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The Challenge of Domesticating Children's Rights Treaties in Nigeria and Alternative Legal Avenues for Protecting Children

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Abstract

The domestication of child-related treaties is not a straightforward process in Nigeria. Unlike treaties with another thematic focus, the majority of constituent states must give their full consent before any child-related instrument may be domesticated at the federal level and subsequently re-enacted in the domestic states. In many ways, the plural legal orders in the country and the differing perceptions of childhood make consensus difficult to achieve in terms of child rights legislation. In this regard, even though the UN Convention on the Rights of the Child has been domesticated (through a contestable procedure), 11 of Nigeria's 36 constituent states have failed to re-enact the domesticating instrument. This study elaborates on this problem, and then examines some instruments that are not affected by the domestication challenges and may offer useful protection to children with regard to certain sectoral aspects, especially child labour and child trafficking.

Keywords
Nigeria, children's rights, legal pluralism, domestication, child labour, child trafficking

INTRODUCTION

Although the protection of children's rights is, to some extent, a global challenge, a less universal occurrence is the existence of states that do not have nationally applicable child rights legislation. The legal protection of children's rights is a challenge that has existed for many years in Nigeria.[1] The problem particularly relates to the domestication (and re-enactment) of children's rights treaties; treaties with another thematic focus are generally not affected by the relevant challenges. In this regard, while the federal legislature possesses wide powers to domesticate treaties with diverse subject matters (including for example environmental, nuclear and trade treaties), state

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1 Legal protection refers here to the protection of children's rights through legislation.

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assemblies must be consulted whenever the subject matter of a treaty concerns children's rights or childhood issues in general. However, given that the Nigerian state is fragmented in terms of culture, religion, ethnicity, language, etc, domestication of children's rights treaties has been a problematic issue and consensus has been difficult to achieve. More specifically, as the Nigerian population is roughly split between a majority Muslim north and a largely Christian south, perceptions about children vary considerably across the religious divides. Thus, efforts to adopt uniform legislation that takes the differing perspectives into account has been a huge challenge in the country.

Although there is a fairly comprehensive children's rights law in Nigeria, the Child Rights Act 2003, (CRA), this statute has failed to gain nationwide acceptance: a number of states, especially those in the mainly Muslim north, continue to object to the legislation by failing to re-enact it. Also, some states that have re-enacted the legislation have lowered certain standards,[2] such that the statute lacks the strength to improve the conditions of children effectively. This article considers some of the main obstacles to effective domestication (and subsequent re-enactment) of children's rights treaties in Nigeria. In this regard, it examines the problems created by the federal constitutional architecture. Also, it considers legal pluralism as a major inhibiting factor; this aspect considers how the fraught relations between different legal norms (common law, Islamic law and customary law) impact on the domestication and subsequent re-enactment of relevant treaties. Following this, the article attempts to examine alternative legal means through which child protection may be achieved, given the gaps created by the relevant challenges. It examines two pieces of national legislation that apply in every state across the country (the Labour Act and the Trafficking Act), to understand whether they can serve as potential gap-fillers in place of the CRA, especially in states that have failed to re-enact that statute. It also suggests how the domestication challenges can be resolved.

THE CHALLENGE OF DOMESTICATING CHILDREN'S RIGHTS TREATIES IN NIGERIA

The legal approach to treaty domestication in Nigeria

Like many common law countries, Nigeria may be classified as a dualist state in relation to the application of international treaties. The basis for this classification is derived from section 12 of Nigeria's 1999 Constitution (the Constitution), which provides:

2 For instance, while the CRA stipulates that a child below the age of 18 years is not capable of contracting a valid marriage, the Child Rights Law in Jigawa State lowers this to 13 years. This problem is considered in more detail below.

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> "(1) No treaty between the Federation and any other country shall have the force of law to the extent to which any such treaty has been enacted into law by the National Assembly.
>
> (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.
>
> (3) A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the House [sic] of Assembly in the Federation."

The content of this provision, especially sub-section 12(1), was clarified by the Nigerian Supreme Court in *Abacha v Fawehinmi*,[3] where the court noted that, "an international treaty entered into by the Government of Nigeria does not become binding until enacted into law by the National Assembly".[4] The Supreme Court further noted that, "where, however, [a] treaty is enacted into law by the National Assembly, … it becomes binding and our Courts must give effect to it like all other laws falling within the Judicial power of the Courts".[5] This explicitly demonstrates the status accorded to treaties in Nigeria, such that signature alone may not confer any legal force to an international instrument. For treaties to become legally binding within the country, the National Assembly (the federal Parliament) must take a further step to domesticate such instruments. Once treaties are domesticated, however, they automatically enjoy the same legal force as other acts enacted by Parliament and no hierarchical distinction may be made between them and other such acts.

It should however be noted that the process of domesticating children's rights treaties is a rather complex procedure in Nigeria. The content of section 12(2) and (3) above introduces additional requirements that, as demonstrated below, hinder the effective domestication of child-related treaties in the country. Thus, while the general rule on treaty domestication is indicated in section 12 of the Constitution, subsections (2) and (3) present a range of exceptions that make it difficult legally to translate treaties with children's rights content at the domestic level. This problem is elaborated upon below.

LEGAL PLURALISM AND THE DOMESTICATION OF CHILDREN'S RIGHTS TREATIES IN NIGERIA

It has been observed that "wherever there were movements of people, wherever there were empires, wherever religions spanned different language and cultural groups, wherever there was trade between different groups, or

3 (2000) 6 NWLR [pt 660] 228.

4 Id at 288–89.

5 Ibid.

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different groups lived side by side, it was inevitable that different bodies of law would operate or overlap within the same social field".[6] Given that many of these realities have been experienced at one time or another in Nigeria's history, it is inevitable that legal pluralism would manifest itself in the country.[7] Apart from being the most populous African country, Nigeria ranks among the most ethnically diverse states in the world, with well over 250 ethnicities.[8] It is worth noting that the proliferation of legal pluralism in Nigeria and much of sub-Saharan Africa today was mainly inspired by western colonization, since, before the colonial period, each group had been regulated by distinct (largely unwritten) customary codes. British colonization however heralded the conflation of autonomous norms and sometimes competing traditions within a single country. Thus, while customary norms (in the newly formed country) were never homogeneous, the transplantation of the British legal system to Nigeria furthered this pluralistic trend. In this regard, Abdulmumini Oba, correctly notes that, "[l]aw in Nigeria is a plural complex with the English style common law, Islamic law and the indigenous African law", otherwise known as customary laws, operating in a competing manner.[9]

The basis for introducing Islamic law into Nigeria's legal jurisprudence is to accommodate one of the country's predominant religions. Nigeria's population is generally split between a majority Muslim north and a largely Christian south, with a small fraction of the population identifying with indigenous African religions.[10] It should however be noted that the country cannot be neatly divided into a Muslim north/Christian south binary, as there are pockets of Christian adherents in the north, just as there is a sizable number of Muslims in the south. Apart from this, worshipers of traditional African religions cannot be tied to any particular region in the country and may be found everywhere across the country.[11] That said, the Constitution creates a number of specialized courts to administer Islamic law issues, as well as customary law matters, alongside the civil courts across the country.[12] Although, there are some Muslim populations in southern Nigeria, there are generally no specialized courts to entertain purely Islamic law matters in the region. Thus, Muslims in southern Nigeria are generally regulated by

6 B Tamanaha "Understanding legal pluralism: Past to present, local to global" (2008) 30 *Sydney Law Review* 375 at 381.

7 Ibid.

8 A Oba "The Sharia Court of Appeal in northern Nigeria: The continuing crises of jurisdiction" (2004) 52/4 *The American Journal of Comparative Law* 859 at 859; U Alkali et al "Nature and sources of Nigerian legal system: An exorcism of a wrong notion" (2014) 5 *International Journal of Business, Economics and Law* 1 at 2.

