# CHILD RIGHTS LAW AND PRACTICE IN NIGERIA: A LESSON FROM SOUTH AFRICA

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## Abstract

In Nigeria, children are not adequately protected because they are exposed to various forms of abuses in the form of child labour, child trafficking, child marriage, domestic violence and sexual abuses amongst other violations of their rights. Also, Child related extant laws are not effective in protecting or promoting the rights of children because of the marked increase in the incidences of child rights abuses in Nigeria. This article seeks to appraise the child rights law and practice in Nigeria and South Africa through doctrinal research method and it found that Nigeria can learn some lessons from the child rights law and practice in South Africa especially in the aspect of constitutional provisions, justice system and social security. The paper therefore recommended legislative and executive inputs to adopt these key aspects to further protect and promote the rights of children in Nigeria.

**Keywords:** Child, Child Rights, Practice, Lesson

## 1 Introduction

In centuries past, countries of the world have no concern for children as they were not in contemplation in the scheme of events and the rights of children were abused especially during the factory system in England.[613] During this era, children were made to work for long hours as early as eight (8) years of age and sometimes children fall asleep while working and get rolled along with cotton bales.[614] In the mid-19th Century, publications by Slagvollk titled "The Rights of Children" in 1852 and another by Kate Kliggin "Children's Rights in 1892" brought the world attention to the working conditions of children. These publications spurred up the introduction of Factory laws whose aim is to ameliorate the working condition of employees especially children.[615]

Children are cherished assets to every family in Africa especially Nigeria and they play very unique roles in the family. Children assist in the development of the family by contributing their quota in the care of the homes and also assisting their parent in their occupation which is predominantly farming. Sometimes children are engaged in street trading, hawking and begging for arms to sustain the family, female children are married out early and dowry used to sustain the family while some children drop out of school due to poverty. Children in Nigeria are exposed to child labour, child trafficking, domestic violence and various forms of sexual abuse in spite of international and national laws.

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[613] M. Rao *Law Relating to Women and Children* (3rd Edn. Lalbagh, Lucknow. Eastern Book Co. Publishing Ltd. 2012)530.

[614] A. Kakadse 'Children in England' in M. Rao ibid.

[615] Ibid.

International instrument protecting the rights of children include The Geneva Declaration in 1924 was adopted in 1948 as the new Declaration of Child Welfare and Protection, then the Declaration on the Rights of the Child in 1959 which later culminated into the United Nations Convention on the Rights of the Child in 1989, a comprehensive instrument recognizing the universal needs and welfare of children.[616] Others are the Universal Declaration of Human Rights (UDHR)1948, International Covenant on Economic, Social and Cultural Rights (ICESCR) 1966, International Covenant on Civil and Political Rights (ICCPR) 1966 which have provisions protecting children from all forms of discrimination by reason of race, colour, sex or circumstances of birth and that each child shall be registered after birth and has a right to a nationality.[617]

The International Labour Organization has provisions protecting the rights of children with respect to ILO Convention on Minimum Age for Admission to Employment and Work (Convention No 138) which stipulate the minimum age of employment as 15 years, ILO Convention on the Elimination of worst Form of Child Labour (Convention No182) but in practice, the rate of child labour has increased globally in deviance and violations of these conventions.

Notably, the two (2) principal international instruments relating to the rights of children are the UN Declaration of the Rights of the Child 1959 and the UN Convention on the Rights of the Child 1989.The United Nations Declaration on the Rights of the Child 1959 has several principlesprotecting the rights of children. The Convention on the Rights of the Child (CRC)[618]was adopted by the General Assembly in November 1989. The convention is a comprehensive instrument intended to protect and promote the wellbeing of children in the world. It contains four (4) sets of rights for children which are civil, political, social and economic rights consisting of the right to survival, protection, development and participation.

The CRC has 2 Optional Protocols, these are the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography 2000 ( Sex Trafficking Protocol) and Optional Protocol to the CRC on the involvement of Children in Armed Conflict also known as the Child Soldier Protocol. Many countries are signatories to this convention and have ratified same,[619] including Nigeria and South Africa who have ratified and adopted this Convention as the Child Rights Act 2003 and Children's Act No 38 of 2005 respectively.

This article seeks to appraise the child's rights law and practice in Nigeria and South Africa and also highlights the lessons from Child's rights law and practice in South Africa that may be adopted in Nigeria to protect and promote the rights of children.The introduction is followed by an appraisal of the legal instrument protecting the rights of children in Nigeria and practice. Thereafter, an exposition on the child's law and practice in South Africa. Finally, the paper will highlights some lessons from child law and practice in South Africa to be adopted by Nigeria in relation to the protection and promotion of the rights of children in Nigeria.

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[616] G. Gupta *Human Rights and Fundamental Freedom in India* (Bhopal, Human Rights Commission, 2002) 995.

[617] ICCPR 1966, art 24.

[618] United Nations Convention on the Rights of the Child 1989(hereinafter referred to as CRC)

[619] Over 194 countries have ratified this convention. The countries that are yet to adopt this convention is Somalia, South Sudan and the United States of America.

