (2001) African Affairs
- Inamete U B, 'Federalism in Nigeria: The Crucial Dynamics' (1991) 80 The Commonwealth Journal of International Affairs
- Inegbedion N A, 'The New Fundamental Rights (Enforcement Procedure) Rules and Public Interest Litigation. Expanding the Frontiers of Human Rights Litigation' (2008) 1 Nigeria Education Law Journal
- Inegbedion N A and Omoregie E, 'Federalism in Nigeria: A Reappraisal' (2006) 4 Journal of Commonwealth Law and Legal Education
- Isawa E J, 'Federalism in Nigeria's New Democratic Polity' (2002) 32 The Journal of Federalism
- Ishaque S, 'Islamic Principles On Adoption: Examining The Impact Of Illegitimacy And Inheritance Related Concerns In Context Of A Child's Right To An Identity' (2008) 22 International Journal of Law, Policy and Family
- Iwobi U, 'Tiptoeing Through a Constitutional Minefield: he Great Sharia Controversy in Nigeria' (2004) 48 Journal of African Law
- Jackson V, 'Being Proportional about Proportionality' (2004) 21 Constitutional Commentary
- James M A, 'Eight Amendment Proportionality Analysis: The Limits of Moral Inquiry' (1984) 26 Arizona Law Review

- Jinadu L A, 'State Constitutional Design in Federal Systems' (1982) 12 *The Journal of Federalism*
- Johnson C A H, 'Entitled to Clemency: Mercy in the Criminal Law' (1991) 10 *Law and Philosophy*
- Johnston G, 'Restorative Justice – Ideas, Values and Debates (William Publishing 2002)
- Johnston G and Ness D W V, 'The Meaning of Restorative Justice' in Gerry Johnston and Daniel W Van Ness (eds) *Handbook on Restorative Justice*
- Joyce T, 'Best Interests Guidance on Determining the Best Interests of Adults Who Lack the Capacity to Make a Decision (or decisions) for Themselves' (2005) *British Psychological Society*
- Joyce T, 'Best Interests' (2009) 8 *Psychiatry*
- Kabasakal A Z F, 'Forging a Global Culture of Human Rights: Origins and Prospects of the International Bill of Rights' (2006) 28 *Human Rights Quarterly*
- Kaime T, 'The Convention of the Rights of the Child and the Cultural Legitimacy of Children's Rights in Africa: Some Reflections' (2005) 5 *African Human Rights Law Journal*
- 'The Foundation of the Rights in the African Charter on the Rights and Welfare of the Child: A Historical and Philosophical Account' (2009) 3 *African Journal of Legal Studies*
- Kalu K, 'A. Constitutionalism in Nigeria: A Conceptual Analysis of Ethnicity and Politics' (2009) *West Africa Review*
- Kamp A, 'Between-The-Wars Social Thought: Karl Llewellyn, Legal Realism and the Uniform Commercial Code in Context' (1996) 59 *Albany Law Review*
- Kaufman I, 'The Child in Trouble: The Long and Difficult Road to Reforming The Crazy-Quilt Juvenile Justice System' (1982) 60 *Washington University Law Quarterly*
- Keith L C and Ogundele A, 'Legal Systems and Constitutionalism in Sub-Saharan Africa: An Empirical Examination of Colonial Influences on Human Rights' (2007) 29 *Human Rights Quarterly*
- Keith L C, 'The United Nations International Covenant on Civil and Political Rights: Does it Make a Difference in Human Rights Behavior?' (1999) 13 *Journal of Peace Research*
- Kendhammer B, 'Islam and the Language of Human Rights in Nigeria: 'Rights Talk' and Religion in Domestic Politics' (2013) 12 *Journal of Human Rights*
- Kilkelly U, 'The Best of Both Worlds for Children's Rights? Interpreting the European Convention on Human Rights in the Light of the UN Convention on the Rights of the Child' (2001) 23 *Human Rights Quarterly*
- Kline M, 'Child Welfare Law, 'Best Interests of the Child' Ideology and First Nations' (1992) 30 *Osgoode Hall Law Journal*

- Kohem L, 'Tracing the Foundations of the Best Interests of the Child Standard in American Jurisprudence' (2007) 10 *Journal of Family Law and Studies*
- Kolakowski L, 'Marxism and Human Rights' (1983) 112 *Daedalus*
- Korpi W and Palme J, 'The Paradox of Redistribution and Strategies of Equality: Welfare State Institutions, Inequality, and Poverty in the Western Countries' (1998) 63 *American Sociological Review*
- Kruzick E R and Zemans D H, 'In the Best Interest of the Child: Mandatory Independent Representation' (1992) 69 *Denver University Law Review*
- Kubota Y, 'The Protection of Children's Rights and the United Nations' (1989) 58 *Nordic Journal of International Law*
- Kumm M, 'Constitutional Rights as Principles: On the Structure and Domain of Constitutional Justice' (2004) 2 *International Journal of Constitutional Law*
- Kupchik, A, 'Prosecuting Adolescents in Criminal Courts: Criminal or Juvenile Justice?' (2003) 50 *Social Problems*
- Kupchik A, Fagan J and Akiva L, 'Punishment, Proportionality, and Jurisdictional Transfer of Adolescent Offenders: A Test of the Leniency Gap Hypothesis' (2003) 14 *Stanford Law and Policy Review*
- Ladan M T, 'The Child Rights Act 2003 and the Challenges of its Adoption By State Governments in the 19 Northern States' (2007) Seminar Paper at Interactive Forum for Sokoto State House of Assembly Legislators (On file)
- LaFave L L, 'Origins and Evolution of the 'Best Interest of the Child' Standard' (1989) 34 *South Dakota Law Review*
- Lallah R, 'Notes on the International Covenant on Civil and Political Rights and Some of its Case Law' (1992) 18 *Commonwealth Law Bulletin*
- Langlois A, 'Human Rights: the Globalization and Fragmentation of Moral Discourse' (2002) 28 *Review of International Studies*
--'Normative and Theoretical Foundation of Human Rights' (2009) 25 *Human Rights: Politics and Practice*
- Larsen K L, 'With Liberty and Juvenile Justice for All: Extending the Right to a Jury Trial to the Juvenile Courts' (1994) 20 *William Mitchell Law Review*
- Leiter B, 'Beyond the Hart/Dworkin Debate: The Methodology Problem in Jurisprudence' (2003) 48 *American Journal of Jurisprudence*
--'Legal Realism and Legal Positivism Reconsidered' (2001) 111 *Ethics*
- Lemert E M, 'Diversion in Juvenile Justice: What Hath Been Wrought' (1981) 18 *Journal of Research and Crime Delinquency*
- Lenz J W, 'Locke's Essays on the Law of Nature' (1956) 17 *Philosophy and Phenomenological Research*
- Levine J G, 'Armed Career Criminal Act and the U.S. Sentencing Guidelines: Moving Toward Consistency' (2009) 46 *Harvard Journal of Legislation*