9 A Oba "Neither fish nor fowl: Area courts in the Ilorin Emirate in northern Nigeria" (2008) 58 *Journal of legal Pluralism* 69 at 69.

10 RC Uzoma "Religious pluralism, cultural differences and social stability in Nigeria" (2004) *Brigham Young University Law Review* 651 at 653.

11 A Oba "Religious and customary laws in Nigeria" (2011) 25 *Emory International Law Review* 881 at 882.

12 See generally, the Constitution, sec 6.

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the civil law or by customary laws, as the Christian population is. Islamic law is therefore not as strong in southern Nigeria as it is in the north.

Thus, for the most part, laws in Nigeria comprise common law, Islamic law and customary law, creating space for legal pluralism. Apart from this, legal pluralism is also expressed through the nature of Nigeria's federal system, whereby federal and state governments share legislative powers, with states possessing even more extensive powers on certain issues, including childhood matters. This is essentially the crux of the domestication and implementation challenge regarding children's rights treaties in Nigeria. It should be added that the problem is not unconnected with religious tensions that have polarized Nigeria since its inception. In this regard, states in the north have continually resisted attempts by the central government to extend to the region the CRA, which domesticates the UN Convention on the Rights of the Child (CRC); the content of the CRA is often perceived to conflict with Islamic values and traditions, its origin being traced to western Christian states. Thus, in these states, there is generally a legal vacuum in terms of children's rights treaties. This problem is considered in more detail in the next section.

THE COMPLEXITIES OF DOMESTICATING CHILD-RELATED TREATIES IN NIGERIA

As indicated above, Nigeria subscribes to the dualist variant of treaty incorporation. However, as will be shown in this section, the process of incorporation is more complex, especially where childhood matters are involved. Since Nigeria is a state party to a number of treaties protecting children's rights, the country is internationally obliged to implement the relevant instruments. In this regard, the CRC specifically indicates that, "States Parties shall undertake all appropriate legislative, administrative, and other measures for the implementation of the rights recognized in the present Convention".[13] A similar provision is also found in the African Charter on the Rights and Welfare of the Child.[14] Of particular relevance here is the obligation to implement the treaties through legislation. In this regard, it is worth noting that, before the CRA was enacted in Nigeria, a number of unsuccessful attempts were made to transform the applicable treaties legally. For instance, in 1993, a comprehensive children's rights bill was drafted and presented to the federal Parliament for approval.[15] The bill was however opposed by a number of religious and traditional groups, on the ground that it largely conflicted with Islamic and customary norms.[16] The government therefore mandated a special committee to review the bill, taking into account religious and customary

13 CRC, art 4.

14 Art 1.

15 OS Akinwunmi "Legal impediments on the practical implementation of the Child Rights Act 2003" (2009) 37/3 *The Journal of Legal Information* 385 at 385.

16 Id at 386.

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laws.[17] Again, the bill failed to succeed, for similar religious and customary reasons.

However, many national and international non-governmental organizations criticized the decision to abandon the bill and urged the legislators to reconsider it again.[18] The CRA was finally enacted in 2003. In accordance with the relevant international instruments, the CRA defines a child as "a person under the age of eighteen years".[19] In this way, the statute repealed and revised a number of existing (children's rights) laws in the country, including the Children and Young People's Act 1958 (CYPA),[20] which had defined a child as a person under the age of 14 years and a young person as an individual who had attained the age of 14 but was under the age of 17.[21] The act also repealed section 91 of the Labour Act,[22] which had defined a child as "a young person under the age of twelve years". Apart from this, the CRA brings together in a single document the fragmented pieces of legislation on children's rights. Nonetheless, it should be noted that the CRA has been extensively challenged since its adoption in 2003, such that the statute is only applicable in 25 of Nigeria's 36 states.[23]

SPECIFIC PROBLEMS CONFRONTING THE NIGERIAN CHILD RIGHTS ACT

The problem of domesticating the CRA across Nigeria emanates from a much broader issue. As already noted, Nigeria is a federation comprising 36 relatively autonomous and equal states, with each having an independent legislature. It should be pointed out that the content of the Constitution is broadly structured into three categories or areas of legislative competence. The first relates to matters within the "exclusive legislative powers" of the federal Parliament, as expressly provided for in the Constitution;[24] the second relates to matters in which both federal and state parliaments may jointly exercise legislative

17 Ibid.

18 Id at 385.

19 CRA, sec 277.

20 The CYPA 1958 revised the Children and Young People's Ordinance of 1943.

21 CYPA, sec 2.

22 Labour Act, cap L1, Laws of the Federation of Nigeria (LFN) 2004. It is to be noted that the LFN 2004 is a consolidation of all existing legislation in the country and not the enactment of new laws per se. The Labour Act referenced in the 2004 LFN had previously existed under chap 198, LFN 1990. Thus, the definition of a child in the CRA is still effective and takes priority, even though the Labour Act was consolidated under a new title in 2004.

23 O Ajaja "Revisiting the Child Rights Act" (28 April 2016) *Punch*, available at: <https://punchng.com/revisiting-child-rights-act/> (last accessed 29 August 2018).

24 Issues on the exclusive legislative list include: state creation; customs and excise duties; creation of banks; defence; citizenship; diplomatic and consular relations; external affairs; extradition; and nuclear energy. See generally the Constitution, second sched, part I (legislative powers).

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powers, otherwise known as "concurrent legislative powers".[25] The third category concerns issues over which only state legislatures may exercise authority, referred to as "residual legislative powers". States' residual powers in this regard affect matters that are within neither the exclusive competence of the federal legislature nor the concurrent powers of both federal and state legislatures.[26] Thus, the federal Parliament is generally incompetent to legislate on matters considered to fall within states' residual powers.[27]

However, it should be noted that this only constitutes the general rule. As noted above, treaties are not self-enforcing in Nigeria. The content of section 12(2) of the Constitution demonstrates that the federal Parliament may domesticate a treaty notwithstanding that the subject matter falls outside its exclusive competence. Thus, treaty domestication exceptionally broadens the powers of the federal Parliament. However, section 12(3) stipulates further conditions to be satisfied before any such treaties may become binding within the country. This section provides that, "a bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the President for assent, and shall not be enacted unless it is ratified by a majority of all the House [sic] of Assembly in the Federation". In other words, for a "domesticating bill" to become legally binding, it must be ratified by a majority of state legislatures.

