

## Child justice administration in the Nigerian Child Rights Act: Lessons from South Africa

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### Summary

*Child justice administration is critical in any legal system. This is due to a general recognition of the vulnerability of children. As such, they must be treated with much care and should be distinguished from adults in the handling of their legal matters. Thus, special legal regimes are put in place to protect the rights of this special class of persons. In Nigeria, the Children and Young Persons Act, together with other related criminal laws, used to be the main statute on child justice administration. However, their inadequacies, the fact that they were unco-ordinated and that large numbers of children technically fell outside their scope, in 2003 led to the enactment of the Nigerian Child Rights Act. The goal of the Child Rights Act was to remedy some of the former injustices against children who are either in conflict with the law or in need of care and protection. The article argues that even this new law does not provide adequate protection for the rights of children as they are still being tried in conventional court environments by the same judges that handle adult criminal cases. The article, therefore, critically examines child justice administration under the regimes of the Child Rights Act, the Children and Young Persons Act and other relevant laws. It argues that, in spite of the lofty provisions of the Child Rights Act, more needs to be done for the protection of the rights of the child. As such, one can gain vital insights from the South African child justice administration regime which, for example, has separate civil and criminal jurisdictions for civil and criminal cases involving children.*

**Key words:** *Children's rights; child justice administration; delinquency; young person; Nigeria; South Africa*

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## 1 Introduction

In Nigeria and South Africa the concept of child justice administration is not clearly defined in provisions relating to children. According to provisions of the Nigerian Child Rights Act (CRA),<sup>1</sup> the South African Children's Act<sup>2</sup> and the South African Child Justice Act,<sup>3</sup> child justice administration may be understood as the process of justice administration of children who are either in 'conflict with the law, beyond parental control or in need of care and protection'.<sup>4</sup>

Bamgbose, cited by Alemika and Chukwuma, holds that the child justice administration regime is based on the philosophy of reformation and rehabilitation of child offenders and children in need of care and protection as these children are immature and should not be treated as adult offenders.<sup>5</sup> Thus, child offenders are considered to be in need of protection and proper guidance.<sup>6</sup> The Children and Young Persons Act (CYPA)<sup>7</sup> was the first and main legislation on the 'protection of children and young persons'<sup>8</sup> in Nigeria. Apart from the CYPA, other complementary statutes applicable to child justice administration in Nigeria include the Criminal Procedure Act,<sup>9</sup> the Criminal Procedure Code,<sup>10</sup> the Penal Code,<sup>11</sup> the Criminal Code<sup>12</sup> and the Shari'a Penal Code.<sup>13</sup>

Despite the enactment of the CYPA and other associated laws that made provision for the welfare and treatment of children<sup>14</sup> to become

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1 The combined effects of secs 50 & 204 of the CRA, 2003.

2 Sec 42(8)(c) of the South African's Children's Act 38 of 2008 (as amended).

3 Long title to the South African's Child Justice Act 78 of 2005 (as amended).

4 It should be noted that children in conflict with the law are different from children in need of care and protection or children that are beyond parental control, as the former relates to children that are 'alleged to have committed an act which would constitute a criminal offence if they were adults'. In Nigeria, children in need of care and protection are interchangeable as children that are beyond parental control. These are children who are adjudged not to have committed any act which would constitute a criminal offence, but status/minor offences such as truancy, or 'street children or children that are exposed to danger'.

5 EEO Alemika & IC Chukwuma *Juvenile justice administration in Nigeria: Philosophy and practice* (2001) 10; O Bamgbose 'An exposition of the laws of crime and health implications in cases of child abuse in Nigeria' (1998) 7 *Nigerian Journal of Health Education* 112.

6 As above.

7 See the Children and Young Persons Act Cap 32, Laws of the Federation of Nigeria and Lagos, 1958 <http://www.cleen.org/Juvenile%20Justice%20Repert> (accessed 20 January 2010).

8 See the Nigerian Children and Young Persons Ordinance Cap 32 of 1958; as above.

9 See the Criminal Procedure Act Cap C41, Laws of the Federation of Nigeria, 2004.

10 See the Criminal Procedure Code Cap C46.

11 See the Penal Code Act, 1960.

12 See the Criminal Code Act, 1965.

13 Zamfara State Court Law, 1999 and 2000. Zamfara State Criminal Procedure Code Law 2000 No 1 vol 4, <http://www.dare.ubvu.vu.nl> (accessed 15 March 2012).

