

## Discipline in Nigerian schools within a human rights framework

Susanna Coetzee\*

Senior lecturer, Department of Teacher Education, University of South Africa

### Summary

*Educators are agents of change and they have a mandate to change schools and classrooms into places where human rights are respected and taken into consideration when discretionary powers are exercised. Nigerian educators have a mandate to observe and promote human rights, not only because such rights are guaranteed in the Nigerian Constitution as the supreme law of the country, but also because the Nigerian government has committed itself to upholding human rights by ratifying and domesticating various international and regional human rights instruments. In this article the author argues for the suitability of a positive discipline approach as a way in which educators could fulfil their mandate to observe and foster children's rights. The author identifies human rights (with specific emphasis on children's rights) as found in international and regional human rights instruments as well as in domestic law that Nigerian educators must observe when establishing a disciplined classroom. Factors which hamper the implementation of human rights instruments such as the misinterpretation of the Constitution in the domestication of treaties and the respective legislative powers of the federal and state legislatures, the conflict between customary law and statutory law, the rejection of the supremacy of the Constitution by some religious groups, and the rejection of human rights instruments on the grounds of cultural and religious practices and customs, for example the traditional view of children as lesser beings and the view that corporal punishment is in the best interests of the child, are identified.*

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\* BA Ed (RAU), BEd MEd (Potchefstroom), DEd LLB (UNISA); Coetzsa1@unisa.ac.za

## 1 Introduction

In 2007, the University of South Africa (UNISA) was approached by a delegation to establish collaboration between UNISA and independent schools in Nigeria. This resulted in annual education management workshops being held. My choice of topic was prompted by the people who attended these workshops. They indicated that they felt disempowered by the new human rights culture in Nigeria. Some of the attendees indicated that they were unable to create disciplined schools and classrooms because the learners now had constitutional rights that left principals and educators powerless. It also became apparent that very few of the attendees knew anything about human rights instruments or were mindful of children's rights when managing learner misbehaviour.

In this article, I contend that it is not a human rights culture that leaves the educators feeling helpless, but a lack of knowledge and skills to create a disciplined school or classroom within a human rights framework. This could be attributed to the fact that, in the past, discipline was equated with punishment; the emphasis was on the educator's position of authority and his or her rights, while children were seen as lesser beings.<sup>1</sup> Corporal punishment was viewed as the only effective means of punishment. Educators were in total and unquestionable control. Human rights, instead, put the child on an equal footing with the adult; not equal in authority but equal as humans with equal dignity and equally worthy of respect. Educators' feelings of disempowerment may be ascribed to a flawed and restricted understanding of what human rights mean and of the reciprocal basis of rights.<sup>2</sup> Educators mistakenly equate the recognition of children's rights with the surrendering of control.

It is important for educators to realise that they remain in control but that their control should be exercised within a human rights framework. One way of doing this is to follow a positive discipline approach. Education, and in particular the management of discipline in schools and classrooms, provides an opportunity for turning theoretical commitment to children's rights into reality. In fact, the Global Initiative to End All Corporal Punishment of Children proposes that the African Commission on Human and Peoples' Rights (African Commission) advises states to support the prohibition on corporal punishment

<sup>1</sup> P Newell 'Legal framework to end all violence against children' speech delivered at the Council of Europe Launch of Platform for Children's Rights, Strasbourg 2 June 2009 <http://www.crin.org/resources/infoDetail.asp?ID=20444> (accessed 15 March 2010).

<sup>2</sup> C Carter & A Osler 'Human rights, identities and conflict management: A study of school culture as experienced through classroom relationships' (2000) 30 *Cambridge Journal of Education* 350; UNICEF *A human right-based approach to education for all* (2007) 22-25 <http://unesdoc.unesco.org/images/0015/001548/154861e.pdf> (accessed 19 March 2010).

through professional training in positive and non-violent forms of discipline.<sup>3</sup>

## 2 Conceptualisation of positive discipline

The first objective of this article is to explain what positive discipline entails. This is done by emphasising the principles underlying a positive discipline approach. From these principles it is evident that a positive discipline approach is an approach well suited to observing and fostering children's rights.

Positive discipline is not a soft approach to discipline, but an approach whereby everyone takes responsibility for his or her actions.<sup>4</sup> In a positive discipline approach it is believed that children learn more through co-operation and rewards than through conflict and punishment.<sup>5</sup> Nelsen calls it 'effective discipline that teaches', and Adler and Dreikurs, often referred to as the fathers of positive discipline, referred to it as a 'kind and firm approach to teaching' which is 'democratic'.<sup>6</sup>

A literature review reveals several interrelated principles on which a positive discipline approach is based.<sup>7</sup> Positive discipline is, first and foremost, based on the notion that discipline should be grounded in human rights. The learner should be respected as a person in his or her own right. In a positive discipline approach, behaviour management is, *inter alia*, used to promote equity, human dignity and tolerance and to prevent discrimination. Positive discipline commands that the empha-

<sup>3</sup> P Newell 'Briefing from global initiative to end all corporal punishment of children' (2006) <http://www.endcorporalpunishment.org/pages/pdfs/briefings/African%20Commission%20briefing%20Nov%202006.pdf> (accessed 10 February 2010).

<sup>4</sup> A Knott-Craig 'Positive about discipline' (2007) <http://capetown.quaker.org/posdispubs.htm> (accessed 12 June 2007).

<sup>5</sup> Save the Children Sweden 'UN study on the violence against children: Ending physical and humiliating punishment of children. Making it happen' Part 1 (2005) 17.

<sup>6</sup> Positive Discipline Association 'What is positive discipline?' (2009) <http://www.positivediscipline.com/what-is-positive-discipline.html> (accessed 27 July 2010).

<sup>7</sup> Because these principles are repeated in the referenced sources and are interrelated, the author opted to include them in one reference. See Save the Children Sweden (n 5 above) 17; K Harper *et al* *Ending physical and humiliating punishment of children: Manual for action* (2005); UNESCO *Embracing diversity: Toolkit for creating inclusive, learning-friendly environments. Specialised Booklet 1: Positive discipline in the inclusive, learning-friendly classroom. A guide for teachers and teacher educators* (2006) <http://www2.unescobkk.org/elib/publications/086/> (accessed 16 July 2010); DE Lee 'Cheating in the classroom: Beyond policing' (2009) 1 *The Clearing House* 173 <http://www.highbeam.com/doc/1G1-195083341.html> (accessed 20 August 2009); G Pienaar 'A different approach to classroom discipline problems' (2003) 68 *Koers* 469; M Siers 'RAPCAN's positive discipline programme in schools: An overview' (2007) 3 *Article 19* 3; MC Yaroson & CE Zaria 'Strategies for curbing indiscipline in Nigerian secondary schools' paper delivered at national workshop on developing education: Issues of standard and sustainability in secondary schools in Nigeria 9-11 August 2004; R Rubin 'Building a comprehensive discipline system and strengthening school climate' (2004) 13 *Reclaiming Children and Youth* 168.

sis be placed on treating everyone fairly rather than treating everyone in the same fashion.

Secondly, positive discipline requires educators to lose the 'them-and-us mindset'. This requires that they uphold the principle of mutual respect. A positive discipline approach can only be implemented successfully by an educator with self-respect. An educator who has to shout and threaten learners to establish or maintain a disciplined classroom will struggle to get the learners to respect him or her.

Thirdly, good relationships should be maintained. This means that the educator needs to take an interest in every child in his or her class. The educator should be kind but firm. An educator in promoting good relationships should, fourthly, emphasise participation and co-operation. Educators should invite co-operation rather than demand it. Fifthly, communication and negotiation are needed in order to establish good relationships and to encourage participation and co-operation. Educators should keep open the channels for communication and negotiation. The emphasis is on two-way communication, thereby moving away from the practice where the educator speaks his or her mind and the learner is expected to keep quiet.