## 2 An Examination Of The Legal Framework Protecting The Rights Of The Child In Nigeria

Under the Nigerian Legal System, a child has many description and definition. A child is a person below 14 years while a young person is one above 14 years but below 17 years,[620] while age of a child is not determined by number but by other factors such as commencement of puberty, initiation into age groups or even financial strength of the individual under customary and Islamic law.[621] For the purpose of this article, the age of a child to be adopted is that stipulated by the Child Rights Act 2003 which is any person below the age of 18 years.[622]

Children are very vulnerable and susceptible to various forms of violation hence laws were enacted to protect their lives, ensure their survival and well- rounded development. Nigeria has plethora of laws protecting the rights of children, these laws will be examined to appraise its effectiveness. They include the Constitution of the Federal Republic of Nigeria 1999(as amended); the Child Rights Act 2003; the Nigerian Labour Act, Violence Against Person Prohibition Act 2015; Children and Young Persons Act; Criminal Code Act, Penal Code Actand Trafficking in Persons(Prohibition) Enforcement and Administration Act among others.

### 2.1 Constitution Of The Federal Republic Of Nigeria 1999(As Amended)

The Constitution the Federal Republic of Nigeria 1999(as amended)[623] is the ultimate law which reigns supreme over other laws and its provision is binding on all persons and authorities in Nigeria.[624]The constitution provides a plethora of fundamental rights in Chapter IV, they are the right to life and development of the Nigerian child is provided for in the constitution.[625]The reason for the protection of life of all persons is hinged on the fact that life is sacred, a divine gift from God which must be guided with upmost care, for without the right to life all other rights become meaningless and unrealizable.[626]But in Nigeria, children are exposed to various forms of child abuse in the form of domestic violence, forced child labour early child marriages and child trafficking among others which are detrimental to the enjoyment of fundamental rights to life and survival of children.

Children must not be subjected to any form of torture or inhuman and degrading treatment, nor engaged in forced labour.[627]Labour that is of essence for the development and the training of the child is not considered as forced labour. It can be argued that corporal punishment, life imprisonment imposed on children constitute inhuman treatment and it is a violation of the right

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[620] Children and Young Persons Act 1946(hereinafter referred to as CYPA)

[621] Among the Yoruba, Igbo Edos and Delta people, initiation into the family shrine, fishing and farming competition in the Northern part of Nigeria. All this methods are used to determine whether or not a person is a child.

[622] Child Rights Act 2003(hereinafter referred to as CRA) See *also Okwueze v Okwueze* (1989)3 NWLR (pt. 109) 321 SC.

[623] Constitution of the Federal Republic 1999(as amended) (hereinafter referred to as CFRN 1999).

[624] CFRN 1999, s 1(1*); National Assembly v President* (2913) 9 NWLR 104; *A.G Bendel State v A.G Federation &22ors* (1982) 3 NCLR 1*; Doherty v Balewa* (1962) All NLR 631

[625]*Ibid*.

[626] *Ibid*.

[627]CFRN 1999, s. 34(1)(b)

to dignity of the human person and it is in conflict with the Child Rights Act(CRA) 2003[628] and the CFRN 1999.

Every citizen including children are entitled to personal liberty. However, this right could be derogated against in the execution of court orders or sentence orfailure to comply with court orders or bringing a person before the court. Issues involving children should be addressed speedily via the family court, and children in conflict with law have constitutional right of fair hearing and such matters must be held in private, preferably a family court as provided by the CRA.

Children have the right to privacy and family life. This is because the family is seen as the foundation and basic unit of the society and it therefore provides a secured environment for the survival, development and protection of the child,[629]but the reverse is the case in Nigeria. Parents ought to be empowered by the government economically to provide basic survival and developmental needs of children.

Furthermore, the Constitution provides for the right to freedom from discrimination by reason of ethnic group, place of origin, sex, religion, political affiliation or by disability or by reason of circumstances of birth.[630]. However, it is observed that in some ethnic groups in Nigeria, male children are accorded more priviledges over and above female children especially with regards to inheritance and succession rights.[631] Female children sometimes have to drop out of school to assist parents to support the family, while some female children are married out in their tender age and bride price used to sustain the family. This act is a violation of the provision of the Constitution againstdiscrimination by reason of sex

## 2.2 The Criminal Code Act

The Criminal Code Act is applicable only to the southern part of Nigeria and it has protective provisions for children. The age of criminal liability as stated in the Criminal Code is that a child below 7 years does not have the capacity to commit an offence[632] while a child above 7 years but below 12 years may be criminally liable for an offence if it can be proved that he/she understands the nature and consequences of the act.[633] Also children above 12 years and below 18years are liable for their criminal act or omission and will not be prosecuted under the conventional justice system but under the Children and Young Persons Law (CYPL). The CYPL sees a child as a person below 14 years and a young person above 14 years and below 17 years.[634]The age of criminal liability of a child or a young person poses a great challenge on how to determine the minimum age of a child or a young person?

[628] Child Rights Act 2003(hereinafter referred to as CRA).
[629] A.K The Law and Child Rights in Nigeria (Malthouse Press Ltd. 2015) 57
[630] CFRN 1999,s.42
[631] This practice of disinheritance of female children is commoner among the Igbo ethnic group in Nigeria.
[632] Criminal Code Act CapC38 Laws of the Federation of Nigeria 2004, s.18.
[633]CCA s. 30.
[634] CYPA, s. 2.

.It is submitted that the issue of minimum age of criminal responsibility ought to have been included in the CRA for more effective protection of the rights of children in conflict with the law in Nigeria.[635]

Under the Act, indecent treatment of boys under fourteen years is a felony whichattracts seven (7) years imprisonment while the defilement of children below 13 years is classified as a misdemeanor which attracts a penalty of less than two (2) years imprisonment. These provisions of the Act is in conflict with of the provisions of the CRA whichstate that any form of indecent assault on a person be it male or female under eighteen years is tantamount to rape and the penalty on conviction is fourteen (14) or life imprisonment.