14 See the long title to the Children and Young Persons Act (n 7 above).

law-abiding citizens in Nigeria, there was still an upsurge in the number of children involved in crime and those beyond parental control or in need of care and protection. As of 2013, these children occupied more than half of the capacity of custodial institutions,<sup>15</sup> for offences ranging from property offences at 30,72 per cent; offences against the person; offences against the state; moral offences; and victimless offences.<sup>16</sup> Also, the system of child justice contends with challenges as child offenders or children in need of care and protection are remanded in 'squalid prisons and [being] deprived of salutary impact of reformatory and rehabilitative custodial environment'.<sup>17</sup> Furthermore, child offenders or children in need of care and protection are also being tried within the conventional court environment by the same magistrates that handle criminal cases involving adults.

The article argues that the above problems expose children to the potential danger of associating with hardened criminals. It further argues that these problems are against the spirit behind the administration of child justice which protects the rights of child offenders from mingling with adult offenders. Similarly, a recent study has shown<sup>18</sup> that existing laws on the child justice system have not adequately protected children who have been adjudged to have committed minor offences, such as being beyond parental control, as they were committal to custodial institutions, contrary to the international standard which allows institutionalisation as a measure of last resort<sup>19</sup> and encourages the use of diversionary measures.<sup>20</sup>

Based on the foregoing, in 2003 the Nigerian National Assembly passed a new law, titled the Child Rights Act,<sup>21</sup> which is expected to replace existing legislation on the administration of child justice.<sup>22</sup> The objective of the CRA is to remedy the inadequacies in the CYPA and other associated laws.<sup>23</sup> Thus, it has been argued that the CRA

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15 Custodial institutions referred to in this article are the Remand homes; the government approved schools; the rehabilitation/reformatory centres; and the Borstal institutions.

16 See Operational Research Report on Challenges of Borstal Institutions, Remand Homes, Reformatory and Approved Schools in Nigeria, submitted to the Federal Department of Social Welfare, Federal Ministry of Women Affairs and Social Development, Abuja, Nigeria, by Alamveabee E Idyotough, June 2013.

17 Alemika & Chukwuma (n 5 above).

18 Study conducted by Y Akinseye-George 'Juvenile justice system in Nigeria', Centre for Socio-Legal Studies, Abuja, 2010. See also B Owasanoye & M Wernham *Street children and juvenile justice system in Lagos State of Nigeria* (2004).

19 See Rules 13 and 19 of the United Nations Standard Minimum Rules for the Administration of Juvenile Justice (Beijing Rules) GA Res 40/33, annex, 40 UN GAOR Supp (No 53) UN Doc A/40/53 (1985) <http://www.iprt.ie> (accessed 19 April 2012).

20 See Commentary to Rule 5 of the Beijing Rules. Proportionality of the reaction by law and from the society includes social status; the family situation; the gravity of the harm caused by the offence; and any other factors affecting personal circumstances.

21 Child Rights Act, 2003, Cap C50, Laws of the Federation of Nigeria, 2004.

22 Child Rights Act (n 21 above).

seems to harmonise several existing laws regulating child justice administration in Nigeria. The Act particularly seems to take cognisance of the welfare and treatment of young persons. Surprisingly, however, the enactment of the CRA does not seem to have solved the problems discussed above. Further, the CRA has not been seen to repeal other existing legislation on the administration of child justice in Nigeria, particularly the CYPA. Some states in the country are still making use of the CYPA, the Criminal Code and the Penal Code in dealing with issues of child justice administration.<sup>24</sup>

In light of the above, the article adopts a multi-disciplinary approach to examine the provisions of the CRA regarding matters of child justice. In doing so, the article examines how the administration of child justice has evolved 55 years after independence. It also analyses the challenges in the treatment of children after the enactment of the CRA in 2003, and draws some vital insights from the South African child justice administration regime for the purpose of enhancing the rights of child offenders and children that are beyond parental control or in need of care and protection in Nigeria.