- Li-ann T, 'The Historical Origins and Contemporary Evolution of International Human Rights Law' (2009) 21 Singapore Academy of Law Journal
- Lindgren A J A, 'The Declaration of Human Rights in Postmodernity' (2000) 22 Human Rights Quarterly
- Lipsitt P D, 'Due Process as A Gateway to Rehabilitation in the Juvenile Justice System' (1969) 49 Boston University Law Review
- Logan W A, 'Proportionality and Punishment: Imposing Life without Parole on Juveniles' (1998) 33 Wake Forest Law Review
- Lovegrove A, 'Proportionality, Sentencing and the Multiple Offender: Towards a Numerical Framework' (2000) 2 Punishment and Society
- Lynn M, 'The Nigerian Self-government Crisis of 1953 and the Colonial Office' (2006) 34 The Journal of Imperial and Commonwealth History
- Mackenzie G 'Achieving Consistency in Sentencing: Moving to Best Practice' (2002) 22 University of Queensland Law Journal
- Makua M, 'Human Rights in Africa: The Limited Promise of Liberalism; (2008) 51 African Studies Review
- Marrus E, 'Best Interests Equals Zealous Advocacy: A Not So Radical View of Holistic Representation for Children Accused of Crime' (2003) 62 Maryland Law Review
- Marsh C and P D P, 'The Globalization of Human Rights and the Socialization of Human Rights Norms' [2007] Brigham Young University Law Review
- Marshall D, "The Construction of Children as an Object of International Relations: The Declaration of Children's Rights and the Child Welfare Committee of League of Nations, 1900-1924' (1997)
- Mashood B A, 'Establishing Areas of Common Ground Between Islamic Law and International Human Rights' (2001) 5 International Journal of Human Rights
--'Islam and the Realization of Human Rights in the Muslim World: A Reflection on Two Essential Approaches and Two Divergent Perspectives' (2007) 4 Muslim World Journal of Human Rights
- Mazower M, 'The Strange Triumph of Human Rights 1933-1950' (2004) 47 The Historical Journal
- McElrea F 'Restorative Justice - The New Zealand Youth Court: A Model for Development in Other Courts?' (1994) 4 Journal of Judicial Administration
- McGoldrick D, 'The United Nations Convention on the Rights of the Child' (1991) International Journal of Law, Policy and the Family
- McHugh J T, 'Utilitarianism, Punishment, and Ideal Proportionality in Penal Law: Punishment as an Intrinsic Evil' (2008) 10 Journal of Bentham Studies
- McLatchey S F, 'Juvenile Crime and Punishment: An Analysis of the Get Tough

- Approach' (1999) 10 University of Florida Journal of Law and Public Policy
- Mears D and Field S, 'Theorizing Sanctioning in a Criminalized Juvenile Court' (2000) 38 Criminology
- Mears D P, Hay C, Gertz M and Mancini C, 'Public Opinion and the Foundation of the Juvenile Court (2007) 45 Criminology
- Melli M S, 'Symposium: Juvenile Justice Reform: Introduction: Juvenile Justice Reform in Context' (1996) Wisconsin Law Review
- Mendus S, 'Human Rights in Political Theory' (1995) 43 Political Studies
- Miller N D, 'International Protection of the Rights of Prisoners: Is Solitary Confinement in the United States a Violation of International Standards?' (1996) 26 California Western International Law Journal
- Mills E M, 'Eighth Amendment: Cruel and Unusual Punishment: Habitual Offender's Life Sentence without Parole Is Disproportionate' (1983) Journal of Criminal Law and Criminology
- Mnookin R, 'Child Custody Adjudication; Judicial Functions in the Face of Indeterminacy' (1975) 39 Law and Contemporary Problems
- Mogalakwe M, 'The Documentary Research Method: Using Documentary Sources in Social Research' (2009) 25 East Africa Social Science Review
- Mohammad F, 'Public Reason as a Strategy for Principled Reconciliation: The Case of Islamic Law and International Human Rights Law' (2007) 8 Chicago Journal of International Law
- 'Islamic Politics and Secular Politics: Can They Co-Exist' (2009) 25 Journal of Law and Religion
- Mojab S, 'In the Quagmires of Ethnicity: A Marxist Critique of Liberal 'Exit Strategies' (2006) 6 *Ethnicities*
- Moore M S, 'A Natural Law Theory of Interpretation' (1985) 58 Southern California Law Review
- 'Justifying the Natural Law School on Constitutional Interpretation' (2011) 69 Fordham Law Review
- Morris H, 'A Paternalistic Theory of Punishment' (1981) 18 American Philosophical Quarterly 263
- Mullender R, 'Theorizing the Third Way: Qualified Consequentialism, the Proportionality Principle, and the New Social Democracy' (2000) 27 Journal of Law and Society
- Muncie J, 'The Globalization of Crime Control—The Case of Youth and Juvenile Justice: Neo-liberalism, Policy Convergence and International Conventions' (2005) 9 Theoretical Criminology
- Munro, E. R., Pinkerton, J., Mendes, P., Hyde-Dryden, G., Herczog, M., &