## 2.3 The Penal Code Act

The Penal Code Act is applicable to all the States in the Northern part of Nigeria. The Penal code Act[636] has special provisions for the protection of children either as offenders or victims and it is similar to the Criminal Code Act. The PCA has protective measures for children starting from the point of conception because it is a criminal offence to procure an abortion to take the life of an unborn child,[637]and the Act recognizes the right of an unborn child.Parents, guardian or persons in *loco parentis* to the child ought to provide necessities for basic survival needs growth and nourishment of children under 14 years.

However, the PCA has no provision penalizing the Almanjiris system where children roam the street as beggars for daily sustenance and nobody can be held responsible for lack of provision of basic survival needs for children in the northern part of Nigeria.[638] Islamic teachings encourages the Almanjiris system which is viewed as child labour and it violates the provisions of the CRAand the Constitution which guarantee the right to life and dignity of human persons.[639]The PCA also permits the chastisement of children below 18 years but without grievous bodily harm, a provision which is in conflict with the provision of the CRA 2003 against corporal punishment.[640]

## 2.4 Children and Young Persons Act

Children and Young Persons Act (CYPA) defines a child as a person below the age of 14years while a young person is one above 14years but below 17years.[641] The disparity in distinguishing who a child really is or should be exposes children to more punitive measure especially in states in Nigeria which are yet to adopt the CRA as a State law.

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[635]G.O Odongo 'The Impact of International Law on Children's Rights on Juvenille Justice Reform in the African Context' in J.Sloth- Neilsen (ed) *Children's Rights in Africa: A Legal Perspective* 2008

[636] Penal Code Act(hereinafter referred to as PCA)

[637] PCA, s 232.

[638] B Owasanoye and A Adekunle, 'An overview of the Rights of the Child in Nigeria' in I A Ayua and I E Okagbue (eds), *The Rights of the Child in Nigeria* (Lagos: Nigerian Institute of Advanced Legal Studies 1996) 41

[639] CRA 2003, ss. 4 and 11 ; CFRN 1999(as amended), s. 34

[640]PCA, s 55.

[641] CYPA 1946, s. 2

The CYPA does not place much importance on the Principle of the Best Interest of the child, rather its emphasis is on the punitive measure as against the welfare of the child. For instance Section 27 of the CYPA direct the court to order a child to be kept with a Probation Officer, this contradicts the provision of the CRA which lay great premium on the care, protection and development of the child in the child justice administration.[642]In the CYPA, issues relating to children in conflict with the law can be addressed in any court and the law provides for approved schools for children in conflict with law as against the CRA which establish Children Residential Centres /Child Correctional homes, an environment more appropriate for the rehabilitation of the child.In addition, the CYPA ensures speedy dispensation of justice and grant of bail except in cases of homicide or grevious crimes.

The CYPA provides for punishment or imprisonment for young persons above 14years and 17 years in remand homes or borstal institution as against the CRA which advocates for non-custodial measures in line with the Tokyo Rules.[643].It is therefore submitted that the CYPA had been able to address issues involving children and young persons in conflict with the law but the approach is largely punitive compared with the CRA. The government must as a matter of urgency encourage all the States yet to adopt the CRA as a State law to do so to ensure the uniformity of the child justice system in Nigeria.

## 2.5 Nigeria Labour Act

The Nigeria Labour Act[644]regulates the appointment, contract and protection of persons including children in employment. The Act has several protective provisions for children as it states that no young child should be employed in job that is unsafe for his/her health or immoral in nature[645]or a job where he will be unable to return home to his parents/guardian on a daily basis.[646]The exception to this provision is an approval from an authorized labour officer or as regards the contract of employment.[647]

Furthermore, a child below the age of sixteen (16) cannot be employed in underground work, operate a machine, in industry or work on public holiday,[648]or employed without express consent of parents or guardian.[649] However, children in technical schools or similar institutions can work in industries as part of the educational training but subject to supervision by the Ministry of Education or other relevant institutions.[650] A child could be employed by family members but on light duty only in agricultural or domestic character subject to approval of the minister.[651]

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[642] CRA 2003 s. 1 provides for the best interest of the child and it shall be the primary consideration in any action taken against a child.
[643] United Nations Standard Minimum Rules for Non –Custodial Measures 1990. Rule 1.5.
[644] Nigerian Labour Act Cap L 1 Laws of the Federation 2004
[645] *Ibid*. s. 59(6).
[646]*Ibid*, s. 59(3).
[647]Nigeria Labour Acts. 59(4).
[648]*Ibid*, s. 59(5).
[649] *Ibid*, s. 59(8).
[650]*Ibid*, s. 59(2)
[651]*Ibid* s. 59(1) (a).

Regrettably, the protective provision of the Act is widely violated as children are engaged as domestic helps, street hawkers and also involved in other forms of child labour with no recourse to the Minister of Labour. Impressively, some States have enacted laws which prohibits street trading or hawking by all persons including children.[652] All employers must keep a register of all employees in industrial undertakings including young persons in employment which comprises their date of birth and the nature of their employment. In spite of these laudable protective provisions of the Nigerian Labour Act, children and young persons are still engaged in employment which have negative impact on the health and general wellbeing of children in Nigeria.