## 2 Conceptualising a child under the Nigerian child justice administration laws and international instruments

From the outset, it is important to note that a child under international, regional and national laws is defined in terms of age.<sup>25</sup> However, the domestic laws of countries have laid down a different minimum age below which a person is exempt from prosecution and punishment.<sup>26</sup> The definition of a child is, therefore, made 'dependent on each respective legal system in order to accommodate the different economic, social, political, cultural and legal systems of the respective state'.<sup>27</sup>

The term 'child' has also been defined in various international and regional instruments. The United Nations (UN) Standard Minimum

23 'In order to give effect to the country's obligations under many international laws governing the administration of juvenile justice, states parties are required to pass specific laws and regulations at the national level' and, in 1993, 'A draft Child Rights Bill aimed at principally enacting into law in Nigeria the principles enshrined in the Convention on the Rights of the Child was drafted.' 'It is only after about ten years of heated debates by the parliamentarians that the Bill was eventually passed into law by the Nigeria National Assembly in July 2003' as Child Rights Act, Cap C50, Laws of the Federal Republic of Nigeria, 2004, <http://www.nigeriarrights.gov.ng/files/download/40> (accessed 10 December 2010).

24 Sokoto, Zamfara, Kebbi, Katsina, Kano, Kaduna, Yobe, Borno, Bauchi, Gombe, Niger, Adamawa and Enugu are the states that are yet to domesticate the CRA, <http://www.nou.edu.ng> (accessed 18 November 2012). See also <http://www.unicef.org/wcaro/WCARONigeriaFactsheetsCRA.pdf> (accessed 18 January 2013).

25 See the Consortium for Street Children, <http://www.streetchildren.or.uk> (accessed 5 March 2013).

Rules for the Administration of Juvenile Justice (Beijing Rules),<sup>28</sup> for example, define a 'juvenile' as 'a child or young person who, under the respective legal systems, may be dealt with for an offence in a manner which is different from an adult'.<sup>29</sup> Similarly, article 1 of the United Nations Convention on the Rights of the Child (CRC)<sup>30</sup> defines a child as 'any person under the age of 18 years unless, under the law applicable to the child, majority is attained earlier'. In Article 2 of the African Charter on the Rights and Welfare of the Child (African Children's Charter), a child is defined more concisely as 'every human being below the age of eighteen years'.<sup>31</sup>

The Nigerian Constitution does not define a child, but in other legislation, individuals are classified into four categories: infants, children, young persons and adults.<sup>32</sup> Similarly, Nigerian laws distinguish between adult offenders and children who are in conflict with the law or children who are in need of care and protection with respect to criminal responsibility.<sup>33</sup> The difference in age of criminal liability can be distilled from Nigerian legislation. For instance, section 50 of the Penal Code<sup>34</sup> and section 30 of the Criminal Code,<sup>35</sup> respectively, define a child on the basis of criminal responsibility, that a child younger than seven years is considered not to be criminally liable and presumed to be *doli incapax* (incapable of committing an offence).

Similarly, 'a male child under the age of twelve years is presumed to be incapable of having carnal knowledge', and<sup>36</sup>

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26 Eg, the official minimum age of criminal responsibility in countries such as Australia, Bangladesh, Egypt, The Gambia, Ghana, India, Nigeria, Sudan, South Africa, Iraq, Kenya, the United Kingdom, Scotland, Turkey, Canada, Colombia, Sweden, Burundi, Gabon, Netherland, Saudi Arabia, New Zealand and a host of others ranges from eight years to 18 years. See UNICEF and Melchiorre 2002 in 'Juvenile justice: Modern concepts of working with children in conflict with the law' Save the Children UK, [http://www.crin.org/docs/savejjmodern\\_concepts.pdf-similar](http://www.crin.org/docs/savejjmodern_concepts.pdf-similar) (accessed 20 December 2013).

27 See Rule 2.2(a) Beijing Rules (n 19 above) <http://www.un.org/documents/ga/res/40/a/40r033.htm> (accessed 20 June 2012.)