Sixthly, learners' self-esteem should be preserved. Unacceptable behaviour should be criticised and defined as wrong, not the person. According to the Dreiker model for discipline, this will allow educators to retain respect for the wrongdoer while addressing the unacceptable behaviour. Educators should see the person beyond the fault and not reduce a learner to his or her perceived faults. This principle also requires that an attempt be made to identify the reason behind the misbehaviour rather than attempting to merely change unacceptable behaviour.

Seventhly, discipline is not aimed at suppressing undesirable behaviour in the short term, but at building responsibility and self-discipline. According to the *Reader's Digest complete word finder*, self-discipline means that a person has the ability to apply and control him- or herself. A learner has self-discipline when he or she does not act on his or her desires or emotions. A learner will behave because he or she believes that it is the correct thing to do and not simply because he or she is forced to do so.

Eighthly, acceptable behaviour is modelled; unacceptable behaviour given as little attention as possible. This does not mean that children should be praised, but rather that they be encouraged to do better. If a child is praised, he or she may become dependent on the praise of others to determine his or her self-worth. The emphasis should once again be on the deed and not the doer. For example, emphasis will be placed on the fact that the learner worked hard and did well and not on the symbol ('A') the learner obtained.

Ninthly, limits and rules are clearly spelt out, framed in a positive manner and consistently enforced. Sanctions should be non-violent and in proportion to the transgression. In line with the principle

of communication and negotiation, rule making is a shared and negotiated process. Discipline should be prospective rather than retrospective. Thus, the emphasis should be on prevention rather than on punishment.

### 3 A human rights framework for positive discipline

As stated above, a positive discipline approach is grounded in a human rights framework.<sup>8</sup> The second objective of this article is to identify those children's rights as found in the human rights instruments that Nigerian principals and educators could promote in following a positive discipline approach.

In article 11(2)(b) of the African Charter on the Rights and Welfare of the Child (African Children's Charter) it is stated that education should be directed towards the fostering of respect

for human rights and fundamental freedoms with particular reference to those set out in the provisions of various African instruments on human and peoples' rights and international human rights declarations and conventions.

Educators thus have the mandate to foster respect for human rights and freedoms, but also to make learners aware of their responsibilities in this regard. The New Partnership for Africa's Development (NEPAD) emphasises in its Democracy and Political Governance Initiatives the importance of heightening public awareness of the African Charter on Human and Peoples' Rights (African Charter) in education institutions.<sup>9</sup> One way to place the emphasis on human rights is to bring them to life in the way in which the educator establishes a disciplined classroom and the manner in which he or she manages learners' misbehaviour.

Emphasis is placed on those human rights instruments that affect discipline in schools and that Nigeria has ratified. Firstly, the international human rights instruments are considered.

#### 3.1 International human rights instruments

International human rights instruments include the International Bill of Human Rights, the United Nations (UN) Convention on the Rights of the Child (CRC) and the United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT).

<sup>8</sup> End All Corporal Punishment 'Interview with the author: Joan E Durrant' <http://www.endcorporalpunishment.org/pages/pdfs/PositiveDisciplineManual-Interview.pdf> (accessed 28 July 2010).

<sup>9</sup> R Murray *Human rights in Africa: From the OAU to the African Union* (2004) 38-39.

### 3.1.1 International Bill of Human Rights

The International Bill of Human Rights consists of the UN Charter, the Universal Declaration of Human Rights (Universal Declaration), the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Cultural Rights (ICESCR).<sup>10</sup>

Because the Universal Declaration is not a treaty, it is often argued that it has no force in law; however, there are also opposing arguments.<sup>11</sup> The author agrees with proponents who regard the Universal Declaration as binding under customary international law. According to this theory, some of the provisions of the Universal Declaration, such as the protection against cruel, inhuman or degrading treatment or punishment, have become customary international law. In common law countries such as Nigeria, customary international law applies automatically and need not be enacted into national law.<sup>12</sup>

Nigeria's intent to commit to the Universal Declaration is evident from the fact that it has ratified legally-binding treaties that give expression to the provisions of the Universal Declaration, including the two international covenants and various UN conventions such as CRC and CAT. Nigeria also recognises its obligations under the Universal Declaration in its policies. In its National Action Plan, the Universal Declaration is included in the list of international human rights instruments that guide Nigeria's international obligations.<sup>13</sup>

Articles 1, 2 and 5 of the Universal Declaration support a positive discipline approach. Article 1 reads: 'All human beings are born free and equal in dignity and rights.'<sup>14</sup> An approach which views adults as being in a stronger position to have their rights protected is invalidated by this provision. Article 2 further places children on an equal footing with adults with regard to the right to claim protection of their human rights. This article reads: 'Everyone is entitled to all rights and freedoms set forth in this Declaration, without distinction of any kind,

<sup>10</sup> T Buergenthal *et al* *International human rights in a nutshell* (2004) 34. Nigeria ratified the Covenants in 1993; [http://www.bayefsky.com/pdf/ccpr\\_ratif\\_table.pdf](http://www.bayefsky.com/pdf/ccpr_ratif_table.pdf) (accessed 16 February 2010).

<sup>11</sup> Buergenthal *et al* (n 10 above) 41-43. A discussion of these arguments falls outside the scope of this article. Please see the referenced source for an explanation of these arguments.

<sup>12</sup> See fn 35 in N O'Neal 'Corporal punishment in schools: A call for legal reform' (2008) 8 *African Human Rights Law Journal* 66 for references to proponents of this theory; E Egede 'Bringing human rights home: An examination of the domestication of human rights treaties in Nigeria' (2007) 51 *Journal of African Law* 276. Also see Buergenthal *et al* (n 10 above) 42.

<sup>13</sup> Federal Republic of Nigeria *National Action Plan for the promotion and protection of human rights in Nigeria: 2009-2013* (2006) 18 92 [http://www2.ohchr.org/english/issues/plan\\_actions/index.htm](http://www2.ohchr.org/english/issues/plan_actions/index.htm) (accessed 27 July 2010) (National Action Plan).

<sup>14</sup> Art 1 Universal Declaration of Human Rights, GA Res 217 (III) UN Doc A/810 (10 December 1948).

such as ... or other status ...'<sup>15</sup> 'Other status' could, of course, include age. Article 5 of the Universal Declaration provides protection against torture and cruel, inhuman or degrading treatment or punishment (such as corporal punishment).<sup>16</sup> As already stated, administering corporal punishment and protecting a person's dignity are mutually exclusive. Cruel, degrading and inhuman treatment and punishment are also incompatible with a positive discipline approach. This right is also guaranteed in article 7 of ICCPR. In its interpretation of this article, the UN Human Rights Committee emphasises that the protection guaranteed under article 7 includes protection of children in teaching institutions against corporal punishment.<sup>17</sup>

ICCPR gives expression to the Universal Declaration's recognition of the child as a person with rights. These rights are built on and strengthened by CRC.

### 3.1.2 United Nations Convention on the Rights of the Child

CRC<sup>18</sup> enables children to claim their human rights alongside adults because it gives recognition to the autonomy of the child. Thus, the child is seen as a person in his or her own right and not as a possession of his or her parents or the state. CRC emphasises that children are holders of rights just like adults. The child is recognised as a legal subject rather than a legal object.<sup>19</sup>

Van Bueren indicates the effect CRC has had on school discipline. Prior to CRC, parties could only challenge punishment measures if they were grave enough to be classified as torture or cruel, inhuman and degrading punishment. Article 28 of CRC, which deals with children's rights to education, specifically mentions state parties' obligation to 'take all appropriate measures to ensure that school discipline is administered in a manner consistent with the child's human dignity and in conformity with the present Convention'.<sup>20</sup> This means that punishment must, *inter alia*, give recognition to article 19, CRC's

<sup>15</sup> Art 2 Universal Declaration.