Under the Constitution, child related matters lie outside the exclusive competence of the National Assembly.[28] The second schedule of the Constitution contains an exhaustive list of issues belonging to the exclusive as well as concurrent legislative lists.[29] For instance, subjects ranging from national defence, diplomatic relations to issues of nuclear energy, etc, are particularly indicated on the exclusive legislative list. Thus, in accordance with section 12(2) and (3) of the Constitution, the absence of children's matters from this list implies that the majority of state parliaments must give their consent before the CRC may be legally domesticated. However, given that many states were either religiously or culturally opposed to the CRC, the federal legislature failed to achieve the minimum support required for domestication. Nonetheless, the National Assembly went ahead (in contravention of the constitutional

25 Concurrently shared powers include legislation relating to: electricity and the establishment of electric power stations; health care; archives and public records of state governments; and the establishment of educational institutions. See the Constitution, second sched, part II (extent of federal and state legislative powers).

26 EB Omoregie "Implementation of treaties in Nigeria: Constitutional provisions, federalism imperative and the subsidiarity principle" (extract of proceedings of the 2nd International Conference on Public Policy, 1–4 July 2015, Milan, Italy) 1 at 3.

27 It should be noted that the term "residual" is not expressly mentioned in the Constitution, but has been used to refer to state legislative powers.

28 See generally the Constitution, second sched, parts I and II (legislative powers).

29 It should be indicated that there is no categorization of residual powers in the Constitution's schedules. It is however widely acknowledged that powers outside the exclusive and concurrent lists reside with states.

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procedure) with the domestication process at the federal level, meaning that the CRA would only apply in Abuja, Nigeria's federal capital.[30]

The federal Parliament's approach therefore resulted in a legal vacuum in the constituent states, in terms of children's protection from exploitative practices and children's rights in general. As of July 2018, however, 25 of Nigeria's 36 states had re-enacted the CRA, although with differing and sometimes far-reaching reservations in certain cases. In a 2010 concluding observation on Nigeria, the CRC Committee particularly noted that, "most northern states of the State party have not yet domesticated the CRA".[31] The committee further observed that, "some states that have passed such legislation have adopted a definition of the child which is not in compliance with that of the Convention".[32] An example of a state that has adopted a lower age is Jigawa, where the age of marriage is reduced to 13, from the 18 years standard contained in the CRA. This approach reveals other complex issues, in particular that the intent of the CRA can still be defeated by re-enacting states, so that this process only serves as a mere symbolic gesture. It is submitted that mere re-enactment should not be the ultimate goal; instead, the relevant state laws must be harmonized with the CRA provisions. To date, Nigeria continues to grapple with the complexities of domesticating the CRA across the country. It is worth emphasizing that the relevant objections are more religious and cultural in nature. This article now considers some of the specific grounds for objection.

Religious and cultural grounds for opposing the Child Rights Act

Prohibition of child marriage

In accordance with the CRC, section 21 of the CRA provides that, "no person under the age of 18 years is capable of contracting a valid marriage, and accordingly a marriage so contracted is null and void and of no effect whatsoever". The prohibition of child marriage in the CRA challenges a deeply entrenched practice that has both religious and cultural ramifications. Indeed, it should be mentioned that, before the CRA was adopted in 2003,

30 In accordance with sec 299 of the Constitution, the National Assembly is empowered to make laws for the Federal Capital Territory, Abuja. It has been pointed out that "the idea of a legislation on the rights of the child met with stiff opposition from religious groups, ethnic and cultural interests and other interest groups. This resulted in a ten-year delay in the passage of the draft bill. In consideration of this, and the likelihood that the bill would not receive the necessary majority support in the state Houses of Assembly, the bill was passed without seeking for ratification by the Majority of the State's Houses of Assembly. This failure to comply with the constitutional preconditions necessary to give the Bill a nationwide application as an Act of the National Assembly, therefore resulted in the Child's Rights Act becoming a law that applies only to the Federal capital Territory, Abuja." See "Introduction to the Child's Rights Act, 2003" *Educational Resource Providers*, available at: <https://www.educationalresourceproviders.com/introduction-to-the-childs-rights-act-2003/> (last accessed 30 August 2018).

31 See Committee on the Rights of the Child, CRC/C/NGA/CO/3–4 (21 June 2010), para 7.

32 Ibid.

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child marriage was recognized under the Marriage Act, provided parental consent was sought and obtained.[33] However, section 21 of the CRA, which prohibits child marriage, now supersedes the relevant section of the Marriage Act. In the predominantly Muslim north for instance, where the CRA is largely rejected, it is estimated that 48 per cent of girls are married by the age of 15, while 78 per cent are married before their 18th birthday.[34] Also, the 2008 Nigerian Demographic and Health Survey puts the median age of marriage in the north-western region at 15.2.[35] That survey also demonstrates that 46 per cent of women across Nigeria between the ages of 20 and 49 were married by the age of 18, while 58 per cent were married by the age of 20.[36] The relevant median age in the south-eastern region was put at 22.8, demonstrating that child marriage is less practised in the southern region compared to the north.[37] Thus, this prohibition in the CRA is not well-received by the northern (Muslim) states, as it challenges some of the pre-existing norms and traditions in the region.[38] Child marriage often manifests itself by way of the betrothal of female children to adult males; this is especially common among the Hausa-Fulani ethnic group.[39] In this context, apart from section 21 of the CRA, which prohibits child marriage generally, section 22(1) further stipulates that "no parent, guardian or any other person shall betroth a child to any person". This provision is again considered as a direct attack on the local customs of the ethnic groupings in the north. To this day, the practice of betrothal remains widespread in the northern region.[40]

Prohibition of marriage to members of an adoptive family

Unlike the prohibition against child marriage, which is often rejected on religious and cultural grounds, the prohibition of marriage between members of an adoptive family and adopted children is mainly opposed on religious (Islamic) grounds. In this regard, section 147 of the CRA provides that, "[a]

33 The Marriage Act, Laws of the Federation of Nigeria, 1990, sec 18 specifically stipulates: "If either party to an intended marriage, not being a Consent widower or widow, is under twenty-one years of age, the written consent of the father, or if he be dead or of unsound mind or absent from Nigeria, of the mother, or if both be dead or of unsound mind or absent from Nigeria, of the guardian of such party, must be produced annexed to such affidavit as aforesaid before a licence can be granted or a certificate issued."

34 GV Kyari and J Ayodele "The socio-economic effect of early marriage in north western Nigeria" (2014) 5/14 *Mediterranean Journal of Social Sciences* 582 at 586.

35 The relevant median age in the south-eastern region was however put at 22.8, demonstrating that child marriage is less practised in the southern region compared to the north; see National Population Commission (Nigeria) and ICF Macro "Nigeria demographic and health survey 2008" (2009) at 95.

36 Id at 94.

37 Id at 95.

38 TS Braimah "Child marriage in northern Nigeria: Section 61 of part I of the 1999 Constitution and the protection of children against child marriage" (2014) 14 *African Human Rights Law Journal* 474 at 475.