28 As above.

29 Under the standard of the UN, the age limit will depend on the particularities of the different legal systems. There is, therefore, provision for a wide range of minimum ages under this definition, ranging from seven to 18 years. See Beijing Rules (n 19 above) 207. However, the CRC Committee has approved 12 years as the minimum age for criminal responsibility. See South African Press Report dated 22 February 2016.

30 Art 1 CRC, <http://www.nwu.ac.za> (accessed 20 August 2013).

31 African Charter on the Rights and Welfare of the Child, 1990.

32 See sec 2 of the Children and Young Persons Act, 1958.

33 This distinction is made in order to determine the age when a person can be held liable for crimes committed.

34 Nigeria operated a dual penal legal system in which the Penal Code is applicable to the northern part of Nigeria.

35 The Criminal Code is applicable in the southern part of Nigeria.

36 See sec 2 of the Criminal Procedure Act. See also TA Aguda & I Okagbue *Principles of criminal liability in Nigerian law* (1990) 323-329; Y Osinbajo & AU Kalu *Law development and administration in Nigeria* (1990) 168-169.

a child between the age of seven to twelve years will not normally be held responsible for his/her actions unless it can be proved that at the time of committing the offence, he/she had the capacity to know that he/she ought not to do it.

However, under Shari'a (Islamic) law, the age of criminal responsibility is determined either by puberty or if the person has attained the age of 18 years, except in the case of Zina (fornication or adultery), where the age of criminal responsibility is 15 years.<sup>37</sup> Instructively, the CYPA defines a juvenile as 'a young person who falls between 14 and 17 years of age'.<sup>38</sup>

It is, however, important to note that the issue of age in the determination of either his or her criminal responsibility, or whether he or she is in need of care and protection has been settled under the CRA.<sup>39</sup> This is pursuant to section 277 of the CRA, which defines 'a child as a person under the age of eighteen years'.<sup>40</sup> Thus, the discrepancies in 'age of criminal responsibility' under the Nigerian Criminal Code, Penal Code, Criminal Procedure Code, Criminal Procedure Act and the CYPA have been harmonised. Without a doubt, the CRA's regime introduced a uniform age so as to bring about consistency in the conceptualisation of a child and child justice administration in Nigeria, though without adopting a minimum age at which a child can be prosecuted for an offence as provided for under the South African child justice regime. For instance, according to section 7 of the South African Child Justice Act, a child below the age of 10 years is not criminally responsible and cannot be prosecuted,<sup>41</sup> but must be dealt with in accordance with section 9 of the Act, while a child above 10 years but under 14 years of age can only be prosecuted for an offence if proved by the state and in accordance with section 11 of the Act.<sup>42</sup>

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37 See Shari'a Penal Code Law of Zamfara State 2000 and Shari'a Courts Law of 1999 (Zamfara 1-1999). See also IA Nyazee *Islamic jurisprudence* (2000) 111.

38 See sec 2 of the Children and Young Persons Law Cap C 10 Laws of Federation and Lagos State, 1958. It was initially Ordinances 44 of 1945; 27 of 1947; 16 of 1950 as well as the Laws of Nigeria 131 of 1954; 47 of 1955 and Order in Council 22 of 1946. The law was extended to the 'eastern and western regions of Nigeria in 1946 by Order-in-Council 22 of 1946. The law was enacted for the northern region in 1958 and constituted the Children and Young Persons Law, Cap 21 of the Laws of Northern Nigeria 1963, <http://www.afrimap.org> (accessed 14 June 2013).

39 Interestingly, the Child Rights Act, 2003 draws its basis from the Constitution of the Federal Republic of Nigeria (as prescribed in ch four); the UN Convention on the Rights of the Child, 1989 (ratification by the government of Nigeria on 16 April 1991); the Beijing Rules (n 19 above); the United Nations Rules for the Protection of Juveniles Deprived of their Liberty, 1990; and the UN Guidelines for the Prevention of Juvenile Delinquency, 1990 (Riyadh Guidelines) <http://www.ncpcr.gov.in> (accessed 20 April 2013).

40 B Owasanoye & M Wernham 'Membership in Lagos, Nigeria: Challenge and resilience' (2011) *Journal of Adolescent Research* 210.