<sup>16</sup> Art 5 Universal Declaration.

<sup>17</sup> Human Rights Committee General Comment 20 UN Doc HRI/GEN/1/Rev 1 30 (1994) <http://www1.umn.edu/humanrts/gencomm/hrcom20.htm> (accessed 17 February 2010). International Covenant on Civil and Political Rights GA Res 2200A (XXI), UN Doc A/6316 (16 December 1966) art 7. Also see O'Neal (n 12 above) for references to proponents of this theory.

<sup>18</sup> United Nations Convention on the Rights of the Child, 28 *International Legal Materials* 1448, 1577 UNTS 3 (20 November 1989). Nigeria ratified CRC in 1991.

<sup>19</sup> Carter & Osler (n 2 above) 336.

<sup>20</sup> G van Bueren 'Autonomy and the child: The international educational rights of the child' (1992) 56 *Social Education* 215.

central article on child protection. Article 19 guarantees a child's right to be protected from<sup>21</sup>

all forms of physical or mental violence, injury or abuse, neglect or negligent treatment, maltreatment or exploitation, including sexual abuse, while in the care of parent(s), legal guardian(s) or any other person who has the care of the child.

Article 19 can be interpreted as guaranteeing children protection while in the care of educators because an educator could be regarded as 'any other person who has care of the child'. A positive discipline approach is that discipline approach most likely to ensure that the child's rights are upheld.

In its General Comment 8, the Committee on the Rights of the Child (CRC Committee), referring to article 28 of CRC, emphasises that this provision prohibits any legalised action that permits violence, such as the use of corporal punishment or any other form of physical or mental violence or punishment that is cruel, inhuman and degrading.<sup>22</sup> This prohibition includes any legislation that allows for violent punishment even where it is described as 'reasonable chastisement' or 'moderate correction'.<sup>23</sup> A positive discipline approach is a non-violence approach.

Article 3 of CRC provides that a child's best interests must be a primary concern when decisions are made that may affect him or her.<sup>24</sup> This is one of the guiding principles of CRC. When a decision is made concerning a child, consideration should be given to the effect the decision will have on the child.<sup>25</sup> A positive discipline approach is an approach well suited to discipline and gives recognition to the best interests of the child.

Another article that affects discipline is article 12, which reads:<sup>26</sup>

State parties shall assure to the child who is capable of forming his or her views the right to express those views freely in all matters affecting the child, the views of the child being given due weight in accordance with the age and maturity of the child.

<sup>21</sup> Art 19 CRC. Also see Van Bueren (n 20 above) 215; S Bennett *et al* 'The need for a General Comment for article 19 of the UN Convention on the Rights of the Child toward enlightenment and progress of child protection' (2009) 33 *Child Abuse and Neglect* 783-790.

<sup>22</sup> CRC Committee General Comment 8 UN Doc CRC/C/GC/8 (2006).

<sup>23</sup> Report of the Committee on the Rights of the Child to the General Assembly 64th session UN Doc A/63/41 (2008) 24; EEO Alemika *et al* 'Rights of the Child in Nigeria: Report on the implementation of the Convention on the Rights of the Child prepared for 38th session of the Committee on the Rights of the Child' January 2005 (2004) 15.

<sup>24</sup> Art 3 CRC.

<sup>25</sup> UNICEF 'The Convention on the Rights of the Child. Guiding principles: General requirements for all rights' [http://www.unicef.org/crc/files/Guideing\\_Principles.pdf](http://www.unicef.org/crc/files/Guideing_Principles.pdf) (accessed 18 February 2010).

<sup>26</sup> Art 12 CRC.

This right further provides that a child be given an opportunity to be heard in administrative proceedings that will affect the child. Disciplinary proceedings are administrative proceedings and a child should therefore be given an opportunity to be heard in disciplinary proceedings. The United Nations Children's Fund (UNICEF) emphasises that this right should not be interpreted to mean that children are now given authority over adults, but rather as a right intended to encourage adults to listen to children's opinions and to involve them in decision making.<sup>27</sup> The principles of positive discipline which place the emphasis on negotiation and communication allow for the protection of the learner's right to be heard in administrative proceedings that will affect him or her. This right is also referred to as the child's right to participate, the right to be heard or the right to be consulted.<sup>28</sup> According to Lundy, these descriptions provide very limited interpretations of this right. Her model for interpreting article 12 concentrates on four elements of the provision, namely, *space*, which refers to children being given the opportunity to express their views; *voice*, which refers to children being facilitated to express their views; *audience*, referring to children's views being listened to; and *influence*, referring to children's views being acted upon where appropriate.<sup>29</sup>

The positive discipline approach allows for the implementation of these elements in various ways. A positive, rights-based discipline approach allows for the implementation of the element of *space* because it requires educators to establish an environment conducive to learners' expressing their views without fear of retaliation or reprimand.<sup>30</sup> If educators regard learners as equal human beings and do not foster the attitude that 'children must be seen and not heard', learners will feel at liberty to express their views.

The element of *voice* is promoted by a positive discipline approach because it requires educators to create an environment conducive to two-way communication.<sup>31</sup> Educators should give learners a voice and encourage them to express their opinions. This could be done by making them part of the process of adopting school or classroom rules and by giving them the opportunity to defend themselves in disciplinary proceedings. More often than not, learners will complain that when they try to explain themselves to an educator, they are scolded. This is because, traditionally, any response from a learner is regarded as an

<sup>27</sup> UNICEF 'The Convention on the Rights of the Child. Survival and development rights: The basic rights to life, survival and development of one's full potential' [http://www.unicef.org/crc/files/Survival\\_Development.pdf](http://www.unicef.org/crc/files/Survival_Development.pdf) (accessed 18 February 2010).

<sup>28</sup> L Lundy "'Voice" is not enough: Conceptualising article 12 of the United Nations Convention on the Rights of the Child' (2007) 33 *British Educational Research Journal* 930.

<sup>29</sup> Lundy (n 28 above) 933.

<sup>30</sup> Lundy (n 28 above) 934.

<sup>31</sup> Lundy (n 28 above) 935.

attempt to challenge the educator's authority and a sign of disrespect towards adults. Sometimes learners may need help from others to form or express a view. As already mentioned, the right to representation in administrative matters is expressly provided for in article 12(2) of CRC and this right should be guaranteed in all disciplinary proceedings.

A positive discipline approach requires that good relationships be maintained and that communication and negotiation channels be kept open. This will allow educators to give effect to the learners' views and to really listen to learners and thus promote the implementation of the element of *audience*.<sup>32</sup>

To give due weight to learners' views implies that their views will have an impact, thus allowing the implementation of the element of *influence*. Educators should ensure that learners' views are considered because merely humouring learners with tokenistic or decorative participation would amount to a breach of article 12 of CRC. To illustrate to learners that their input is considered, the educator should not only allow learners input on which rules should be included in the classroom rules, but also start the rules with 'We agreed on the following classroom rules'.<sup>33</sup>

A positive discipline approach with the emphasis on human rights, mutual respect and healthy relationships will endorse the goals of education as set out in article 29 of CRC. Education should, *inter alia*, encourage children to respect others, their human rights and their own and other cultures.<sup>34</sup> In its first General Comment, the CRC Committee emphasised that corporal punishment is incompatible with the aims of education as set out in article 29(1). It stressed that education should be provided in a manner that respects the inherent human dignity of the child and that children should be involved in disciplinary proceedings.<sup>35</sup> Both these principles are grounding principles of a positive discipline approach.