## 2.6 The Child Rights Act 2003

The Child Rights Act (CRA) 2003 is the primary and comprehensive legislation on issues affecting children in Nigeria and is a derivative of the United Nation Convention on the Rights of Children of 1989 and the African Charter on the Rights and Welfare of the Child 1990.[653]The CRA recognises that all the rights accruable to children are fundamental and should be protected and promoted. The Act reiterate that in all issues affecting children, the best interest of the child must be of paramount consideration.[654] The enactment of the CRA into a State law is the solely the responsibilities of respective states in Nigeria because issues concerning children are in the Residual list which only the state has the authority to legislate on.

Some States have adopted the CRA as a State law while other states yet to domesticate the CRA are mainly northern states where about 11 States are yet to domesticate the CRA. Umar[655] argued that the reason for not adopting the Act as a State law is because the provisions of the CRA conflicts with Islamic law especially with regards to child marriages and therefore, it is against the spirit and practice of Islamic Law. He therefore stated that to make the rights of children realizable in the north, there must be a compatibility between the CRA and Islamic law.

CRA provides children with survival rights, protection rights, developmental right and participatory rights. The survival rights of the child include the right to life[656]which is the most fundamental of all rights and it is a prerequisite to the actualization of other rights[657]This include a life free from hunger, poverty, disease, illiteracy amongst other needs. The right of survival is closely linked to identification and recognition, the right to a name at birth and mode of identification and registration of birth in accordance with the provision of the law.[658]

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[652] For instance, Lagos state Street Trading and Illegal Markets Prohibition Law, 1984; Rivers State Law on Prohibition of Street Trading and Illegal Structures 1999.

[653] M.T Ladan 'An Overview of State Obligation in respect of Children Rights in Nigeria' A Paper presented at the National Assembly Complex, Abuja, March 2003.

[654] CRA 2003, ss 1 and 2.

[655] A. Umar 'An X-ray of the Conflict between the Child Rights Act 2003 and Islamic Law on Child Marriage and Legitimacy' [2012](3*) Human Rights Review: An International Human Rights Journal*,76

[656]CRA 2003, s.4; The Constitution of the Federal Republic of Nigeria 1999 (as amended) s.33

[657] CFRN 1999, s.33. Without the rights to life, all other rights which include protective, developmental and participatory rights cannot be enjoyed.

[658] CRA 2003, s. 5(1) The Act rejects any other mode of identification of a child such as tribal marks, tattoos or other forms of identification.

The health and welfare of the child also promote the survival rights of children.[659]These can be achieved through the eradication of childhood diseases and provision of standardized care for children to reduce morbidity and mortality rate. Regrettably, the welfare of the Nigerian child is undermined by underfunding of the educational sectors and weakness of institutions whose mandate is to protect and promote the rights of children in Nigeria.The Act imposes duties on the government, parents and institutions to protect and care for children and conform to the approved standard to enhance the dignity of every child.[660]Also, the Act provides for the adoption of children, states the procedures and inbuilt mechanism to monitor such children.[661]

The Protective rights of children include protecting all children from all forms of corporal punishment and harmful cultural practices such as female genital mutilation, child marriages, child abuse, tattoos and skin marks.[662] In spite of these laws, some communities are still engaged in female genital mutilation as well as child marriages.[663]However, in response to the provision of the Act to protect children from any form of violence, some states in Nigeria have enacted laws against domestic violence to protect children and women from domestic violence.[664]

In cognizance of the Principles of Beijing Rules, the CRA also prohibits the imprisonment of children below 18 years,corporal punishment and death penalty. The Act also abolishes age of criminal responsibilities and adopted above age eighteen as the age where a child can be subjected to adult criminal process.[665]

With regards to development rights of the child, the CRAguarantees various rights relating to developmental rights of children as they grow from childhood to adulthood. These rights include freedom of thoughts, conscience and religion, right to rest and leisure, free and compulsory basic education and places a responsibility on the government and parents to ensure that children are educated.[666] The Act provides the right of children to participate in decisions that affect their lives either directly or indirectly, this provision is affirmed by both the Constitution[667]and the CRA.[668]The CRA also imposes duties and obligations on children to work towards the progress of their families and communities.

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[659] CRA 2003, s.13.

[660]*Ibid.* s. 30

[661]*Ibid*. s. 125-148

[662] Female Genital Mutilation is a practice in communities in the Southern part of Nigeria, the female genital(clitoris) is excised under poor hygienic condition and therefore the girl child is exposed to the risk of excessive bleeding, HIV/AIDS. However, recently, some states have enacted laws criminalizing this act.

[663] Child Marriage is still very common in Nigeria but higher incidence is in the Northern part of Nigeria. Here, young girl within the age range of 10-14 years are married out as soon as they attain menarche.

[664] Cross- Rivers State adopted the Domestic Violence Law in 2003 while other states Houses of Assembly are in different stages of passing Domestic Violence Prohibition Bill in their states. See also Federal Ministry of Women Affairs, Periodic Report on the Implementation of the Rights and Welfare of the Child in 2006.Violence Against Persons Prohibition Law 2021 of Rivers State.

[665] All children below eighteen (18) years who are in conflict with the law are subjected to Child Justice Administration process under the Child Rights Act 2003.

[666] CRA 2003 Sec.15

[667] CFRN 1999, s.39.

[668] CRA 2003, s.3.

The CRA establishes a child justice system to address issues relating to children who contravene the law as against adult criminal justice system. To ensure the effectiveness of the justice system, a special Children Police Unit is established to handle child offenders and such cases is heard in a family court..However, in practice, the child justice administration is only applicable to States which have adopted the CRA while other States still apply the CYPA to issues relating to children who are in conflict with the law.