- Benbenishty, R. 'The contribution of the United Nations Convention on the Rights of the Child to understanding and promoting the interests of young people making the transition from care to adulthood' (2011) 33 *Children and Youth Services Review*
- Murphy C, 'Natural Law Jurisprudence' [2003] *Legal Theory* 241
- Murphy J G, 'Retributivism, Moral Education and the Liberal State' (1985) 4 *Criminal Justice Ethics*
- Nauche E, 'The Nigerian Fundamental Rights (Enforcement) Procedure Rules: A Fitting Response to Problems in the Enforcement of Human Rights in Nigeria' (2010) *African Human Rights Law Journal*
- Nicholas C, 'God, the Bible and Human Rights' (2012) 14 *Ecclesiastical Law Journal*
- Nielsen K, 'Marxism and the Moral Point of View' (1987) 24 *American Philosophical Quarterly*
- Nmeielle V O, 'Sharia Law in the Northern States of Nigeria: To Implement or Not to Implement, the Constitutionality is the Question' (2004) 26 *Human Rights Quarterly*
- Nolan D R, 'Sir William Blackstone and the New American Republic: A Study of Intellectual Impact' (1976) 51 *New York University Law Review* 731
- Ntlama N, 'The Application of Section 8(3) of the Constitution in the Development of Customary Law Values in South Africa's New Constitutional Dispensation' (2012) *Potchefstroom Electronic Law Journal*
- Nussbaum M C, 'Capabilities of Human Rights', (1998) 66 *Fordham Law Review*
- Nwapi C, 'International Treaties in Nigerian and Canadian Courts' (2011) 19 *African Journal of International and Comparative Law*
- Nwauche E S, 'Enforcing ECOWAS Law in West African National Courts' (2011) 55 *Journal of African Law*
 --'Constitutional Challenge of the Integration and Interaction of Customary and the Received English Common Law in Nigeria and Ghana' (2010) 25 *Tulane European and Civil Law Forum*
- O'Connor D, 'Defining the Strike Zone-An Analysis of the Classification of Prior Conviction Under the Federal 'Three Strikes and You are Out'' (1995) 36 *Boston College Law Review*
- O'Donnell T A, 'The Margin of Appreciation Doctrine: Standards in the Jurisprudence of the European Court of Human Rights' (1982) 4 *Human Rights Quarterly*
- O'Hear M M, 'Is Restorative Justice Compatible with Sentencing Uniformity' (2005) 89 *Marquette Law Review*
- O'Malley T, 'Sentencing Values and Sentencing Structure' (2003) *Judicial Studies Institute Journal*, Vol. 3

- Oba A.A, 'Islamic Law as Customary Law: The Changing Perspective in Nigeria' (2002) 6, International and Comparative Law Quarterly
- Oba A A, 'The Sharia Court of Appeal in Northern Nigeria: The Continuing Crises of Jurisdiction' (2004) 52 The American Journal of Comparative Law
- Obilande A O, 'The Nigerian Legal System (Sweet & Maxwell 1979)
- Ochieng A, 'An Analysis of the Strengths and Limitation of Qualitative and Quantitative Research Paradigms' (2009) 13 Problems Of Education In The 21St Century
- Oddo D R, 'Removing Confidentiality Protections and the Get Tough Rhetoric: What has Gone Wrong with the Juvenile Justice System' (1988) 18 Boston College Third World Law Journal
- Odera O U, 'Knowledge and Awareness of the Child's Rights Act Among Residents of a University Town in Enugu State Nigeria' (2011) 2 Educational Research
- Odhiambo O G, 'The Domestication of International Law Standards on the Rights of the Child with Specific Reference to Juvenile Justice in the African Context' (Phd Thesis University Western Cape South Africa 2005)
- Odinkalu C A, 'Africa's Regional Human Rights System: Recent Developments and Jurisprudence' (2002) 2 Human Rights Law Review
- Odongo G O, 'The Domestication of International Standards on the Rights of the Child: A Critical and Comparative Evaluation of the Kenyan Example' (2004) 1 International Journal of Children's Rights
- Ogbu O, 'Re-inventing Federalism in Post-transition Nigeria: Problems and Prospects' (2004) 29 Africa Journal Online
- Ogunniran I, 'The Child Rights Act Versus Shari'a Law in Nigeria: Issues, Challenges and A Way Forward' (2010) 30 Child Rights Journal --'The Lock and Key Phenomenon: Reforming the Penal Policy for Child Offenders in Nigeria' (2013) 10 Justice Policy Journal
- Ojielo O M, 'Human Rights and Sharia'h Justice in Nigeria' (2003) 9 Annual Survey of International and Comparative Law
- Ojigho O J, 'Evaluating the Application, Implementation and Enforcement of International Human Rights Instruments and Norms in Nigeria' (2005) 31 Commonwealth Law Bulletin
- Ojukwu C N, 'Enforcement of the African Charter on Human and Peoples' Rights as a Domestic Law in Nigeria' (2000) 25 International Legal Practitioner
- Okere B O, 'The Protection of Human Rights in Africa and the African Charter on Human and Peoples' Rights: A Comparative Analysis with the European and American Systems' (1984) 6 Human Rights Quarterly
- Olowu D, 'Protecting Children's Rights in Africa: A Critique of the African Charter