Article 24(3) obliges state parties to take all appropriate measures to abolish traditional practices that are prejudicial to the health of children.<sup>36</sup> It is clear that CRC intends the substantive rights guaranteed under it to supersede harmful cultural practices. Kaime argues that some cultural practices, such as son-preference, endanger healthy relationships.<sup>37</sup> Educators can uphold this right by not using corporal punishment to differentiate between girls and boys in disciplinary practices and by regarding children as persons in their own right.

<sup>32</sup> Lundy (n 28 above) 936.

<sup>33</sup> Lundy (n 28 above) 937 938; Positive Discipline Association (n 6 above).

<sup>34</sup> UNICEF (n 27 above).

<sup>35</sup> CRC Committee General Comment 1 UN Doc CRC/GC/2001/1 (2001).

<sup>36</sup> Art 24(3) CRC.

<sup>37</sup> T Kaime 'The Convention on the Rights of the Child and the cultural legitimacy of children's rights in Africa: Some reflections' (2005) 5 *African Human Rights Law Journal* 227.

Another convention which is served well by a positive discipline approach is the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), discussed below.

### 3.1.3 The United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment

If one considers the definition of 'torture' in CAT,<sup>38</sup> it becomes evident that corporal punishment could constitute torture.<sup>39</sup> 'Torture' is defined as<sup>40</sup>

[a]ny act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as ... punishing him for an act he or a third person has committed, or intimidating or coercing him or a third person ... when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity.

Although the author agrees with O'Neal that corporal punishment may not reach the level of severity necessary to constitute torture, Nigerian news reports and the case of *Ekeogu v Aliri* present evidence to the contrary.<sup>41</sup> The *Daily Trust* refers to the wife of the Katsina State Governor, Hajiya Fatima Shema's critique of the severity of corporal punishment used in schools in instances where the offences have not justified corporal punishment as a sanction in the first place. She refers to a case of a girl whose eye was damaged by an educator and to a case where a learner ended up in a coma after being brutally beaten.<sup>42</sup> Chianu refers to an incident reported in the *Sunday Tribune* in February 1997, where a learner who failed to submit an assignment was so severely beaten on his head, arms and legs that he died of his injuries. He also refers to an incident reported on in the *National Concord* in March 1998 where a learner was literally flogged to death by his educator. This beating took place in the heat of the day and the educator continued until the boy collapsed.

In *Ekeogu v Aliri*, the court found an educator innocent after he had whipped learners indiscriminately when entering his classroom for being late and a learner lost her eye as a result. This educator was not charged or arrested. The child then brought a civil case which she lost. It is clear that the court did not consider the rights of the child at all

<sup>38</sup> Nigeria ratified CAT in 2001.

<sup>39</sup> See O'Neal (n 12 above) 68.

<sup>40</sup> Art 1 United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, GA Res 39/46, 39 UN GAOR Supp (No 16) (1984).

<sup>41</sup> See O'Neal (n 12 above) 68; E Chianu 'Two deaths, one blind eye, one imprisonment: Child abuse in the guise of corporal punishment in Nigerian schools' (2000) 24 *Child abuse and neglect* 1005–1009; *Ekeogu v Aliri* (1991) 3 NWLR (Pt 179).

<sup>42</sup> NAN 'Gov's wife faults corporal punishment in schools' *Daily Trust* 7 May 2009 <http://allafrica.com/stories/200905070909.html> (accessed 24 July 2010).

when it held that the incident was an accident.<sup>43</sup> The court explained educators' public duty to discipline learners in terms of the *in loco parentis* principle and referred to section 295(1) of the Criminal Code and section 55 of the Penal Code to explain an educator's authority to inflict corporal punishment.<sup>44</sup> The statutory provisions the court relied on are also in conflict with CRC 9 (article 19) and ICCPR (article 7).<sup>45</sup> From the facts of the case, it is evident that the educator did not exercise his authority to discipline with compassion. It was the educator himself who sent the learners out of the class to watch how community members beat a thief. He told the learners to take note of what happens to a thief, thereby indicating that to assault somebody else and take the law into your own hands were acceptable. Then, when the bell rang and the learners returned to the classroom, they were beaten indiscriminately. Although the decision was overturned on appeal, the court *a quo's* decision illustrates how traditional views can impede children's rights.

The Committee against Torture, the UN Human Rights Committee, the World Organisation against Torture (OMCT) and the Centre for Law Enforcement Education (CLEEN) have expressed the view that corporal punishment could indeed amount to torture. The Inter-American Court of Human Rights confirmed this in *Caesar v Trinidad and Tobago*. The Court expressed this as follows:<sup>46</sup>

As such, corporal punishment by flogging constitutes a form of torture and, therefore, is a violation *per se* of the right of any person submitted to such punishment to have his physical, mental and moral integrity respected, as provided in article 5(1) and 5(2), in connection with article 1(1) of the Convention.

To prevent Nigerian children from being subjected to similar abuse in future educators could adopt a positive discipline approach which is, as stated above, a non-violence, rights-based approach where the child is seen as an autonomous human being with the right to be treated with dignity and respect.

<sup>43</sup> Chianu (n 41 above) 1005–1009; D Akhilomen 'Addressing child abuse in Southern Nigeria: The role of the church' (2006) 12 *Studies in World Christianity* 239.

<sup>44</sup> Chianu (n 41 above) 1006.

<sup>45</sup> Chianu (n 41 above) 1007.

<sup>46</sup> UN Human Rights Committee Res 1998/38, ESCOR Supp (No 3) UN Doc E/CN.4/1998/38 (1998) 134; Alemika *et al* (n 23 above) compiled the report on *Rights of the child in Nigeria* for the 38th session held in Geneva in January 2005 under the auspices of CLEEN and the OMCT. CLEEN is a non-governmental organisation with the mission of 'promoting public safety, security and accessible justice through the strategies of empirical research, legislative advocacy, demonstration programmes and publications, in partnership with government and civil society See <http://www.cleen.org/about.html>. OMCT is an 'international coalition of NGOs fighting against torture, summary executions, forced disappearances and all other forms of cruel, inhuman or degrading treatment'. See <http://www.omct.org/>. Inter-American Court of Human Rights *Caesar v Trinidad & Tobago* para 73 [http://www.corteidh.or.cr/docs/casos/articulos/seriec\\_123\\_ing.pdf](http://www.corteidh.or.cr/docs/casos/articulos/seriec_123_ing.pdf) (accessed 27 July 2010).

Next regional human rights instruments which may be endorsed by positive discipline are discussed.

## 3.2 Regional human rights instruments

### 3.2.1 The African Charter on Human and Peoples' Rights

Article 5 of the African Charter guarantees the right to human dignity, recognises every person's (also every child's) legal status and expressly prohibits 'torture, cruel, inhuman or degrading punishment and treatment'.<sup>47</sup> As already mentioned, a positive discipline approach is a non-violence approach that requires the recognition of the autonomy of children and the protection of children's dignity.

Article 18 refers to the obligation of states to protect the rights of women and children as guaranteed in international declarations and conventions.<sup>48</sup> Perhaps the most important for African children is the African Charter on the Rights and Welfare of the Child (African Children's Charter).