## 2.7 Violence against Persons (Prohibition) Act 2015

This Act was enacted to prevent violence against persons especially women and children. The Act defines rape[669] and anyone convicted of rape against persons or children is liable to sentence of minimum of 12 years and maximum of 20 years for gang- rape[670] and compensation to victims of rape issued by the court.[671] A register of convicted sex offenders are kept and accessible to the public.[672] Infliction of physical injury on a child by weapon, substance or object is an offence punishable on conviction of 5 years imprisonment or and a fine of 100,000 Naira.[673] The Act prohibits female circumcision and genital mutilation with a penalty of less than 4 years and or fine of 200,000 Naira.[674]Other harmful traditional practices attracts a sentence of less than 4 years and or a fine of 500,000 Naira and incest attracts a penalty of 10 years imprisonment without an option of fine.

In practice however, the law has not been effective in curbing violence against children as the incidence of rape of minors have increased, this is more evident during the Covid 19 pandemic and lockdown in Nigeria, but a lot of these cases were unreported because of fear of stigmatization. The practice of female circumcision and female genital mutilation have remained unabated as female children are exposed to this harmful cultural practices without known health benefits. The Act prohibits forced isolation or separation from family and friends[675]but children and women are abducted on daily basis especially in the North East region of Nigeria, the insecurity challenges seems to be overwhelming and the government is struggling to address the situation.[676]

## 2.8 Trafficking in Person (Prohibition)Law Enforcement and Administration Act

This Act was enacted in 2003 empowers the National Agency for the Prohibition of Trafficking in Person and Other Related Matters(NAPTIP) to investigate and prosecute offenders of child trafficking in Nigeria. The agency is also involved in counselling and rehabilitation of victims(trafficked persons).The Act prescribes penalties for any breach of its provisions.For instance, Sections 30 and 31 of the Act state that persons aiding or abetting, facilitating or promoting in anyway the trafficking of any person(women or children) commits an offence and liable on conviction to a fine of N200,000 and forfeiture of passport. Where a corporate body is

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[669] Violence Against Persons Prohibition Act 2015, s. 1(1)
[670] *Ibid*, s. 1(2).
[671]*Ibid*, s. 1(3).
[672]*Ibid*, s. 1(4).
[673]*Ibid,* s. 2.
[674]*Ibid,* s, 6.
[675]Violence Against Persons Prohibition Act 2015 s.13.
[676] Insecurity in the North by Boko Haram, Killer Fulani Herdsmen and Bandits

convicted for an offence of trafficking or aiding in trafficking, shall be liable to a fine of 2,000,000 (Two million) naira only, forfeiture of assets and closure of the body corporate.[677] Also, any commercial carrier who carries any person in violation of the Act commits an offence and is liable to 2 years imprisonment or a fine of Two million naira.[678] NAPTIP also monitors child trafficking units present in Nigerian Police Force, Nigerian Immigration Services and the Nigerian Customs Services. NAPTIP has been in the fore front in the fight against child trafficking in Nigeria, a lot of children have been rescued from their abductors and re united with their families.

### 2.9 The Evidence Act

The Nigerian Evidence Act 2011 protects children from acting as witnesses.[679] However, where a child is competent and capable of understanding questions put to him and giving rational answers to such questions, then he or she can testify on oath. This provision of the law has been judicially recognised in the case of *Sambo v the State*[680] where the child possessed enough intellect to understand the task he was to perform in the witness box.

It is submitted that the extant child related laws have been unable to address the challenges faced by children in Nigeria. Practically speaking, children are seen on a daily basis roaming the streets, hawking wares, street trading, begging for alms for daily survival. Children cannot access education due to poverty and lack of implementation of educational policy aimed at removing children from the streets. There is also an increase in the cases of sexual violation of children, child kidnaping and domestic violence. This calls for urgent attention to strengthen existing child related laws to protect and promote the rights of children in Nigeria.

Having examined child rights law and practice in Nigeria, a brief outlook of the child rights law and practice in South Africa will be made and the lesson to be adopted by Nigeria from the model of South Africa to improve the rights of children in Nigeria.

## 3Child Rights Law And Practice In South Africa

South Africa was an early and active leader in the recognition of children's rights in the international community.[681] For example, the Union of South Africa was a founding member of the League of Nations[682] and voted to endorse the first major international instrument which recognized the rights of children: the Geneva Declaration 1924,[683] and the UN Declaration of the Rights of the Child.[684]South Africa, despite laying a good and early foundation for the recognition of the rights of children, became one of the highest violators of the same rights due to its apartheid policies after World War II.

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[677] Trafficking in Person (Prohibition) Law Enforcement and Administration Act 2003, s 28.

[678] *Ibid*, s 29.

[679] Evidence Act 2011, s. 175(1).

[680] [1993]7 SCNJ (Pt 1) 128. See also *Peter v the State* (1997) 12 SCNJ 53.

[681] W. Binford 'The Constitutionalisation of Child Rights in South Africa' [2015-2016] (60) NYL Sch. L. Rev 333, 335.

[682] International Security and the United States: An Encyclopedia in K R De Rouen and P Bellamy (Eds) (2008).

[683] W. Binford (n87) 334 – 5.

[684] Ibid, 336.