- on the Rights and the Welfare of the Child' (2002) *International Journal of Child Rights*
- Omale D J O, 'Justice in History: An Examination of African Restorative Traditions and the Emerging Restorative Paradigm' (2006) 2 *African Journal of Criminology and Justice Studies*
- 'Restorative Justice as an Alternative Dispute Resolution Model: Opinions of Victims of Crime and Criminal Justice Professionals in Nigeria (PhD thesis De Montfort University 2009)
- Omotola J S, 'Democracy and Constitutionalism in Nigeria Under the Fourth Republic' (2008) 2 *Africana*
- Oritsegbubemi A O, 'An African Conception of Human Rights? Comments on the Challenges of Relativism' (2014) *Human Rights Review*
- Osaghae E E, 'The Status of State Governments in Nigeria's Federalism' (1992) 22 *The Journal of Federalism*
- 'Purpose and Functioning of the Senate' in Bertus de Villiers, Frank Delmartino and Andrea Allen (eds) *Institutional Developments in Divided Societies* (Human Sciences Research Council 1998)
- Othman N, 'Grounding Human Rights Arguments in Non Western Culture: Shari'a and the Citizenship Rights of Women in Modern Islamic State' in Joanne R. Bauer & Daniel A. Bells (eds) *The East Asian Challenge for Human Rights* (Cambridge University Press 1999)
- Pace J P, 'The development of human rights law in the United Nations, its control and monitoring machinery' (1998) 50 *International Social Science Journal*
- Pagnanelli E, 'Children As Adults: The Transfer of Juveniles to Adult Courts and the Potential Impact of Roper v. Simmons' (2007) 44 *American Criminal Law Review*
- Palmer D and Walters R, 'Crime Prevention Camps for Youth 'at Risk: Blurring the Boundaries of Care and Control' in C Simpson & R Hil (eds) *Ways of Resistance: Social Control and Young People in Australia* (Hale & Iremonger 1995)
- Parent W A, 'Some Recent Work on the Concept of Liberty' (1974) 11 *American Philosophical Quarterly*
- Parker S, 'The Best Interest of the Child: Principles and Problems' (1994) 8 *International Journal of Law and Family*
- Parry-Williams J, 'Legal Reform and Children's Rights in Uganda - Some Critical Issues' (1993) 1 *International Journal of Child Rights*
- Pedersen S, 'Back to the League of Nations' (2007) 112 *The American Historical Review*
- Pegden A, 'Human Rights, Natural Rights and Europe's Imperial Legacy' (2003) 31 *Political Theory*

- Perkins R, 'Criminal Liability Without Fault: A Disquieting Trend' (1982) 68 Iowa Law Review
- Philip A and Quinn G, 'The Nature and Scope of States Parties' Obligations Under the International Covenant on Economic, Social and Cultural Rights' (1987) 9 Human Rights Quarterly
- Pollis A, 'A New Universalism in Adamanitia Pollis and Peter Schwab' (eds) *Human Rights: New Perspectives, New Realities* (Lynne Rienner Publishers 2000)
- Poole T, 'The Administration of Justice in the Modern City' (1913) 26 Harvard Law Review
- Pratt J, 'Corporatism: The Third Model of Juvenile Justice' (1989) 29 British Journal of Criminology
- Pruett M K, Hoganbruen K and Jackson T, 'The Best Interest of the Child: Parents' versus Attorneys' Perspectives' (2000) 33 Journal of Divorce & Remarriage
- Rains P, 'Juvenile Justice and the Boys' Farm: Surviving a Court-Created Population Crisis, 1909-1948' (1984) 31 Social Problems
- Rawls J, 'Kantian Constructivism in Moral Theory' (1980) 77 The Journal of Philosophy
- Raz J, 'Authority, Law and Morality' (1985) 68 The Monist
 --'The Problem of Authority: Revisiting the Service Conception' (2006) Minnesota Law Review
 --'The Problem of Authority: Revisiting the Service Conception' (2006) Minnesota Law Review
- Reisman M, 'Where to Decide the 'Best Interests' of Elian Gonzalez: The Law of Abduction and International Custody Disputes' (2000) 31 University of Miami Inter-American Law Review
- Rendleman D R, 'Parens Patriae: From Chancery to the Juvenile Court' (1971) 23 South Carolina Law Review
- Reus-Smit C, *Human Rights in a Global Ecumene* (International Affairs 2011)
- Ristroph A, 'Proportionality as a Principle of Limited Government' (2005) 55 Duke Law Journal
 --'Desert, Democracy, and Sentencing Reform' (2006) 96 The Journal of Criminal Law and Criminology
 --'How (Not) to Think Like a Punisher' (2009) 61 Florida Law Review
- Ryberg J, 'Responsibility and capacities: A Note on the Proportionality Assumption' (2014) Analysis Advance Access
- Schauer F, 'Positivism Before Hart' (2011) 24 Canadian Journal of Law and Jurisprudence
- Schissel B, 'Youth Crime, Moral Panics, and the News: The Conspiracy Against the Marginalized in Canada' (1997) 24 Social Justice
- Schmidt M G, 'What Happened to the Spirit of the Vienna? The Follow-Up to the