### 3.2.2 The African Charter on the Rights and Welfare of the Child

The African Children's Charter reflects an African normative consensus on the rights of children. It not only complements CRC, but attempts to Africanise the children's rights discourse by placing it within the African cultural context.<sup>49</sup> This is evident from paragraph 6 of the Preamble of the African Children's Charter:<sup>50</sup>

Taking into consideration the virtues of their cultural heritage, historical background and the values of the African civilisation which should inspire and characterise their reflection on the concept of the rights and the welfare of the child.

Mezmur refers to the argument that the African Children's Charter actually supports corporal punishment by parents and in schools. The author agrees with Mezmur that such an argument is flawed; firstly, because such proponents usually rely on articles 11(5) and 20(1)(c) of the African Children's Charter and on closer scrutiny it is evident that both these articles require that discipline and punishment should be exercised with humanity and in a manner that conforms to the Children's Charter and gives recognition to the inherent human dignity of the child.<sup>51</sup> Corporal punishment can never be regarded as humane – corporal punishment and the recognition of human dignity, as

<sup>47</sup> Art 5 African Charter.

<sup>48</sup> Art 18 African Charter.

<sup>49</sup> BD Mezmur 'The African Charter on the Rights and Welfare of the Child and corporal punishment: Spare the rod, spare the child' (2006) 2 *Article* 19 8.

<sup>50</sup> African Charter on the Rights and Welfare of the Child, OAU Doc CAB/LEG/24.9/49 (1990).

<sup>51</sup> Mezmur (n 49 above) 9.

required by a positive discipline approach, are mutually exclusive.<sup>52</sup> Secondly, such interpretation of the African Children's Charter is in conflict with the cardinal principles that the best interests of the child must be the primary consideration in all actions concerning the child and the principle that harmful social and cultural practices must be eliminated.

Various other provisions of the African Children's Charter favour a positive discipline approach. Article 3 guarantees the full enjoyment of rights and freedoms without any discrimination.<sup>53</sup> The non-exhaustive list of grounds on which discrimination is prohibited includes, as does the Universal Declaration, 'other status' which, as already stated, could include age. To understand the importance of this for discipline, one should keep the traditional view of the child as a lesser being in mind.

Article 4 contains a similar provision to article 12 of CRC, requiring that a child's best interests should be considered by those undertaking actions concerning the child and that a child be given an opportunity to be heard in administrative proceedings that will affect the child.<sup>54</sup>

The way an educator handles conflict can either promote or counter the promotion of human rights. As already mentioned, article 11(2)(b) places an obligation on member states to direct education so as to foster a respect for human rights. A positive discipline approach requires educators to lead by example and to promote human rights.

Article 11(5) places an obligation on state parties to take measures to ensure that discipline at home or in schools is exercised with humanity, respect for the child's dignity and in conformity with the African Children's Charter.<sup>55</sup>

State parties are obliged to take 'specific legislative, administrative, social and educational measures to protect the child from all forms of torture, inhuman or degrading treatment ...'<sup>56</sup> Since corporal punishment is generally regarded as degrading punishment, administering it may constitute an infringement of article 16. O'Neal rightly argues that schools as representatives of their governments cannot simultaneously protect children from degrading and inhuman treatment and then allow corporal punishment and other degrading disciplinary measures.<sup>57</sup> The African Commission has held in *Doebbler v Sudan* that<sup>58</sup>

[t]here is no right for individuals, and particularly the government of a country, to apply physical violence to individuals for offences. Such a right would be tantamount to sanctioning state-sponsored torture under the Charter and contrary to the very nature of this human rights treaty.

<sup>52</sup> As above.

<sup>53</sup> Art 3 African Children's Charter.

<sup>54</sup> Art 4 African Children's Charter.

<sup>55</sup> Art 11 African Children's Charter.

<sup>56</sup> Art 16 African Children's Charter.

<sup>57</sup> O'Neal (n 12 above) 70.

<sup>58</sup> (2003) AHRLR 153 (ACHPR 2003) para 42; O'Neal (n 12 above) 71.

Reference was made to *Huri-Laws v Nigeria*. In this case, the African Commission stated that<sup>59</sup>

[t]he prohibition of torture, cruel, inhuman, or degrading treatment or punishment is to be interpreted as widely as possible to encompass the widest possible array of physical and mental abuses.

Corporal punishment is regarded as a harmful social practice.<sup>60</sup> Articles 1(3) and 21(1) of the African Children's Charter assert the supremacy of the Children's Charter over any custom, or cultural or religious practices which are inconsistent with the rights guaranteed under it.<sup>61</sup> Article 1(3) reads as follows:

Any custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.

Article 21(1) reads as follows:

State parties to the present Charter shall take all appropriate measures to eliminate harmful social and cultural practices affecting the welfare, dignity, normal growth and development of the child and in particular:

- (a) those customs and practices prejudicial to the health or life of the child; and
- (b) those customs and practices discriminatory to the child on the grounds of sex or other status.

### 3.2.3 African Youth Charter

Nigeria ratified the African Youth Charter in 2009 and since 'youth' is defined as 'every person between the ages of 15 and 35 years', it applies to a portion of the learners and, I might add, even some educators, in schools.<sup>62</sup> Once again one can argue that, as in the case of the African Children's Charter, the African Youth Charter reflects an African

<sup>59</sup> (2000) AHRLR 273 (ACHPR 2000) para 40.

<sup>60</sup> S Waterhouse *et al* 'Ending corporal and other forms of humiliating punishment of children' presentation to the African Committee of Experts on the Rights and Welfare of the Child, 3 November 2008. [http://www.rapcan.org.za/sanchpc/documents/Presentation\\_to\\_the\\_ACERWC.pdf](http://www.rapcan.org.za/sanchpc/documents/Presentation_to_the_ACERWC.pdf) (accessed 28 July 2010).

<sup>61</sup> Kaime (n 37 above) 227.

<sup>62</sup> The African Youth Charter was adopted by the 7th ordinary session of the Assembly held in Banjul, The Gambia on 2 July 2006. The Charter is described as creating 'a legally binding framework for governments to develop supportive policies and programmes for young people ... It also provides a platform for youth to assert their rights and fulfil their responsibility of contributing to the continent's development.' See HSRC 'African Youth Charter' (2006) 4 *HSRC Review* [http://www.hsrc.ac.za/HSRC\\_Review\\_Article-34.phtml](http://www.hsrc.ac.za/HSRC_Review_Article-34.phtml) (accessed 18 March 2010). For more information on the history of the African Youth Charter, see D Mac-Ikemenjima 'Beyond Banjul: It's time to implement the African Youth Charter' (2009) *AfriMAP* <http://www.afriMAP.org/english/images/paper/AfriMAP-AYC-MacIkemenjima-EN.pdf> (accessed 16 July 2010). African Union 'List of countries which have signed, ratified/acceded to the Youth Charter' as on 3 February 2010 <http://www.africa-union.org/root/au/Documents/Treaties/list/Youth%20Charter.pdf> (accessed 18 March 2010). For a definition of 'youth', see the section on definitions in the Youth Charter (2006).

normative consensus on the rights of the youth. It complements CRC and the African Children's Charter and emphasises the African cultural context of youth rights. This is evident from its Preamble, wherein it is stated that the Charter is 'fully attached to the virtues and values of African historical tradition and civilization which form the foundation for our concept of people's rights', and<sup>63</sup>

[the Charter is] reaffirming the need to take appropriate measures to promote and protect the rights and welfare of children as outlined in the Convention of the Rights of the Child (1989) and through the African Charter on the Rights and Welfare of the Child (1999).