During the apartheid regime in South Africa, a law restricting educational opportunities to only white and coloured children was passed. The peaceful demonstration of black children to assert their inalienable rights to education took a violent turn when the apartheid administration opened fire on the students. This led to the death of about 700 students, with many more injured.[685] In order to forestall further violations,the Constitution of the Republic of South Africa 1996[686] provided greater recognition and protection to the unique rights of children than any other Constitution in the world.[687]

In South Africa, the rights of children have constitutional backing and it is not subject to the whims and caprices of each State or province to determine whether or not it will domesticate and apply the rights. The Constitution expressly requires the courts in South Africa to consider child relatedInternational lawwhen making decisions[688] and to favour interpretations of municipal law which are consistent with international law whenever reasonable.[689] National legislations protecting the rights of children in South Africa to be briefly appraised below.

### 3.1 Constitution of the Republic of South Africa 1996

South Africa has one of the most progressive Constitutions in the world. Chapter Two of the Constitution recognizes an array of human rights which are to be protected by the State for the enjoyment of all its citizens including children. These Bill of Rights include the rights to equality,[690] human dignity;[691] freedom and security of the person[692]freedom from slavery, servitude and forced labour;[693] privacy;[694] freedom of religion, belief and opinion;[695]and more importantly right to life[696]among all other rights.

Section 28 of the Constitution specifically recognizes and guarantees a number of rights which are peculiar to the child. These arethe right to a name and a nationality from birth;[697] family care or parental care, or appropriate alternate care when removed from the family environment;[698]

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[685] D Harrison, The White Tribe of South Africa: South Africa in Perspective (University of California Press 1983) 196 [citing 600 casualties]; M Mason, Development and Disorder; A History of the Third World Since 1945 (University Press of New England 1997) 240 [putting the official figure at 200 and the unofficial count between 600 and 700]; D R Gordon, Transformation and Trouble: Crime, Justice and Participation in Democratic South Africa (University of Michigan Press 2006) 141 [putting the official death rate at 176 within the first week of the uprising].

[686]The Constitution of the Republic of South Africa 1996 (hereinafter referred to as the 1996 Constitution).

[687] J D Van der Vyver, 'Municipal Legal Obligations of States Parties to the Convention on the Rights of the Child: The South African Model' [2006] (20) *Emory International Law Review* 9

[688]Constitution of the Republic of South Africa 1996 s.39 (1) (b).

[689]*Ibid*, s. 233.

[690] *ibid*, s. 9

[691]*Ibid,* s.10

[692]*Ibid,* s. 12

[693] *Ibid,* s.13

[694] *Ibid*, s.14

[695] *Ibid*, s.15

[696] *Ibid*, s.11

[697]Ibid, s 28(1)(a).

[698] Ibid, s. 28(1) (b).

basic nutrition, shelter, basic health care services and social services;[699] protection from maltreatment, neglect, abuse or degradation;[700] protection from exploitative labour practices[701] and that the best interest of the child must dominate every action in any matter concerning the child[702]and the Constitution defines a child as a person below the age of eighteen years.[703]

Section 38 of the Constitution provides for the mode of enforcement of the rights contained in the Bill of Rights.In seeking for redress in court, the principle of locus standi is flexible that it can be assessed byanyone acting in his or her own interest or acting on behalf of another person who cannot act in his or her own name or a group or class of persons, acting in the public interestcan access the court.[704]Every court, when called upon to interpret any legislation must prefer any reasonable interpretation of the legislation which is consistent with international law over any alternative interpretation that is inconsistent with international law.[705]

### 3.2The Children's Act No.38 of 2005

This Act was enacted pursuant to the Constitution of South Africa and improved upon the Bill of rights enunciated in section 28 of the Constitution. The Children's Act is an important legislation. The Act adopts the Constitutional definition of the child in section 28(3) andalso declares that the best interest of the child must be the paramount consideration in all actions.[706] In the event of any breach or violation of any provisions of the bill of rights, the person may approach the court for redress.[707]The Act also imposes certain obligations on the parents to care, maintain and protect the propriety rights of the child.[708] The Act established Children's Court for the enforcement and adjudication of issues relating to children's rights.[709]

However, Children's Act does not have provisions that prohibits virginity testing – an age-long cultural practice in some parts of the country.[710] Clearly virginity testing is in the same category as female genital mutilation and ought to be prohibited as it contravenes international laws relating to children. Similarly, the Act gives recognition and approval to the cultural practice of circumcising male persons under and above the age of sixteen.[711] Considering the enormous pain a male person above sixteen (16) years will be subjected to during circumcision, it is submitted that this practice amounts to torture, inhuman and degrading treatment which should not be allowed under the guise of religious observance. However section 12(10) merely provides that every male child has the right to refuse circumcision. having regard to his age,

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[699]*Ibid, s 28(1) (c).*
[700] *ibid, s. 28(1) (d).*
[701]*Ibid, s 28(1) (e) and (f).*
[702]*ibid, s. 28(2).*
[703]*Ibid, s 28(3).*
[704] *Ibid, s 38(a)-(e)*
[705]Constitution of the Republic of South Africa 1996 s. 233
[706]*Ibid*, ss, 29(1) (c) .and 7.
[707] *Ibid*, s. 15.
[708]*Ibid,* s. 18(2) (a)-(d).
[709]The Children's Act No.38 of 2005 s 42(1).
[710]*Ibid*, s. 12(4)-(7).
[711]*ibid,* s 12(8) and (9).

maturity or stage of development. It is submitted that total abolition of the practice appears to be in the best interest of the child.