41 The South African cabinet met on 17 February 2016 and approved the report on upward review of the minimum age for criminal responsibility to 12 years with some special protection measures in place for 13 and 14 year-old children. See South African Press Report dated 22 February 2016.

However, it is submitted that there is no basis for such delimitation as the Nigerian Constitution, being the primary law of the land, has not made any provision which limits or delimits the age of childhood. It may be argued that the approach of the CRA is derived from other legislative approaches and international conventions. As is the case with the Nigerian Marriage Act<sup>43</sup> and the Nigerian Electoral Act,<sup>44</sup> an adult is defined as 'a person above the age of 18 years'. Thus, it can be argued that any person below 18 years is a child in Nigeria. The CRA defines a child in the same way as the South African Constitution<sup>45</sup> and the South African Children's Act.<sup>46</sup> In addition, the applicability of the CRA depends on its domestication by states in Nigeria in order to bring uniformity to the age of a child, as the CRA is a federal Act on a subject which is not within the exclusive legislative competence of the federal government. The CRA (with the exception of the federal capital territory, Abuja, which has direct application) can only become binding on states in the federation if it is approved by a simple majority or if the interested state passes its own version without reference to the federal statute.<sup>47</sup> This problem results from a lack of definition of a child in the 1999 Nigerian Constitution, which is the *grundnorm* of the country.

In spite of the innovations of the CRA in child justice administration, its delimitation of the age of childhood creates certain problems.<sup>48</sup> One such difficulty is seemingly placing culpability on a child below 10 years of age, as no minimum age is adopted under the CRA.

### 3 Legal framework for child justice administration in Nigeria: A critique

The Nigerian child justice administration regime is influenced by international, regional and national laws. Nigeria is a state party to the CRC<sup>49</sup> and the African Children's Charter<sup>50</sup> that govern child justice

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42 See generally part 2 of the South African Child Justice Act 78 of 2008. See also *S v GK* 2013 (2) SACR 505 (WCC) 58-59.

43 See sec 18 of the Nigerian Marriage Act Cap M6, Laws of the Federation of Nigeria, 2004.

44 See sec 2(1) of the Nigerian Electoral Act, 2010.

45 Sec 28(3) of the Constitution of the Republic of South Africa, 1996.

46 See secs 1 and 17 of the South African Children's Act (as amended by sec 3(c) of the Children's Act 41 of 2007) volume 7, JUTA's Statutes of South Africa 2013/2014, which define a child as 'a person under the age of 18 years' and state that 'a child whether male or female becomes a major upon reaching the age of 18 years'.

47 See also B Owosonoye & M Wernham, *M Street children and juvenile justice system in Lagos State of Nigeria* (2004) 11, <http://www.gvnet.com> (accessed 12 May 2013).

48 This warranted each state in the Federation of Nigeria to adopt their respective age of 'criminal responsibility'. It is evident from sec 274 of the Kwara State Child Rights Law, 2007 where 'a child is defined as any person under the age of 16'.

49 Nigeria ratified the CRC in 1991.

administration<sup>51</sup> by emphasising the ‘treatment of child offenders to be fair and humane’ by emphasising ‘their well-being and rehabilitation and that the reaction of the authorities should be proportionate to the circumstances of the offender as well as the offence’.<sup>52</sup> The rationale behind these provisions is to prevent issues that may affect the child from his or her development in life and to accord him or her dignity and respect.

The core principle of the CRC and the African Children’s Charter is to emphasise the best interests of the child as being the prime consideration. For instance, articles 37 to 40 of the CRC emphasise that ‘a child cannot be deprived of his/her liberty unjustly’, recognise the right of juveniles to ‘rehabilitation and social reintegration extending to children who are victims of neglect, exploitation and abuse’ and confers some rights on juveniles which apply to all phases of the juvenile justice process. Article 17 of the African Children’s Charter affords the ‘juvenile offender accused of having infringed penal law the opportunity of having the right to special treatment in a manner consistent with the child’s dignity and worth’. This reinforces the respect for the child’s rights and fundamental reforms by reintegrating and rehabilitating him or her back to his or her family and society.