Various youth rights included in the African Youth Charter support a positive discipline approach. For example, article 2 contains a similar non-discrimination clause to the African Children's Charter and article 4 guarantees every young person's right to freedom of expression.<sup>64</sup> Once again, if one considers the grounding principles of a positive discipline approach, such an approach is the most suited to ensuring the optimal fulfilment of the objectives set for the education and skills development guaranteed in article 13:<sup>65</sup>

- (b) Fostering respect for human rights and fundamental freedoms as set out in the provisions of the various African human and people's rights and international human rights declarations and conventions;
- (c) Preparing young people for reasonable lives in free societies that promote peace, understanding, tolerance, dialogue, mutual respect and friendship among all nations and across all groupings of people ...

### 3.3 National human rights law and policy

Principal sources of children's rights in Nigerian domestic law and policy include the Constitution, the African Charter on Human and Peoples' Rights (Enforcement and Ratification) Act (CAP 10) of 1990, the Child Rights Act 26 of 2003 and the National Action Plan.<sup>66</sup>

Although in conflict with international and regional human rights instruments, as well as federal law, physical punishment is still administered in Nigerian schools in terms of article 55 of the Penal Code (North) and article 295(4) of the Criminal Code (South).<sup>67</sup>

The Constitution guarantees the right to human dignity. Article 34(1) reads:

<sup>63</sup> Preamble African Youth Charter.

<sup>64</sup> Federal Republic of Nigeria (n 13 above).

<sup>65</sup> Arts 13(3)(b) & (c) African Youth Charter.

<sup>66</sup> Federal Republic of Nigeria (n 13 above)

<sup>67</sup> Although federal law should take precedence, state law still prevails in many states. See the discussion below. Alemika *et al* (n 23 above) 19. Also see Committee on the Rights of the Child 'Analysis of progress reports' (2008) <http://www.Endcorporalpunishment.org/pages/progress/reports/Nigeria.html> (accessed 23 February 2010).

Every individual is entitled to respect for dignity of his person, and accordingly

- (a) no person shall be subject to torture or to inhuman and degrading treatment ...

As mentioned previously, a positive discipline approach lends itself to the promotion of this right as well as the right to personal liberty. Article 35(1) of the Constitution reads:

Every person shall be entitled to his personal liberty and no person shall be deprived of such liberty save in the following cases and according with a procedure permitted by law ...

- ...  
(d) in the case of a person who has not attained the age of eighteen years for the purpose of his education or welfare ...

In *Florence Olusa v Commissioner of Education, Ondo State and Marian Olaniyan*,<sup>68</sup> the learner's case was dismissed on the ground that the educator's action was protected by section 32(1)(d) of the Constitution, 1979 (section 35(1)(d) of the 1999 Constitution). The court argued that this section empowered educators to deprive learners of their personal liberty in accordance with a procedure permitted by law for the purpose of the child's education. However, if one considers the facts of the case, this interpretation does not make sense. The educator invited the learner to her apartment after school hours to wash dishes and sweep her apartment. When the educator discovered that some money was missing from her home, she flogged the learner and locked her in her (the educator's) apartment for hours as a means of compelling her to acknowledge that she had stolen the money. Clearly, section 32(1)(d) is intended to allow for compulsory school attendance, which was not applicable in this case, and the right was thus incorrectly interpreted. Furthermore, there was no educational purpose attached to the child's presence in the educator's apartment or the flogging and detention.

The Child Rights Act 26 of 2003 does not explicitly indicate that it is a domestication of CRC and the African Children's Charter, but it is commonly accepted that the Act domesticates these treaties, as well as conforming to a large extent to these treaties.<sup>69</sup> Section 221 of the Child Rights Act, specifically, is of importance to Nigerian educators attempting to establish a positive discipline approach. This section provides that 'no child shall be ordered to be subjected to corporal punishment' and a ministerial note has been sent to all schools informing them that corporal punishment is now prohibited in schools.<sup>70</sup> The Act also provides for the establishment of child rights committees at national, state and local level to oversee the implementation of children's rights. These committees have to initiate actions to ensure that children's

<sup>68</sup> *Florence Olusa v Commissioner of Education, Ondo State and Marian Olaniyan* High Court of Nigeria Law Report 1985 (1133); Chianu (n 41 above) 1006.

<sup>69</sup> Egede (n 12 above) 268.

<sup>70</sup> Committee on the Rights of the Child (n 68 above).

rights are observed and made known to the general public. Children's rights in this instance refer to those rights provided for in CRC and the African Children's Charter, as well as other international conventions, charters and declarations to which Nigeria is or is to become a signatory. Egede contends that this means that these committees have to observe and advocate all treaties relating to children, even those not ratified by Nigeria.<sup>71</sup> Unfortunately these committees have proven to be ineffective thus far.<sup>72</sup>

The African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act contains only two sections and a schedule containing the provisions of the African Charter itself.<sup>73</sup> Section 1 provides that the African Charter has the force of law in Nigeria, and it binds the legislative, executive and judicial powers in the country. The enforceability of the Act was confirmed by the Supreme Court of Nigeria in *Abacha and Others v Fawehinmi*. The Supreme Court confirmed that as soon as a treaty is incorporated into municipal law, it becomes binding on Nigerian courts and the courts are then obliged to uphold such law like any other Nigerian law. The Court, however, argued that, should there be a conflict between the African Charter and any other Act, the African Charter would prevail since it is presumed that the legislature would not intend to breach an international obligation. However, should the treaty legislation be in conflict with the Constitution, the Constitution would prevail because it is the superior law of the country.<sup>74</sup>

In its Action Plan for the Promotion and Protection of Human Rights in Nigeria, the government's objectives are indicated as addressing the abuse of children, fostering a culture of respect for human rights, developing public awareness on the rights of the child (particularly the girl child) and adopting and implementing child's rights laws in all states of the Federation.<sup>75</sup> The promotion of a positive discipline approach could go a long way in contributing to the fulfilment of these objectives.

Despite the fact that the Nigerian government has ratified the above human rights instruments, educators may find it difficult to promote the rights they guarantee. The factors that hamper the implementation of human rights are discussed next.

<sup>71</sup> Egede (n 12 above) 270.

<sup>72</sup> African Network for the Prevention and Protection against Child Abuse and Neglect 'Shadow report on the implementation of the African Union Charter on the Rights and Welfare of Children (AUCRWC) in Nigeria' (2010) <http://www.crin.org/resources/infoDetails.asp?ID=21769&flag=legal> (accessed 15 March 2010).

<sup>73</sup> Cap 10, commencement date 17 March 1983.

<sup>74</sup> [2000] 6 NWLR (Part 660) 228; Egede (n 12 above) 251 254 261; *Abacha & Others v Fawehinmi* (2001) AHRLR 172 (NgSC 2000) *per* Ogundare JSC.

<sup>75</sup> Federal Republic of Nigeria (n 13 above).

#### 4 Factors hampering the implementation of human rights instruments in Nigeria

There is a clear discrepancy between acceding to or ratifying a human rights instrument and actually fulfilling the state's obligations under such an instrument. In various African countries, human rights are still not recognised as a primary societal value that informs social policy.<sup>76</sup>

For treaties to have force in Nigeria, they have to be enacted into law. Article 12 of the Constitution prescribes that no treaty between the Federation and any other country shall have force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.<sup>77</sup> Where the treaty has been enacted into law, as was done with the African Charter, the treaty becomes enforceable and Nigerian courts *must* give effect to it.<sup>78</sup>

Although the Nigerian government has domesticated some human rights instruments, there is still an inability to get states to adopt state legislation.<sup>79</sup> It is argued that children's rights are a state responsibility in terms of section 4(7) of the Constitution and that before a Federal Act can become operational in a specific state, it must first be passed into law by such a state. It is further argued that children's rights fall in the Residual Legislative List which is within the sole legislative authority of state legislatures.<sup>80</sup>

The author agrees with Egede that the above arguments are flawed. Although the support of all states will of course affect the implementation of federal law and children's rights specifically, the fact that not all the states have adopted the Child Rights Acts does not affect the enforceability of the Federal Child Rights Act.<sup>81</sup> Firstly, such an argument does not give recognition to the fact that the Constitution is the supreme law of the country and that all law inconsistent with it (such as the Penal Code (North) and the Criminal Code (South) is invalid.<sup>82</sup> Secondly, in terms of section 12(2) of the Constitution, the

<sup>76</sup> J Sloth-Nielsen & BN Mezmur 'Surveying the research landscape to promote children's legal rights in an African context' (2007) 7 *African Human Rights Law Journal* 332. Also see N Pillay 'Are human rights universal?' (2008) 2/3 *UN Chronicle*; L Lindholt *Questioning the universality of human rights* (1997) 102.