### 3.3 Child Justice Act No.75 of 2008

This Act provides for the child criminal justice administration apparatus and procedure in South Africa. The objective of the Act stated among others, is the protection of the rights of children enshrined in the Constitution.[712] The Act sets the minimum age for the criminal capacity of a child at below ten years.[713] There is thus an irrebutable legal presumption that a child who has not attained the age of ten is incapable of committing a criminal offence. Also, a child who has attained the age of ten but under fourteen years is presumed to be incapable of committing an offence unless the State proves otherwise in accordance with section 11 of the Act.[714]

Children are detained under conditions which take into consideration their particular vulnerability and which will reduce the risk of harm to the child.[715] Children detained have the right to be visited by their parents, appropriate adults guardians, legal representatives and other persons related to the child.[716]The Act also established the Child Justice Court as the proper forum for the trial of child offenders.[717]Furthermore, Child Justice Court may not impose a sentence of imprisonment on a child who is under fourteen years of age at the time of the sentence[718]Imprisonment is done only as a matter of last resort.[719] A child standing trial before the Child Justice Court is entitled to free and compulsory legal representation, where he or she is not legally represented,[720] the right to legal representation may not be waived by the child.[721] The Act also establishes a One-Stop Child Justice Centre, designed to promote co-operation between government departments and non-governmental sector and civil society for the purpose of ensuring an integrated and holistic approach in the implementation of the Act.[722] The South African Criminal Justice Administration provides for a separate civil and criminal jurisdiction to deal with civil and criminal matters involving children to protect them and ensure speedy dispensation of justice.

### 3.4 Basic Conditions of Employment Act No.75 of 1997(as Amended) by Basic Conditions of Employment Act No.11 of 2002

This Act regulates the terms and conditions of labour and employment in South Africa especially the conditions under which children can be employed in work situations. It prohibits the employment of a child who has not attained fifteen years of age,[723]or engaged in work that

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[712] Child Justice Act No 75 of 2008, s. 2(a).
[713]*Ibid*, s 7(1).
[714]Child Justice Act No 75 of 2008 s. 7(2).
[715]*Ibid*, s 28(1)(b)
[716] Ibid, s.28(1( (c)
[717]Ibid, s 63(1) and (2).
[718]Ibid, s. 77(1) (a).
[719]*Ibid*, s 77(1) (b).
[720]Ibid s. 82(1).
[721]Ibid, s.83.
[722]*Ibid*, s.89.
[723] The Basic Conditions of Employment Act No.75 of 1997, s 43(1) (a).

is inappropriate for age or that places the child's wellbeing, education, physical or mental health, or spiritual, moral or social development at risk.[724] It is an offence to employ a child in contravention of the Act[725]and employers of labour are required to conduct medical examinations on children in employment under regulations made by the Minister of Labour[726]

### 3.5 Domestic Violence Act No. 116 of 1998

This Act seeks to provide for the issuing of protection order to victims of domestic violence. Where the victim is a child, [727]application can be brought without the assistance of the minor's parent, guardian or any other person.[728] This provision removes the barrier of *locus standi* to the prosecution of cases of domestic violence against children in South Africa.

### 3.6 Films and Publications Act No.65 of 1996

This Act protects children from exploitation caused by obscene pictures, films, publications and pornographic materials. The objectives of the Act are to regulate the creation, production, possession and distribution of films, games and certain publications; to protect children from exposure to disturbing and harmful materials and the use of children in pornographic acts and defaulters are liable to criminal sanction.[729]

### 3.7 Criminal Law (Sexual Offences and Related Matters) Amendment Act No.32 of 2007

The Act protects children from sexual exploitation by prohibiting a range of sexual acts that are child-directed.Chapter 3 contains detailed provisions of sexual conducts which are prohibited when committed against children. These include child pornography,exposure, display or causing exposure or display of child pornography or pornography to children[730]using children for child pornography or benefiting from child pornography;[731] The Act makes it criminal for any person to have sexual penetration with a child, even with the child's consent,[732] and all other forms of sexual assault against children.The Act creates a duty to report sexual offences committed with or against children to the South African Police Service for investigation and clothes the court with extra-territorial jurisdiction and establishes a National Register for sex convicts, among others.

### 3.8 Social Assistance Act No.13 of 2004

This Act seeks to provide financial support and care to children who have no parents and whose parents are poor and for child's parents. The objectives of the Act are to provide for the administration of social assistance and payment of social grants. Section 4 of the Act requires

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[724]*Ibid*, s. 43(2).
[725]*Ibid*, s 43(1-3).
[726] *Ibid*, s.45
[727]Domestic Violence Act No.116 of 1998 s. 4(3).
[728] *Ibid*, s. 4(4).
[729]*ibid,* Ss 25-30
[730]*Ibid*, s. 19.
[731] *Ibid*, s.20.
[732] Criminal Law (Sexual Offences and Related Matters) Amendment Act No.32 of 2007, s 15

the Minister of Social Development to provide the following categories of grants: child support grant, care dependency grant, foster child grant and disability grant, among others to assist indigent parents and children.[733]

### 3.9 Maintenance Act No. 99 of 1998

This Act protects the rights of children in South Africa to be maintained, cared and provided for by their parents. The Act declares that the Republic of South Africa is committed to give high priority to the rights of children, their survival, protection and development.[734]The Act applies to any person who has the legal duty to provide for another – in this case, parents and their children.[735] It creates maintenance courts and designates every magistrate's court as a maintenance court.[736]Maintenance officers receive complaints bordering on the refusal or failure of a person who owes a legal obligation to provide for certain dependents and maintenance investigators are mandated to investigate the respondent and report to the courts.[737]The Act imposes a duty on parents to support their children with food, clothing, accommodation, medical care and education.[738] The duty is jointly owned by both parents and it exists whether or not the child was born in or out of wedlock.[739]