Due to the global increase in child delinquency<sup>53</sup> and the lack of definite provisions dealing with ‘children who are in conflict with the law’ or ‘in need of care and protection’ in the Nigerian Constitution,<sup>54</sup> the concept of child justice administration in Nigeria was formalised with the enactment of the CYPA and later the CRA, after Nigeria signed the international and regional instruments.

As noted earlier, Nigeria presently has two types of legislation on issues of children who are in conflict with the law or beyond parental control.<sup>55</sup> The CYPA has been in use and is still being used by some states in child justice administration<sup>56</sup> in Nigeria. However, the CYPA does not place the principle of the best interests of the child as paramount consideration when dealing with him or her, as

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50 Nigeria signed the African Children’s Charter in 1999 and ratified it in 2001.

51 The combined effects of arts 3, 6, 12 and 37 of the CRC, Rules 5 and 17(1)(a) of the Beijing Rules and art 17 of the African Children’s Charter.

52 See I Okagbue ‘The treatment of juvenile offenders and the rights of the child’ in IA Ayua & IR Okagbue (eds) *The rights of the child in Nigeria* (1996) 243. See Commentary to Rule 1 of the Beijing Rules (n 19 above).

53 Juvenile Justice Report ‘Juvenile justice in Nigeria’ <http://www.britannica.com/EBchecked/topic/kuvenilejustice/nigeria> (accessed 2 February 2012).

54 Reference can only be inferred from ch four of the 1999 Nigerian Constitution which generally protects Nigerian citizens on fundamental human rights.

55 The Children and Young Persons Act, 1958 and the Child Rights Act, 2003.

56 The Child Rights Act has been promulgated into law in only 23 out of 36 states; these are Abia, Anambra, Bayelsa, Eboniyi, Ekiti, Imo, Jigawa, Kwara, Lagos, Nassarawa, Ogun, Ondo, Plateau, Rivers, Taraba, Kogi, Oyo, Benue, Osun, Edo, Delta, Cross River and Akwa Ibom, <http://www.iags.org>. See also [http://www.unicef.org/wcaro/WCARO\\_Nigeria\\_Factsheets\\_CRA.pdf](http://www.unicef.org/wcaro/WCARO_Nigeria_Factsheets_CRA.pdf) (accessed 18 January 2013).



emphasised in the CRA. It concentrates more on punitive measures than on the welfare of the child.<sup>57</sup>

However, the CRA's provisions emphasise the need for proper care, protection, treatment and development in the administration of child justice, and provide for and protect the rights of the Nigerian child and other related matters.<sup>58</sup> It, therefore, puts in place 'a child-friendly approach in the adjudication and disposition of matters in his/her best interests'<sup>59</sup> and 'best ways to secure his/her ultimate rehabilitation through various institutions established under this enactment'. Nevertheless, the Act has no clarity on what should be done to ensure 'the best interests of the child', contrary to the position in South Africa.<sup>60</sup>

Similarly, section 223(2) of the CRA makes the confinement of a child alleged to have committed an offence or being beyond parental control the last option to be resorted to only when 'there is no other way of dealing with the child' and, more importantly, the court is required to state the reason(s) for choosing the option of confining the child. It is contended that the rationale for this provision of the CRA is that the punitive approach adopted for a child under the CYPA could lead to criminalisation and stigmatisation, and may have a recidivistic result for the child offender, rather than rehabilitating and socially readjusting the child against criminality.

The CRA, similar to some of the provisions of South African legislation, provides for the substitution of the word 'juvenile'<sup>61</sup> in the CYPA with 'child offender';<sup>62</sup> 'juvenile court'<sup>63</sup> in the CYPA with 'family court'<sup>64</sup> in the CRA; and juvenile justice administration'<sup>65</sup> in the CYPA with 'child justice administration'<sup>66</sup> in the CRA. Other changes include the substitution of the word 'detention'<sup>67</sup> in the CYPA with 'custody'<sup>68</sup> in the CRA; 'approved schools'<sup>69</sup> in the CYPA

57 An example is the provision of sec 27 of the CYPA which directs the court to order a child who is beyond parental control to be kept with a probation officer.

58 See long title to the Nigerian Child Rights Act, 2003. See also secs 50 and 204 of the CRA.

59 Sec 1 of the Child Rights Act provides that '[t]he best interests of the child shall be the primary consideration in any action taken against a child'.