39 Ibid.

40 Ibid.

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marriage between a person who has adopted a child under this Act or a natural child of the person who adopted the child and the adopted child is hereby prohibited and any such marriage shall be null and void". The section further provides that any such marriage is an offence that may be subject to imprisonment of up to 14 years. The content of section 147 is broadly considered, especially by the predominantly Muslim states, to conflict with Islamic norms and traditions. Felix Nzarga, for instance, argues that the relevant CRA provision contravenes the express provisions of the "Qur'an and Sunnah of the Holy Prophet on adoption of children".[41] Chapter 33: 4–6, of the Qur'an is often cited as authority for rejecting the wider (western) notion of adoption. The chapter provides that, "nor hath He made those whom ye claim [to be your sons] your sons. This is but a saying of your mouths. But Allah sayeth the truth and he showeth the way. Proclaim their real parentage. That will be more equitable in the sight of Allah. And if ye know not their fathers then [they are] your brethren in the faith and your clients".[42]

It is worth indicating however that adoption, as more legally understood, was well practised and recognized in pre-Islamic Arab societies, whereby an adopted child was entitled to the same legal rights and privileges enjoyed by biological children.[43] During this era, the rules of affinity and consanguinity were strictly enforced, such that marriage between an adopted child and a member of the adoptive family was impossible.[44] However, this practice was reversed when the Prophet Mohammed became attracted to the wife of his adopted son, Zayd, whom he subsequently married following her divorce from Zayd, mainly to serve Prophet Mohamed's interests.[45] The principle was thus established that adoption constituted no real relationship. Consequently, this interpretation would legitimize any marriage between an adopted child and members of the adoptive family. Chapter 33: 4–5 of the Qur'an, was thus formulated, became authoritative and effectively abolished the earlier conception of adoption.[46]

41 FD Nzarga "Impediments to the domestication of Nigerian Child Rights Act by the states" (2016) 19 *Journal of Culture, Society and Development* 48 at 52.

42 Quoted in UM Assim and J Sloth-Nielsen "Islamic Kafalah as an alternative care option for children deprived of a family environment" (2014) 14 *African Human Rights Law Journal* 322 at 326.

43 Ibid.

44 Ibid.

45 Ibid.

46 Commenting further on this, Usang Assim notes that, "the abolition of adoption further gained support because adoption in pre-Islamic Arabia was practised together with certain acts that were not supported by Islam. For instance, a family could disclaim a member and a person could renounce his biological family. Such practices were popular because adoption into another family was always a possibility. Such actions were considered unacceptable in the creation of a new Islamic community in Mecca and Medina at the time. Consequently, although some scholars argue that adoption in Islam is mubah and have called for a reform of Muslim legal traditions to conform to the formal notion of adoption, the general and popular position is that adoption is prohibited in Islam, the

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Thus, from a broader perspective, Oba argues that, given its divine nature, Islamic law is more definitive and regulates all Muslims.[47] He further notes that, in Islam, there is no distinction between the secular and the spiritual: "everything [including adoption] falls into the realm of religion".[48] Following the same line of argument, Abun Nasr, notes that, "to the pious Muslim, God is the legislator and the Sharia is an expression of his ordinance …".[49] Accordingly, with the entrenchment of Islam in much of northern Nigeria, it is inevitable that a conflict situation would arise between Islamic and official state law: the prohibition of marriage to an adopted child is thus considered a direct violation of rights under Islamic law and consequently a ground for rejecting the CRA.

Prohibition of skin marks and tattoos

This provision in the CRA is another ground for broader objection to the statute. More specifically, section 24 provides that, "[n]o person shall tattoo or make a skin mark or cause any tattoo or skin mark to be made on a child". This section further provides that, "[a] person who tattoos or makes a skin mark on a child commits an offence under this Act and is liable on conviction to a fine not exceeding five thousand naira or imprisonment for a term not exceeding one month or to both such fine and imprisonment".

This provision challenges some widely held practices that have extensive local ramifications, not only in northern Nigeria, but also in the south-western region of the country. In the northern region for instance, it is sometimes considered fashionable for ladies, including girls, to wear tattoos on their skin. Also, although the practice of skin (tribal) marks, which is more widespread among the Yoruba people in south-western Nigeria, generally seems to be receding, the prohibition in the CRA is nonetheless perceived as somewhat far reaching and undermining of prevailing local traditions.[50]

Prohibition of child labour

Broader aversion to the CRA is also founded on the prohibition of certain aspects of child labour. In this regard, section 30(2)(a) provides that a child shall not be used "for the purpose of begging for alms, guiding beggars, prostitution …". Section 30(2)(c) further provides that no child may be used to hawk goods or services on main city streets, brothels or highways. It should be mentioned that, across Nigeria, but also more specifically in the northern

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contd
practice of which amounts to a sin of apostasy (kufr). The eventual inclusion of kafalah in CRC reflects the current Islamic populist position on adoption." See Assim and Sloth-Nielsen "Islamic Kafalah", above at note 42 at 327.

47 See generally, A Oba "Islamic law as customary law: The changing perspective in Nigeria" (2002) 51 *International and Comparative Law Quarterly* 817 at 817.

48 Id at 845.

49 Quoted in id at 831.

50 Nzarga "Impediments to the domestication", above at note 41 at 54.

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states, alms begging and the use of children as guides to visually impaired individuals is widespread. More impoverished children known as *almajiris*[51] may be found on streets across northern Nigeria, begging for alms.[52] It is apparent that the full implementation of the CRA in the relevant states may threaten the livelihoods of street children who have no concrete alternatives, since they mostly beg to survive.

ALTERNATIVE LEGAL MEASURES FOR ACHIEVING CHILD PROTECTION IN NIGERIA

As demonstrated above, the problems confronting the CRA have enormous implications for the broader protection of children's rights in Nigeria. Since the statute constitutes the central legislation protecting children in the country, failure to re-enact it across the federation would effectively create a legal gap in the non-enacting states. This section examines two specific national laws that touch upon child-related issues (the Labour Act and the

51 *Almajiris* are arguably some of the most exploited and marginalized children in Nigeria today. In terms of its history and meaning, Fowoyo Joseph Taiwo, notes that the word *almajiri* generally implies "seeker of Islamic knowledge". Thus, given the Islamic injunction that "the best among you [Muslims] are those who learn the Qur'an and teach it", there was a proliferation of informal Qur'anic schools (the Almajiri system) across northern Nigeria during the pre-colonial era. However, Taiwo further notes that, during colonial rule, "[t]he British invaded the region and killed most of the Emirs and disposed some. The Emirs lost control of their territories and accepted their new roles, as mere traditional rulers. They also lost fundamental control of the Almajiri system. The British deliberately abolished state funding in respect to the system arguing that, they were religious schools. With loss of support from the government, its immediate community and the helpless Emirs, the Almajiri system collapsed like a pile of cards. Karatun Boko, western education was introduced and funded instead. The pupils now, having no financial support resorted to begging and other menial jobs for survival. This is certainly the genesis of the predicament of the Almajiri system today." See FJ Taiwo "Transforming the Almajiri education for the benefit of the Nigerian society" (2013) 3/9 *Journal of Educational and Social Research* 67 at 67 and 68. In a similar vein, N Awofeso, J Ritchie and P Degeling observe that, "Nigeria's post-independence federal governments have neither formally recognized Almajiri schools as part of Nigeria's educational structure, nor provided funding for their operations. The fact that the heritage has survived, and continues to grow despite a century of neglect and intimidation by colonial and post-independence governments indicates the high level of acceptance, among the underclass, of the religious and political issues used by custodians of the heritage to justify its continuation": N Awofeso, J Ritchie and P Degeling "The Almajiri heritage and the threat of non-state terrorism in northern Nigeria: Lessons from Central Asia and Pakistan" (2003) 26/4 *Studies in Conflict & Terrorism* 311 at 317.