<sup>77</sup> Constitution of the Federal Republic of Nigeria 24 of 1999.

<sup>78</sup> C Heyns *Human rights law in Africa* (2004) 1389.

<sup>79</sup> T Oyesina 'Child Rights Act and problems of implementation' *Nigerian Tribune* 8 March 2010 <http://www.tribune.com.ng/index.php/tribune-law/2242-child-rights-act-and-problem-of-implementation> (accessed 28 July 2010); UNICEF 'Nigerian country programme: Information sheet: The Child Rights Act (2007) <http://www.unicef.org/wcaro/WCARO-Nigeria-Factsheets-CRA.pdf> (accessed 11 February 2010).

<sup>80</sup> UN Integrated Regional Information Networks 'Nigeria: Cross river passes Child Rights Act' (2009) <http://allafrica.com/stories/printable/200905270587.html> (accessed 11 February 2010); Egede (n 12 above) 271.

<sup>81</sup> Egede (n 12 above) 271.

<sup>82</sup> Secs 1 & 3 1999 Nigerian Constitution.

National Assembly is empowered to enact legislation for the purpose of domesticating treaties.<sup>83</sup> This provision applies to matters in both the exclusive and the concurrent lists. Should the treaty deal with a matter not included in the exclusive list (thus included in the concurrent or residual lists), the bill must be ratified by the majority of all state legislatures, as would be the case with the Child Rights Act.<sup>84</sup> Based on this requirement, the incorrect view exists that the Federal Child Rights Act cannot be enforced unless the various states have adopted their own Child Rights Acts. Since the Federal Child Rights Act could not have been passed without it being ratified by a majority of all the Houses of Assembly in the Federation (as required by section 12(3) of the Constitution), it is now enforceable law. It is enforceable as valid law in the whole Federation, including the dissenting states.<sup>85</sup>

Thirdly, in terms of section 4(5) of the Constitution, law made by the National Assembly shall prevail over any law enacted by the House of Assembly of a state. Any inconsistent law enacted by a state legislature will be void to the extent of its inconsistency.<sup>86</sup> The Child Rights Act 26 of 2003 enacted the principles enshrined in CRC and the African Children's Charter in Nigerian law.<sup>87</sup> As a federal Act, it prevails and supersedes all other legislation that has a bearing on the rights of the child and states are expected to formally adopt and adapt the Act for domestication as state law.<sup>88</sup> Unfortunately, by December 2009, only 21 of the 36 states had promulgated the Act as state law and legislation inconsistent with the Constitution and the Act has not been amended.<sup>89</sup>

The fact that customary law co-exists with statutory law is also a factor that obstructs the implementation of children's rights in Nigeria.<sup>90</sup> Once again, however, this problem could be overcome by enforcing the Constitution and federal law. Customary law must pass a constitutional and various statutory tests before it can be applied by a Nigerian court.

<sup>83</sup> Sec 12(1) 1999 Nigerian Constitution.

<sup>84</sup> Egede (n 12 above) 250-251.

<sup>85</sup> Egede (n 12 above) 272.

<sup>86</sup> Sec 4(5) 1999 Nigerian Constitution; Egede (n 12 above) 272.

<sup>87</sup> UNICEF (n 79 above). Also see N Imoukhuende 'Right to protection, stop violence against children' paper presented to mark the 2006 Day of the African Child organised by the Edo state Ministry of Women Affairs on 26 June 2006 <http://www.rufarm.kabissa.org/pressrelease/legalaid-day%20of%20african%20child.htm> (accessed 10 March 2008).

<sup>88</sup> UNICEF (n 79 above).

<sup>89</sup> E Alaneme 'Nigeria: UNICEF kicks against non-passage of Child Rights Act' *Daily Champion* 24 November 2009. However, there are also those indicating that already 23 states have adopted the Act. See 'Global initiative to end all corporal punishment of children' *Newsletter* 8 June 2009 <http://www.endcorporalpunishment.org/pages/pdfs/newsletters/Issue08-June2009.pdf> (accessed 11 February 2010); W Ogbobo 'Any hope for the right of a child?' *Leadership Nigeria* 19 November 2009 <http://www.leadershipnigeria.com/index.php/columns/ views/features/ 8644-any-hope-for-the-right-of-a-child> (accessed 11 February 2010).

<sup>90</sup> Sloth-Nielsen & Mezmur (n 76 above) 349.

The constitutional test can be found in section 3 of the Constitution. Customary law inconsistent with the Constitution is void to the extent of its inconsistency.<sup>91</sup> The first statutory test provides that customary law can only be applied if it is not 'repugnant to natural justice, equity and good conscience'.<sup>92</sup> This test is a very vague test and courts have interpreted it differently in the past.<sup>93</sup> Secondly, in terms of section 14(3) of the Evidence Act, inconsistency between customary law and any law in force in Nigeria will be resolved in favour of the latter. The third test is that customary law must not be contrary to public policy. In *Okonkwo v Okagbue*, the Nigerian Supreme Court held that public policy 'must objectively relate to contemporary mores, aspirations and sensitivities of the people of this country and to the consensus values in the civilised international community, which we share'.<sup>94</sup> There is thus no legal justification for customary law to override the constitutional guarantees given in chapter 4 of the Constitution or in any of the human rights instruments.<sup>95</sup> The author agrees with the view that the importance of culture and custom needs to be recognised, but where children's rights are violated or infringed by a cultural practice, the benefits of such practice should be weighed against the extent of it violating children's rights.<sup>96</sup>

The contention that human rights are not universal hampers the implementation of human rights instruments.<sup>97</sup> Many authors refer to the argument that human rights are of Western origin and thus, given the differences between the West and Africa and the cultural realities in most African countries, irrelevant to Africa.<sup>98</sup> Sloth-Nielsen and Mezmur argue that the fact that CRC was acceded to by states all over the world and the fact that it is supplemented by the African Children's Charter are indicative of a 'high normative consensus among the various nations of the world (particularly Africa) on the idea and content of children's rights as human rights'.<sup>99</sup> Kaime emphasises that traditional African value systems recognise the human dignity and integrity of all persons, the intrinsic worth of children and the need for children to

<sup>91</sup> Sec 3 1999 Nigerian Constitution.

<sup>92</sup> ES Nwauche 'Law, religion and human rights in Nigeria' (2008) 8 *African Human Rights Law Journal* 592.

<sup>93</sup> See footnotes 99 and 100 in Nwauche (n 92 above) 592.

<sup>94</sup> Nwauche (n 92 above) 592.

<sup>95</sup> Sloth-Nielsen & Mezmur (n 76 above) 349; Nwauche (n 92 above) 575.

<sup>96</sup> Sloth-Nielsen & Mezmur (n 76 above) 349; Egede (n 12 above) 281.

<sup>97</sup> Pillay (n 76 above) 5.