### 3.10 Prevention and Combating of Trafficking in Persons Act No.7 of 2013

This Act declares its objective to be the prevention of trafficking in persons, protections and assistance of victims of trafficking.[740]The Act prohibits the act of delivering, recruiting, transporting, transferring, harbouring, selling, exchanging, leasing or receiving another person especially children within or across the borders of South Africa.Furthermore, the Act prohibits and criminalizes illegal adoption or forced marriage.[741] Section 18 of the Act provides that a rescued child victim of trafficking must be protected in accordance with the provisions of the Children's Act. The court has the power to suspend all the parentage rights and responsibilities of a parent, guardian or other person in whose custody and protection a child had been placed, if the court has reason to believe that such parent, guardian or other person has been involved in one way or the other in the trafficking of that child, such child must be placed in temporary safe care.[742]

## 4 Lessons From South Africa

South Africa has more progressive and comprehensive legal frameworks than Nigeria regarding the protection of the rights of children. The South African Courts, especially the Constitutional Court, have made progressive interpretations of the various child-focused lawsin advancing the

[733]*ibid*, s. 4(a)-(d).
[734]Maintenance Act No.99 of 1998, Preamble.
[735]Ibid, s. 2.
[736]*Ibid*, s. 3.
[737]*Ibid*, ss 5 and 6
[738]*Ibid*, s 15(1) (2).
[739]*Ibid*, s 15(3).
[740]Prevention and Combating of Trafficking in Persons Act No.7 of 2013, s 3.
[741] Ibid, s 4(2).
[742]*Ibid*, s 4(1).

rights of children. Nigeria can take a cue from the child rights law and practice in South Africa to improve the rights of children in Nigeria in the following ways:

The Constitution of the Federal Republic of Nigeria should be amended to confer exclusive rights on children as it is provided for in section 28 of the Constitution of South Africa where such fundamental rights are not subject to the whims and caprices of any state or province in South Africa. Also, the restriction in section 12 of the Constitution should be amended so that international laws relating to children can be applied by the court automatically and have the same status as municipal law which is enforceable as it is practiced in South Africa.[743]

The Children's Act (No 38) 2005 has the backing of the Constitution of the Republic of South Africa and contains plethora of provisions protecting the rights of children in South Africa. The Act recognises the right of every child to participate in decisions affecting his life and where the child is unable to do so, the interest of the child must be of paramount consideration. This Act has similar provisions with the Child Right Act 2003 which protects the rights of children in Nigeria. Unfortunately, the CRA 2003 though a federal law cannot be applied in the states unless it has been adopted by the State. This is the reason why some states in Nigeria are yet to adopt the CRA as a state law. It is therefore imperative for the Constitution to be amended to place issues relating to children in the exclusive legislative list to be binding on all states to promote the rights of children in Nigeria.

With regards to the Child Justice Act No 35 of 2008 of South Africa, the minimum age of criminal liability of a child is below 10 years while that of Nigeria is below 7 years. South African criminal justice administration provides for separate civil and criminal jurisdiction to deal with matters involving children while in Nigeria, the jurisdictions are fused causing delay in court processes. Also,the barrier of *locus standi*in the Child Justice Act of South Africa is removed especially in the prosecution of cases involving violence against children and child abuse cases. It is submitted that the age of criminal liability of a child in Nigeria be increased to 10 years, the barrier of *Locus Standi* be removed especially in cases involving sexual abuse or violence against children and the civil and criminal jurisdiction be separated to ensure speedy dispensation of justice as it is practiced in South Africa.

In South Africa, the Social Assistance Act No 13 of 2004 and the Maintenance Act 1998 provide financial support to orphans, destitute and children whose parents are poor to ensure the rights of children to survival, protection and development and Maintenance Courts are established to enforce these rights. This is unlike Nigeria which does not have laws such as Social Assistance Act nor the Maintenance Act which takes care of children whose parents are financially handicapped or care of orphans and destitute. This Act does not apply to parents who are financially capable to provide for their children.

It is therefore submitted that Nigeria has a lot to learn from the Child rights law and practice in South Africa and to also adopt their comprehensive and robust child related laws and domesticate same to protect and promote the rights of children in Nigeria.

## Conclusion

[743] Constitution of the Republic of South Africa 1960, s.233.

This article has appraised the child rights law and practice in two jurisdictions to wit Nigeria and South Africa. The authors submit that Nigeria can learn some lessons from some of the child related laws from South Africa with respect to constitutional provisions, justice system, social securities to improve and promote the rights of children in Nigeria.

The authors therefore recommend the following for the improvement of the rights of children in Nigeria.

(1) The Constitution of Nigeria should be amended to confer exclusive rights on children as provided for in the Constitution of South Africa.
(2) Section 12 of the Nigerian Constitution should be amended to enable international laws relating to children to be applied by the court automatically as practiced in South Africa.
(3) Issues relating to children should be placed in the Exclusive Legislative List so that the Child Rights Act 2003 can be applicable to all States in the federation.
(4) The age of criminal liability should be increased from 7 years to 10 years as practiced in South Africa, barriers of locus standi removed and civil and criminal jurisdiction separated to ensue speedy dispensation of justice for children in conflict with the law.
(5) The enactment of Social Assistance Act and Maintenance Act to provide financial support to orphans, destitute and poor parents to ensure the rights of children to survival, protection and development as practiced in South Africa.