52 The CRC Committee recognized the plight of *almajiri* children in its 2010 concluding observation on Nigeria, when it urged the Nigerian government to prevent "children from living and working in the street, including the *almajiri*, by ensuring that children in street situations are provided with adequate nutrition, clothing, housing, health care and educational opportunities, including vocational and life-skills training, in order to support their full development": Committee on the Rights of the Child, CRC/C/NGA/CO/3–4 (21 June 2010), para 85(C).

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Trafficking Act) and may serve to protect children legally in the absence of the CRA. Effort is also made to assess the compatibility of these alternative measures with existing international standards, to demonstrate their legal significance in terms of child protection. Although, as previously pointed out, the federal government has no legal competence to enact a child-focused law for the whole federation unilaterally, without the support of the constituent states, the legality and relevance of these national instruments (which address child-related issues) are discussed later in this article.

Child protection under the Labour Act

The Nigerian Labour Act,[53] although not a child specific instrument, has enormous relevance in the protection of children's rights, especially child labour. From the outset, it should be pointed out that the CRA and the Labour Act are complementary instruments: the CRA specifically makes reference to the complementarity of the Labour Act by stating that certain sections of that statute are applicable to children under the CRA.[54] It should be mentioned that, while the CRA essentially domesticates the CRC, the relevant portion of the Labour Act somewhat reflects certain aspects of the International Labour Organization (ILO) Minimum Age Convention 138 (ILO 138) as well as the ILO Worst Forms of Child Labour Convention 182 (ILO 182). Thus, section 59 (1) of the Labour Act provides:

> "No child shall–
> (a) be employed or work in any capacity except where he is employed by a member of his family on light work of an agricultural, horticultural or domestic character approved by the Minister; or
> (b) be required in any case to lift, carry or move anything so heavy as to be likely to injure his physical development".

It is worth emphasizing here that, unlike the CRA, the Labour Act distinguishes between a child and a young person. The Labour Act defines a child as a "young person under the age of twelve years", while a young person is defined as "a person under the age of eighteen years".[55] Accordingly, section 59(1) recognizes the right of children (below the age of 12) to undertake light works in a family enterprise. Although ILO 138 generally prohibits light or any form of work for children below the age of 12,[56] the exception contained in article 5(3) of ILO 138 with regard to work within a family enterprise somewhat endorses the right of children (including those below the age

53 Labour Act, cap L1, Laws of the Federation of Nigeria, 2004.

54 CRA, sec 29 provides that, "the provisions relating to young persons in sections 58, 59, 60, 61, 62 and 63 of the Labour Act shall apply to children under this Act".

55 Labour Act, sec 91.

56 See ILO 138, art 7(1)(a) and (b) as well as art 7(4).

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of 12) to undertake light work, in accordance with the Labour Act. Article 5(3) of ILO 138 provides:

> "The provisions of the Convention shall be applicable as a minimum to the following: mining and quarrying; manufacturing; construction; electricity, gas and water; sanitary services; transport, storage and communication; and plantations and other agricultural undertakings mainly producing for commercial purposes, *but excluding family and small-scale holdings producing for local consumption and not regularly employing hired workers*." (emphasis added)

Of particular relevance here is the latter part, which recognizes children's economic activities within the family sector. In other words, while the general rule is that children below the age of 12 may not work, the prohibition does not apply to work within a family or small-scale holding producing for local consumption etc, indicating that younger children (below the age of 12) may work in such sectors. Thus, the Labour Act tends to reflect the content of ILO 138, as regards light agricultural work in family undertakings. It should however be mentioned that other provisions of ILO 138,[57] stipulating that engagement in light works must not prejudice school attendance etc, are not found in the Labour Act.[58] Furthermore, apart from section 59(1), which addresses work undertaken within a family enterprise, other sub-sections of section 59 also regulate the extent of child labour in the more formal sectors, including industrial works. Like article 6 of ILO 138, works undertaken in technical schools are also excluded from the scope of industrial works under the Labour Act.[59] The Labour Act also contains some additional provisions that are largely absent at the international level. For instance, children below the age of 14 are allowed to undertake waged employment, provided they return to their places of residence each night.[60] The requirement to return "home" is generally unique to the Labour Act.

Other provisions in the Labour Act also prohibit underground work, machine work and other potentially dangerous works by children below the age of 16.[61] To some extent, the prohibition of dangerous work for children below the age of 16 is consistent with article 3(3) of ILO 138, as well as article

57 See for instance id, arts 2(3) and 7(1)(b).

58 In a sense, education and work are not treated as mutually exclusive in the Labour Act. Although it may be that the Labour Act deliberately avoids going into issues that are not strictly labour related; issues concerning education, for example, may be considered to be outside its scope.

59 For instance sec 59(2) provides: "No young person under the age of fifteen years shall be employed or work in any industrial undertaking: Provided that this subsection shall not apply to work done by young persons in technical schools or similar institutions if the work is approved and supervised by the Ministry of Education (or corresponding department of government) of a State."

60 Id, sec 59(3).

61 Id, sec 59(5).

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3(d) of ILO 182 (if read together with Recommendation 190).[62] Generally, Recommendation 190 interprets the content of article 3(d) of ILO 182 to include underground work and the use of dangerous machinery etc.[63] More importantly, the recommendation also stipulates the minimum age for potentially dangerous works to be 16 years. However, it should be noted that the requirement in ILO 138 that such works may only be undertaken where "the health, safety and morals of the young persons concerned are fully protected and that the young persons have received adequate specific instruction or vocational training in the relevant branch of activity",[64] is not contained in the Labour Act.

It is also worth noting that, unlike many of the international instruments, the Labour Act stipulates in clear terms the permissible hours of work. In this regard, section 59(8) provides, "[n]o young person under the age of sixteen years shall be required to work for a longer period than four consecutive hours or permitted to work for more than eight working hours in any one day: Provided that, save as may be otherwise provided by any regulations made under section 65 of this Act, this subsection shall not apply to a young person employed in domestic service".

This provision in some ways implements the content of article 32(2)(b) of the CRC, which obliges states parties to "provide for appropriate regulation of the hours and conditions of employment". It should also be mentioned that the Labour Act equally regulates other categories of works including night work[65] and employment in a vessel,[66] and also imposes an obligation on employers to keep registers that document the ages, date of employment, conditions as well as nature of employment of all "young persons".[67] The registers must be produced for inspection when required by authorized state officers. This is mainly to ensure strict adherence to relevant statutory regulations. In summary, the Labour Act, although more generic in scope, contains some specific provisions that implement the contents of international child labour instruments.

62 In this regard, ILO 182, art 3(d) restricts children below the age of 18 from undertaking "work which, by its nature or the circumstances in which it is carried out, is likely to harm the health, safety or morals of children". ILO Recommendation 190, art 4 however provides: "For the types of work referred to under Article 3(d) of the Convention and Paragraph 3 above, national laws or regulations or the competent authority could, after consultation with the workers' and employers' organizations concerned, authorize employment or work as from the age of 16 on condition that the health, safety and morals of the children concerned are fully protected, and that the children have received adequate specific instruction or vocational training in the relevant branch of activity."