- Vienna Declaration and Programme of Action and the Mandate of the UH High Commissioner for Human Rights' (1995) 64 *Nordic Journal of International Law*
- Scott E and Grisso T, 'The Evolution of Adolescence: A Development Perspective in Juvenile Justice Reform' (1997) 88 *Journal of Criminal Law and Criminology*
- Sen A, 'Elements of a Theory of Human Rights' (2004) 32 *Philosophy & Public Affairs*
 --'Human Rights and the Limits of the Law' (2006) 27 *Cardozo Law Review*
 --'The Global Reach of Human Rights' (2012) 29 *Journal of Applied Philosophy*
- Shapiro D A, 'What's Beneath the Graham Cracker?: The Potential Impact of Comparative Law on the Future of Juvenile Justice Reform after *Graham v. Florida*' (2012) 24 *Pace International Law Review*
- Sheffer J P, 'Serious and Habitual Juvenile Offender Statutes: Reconciling Punishment and Rehabilitation within the Juvenile Justice System' (1995) 48 *Vanderbilt Law Review*
- Shelton D, 'Protecting Human Rights in a Global World' (2002) 25 *Boston College International and Comparative Law Review*
- Shestack J J, 'The Philosophical Foundations of Human Rights' (1998) 20 *Human Rights Quarterly*
- Simon J, 'Power Without Parents: Juvenile Justice in A Postmodern Society' (1995) 16 *Cardozo Law Review*
- Singer R G, 'Proportionate Thoughts About Proportionality' (2010) 8 *Ohio State Journal of Criminal Law*
- Skelton A, 'Restorative Justice as a Framework for Juvenile Justice Reform: A South African Perspective' (2002) 42 *British Journal of Criminology*
 --'The Child Justice Bill: Implementing the UN Convention Through the Process of Law-Making (Unpublished Paper delivered at the International Society for the Prevention of Child Abuse and Neglect (ISPCAN) Conference on 'Implementing the UN Convention on the Rights of the Child: Myth or Reality' Durban, September 2000
 --'Developing a Juvenile Justice System for South Africa: International Instruments and Restorative Justice' (1996) 17 *Acta Juridica*
- Skivenes M, 'Judging the Child's Best Interests: Rational Reasoning or Subjective Presumptions' (2010) 53 *Acta Sociologica*
- Skoler D L, 'World Implementation of the United Nations Standard Minimum Rules for the Treatment of Prisoners' (1975) 10 *Journal of International Law and Economics*

- Sloth-Nielsen J, 'Children's Rights in the South African Courts: An Overview Since Ratification of the UN Convention on the Rights of the Child' (2002) 10 International Journal of Children's Rights
- Smith E, 'In a Child's Best Interest: Juvenile Status Offenders Deserve Procedural Due Process' (1992) 10 Law & Inequality
- Sorkow Harvey, 'Best Interest of the Child: By Whose Definition' (1991) 18 Pepperdine Law Review
- Sossou M A and Yogtiba J A, 'Abuse of Children in West Africa: Implications for Social Work Education and Practice' (2009) 39 British Journal of Social Work
- Spaak T, 'Legal Positivism, Law's Normativity and the Normative Force of Legal Justification' (2003) 16 Ratio Juris
- Stafford, A., Laybourn, A., Hill, M., & Walker, M 'Having a Say': Children and Young People Talk About Consultation' (2003) 17 Children & Society
- Stammers N, 'Social Movements and the Social Construction of Human Rights' (1999) 21 Human Rights Quarterly
--'A Critique of Social Approaches to Human Rights' (1995) 17 Human Rights Quarterly
- Stefan S, 'Juvenile Justice in Namibia: A System in Transition' in John Winterdyk (ed) *Juvenile Justice Systems: International Perspectives* (Canadian Scholars' Press 2002)
- Steiker S, 'No, Capital Punishment Is Not Morally Required: Deterrence, Deontology, and the Death Penalty' (2005) 58 Stanford Law Review
- Stettinius E R, 'Human Rights in the United Nations Charter' (1946) 243 The Annals of the American Academy of Political and Social Science
- Stinneford J F, 'Rethinking Proportionality under the Cruel and Unusual Punishments Clause' (2011) 97 Virginia Law Review
- Stout B, 'Restorative Justice in South Africa: Resolving Conflict' (2003) 1 British Journal of Community Justice
- Stout M and Salm J, 'What Restorative Justice Might Learn From Administrative Theory' (2011) 14 Contemporary Justice Review
- Suberu R 'The Travails of Federalism in Nigeria' (1993) 4 Journal of Democracy
--'Reinventing the Architecture of Nigerian Federalism' (2006) 12 Brown J. World Aff.
--'The Nigerian Federal System: Performance, Problems and Prospects' (2010) Journal of Contemporary African Studies
--'The Supreme Court and Federalism in Nigeria' (2008) 46 Journal of Modern African Studies
--'Religion and Institutions: Federalism and the Management of Conflicts over Sharia in Nigeria' (2009) 21 Journal of International Development