<sup>98</sup> T Bankole 'Africa's charter on children's rights: A normative break with cultural traditionalism' (1992) 41 *International and Comparative Law Quarterly* 432, A Pollis & P Schwab 'Human rights: A Western construct with limited applicability' in C Heyns & K Stefiszyn (eds) *Human rights, peace and justice in Africa. A reader* (2006) 93-94. For a detailed exposition of this argument, see Lindholt (n 76 above).

<sup>99</sup> Sloth-Nielsen & Mezmur (n 76 above) 331.

be protected. If so, then children's rights do indeed have a universal character.<sup>100</sup>

Lindholt identifies two major aspects of the universality of human rights: the ideological and empirical aspects. Emphasis on the ideological aspects of universality concentrates on the argument that human rights *ought to be* universal, while an emphasis on the empirical aspects concentrates on the argument that human rights *are* universal. Most scholars incorporate both aspects when arguing the universality of human rights, thus giving recognition to the fact that human rights ought to be universal because there is a need for generally definable standards and principles but that cultural relativism need to be appreciated in the interpretation and application of these standards and principles.<sup>101</sup>

Pillay states that 'human rights law ... emphasised our human commonality, as well as the indivisible character of rights'.<sup>102</sup> State parties cannot pick and choose which rights to implement and which rights to ignore because that would amount to ignoring the fact that rights are indivisible and interrelated. No one right can be fully enjoyed without recognising other rights. The fact that the essential values and aspirations embodied in human rights instruments are universal is undeniable.<sup>103</sup> The Vienna Declaration and Programme of Action emphasises the principles of universality, indivisibility, interdependence and interrelatedness of all human rights and by associating itself with the Vienna Declaration, Nigeria illustrated its acceptance of these principles.<sup>104</sup> It is also pertinently stated in the Nigerian Action Plan that the Plan is based on the premise that all human rights are universal, indivisible, interdependent and interrelated.<sup>105</sup>

The level of cultural legitimacy accorded to children's rights will affect the effective implementation of human rights instruments. The implementation of regional and universal children's rights in African countries is hampered by practices and values that enjoy cultural legitimacy but which are incompatible with human rights.<sup>106</sup> This is, for example, one factor that hampers the implementation of the Child Rights Act in Nigeria.<sup>107</sup>

Another factor that hampers the implementation of children's rights in particular is the traditional view of children as being subordinate

<sup>100</sup> Kaime (n 37 above) 224.

<sup>101</sup> Lindholt (n 76 above) 52-53 250. See J Donnelly 'Cultural relativism and universal human rights' in Heyns & Stefiszyn (n 99 above) 96-106 for a discussion of the levels of cultural relativism.

<sup>102</sup> Pillay (n 76 above) 4.

<sup>103</sup> Pillay (n 76 above) 5.

<sup>104</sup> Federal Republic of Nigeria (n 13 above).

<sup>105</sup> As above.

<sup>106</sup> Kaime (n 37 above) 221.

<sup>107</sup> Egede (n 12 above) 272 282.

to adults. Traditionally, African societies are socially and religiously organised according to age. The older a person, the more deserving of respect and the younger, the more respectful should one be and the more open one is to disadvantaged attitudes, disregard and abuse.<sup>108</sup>

In many African traditional societies, the autonomy of the child, as guaranteed by various international and regional human rights instruments, is severely constrained.<sup>109</sup> This can be attributed to the traditional, paternalistic notion that adults always know what is best for children.<sup>110</sup> It is clear that a relationship built on these notions is not conducive to the fostering of children's rights or a positive discipline approach. The best interest principle challenges the traditional notion that adults are always capable of deciding what should be regarded as being in the best interests of the child.<sup>111</sup> This is the reason why an argument that corporal punishment is in the best interest of the child is widely accepted. The Committee on the Rights of the Child, however, emphasises that any interpretation of 'the best interest of the child' should be consistent with the entire CRC, including the provision that children should be protected against all forms of violence.<sup>112</sup>

Religious law and convictions negatively affect the implementation of children's rights in Nigeria. The question whether Islamic principles are compatible with the universality of human rights is a historic one which has not yet been answered conclusively.<sup>113</sup> One of these principles is the principle that bodily harm may be inflicted for a reason provided for in Shari'a law. This principle allows for the use of violence and permits cruel, inhuman or degrading punishment and even torture.<sup>114</sup> This is contrary to the protection against inhuman and degrading punishment and treatment guaranteed in terms of section 11(b) of the Constitution, article 37(a) of CRC, article 16(1) of the African Children's Charter, article 7 of ICCPR and CAT.<sup>115</sup>

Resistance to the Child Rights Act can mainly be found in religious convictions and cultural values. Gafasa, speaker of the House of Assembly of Kano State, even described the Act as 'a document against the

<sup>108</sup> Akhilomen (n 43 above) 241; Oyesina (n 79 above).

<sup>109</sup> See discussion above. Kaime (n 37 above) 231.

<sup>110</sup> Kaime (n 37 above) 231.

<sup>111</sup> G van Bueren *International law on the rights of the child* (1995) 47.

<sup>112</sup> Global initiative to end all corporal punishment of children 'The Committee on the Rights of the Child' [http://www.endcorporalpunishment.org/pages/hrlaw/crc\\_session.html](http://www.endcorporalpunishment.org/pages/hrlaw/crc_session.html) (accessed 27 August 2009).

<sup>113</sup> M Rishmawi 'The revised Arab Charter on Human Rights: A step forward?' (2005) 5 *Human Rights Law Review* 366-367.

<sup>114</sup> Rishmawi (n 113 above) 367.

<sup>115</sup> AU Iwobi 'Tiptoeing through a constitutional minefield: The great Shari'a controversy in Nigeria' (2004) 48 *Journal of African Law* 137-138.

interest of the north'.<sup>116</sup> The Supreme Council for Shari'a in Nigeria depicts Nigeria's ratification of UN human rights instruments as a campaign against Islam. It describes CAT as 'intended to make illegal most aspects of Shari'a *Hudud* (Islamic punishments) as divinely ordained by Allah ...'<sup>117</sup> Muslim followers argue that Shari'a embodies the will of Allah and is thus 'eternally valid, immutable and not susceptible to review by human agency'. This argument implies a rejection of the supremacy of the Constitution and acceptance of the notion that all laws, including the Constitution, must be written in accordance with Shari'a.<sup>118</sup>

These factors not only impede the implementation of human rights instruments and national law, but also make it very difficult for educators to promote human rights in schools and classrooms.

#### 4 Conclusion

Although the Nigerian government has created a human rights framework which creates the perfect canvas for a positive discipline approach, it seems that this canvas is spoilt by factors hampering the implementation and recognition of children's rights in practice. Even in instances where international and regional human rights instruments have been domesticated, the government seems to be unable to enforce federal law. Factors hampering the implementation of children's rights include the misinterpretation of the Constitution on the legislative powers of the federal legislature with regard to the domestication of treaties, a conflict between customary law and statutory law, the rejection of the supremacy of the Constitution by some religious groups, the rejection of human rights instruments on the grounds of irrelevance and their Western origin, and the traditional view of children as lesser beings which affects the autonomy of children as independent beings.

<sup>116</sup> I Shuaibu 'Nigeria: Child Rights Act's anti-north, says Kano speaker' 10 February 2008 *This Day* <http://allafrica.com/stories/200802111065.html> (accessed 15 March 2010).

<sup>117</sup> Iwobi (n 115 above) 140.

<sup>118</sup> Iwobi (n 115 above) 127. See H Bielefeldt 'Muslim voices in the human rights debate' in Heyns & Stefiszyn (n 99 above) 133-136 for a different view.