63 See generally, recommendation 190, art 3(a)–(e).

64 A similar provision is also contained in id, art 4.

65 Labour Act, sec 60.

66 Id, sec 61(5) defines vessels to include "floating craft of every description except ships of war".

67 Id, sec 62.

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Child protection under the Trafficking Act

The Nigerian legislature recently enacted the Trafficking in Persons (Prohibition) Enforcement and Administration Act, 2015 (Trafficking Act), which repeals the country's 2005 anti-trafficking legislation.[68] The new legislation was adopted to reflect more recent developments in trafficking, especially those that were not addressed in the repealed statute. Generally speaking, the Trafficking Act, 2015, targets a wide range of exploitative practices, especially those commonly referred to as unconditional worst forms of child labour under ILO 182. Section 82 of the Trafficking Act defines a child as "a person under the age of 18 years". This definition accords with the CRA and other international legal standards; as such, the distinctions between a child and a young person found in the Labour Act are not made. In more specific terms, section 16 of the Trafficking Act provides:

> "(1) Any person who procures or recruits any person under the age of 18 years to be subjected to prostitution or other forms of sexual exploitation with himself, any person or persons, either in Nigeria or anywhere else, commits an offence and is liable on conviction to imprisonment for a term of not less than 7 years and a fine of not less than ₦1,000,000.00.
>
> (2) Any person who procures or recruits any person under the age of 18 years to be conveyed from his usual place of abode, knowing or having reasons to know that such a person may be subjected or induced into prostitution or other forms of sexual exploitation in any place outside Nigeria, commits an offence and is liable on conviction to imprisonment for a term of not less than 7 years and a fine of not less than ₦1,000,000.00."

Generally, this provision reflects the wider international consensus on the prohibition of child sexual exploitation.[69] The provision is particularly relevant in the context of children's rights as it addresses the trafficking of individuals below the age of 18. Also, at the more domestic level, the provision gives stronger expression to the prohibition of trafficking and other forms of sexual exploitation contained in the CRA.[70] More specifically, under section 16 of the Trafficking Act, child trafficking offences are expressly criminalized and may be punished with a prison term of not less than seven years and a fine not less than ₦1,000,000 (about EUR3,000). It is also worth emphasizing that section 16(2) targets the recruitment of children to be used as prostitutes outside

68 Trafficking in Persons (Prohibition) Enforcement and Administration Act, 2003 (as amended in 2005).

69 See for instance: CRC, arts 34 and 35; ILO 182, art 3; and, more generally, the Optional Protocol to the CRC on the Sale of Children, Child Prostitution and Child Pornography (2000).

70 CRA, sec 30(2)(e) for instance provides that a child shall not be used, "procured or offered for prostitution or for the production of pornography or for any pornographic performance".

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Nigeria. This prohibition is highly relevant, especially since Nigeria is one of the highest source countries for trafficked girls/women in Europe, which is the main destination region. In this regard, CS Baarda notes that, "the number of Nigerian victims of human trafficking for sexual exploitation is among the highest of any ethnicity in Western Europe".[71] This practice often generates a continuous source of profit for traffickers, since victims constitute a flexible and largely inexpensive source of "labour".[72] Usually, victims can be exploited for a prolonged period of time, to offset the transit cost and also for profit motives. Paolo Campana observes that Nigerians as well as other victims are typically requested to pay the traffickers between USD40,000 and 70,000, which translates into "victims being held captive for a minimum of one year to (often) three years or more".[73] Thus, if well implemented, the Trafficking Act may deter potential traffickers.

In terms of the extradition of trafficking offenders, it should be pointed out that there is no need for a special extradition treaty between Nigeria and the destination country, as the Optional Protocol to the CRC (Optional Protocol)[74] may generally serve as a basis for any such extradition.[75] Accordingly, since many destination countries are states parties to the Optional Protocol, the Nigerian government may request the extradition of foreign based traffickers and, if successful, prosecute them effectively in line with the Trafficking Act. In this regard, article 5(2) of the Optional Protocol provides that, "[i]f a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider the present Protocol to be a legal basis for extradition in respect of such offences. Extradition shall be subject to the conditions provided by the law of the requested State". Prosecution of extradited offenders in Nigeria is facilitated by section 16(2) that mainly targets offences with transnational elements. It should be noted that the approach of section 16(2) in this regard is generally in consonance with article 3(1) of the Optional Protocol, which obliges states parties to take legislative action to criminalize offences described in the instrument, whether committed domestically or internationally.

Section 17 of the Trafficking Act also prohibits sexual exploitation, especially recruitment for pornography or pornographic performances. In this regard, section 17(1)(a) and (b) explicitly prohibits the use of children for pornographic purposes or the harbouring of children in brothels. Offences of this nature are liable on conviction to at least seven years imprisonment

71 CS Baarda "Human trafficking for sexual exploitation from Nigeria into western Europe: The role of voodoo rituals in the functioning of a criminal network" (2016) 13/2 *European Journal of Criminology* 257 at 258.

72 P Campana "The structure of human trafficking: Lifting the bonnet on a Nigerian transnational network" (2016) 56 *The British Journal of Criminology* 68 at 72.

73 Ibid.

74 Above at note 69.

75 Nigeria ratified the Optional Protocol in 2010.

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and a fine of not less than ₦1,000,000. Apart from this, section 17(2) stipulates additional punishment where victims are rendered unconscious through the use of drug substances. In such cases, traffickers may be sentenced to an additional one year's imprisonment. Thus, sex trafficking offences committed with the use of drug substances may be liable to imprisonment of at least eight years. The rationale for this additional punishment is probably because the administration of abusive substances may remove the exercise of good judgment and consent by victims.

Section 18 of the Trafficking Act also stipulates that "any person, who organizes, facilitates or promotes foreign travels which promote prostitution or other forms of exploitation of any person or encourages such activity, commits an offence and is liable on conviction to imprisonment for a term of not less than 7 years and a fine of not less than ₦1,000,000.00". It should be pointed out that, although this provision seems to restate the content of section 16(2) noted above with regard to transnational sex trafficking, some distinct differences may be seen between the two provisions. For instance, while section 16(2) is more child-specific in scope, section 18 generally applies to both children and adults alike. As may be seen, section 18 utilizes the phrase "exploitation of any person", suggesting that it targets not only children, but also adults. Beyond this however, the prohibition in both sections implicitly acknowledges the prevalence of transnational sex trafficking, with Nigeria as a source country. Thus, the effective implementation of these provisions may well eliminate, or at least reduce, this highly exploitative practice.