- Suberu R and Diamond L, 'Institutional Design, Ethnic Conflict Management, and Democracy in Nigeria' (2002) *The Architecture of Democracy*
- Sweet S and Matthews J, 'Proportionality Balancing and Global Constitutionalism' (2008) 47 *Columbia Journal of Transitional Law*
- Tawfiq L M, 'Legal Pluralism and the Development of the Rule of Law in Nigeria: Issues and Challenges in the Development and Application of the Sharia' in Jibrin Ibrahim (ed) *Sharia Penal and Family Laws in Nigeria and in the Muslim World: Rights Based Approach*, (2004)
- Thagirisa P, 'Historical Perspective of the Sharia Project & (and) a Cross-Cultural and Self-Determination Approach to Resolving the Sharia Project in Nigeria' (2004) 29 *Brooklyn Journal of International Law*
- Thomas C and Cage R, 'The Effect of Social Characteristics on Juvenile Court Dispositions' (1997) 18 *Sociological Quarterly*
- Thomas T, 'Proportionality and the Supreme Court's Jurisprudence of Remedies,' (2007) 59 *Hasting Law Journal*
- Tobin J, 'Beyond the Supermarket Shelf: Using a Rights-Based Approach to Address Children's Health Needs' (2006) 14 *International Journal of Children's Rights*
- Todres J, 'Emerging Limitations on the Rights of the Child: The U.N. Convention on the Rights of the Child and Its Early Case Law' (1999) 30 *Columbia Human Rights Law Review*
- Tonry M, 'Purposes and Functions of Sentencing' (2006) 34 *Crime and Justice* --'Obsolescence and Immanence in Penal Theory and Policy' (2005) 105 *Columbia Law Review*
- Tor-Inge H, 'The Function of Proportionality Principle in EU Law' (2010) 16 *European Law Journal*
- Toyo N, 'Revisiting equality as a right: the minimum age of marriage clause in the Nigerian Child Rights Act, 2003' (2006) 27 *Third World Quarterly*
- Tsutsui K, Whitlinger C, and Lim A, 'International Human Rights Law and Social Movements: States' Resistance and Civil Society's Insistence' (2012) 8 *Annual Review of Law and Social Science*
- Turner J H, 'In Defense of Positivism' (1985) 3 *Sociological Theory*
- Uhlich W, 'Best Interests of the Child: Considering the Effects of Passive Smoking When Making a Custody Adjudication' (1992) 68 *North Dakota Law Review*
- Umar M, 'Gender Issues in Application of Islamic Law in Nigeria' (2007) 45 *Al-Jami'ah JIS*
- Umzurike U O, 'The African Charter on Human and Peoples' Rights, (1983) 77 *American Journal of International Law*
- Uweru B C, 'Repugnancy Doctrine and Customary Law in Nigeria: A Positive

- Aspect of British Colonialism' [2008] African Research Review
- Van D C R, 'The Best Interest of the Child And the Law' (1991) 18 Pepperdine Law Review
- Van K R, 'The Best Interests of the Child and Parental Separation: on the Civilizing of Parents' (2005) The Modern Law Review
- van Zyl S D, 'Life Imprisonment: Recent Issues in National and International Law' (2006) 29 International Journal of Law and Psychiatry
- Viccica A D, 'Promotion and Protection of Children's Rights through Development and Recognition of an International Notion of Juvenile Justice and Its Child-Centered Perspective in the United Nations' (1989) 58 Nordic Journal of International Law
- Viljoen F, 'Supra-national human rights instruments for the protection of children in Africa: the Convention on the Rights of the Child and the African Charter on the Rights and Welfare of the Child' (1998) 31 The Comparative and International Law Journal of Southern Africa
- von Bernstorff J, 'The Changing Fortunes of the Universal Declaration of Human Rights: Genesis and Symbolic Dimensions of the Turn to Rights in International Law' (2008) 19 European Journal of International Law
- von Hirsch A, 'Proportionality and Desert: A Reply to Bedau' (1978) 75 The Journal of Philosophy
- 'Proportionality in the Philosophy of Punishment: From 'Why Punish?' to 'How Much?' (1991) 25 Israel Law Review
- 'Proportionality in the Philosophy of Punishment' (1992) 16 Crime and Justice
- 'Recent Trends in American Criminal Sentencing Theory' (1983) 42 Maryland Law Review
- 'Utilitarian Sentencing Resuscitated; The American Bar Association's Second Report On Criminal Justice' (1981) 33 Rutgers Law Review
- 'Why Have Proportionate Sentences: A Reply to Professor Gabor' (1990) 32 Canadian Journal of Criminology
- 'Proportionate Sentences for Juveniles: How Different than for Adults?' (2001) 3 Punishment and Society
- 'Commensurability and Crime Prevention: Evaluating Formal Sentencing Structures and their Rationale' (1984) 74 The Journal of Criminal Law and Criminology
- von Leyden W, 'John Locke and Natural Law' (1956) 31 Philosophy
- Vukor-Quarshie G N K, 'Criminal Justice Administration in Nigeria: Saro Wiwa in Review' (1979) 8 Criminal Law in Review
- Wadri K, 'Introducing Child Rights Through Law Reform in Uganda' in Petty C and

- Brown, M (eds) *Justice for Children: Challenges for Policy and Practice in Sub-Saharan Africa* (Save the Children 1998)
- Waldron J, 'Concept and the Rule of Law' (2009) 43 *Georgia Law Review*
 --'John Locke: Social Contract Versus Political Anthropology' (1989) 51
The Review of Politics 3
- Walgave L, 'Restoration in Youth Justice' in Michael Torny and Anthony N. Doob
 (eds) *Youth Crime and Youth Justice: Comparative and Cross-National Perspectives* (2004) 31 *Crime and Justice: A Research Review*
- Walgrave L, 'Restoration in Youth Justice, Crime and Justice' (2004) 31 *Youth Crime and Justice: Comparative and Cross-National Perspectives*
 --'Restorative Justice for Juveniles: Just a Technique or a Fully Fledged Alternative?' (1995) 34 *Howard Journal of Criminal Justice*
- Waltz S E, 'Universalizing Human Rights: The Role of Small States in the Construction of the Universal Declaration of Human Rights' (2001) 23 *Human Rights Quarterly*
 --'Reclaiming and Rebuilding the History of Universal Declaration of Human Rights' (2002) 23 *Third World Quarterly*
- Wayne R, 'The Best Interests of the Child: A Silent Standard – Will You Know It When You Hear It?(2008) 2 *Journal of Public Child Welfare*
- Weinreb L L, *Natural Law and Justice* (Library of Congress Cataloging in Publication Data 1987)
- Weinrib E J, 'Legal Formalism: On the Immanent Rationality of Law' (1988) 97 *Yale Law Journal* 949
- Wemmers J A, 'Restorative Justice for Victims of Crime: A Victim-Oriented Approach to Restorative Justice' (2002) 9 *International Review of Victimology*
- Wemmers J A and Cyril K, 'Victims' Perspectives on Restorative Justice: How Much Involvement Are Victims Looking For?' (2004) 11 *International Review of Victimology*
- Wheeler N J, 'Victory for Common Humanity - The Responsibility to Protect after the 2005 World Summit' (2006) 2 *Journal of International Law and International Relations*
- White E, 'From Sociological Jurisprudence to Realism: Jurisprudence of Social Change in Early Twentieth Century America' (1972) 58 *Virginia Law Review*
 --'The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change' (1973) 59 *Virginia Law Review*
- Wiese K K, 'Juvenile Justice: A Comparison Between the Laws of New Zealand and Germany. (LL.M thesis University of Canterbury 2007)
- Wolfson S, 'Children's Rights: Theoretical Underpinning of the 'Best Interests of the

- Child' in Michael Freeman and Philip Veerman (eds) *The Ideologies of Children's Rights* (Martinus Nijhoff Publishers 1992)
- Wood D, 'Retribution, Crime Reduction and Justification of Punishment' (2002) 22 *Oxford Journal of Legal Studies*
- Woodman G, 'Customary Law in Common Law Systems' (2001) 32 *Introductory Development Studies Bulletin*
- Wundersitz J, 'Pre-court diversion: The Australian experience' in A Borowski & I O'Connor (eds) *Juvenile Crime, Justice and Corrections* (Longman 1997)
- Wyles P, 'Building a Human Rights Youth Justice System' (2009) 28 *Youth Justice Australia*
- Yadudu A H, 'Colonization and the Transformation of Islamic Law in Nigeria' (1992) *Journal of Law and Religion*
- Yeats M A, 'Three Stikes and Restorative Justice: Dealing with Young Repeat Burglars in Western Australia' (1997) 8 *Criminal Law Forum*
- Yeckel J, 'Violent Children in Conflict with the Law: Rethinking Federal Intervention in Juvenile Justice' (1997) 51 *Washington University Journal of Urban and Contemporary Law*
 --'Violent Juvenile Offender: Rethinking Federal Intervention in the Juvenile Justice' (1997) 51 *Washington University Journal of Urban and Contemporary Law*
- Zehr H and Mika H, 'Fundamental Concepts of Justice' in Eugene MaLaughlin and Others (eds) *Restorative Justice: Critical Issues* 2003)
- Zermatten J, 'The Best Interests of the Child Principle: Literal Analysis and Function' (2010) 18 *International Journal of Children's Rights*
- Zimring F E, 'Penal Proportionality for the Young Offender: Notes on Immaturity, Capacity and Diminished Responsibility' in Thomas Grisso and Robert Schwartz (eds) *Youth on Trial: A Developmental Perspective on Juvenile Justice* (University of Chicago Press 2000)
 --'The Common Thread: Diversion in the Jurisprudence of Juvenile Courts' (2000) 88 *California Law Review*
- Zoller E, 'Congruence and Proportionality for Congressional Enforcement Powers: Cosmetic Change or Velvet Revolution?' (2003) 78 *Indiana Law Journal*
- Zubair A, 'Reintroduction of Shari'a Courts in Nigeria: Some Perspectives' in Ezeilo, Ladan and Afolabi-Akiyode (eds) *Sharia Implementation in Nigeria, Issues and Challenges on Women's Rights and Access to Justice*, (2003) WACOL

Web Articles

ABA, *Rethinking A National Model: The Massachusetts Juvenile Justice System*

- (1990) Report of the Boston Bar Association's Task Force in the juvenile justice System. <<http://www.bostonbar.org/prs/reports/majjuvenile94.pdf>> accessed 1 April 2012
- Abubakar M U, 'Criminal Law and the Rights of the Child in Northern Nigeria' (2010) Legal Studies Research Paper No 2012 – 11 <<http://ssrn.com/abstract=2055162>> accessed 11 April 2014
- Bureau of Justice Statistics Special Report, 'Juvenile Delinquents in the Federal Criminal Justice System' (1997) <<http://www.bjs.gov/content/pub/pdf/Jdfcjs.pdf>> accessed 10 April 2014
- Kirchengast T, 'Proportionality in Sentencing and the Restorative Justice Paradigm: 'Just Deserts' for Victims and Defendants Alike' (2009) 15 University of New South Wales Faculty of Law Research Series <<http://law.bepress.com/unswwp/flrps09/art15>> accessed 17 May 2011
- Kumm M, 'Democracy is not Enough: Rights, Proportionality and the Point of Judicial Review' (2009) New York University Public Law and Legal Theory Working Papers, No. 118 <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1356793> accessed December 2011
- Makeri S H, 'Jurisdictional Issues in the Application of the Customary Law in Nigeria,' <<https://www.vpn.helsinki.fi/articles/customary%20law%20and%20procedure/,DanaInfo=www.nigerianlawguru.com+JURISDICTIONAL%20ISSUES%20IN%20THE%20APPLICATION%20OF%20CUSTOMARY%20LAW%20IN%20NIGERIA.pdf>> accessed 19 March 2014
- Marshall T, *Restorative Justice: An Overview* Home Office. (1999) Research Development and Statistics Directorate <<http://www.homeoffice.gov.uk/rds/pdfs/occ-resjus.pdf>> accessed 3 April 2014
- Okagbue I, 'Children in Conflict with the Law: The Nigerian Experience' <http://www.unicef-irc.org/portfolios/documents/487_nigeria.htm> accessed 26 October 2013
- Penal Reform International, 'Northern Zonal Consultative Conference on Juvenile Justice Administration in Nigeria, Kano' (September 2002) <<http://www.penalreform.org/wp-content/uploads/2013/06/rep-2002-nigeria-juvenile-justice-en.pdf>> accessed 12 May 2012
--'Report on the National Conference on Juvenile Justice Administration in Nigeria. Abuja (July 2002) <<http://www.penalreform.org/wp-content/uploads/2013/06/rep-2002-nigeria-juvenile-justice-en.pdf>> accessed 12 May 2012