Another important provision in the Trafficking Act is section 23, which regulates the employment of child domestic workers. This provision is particularly relevant, as the use of children as domestic workers is widespread across Nigeria. It should first be indicated that section 23(1)(a) does not consider all employments to be exploitative; only employment involving children below the age of 12 is considered an offence and therefore exploitative. Accordingly, as a general rule, children above the age of 12 may work as domestic workers under the Trafficking Act. However, elements of exploitation or harm must not be present, as indicated in section 23(1)(b). Generally, the recognition of domestic work for children aged 12 and above tends to engage realistically with the widespread phenomenon in Nigeria,[76] as opposed to a rather blanket prohibition that would deny existing realities and may be rather difficult to implement. This approach largely accords with relevant international standards, especially ILO 138,[77] which recognizes the right of children as young as 12 to undertake light work. Although no reference to light work is made in section 23(1), it is to be expected that children

76 It has been argued that the majority of economically active children in Nigeria are employed as child domestic workers; see for instance, EE Okafor "Child labour dynamics and the implications for sustainable development in Nigeria" (2010) 12/5 *Journal of Sustainable Development in Africa* 8 at 11.

77 ILO 138, arts 7(1) and (4).

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are not subjected to conditions that are otherwise harsh. Also, the ILO Domestic Workers Convention 189 (ILO 189) tends to support the thinking that children below the age of 18 may work as domestic staff. In this regard, article 4(1) of ILO 189 provides that, "[e]ach Member shall set a minimum age for domestic workers consistent with the provisions of the Minimum Age Convention, 1973 (No 138), and the Worst Forms of Child Labour Convention, 1999 (No 182), and not lower than that established by national laws and regulations for workers generally". Furthermore, article 4(2) stipulates that, "[e]ach Member shall take measures to ensure that work performed by domestic workers who are under the age of 18 and above the minimum age of employment does not deprive them of compulsory education, or interfere with opportunities to participate in further education or vocational training". It is however worth noting that, as of July 2018, Nigeria had yet to ratify ILO 189. Despite the failure to ratify, it can be inferred (especially from ILO 189) that relevant international standards are not completely opposed to domestic work by children (ie, below the age of 18). Thus, the recognition of such work from age 12 and above in the Trafficking Act may be legally valid.[78]

In general, it should be stated that, since section 23 of the Trafficking Act addresses a rather obscure sector where child exploitation may easily escape government scrutiny, concrete measures must be taken if this provision is to be meaningfully translated. Beyond the regulation of child domestic work, it should also be mentioned that the Trafficking Act further prohibits all forms of slave dealings, with stiffer punishment.[79] Therefore, in summary, the Trafficking Act addresses a range of exploitative practices and has an added value in achieving effective child protection regimes.

THE LEGALITY OF THE LABOUR ACT AND TRAFFICKING ACT IN PROTECTING CHILDREN IN NIGERIA

As indicated above, the National Assembly (the federal Parliament) lacks exclusive competence to enact purely child-centred laws or to domesticate a treaty

78 From a general perspective, it should be noted that employment of child domestic workers seems to be more dominant in southern Nigeria than in the north. Usually, families with modest income or the more affluent engage the services of children from poorer families, often committing to finance their education. In reality however, child domestic work is sometimes a synonym for exploitation. Tade and Aderinto have, for example, conducted an extensive study of child domestic work in Oyo, Nigeria (one of the southern states); see generally O Tade and A Aderinto "Factors influencing the demand for domestic servants in Oyo State, Nigeria" (2012) 4/1 *International Journal of Child, Youth and Family Studies* 521.

79 In this regard, the Trafficking Act, sec 24 stipulates: "Any person who recruits, imports, exports, transfers, transports, buys, sells, disposes or in any way traffics in any person as a slave or accepts, receives, detains or harbours a person as a slave, commits an offence and is liable on conviction to imprisonment for a term of not less than 7 years and a fine of not less than ₦2,000,000.00." Thus, unlike other provisions that stipulate punishment of up to seven years, under sec 24, imprisonment may not be less than seven years.

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with children's rights content without securing the overwhelming support of states across the federation. However, contrary to the constitutional requirements (ie, the need to involve the constituent states in the enactment process), the federal Parliament unilaterally enacted the CRA and expected relevant state assemblies to follow suit. To date, the statute has failed to gain widespread acceptance across Nigeria. It should be reemphasized that relevant objections to the CRA are largely accommodated because child-related issues are not included in the exclusive legislative list, over which the National Assembly may exercise full legislative rights. If such issues were included in the exclusive or concurrent legislative lists, the need to re-enact the CRA in the constituent states would not have arisen, as the statute would have applied nationally,[80] even though dissenting views may still be voiced. In line with the current constitutional framework, however, the relevant states may legally exercise the right not to re-enact the CRA. It is worth noting, however, that the CRA is not rejected simply because the federal legislature acted beyond its constitutional powers, by enacting it without securing the overwhelming support of states. Instead, the main grounds of objection are those already highlighted above.

The failure to re-enact the CRA may however have negative effects on children in the relevant states. Accordingly, this section aims to address a number of issues, including: the legal status of the Labour Act and the Trafficking Act in Nigeria (ie, whether they apply nationally or are limited in scope and must be re-enacted in states); whether the federal legislature is acting beyond its constitutional powers by legislating on child-related matters; and whether these statutes play gap-filling roles in the absence of a more overarching instrument (ie, the CRA).

The legal status of the Labour and Trafficking Acts in Nigeria

The Constitution is the central legislation that clarifies law-making competences in Nigeria. The Constitution indicates the "what" (issues) and "who" (relevant Parliament, whether federal or state) is competent to legislate on specific matters. As pointed out above, the Constitution generally excludes child-related issues from the exclusive legislative competence of the National Assembly, indicating that state legislatures are the primary law makers in their respective jurisdictions. However, given that the constituent states have no powers to sign or ratify a treaty, even when the subject matter is child-related, the federal government, by virtue of its international standing, is expected to ratify treaties, but must also involve the states in the domestication process.[81] This demonstrates that, under the Constitution, powers to make child-related laws are mainly devolved to the states.[82]

80 See the Constitution, sec 4(1) and (2).

81 Id, sec 12.

82 As already pointed out. The exclusive powers of the federal legislature in child-related matters are limited to the Federal Capital Territory, in Abuja.

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Unlike child-centred issues, however, the Constitution explicitly grants the federal legislature powers to enact labour-related statutes. In this regard, the second schedule to the Constitution clearly includes "labour" in the exclusive legislative list. This confers wide legislative powers on the National Assembly to make labour-related laws for every part of the federation. It should however be pointed out that the Constitution makes no distinction between child work and labour in general (ie, adult labour); the second schedule merely describes the National Assembly's powers to cover "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".[83] Thus, the Labour Act is a statute of the federal Parliament and applies nationally. As a result, questions of state re-enactment do not arise. Also, as regards the Trafficking Act, although the exclusive legislative list makes no express mention of "trafficking", the statute was enacted by the National Assembly and also applies nationally.[84]

However, the more pertinent question is whether the federal legislature may legally enact child-related laws (in the Labour and Trafficking Acts) for the whole federation. In general, it must be acknowledged that the subject matter of each statute overlaps somewhat, in that it cuts across issues related to both children and adults, such that a neat separation of legislative powers between federal and state legislatures may be difficult to accomplish. With regard to the Labour Act for instance, it may be argued that powers to make labour laws for adults would implicitly include powers to determine the age of entry into the work force. Thus, if the federal legislature adopts age 16 as the relevant admission age for employment, this clearly touches upon questions of childhood and will automatically drag Parliament into child labour issues. The same argument also goes for the Trafficking Act: purely adult-centric legislation may be difficult to formulate. As already demonstrated, however, beyond the areas of intersection (ie, provisions that apply to both children and adults alike), the Labour and Trafficking Acts also contain some more specific regulation of children's work, as well as prohibition of child trafficking, which may validly raise the question of legislative competence. So far, states have however been silent and no objection has been raised on the issue of legality. This generally reveals that states, especially those yet to re-enact the CRA, are not particularly opposed to child labour or child trafficking regulation; instead their objections to the CRA are inspired by other factors.[85] It is worth noting that, even though some northern states are

83 The Constitution, second sched, item 34.

84 Generally, as trafficking is contained in neither the exclusive nor concurrent legislative list, states must be duly consulted and involved in the enactment of relevant legislation, in accordance with the Constitution, sec 12. It is however not clear if this process was duly followed in adopting this statute.

85 The main grounds for objection are highlighted above, including prohibition of child marriage, prohibition of marriage to members of an adoptive family, prohibition of skin marks and tattoos, as well as prohibition of child labour, especially begging.

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reluctant to accept the prohibition against child begging in the CRA, this is not their primary reason for rejecting the statute. Nonetheless, it may be argued that the exclusion of child begging from the scope of prohibition in the Labour and Trafficking Acts also contributed to their wide acceptance across Nigeria, especially in the north. Overall, it must still be acknowledged that the inclusion of child-related provisions in these federal laws can be legally challenged in the courts (even though any such suit is yet to be instituted), as they fall outside the exclusive law making powers of the federal Parliament.

Relevance of the Labour and Trafficking Acts in the protection of children's rights

As indicated above, some 11 of Nigeria's 36 states are yet to re-enact the CRA. Failure to re-enact this statute should ordinarily create a complete legal vacuum and consequently a margin for exploitation in the states. However, the nationwide application of the Labour and Trafficking Acts suggests that legislation provides some protection for children. These statutes are highly relevant and may usefully address some important themes, especially regarding child labour and child trafficking. Thus, even though these issues represent only one aspect of the broader children's rights framework, their effective implementation may offer considerable protection to children. In a sense therefore, the Labour and Trafficking Acts are essential gap-fillers in the absence of more overarching legislation (ie, the CRA).

Despite their relevance, however, it is important to state that these avenues (ie, protection through the Labour and Trafficking Acts) are generally narrow and limited; they only address one aspect of the range of exploitation that children experience. The legislation lacks the comprehensive force that child protection demands. Apart from this, it is a well-established legal principle that human rights obligations include both positive and negative duties. To a large extent, however, the Labour and Trafficking Acts tend to focus mainly on negative obligations, thus ignoring the more positive ones. The alternative measures do not address questions of rights that must be accorded to children. Thus, there is need for more comprehensive legislation that recognizes the rights of children, including the rights to freedom from discrimination, dignity, education and freedom of movement. Generally, in the absence of more comprehensive provisions in the Labour and Trafficking Acts, as well as failure to re-enact the CRA, it should be noted that the fundamental rights contained in the Constitution may still be invoked to protect children, even though these are not child-specific provisions. In this regard, chapter IV of the Constitution contains a range of rights, including the rights to life, freedom from discrimination and dignity of human persons. However, some provisions, such as the right to education, are not contained in chapter IV. Instead, education is classified as one of the fundamental objectives and directive principles of state policy (in chapter II), which are non-justiciable rights. This reemphasizes the need for the CRA to be adopted nationally, as many of the relevant rights are legally guaranteed in the statute. Thus, the alternative

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measures considered in this article may not sufficiently address other important aspects of children's rights discourse.

It is therefore recommended that the CRA be re-enacted nationally, as it contains a broader range of protection. It serves little purpose for protection from child labour or trafficking to be guaranteed while exploitation is experienced in other areas. The indivisibility of rights must also be emphasized. Thus, it is recommended that the Constitution be amended to prioritize child-related issues by including them in the concurrent legislative list.[86] This may be a rather tedious but worthwhile process,[87] as including such issues in the concurrent, rather than the exclusive, list would allow both states and the national government to exercise legislative powers on child-related matters jointly.[88] With regard to matters on the concurrent list, even though the national and state assemblies have joint legislative powers, states may not adopt laws that conflict with the federal law.[89] This is generally consistent with the constitutional doctrine of "covering the field", which was reaffirmed by the Nigerian Supreme Court in *Fawehinmi v Babangida*.[90] Thus, states would be legally obliged to adopt laws that conform with the national standard, as opposed to the current practice where inconsistent standards are adopted in some states. At the moment, however, this principle cannot be invoked, as the National Assembly is not legally empowered to legislate on childhood matters for the whole of the federation. Amending the Constitution in the manner suggested in this article would have the power to rectify the current defects.

CONCLUSION

This article has presented the challenges of effectively domesticating children's rights treaties in Nigeria. It has demonstrated that, although Nigeria subscribes to the dualist variant of treaty incorporation, mere enactment by

86 A similar recommendation was also made by the UN CRC Committee in its concluding observation on Nigeria; see above at note 52, para 8.

87 The Constitution, sec 9 specifies the step-by-step process of constitutional amendment in Nigeria. The relevant part is: "(1) The National Assembly may, subject to the provision of this section, alter any of the provisions of this Constitution; (2) An Act of the National Assembly for the alteration of this Constitution, not being an Act to which section 8 of this Constitution applies, shall not be passed in either House of the National Assembly unless the proposal is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States."

88 Issues of child protection can be better realized when powers are jointly shared by states and the federal government, not exercised by the federal government alone.

89 In this regard, the Constitution, sec 4(5) provides: "If any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other Law shall, to the extent of the inconsistency, be void."

90 (2003) 12 WRN 1 SC.

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the federal Parliament may not necessarily translate into nationwide applicability. In this regard, it was revealed that the CRA, which mainly domesticates the CRC, has been fraught with many challenges. The constitutional requirement that states must be involved in the domestication of certain treaties implies that state assemblies must participate in the domestication of child-related instruments, as issues of this nature are not included in the exclusive legislative list. However, Nigeria's pluralistic nature would make state consent difficult to achieve. Thus, although the CRA was passed in 2003, 15 years later the statute is yet to gain widespread acceptance across Nigeria. Some states have found fault with the statute based on some of its content, including the prohibitions against child marriage, marriage to members of an adoptive family, skin marks and tattoos, and certain aspects of child labour. These issues are thought to conflict with prevailing socio-religious values in the relevant states. While this should potentially create a complete legal gap, especially in the non-enacting states, it was however found that certain national instruments (the Labour and the Trafficking Acts) may fulfil some gap-filling roles, especially in areas of child labour and child trafficking. However, for greater effectiveness, and to ensure better protection for the growing number of children, it was recommended that child-related issues be included in the concurrent legislative list, as opposed to the current practice where states enjoy a stronger mandate on child issues. By including the matter in the concurrent list, both the federal and state legislative bodies would exercise joint legislative powers, although, in accordance with the constitutional provision,[91] state laws must always be consistent with the federal enactment. This way, the CRA can be legally enforceable throughout the federation.

91 The Constitution, sec 4(5).

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