- ‘Southern Zonal Consultative Conference on Juvenile Justice Administration in Nigeria, Ibadan’ (October 2002) <<http://www.penalreform.org/wp-content/uploads/2013/06/rep-2002-nigeria-juvenile-justice-en.pdf>> accessed 12 May 2012
- Peters R, ‘The Reintroduction of Islamic Criminal Law in Northern Nigeria, (2001) <https://www.vpn.helsinki.fi/hassan_rezaei/files/,DanaInfo=rezaei.typepad.com+islamic-criminal-law-nigeria_en.pdf> accessed 22 January 2014
- Poole T, ‘Proportionality in Perspective Law Society Economy’ (2010) LSE Law, Society and Economy Working Papers No. 16/2010 <http://eprints.lse.ac.uk/32900/1/WPS2010-16_Poole.pdf> accessed 4 May 201
- Schulz S and Hamutenya M, ‘Child justice in Namibia: Law Reform Towards Reconciliation and Restorative Justice’ <<http://www.restorativejustice.org/>>
- Smith S, ‘Proportionality and Federalization’ (2004) 91 Virginia Law Review, Public Law and Legal Theories Working Paper Series <http://bpress.com/uvalwps/uva_publiclaw/art11> accessed February 2011
- UN Children’s Fund (UNICEF) *Judicial Implementation of Article 3 of the Convention on the Rights of the Child in Europe: The case of migrant children including unaccompanied children* (OHCHR – Europe 2012) <<http://www.refworld.org/docid/5135ae842.html>> accessed 05 April 2014
- UN Commission on Human Rights, *Effects on the Full Enjoyment of Human Rights of the Economic Adjustment Policies Arising from Foreign Debt and, in Particular, on the Implementation of the Declaration on the Right to Development*, 22 February 1991, E/CN.4/RES/1991/13 <<http://www.refworld.org/docid/3b00f0d5c.html>> accessed 18 April 2014
- UN Committee on the Rights of the Child: *Concluding Observations of the Committee on the Rights of the Child, Nigeria*, (U.N. Doc. CRC/C/15/Add. 61 1996) <<http://www1.umn.edu/humanrts/crc/nigeria1996.html>> accessed 15 December 2013
- UN Human Rights Committee (HRC), *UN Human Rights Committee: Addendum to the Third Periodic Reports of States Parties Due in 1991, Australia*, 22 July 1999 CCPR/C/AUS/98/3 <<http://www.refworld.org/docid/3ae6b0510.html>> accessed 5 April 2014
- United Nations Children's Fund (UNICEF), *Child Poverty Profile, Global Study on Child Poverty and Disparities, Nigeria*. <<http://www.devinfolive.info/childdisparities/ChildDisparitiesWebService/stock/RefernceDocuments/AFRNGA.pdf>> accessed 31 October 2013
- United Nations Development Programme Human Development Report *The Rise of*

the South: Human Progress in a Diverse World (2013) <
<http://hdrstats.undp.org/images/explanations/NGA.pdf>> accessed 31
October 2013

Waldron J, 'Judges as Moral Reasoners' (2009) 7 *International Journal of
Constitutional Law* 25; Jeremy Waldon, 'Do Judges Reason Morally'
[https://www.vpn.helsinki.fi/laws/jurisprudence/docs/2008/,DanaInfo=www.
ucl.ac.uk+08_waldron.pdf](https://www.vpn.helsinki.fi/laws/jurisprudence/docs/2008/,DanaInfo=www.ucl.ac.uk+08_waldron.pdf) accessed 5 April 2014

Working and Conference Papers/Reports/Memoranda

Abubakar M U, 'Childs Rights Act: Critical Analysis from the Islamic Perspective'
'A paper presented at the 7th Annual Scientific Conference of Islamic
Medical Association of Nigeria (On File)

Abubakar M U, -- 'Childs Rights Act: Critical Analysis from the Islamic
Perspective' Paper Presented at the 7th Annual Scientific Conference of
Islamic Medical Association of Nigeria July 2005

Australian Law Reform Commission Sentencing Report (1998)

Hagen-Zanker J and Holmes R, 'Social Protection in Nigeria: Synthesis Report'.
(2012) ODI/UNICEF Nigeria

Holmes R and Akinrimisi, 'Social Protection in Nigeria: Mapping Programmes and Their
Effectiveness' (2012) ODI/UNICEF Nigeria

Jones N, Presler-Marshall, Cooke Nicholas and Akinrimisi Banke, 'Promoting
Synergies between Child Protection and Social Protection in Nigeria'
(2012) ODI/UNICEF Nigeria

Miller R, *Best Interests Principles: Conceptual Overview* (Victorian Government
Department of Human Services 2007)

Murphy M C, *National Prison Audit* (National Human Rights Commission, UNDP
and NORAAD 2008)

Nwanna C R and Akpan E N *Research Findings of Juvenile Justice Administration
in Nigeria* (Constitutional Rights Project 2003)

Smit P and Harrendorf S, 'Responses of the Criminal Justice System' in Stefan
Harrendorf, Markku Heiskanen, Steven Malby (eds) *International Statistics
on Crime and Justice* (HEUNI-Publication Series No. 64 2010)