60 The next part of this article will examine the legal framework for child justice administration in South Africa.

61 See generally Part 2 of the Children and Young Persons Act, 1965.

62 Sec 213 CRA.

63 Sec 6 CYPA.

64 Sec 149 of Part XIII CYPA. The terms 'child justice court' and 'children's court' were used in both the old Child Justice Act and Child Care Act and the new South African Child Justice Act and Children's Act respectively.

65 Part 2 CYPA.

66 See Part XX of the CRA.

67 Sec 16 CYPA.

68 Sec 223(1)(f) CRA.

69 Sec 19 CYPA. In South Africa, correctional centre in the old Correctional Services Act 111 of 1998 was replaced with child and youth care centre in both the Child Justice Act and Children's Act.

with 'children residential and children correctional centres'<sup>70</sup> in the CRA; and 'probation and probation officers'<sup>71</sup> in the CYPA with 'child care, guidance and supervision'<sup>72</sup> in the CRA. It is my contention that these substitutions in the CRA bring about greater clarity in the application of the law in Nigeria as these replacements, if implemented, will prevent the stigmatisation of a child alleged to have committed an offence, or one who is beyond parental control to be regarded as an offender.

In practice, the replacement of approved schools or remand homes or Borstal institutions, as indicated in the CRA, has not been implemented as the old system is still in operation,<sup>73</sup> especially as the Laws of the Federal Republic of Nigeria (LFN) 2004 have not been amended to reflect the new names. For instance, the remand home and Borstal institution in the old order of the CYPA are still retained in the LFN as the Borstal Institutions and Remand Centre Act,<sup>74</sup> despite the enactment of the CRA which changed the name, as indicated above. The article, therefore, argues that retaining the old names in the LFN results in discrepancies in the treatment of a child alleged to have committed an offence or a child in need of care and protection.

#### 4 Legal framework for child justice administration in South Africa

Child justice administration in South Africa<sup>75</sup> has gained constitutional recognition in chapter 2 of the South African Constitution, specifically in section 28, which deals with issues relating to the definition of a child and the treatment of a child for the purposes of adjudicating a child alleged to have committed an offence or one in need of care and protection. The South African Constitution emphasises the 'presumption of innocence'<sup>76</sup> and 'the best interests of the child to be of paramount importance'<sup>77</sup> and, where the confinement of a child is necessary, he or she must<sup>78</sup>

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70 Sec 248 CRA.

71 Sec 18 CYPA. The new African legislation still retained probation.

72 Part XXI CRA.

73 Studies conducted by MA Abdulraheem-Mustapha 'An analysis of the framework for juvenile justice administration in Nigeria' unpublished PhD thesis, Faculty of Law, University of Ilorin, Nigeria, 2014.

74 Borstal Institutions and Remand Centre Act 32 1960, now Cap B38 Laws of the Federation of Nigeria 2004.

75 It should be noted from the outset that the relevant legislation for South African child justice administration in this article will be limited to the Constitution of the Republic of South Africa, 1996 (as amended), the South African Child Justice Act 78 of 2008 (as amended) and the Children's Act 38 of 2005 (as amended) respectively. However, reference may be made to the South African Child Care Act 74 of 1983 (as amended).

76 See sec 35(3)(h) of the Constitution of the Republic of South Africa, 1996 (as amended).

77 See sec 28(2) of the South African Constitution.

not be detained except as a measure of last resort, in which case, in addition to the rights a child enjoys under sections 12<sup>79</sup> and 35,<sup>80</sup> the child may be detained only for the shortest appropriate period of time.

Prior to the enactment of the two sets of legislation in South Africa,<sup>81</sup> which separate the adjudication of children in need of care and protection<sup>82</sup> and children in conflict with the law,<sup>83</sup> the country lacked a single body of law that contained a comprehensive and integrated system that took into account children's vulnerability and special needs, particularly those of black children.<sup>84</sup> The concept of child justice administration in South Africa was formalised with the enactment of the Reformatory Institutions Act, 1879, followed by the Deserted Wives and Children's Protection Act 7 of 1895, the Cruelty to Animals Act 13 of 1895, the Care of Neglected Children Act 24 of 1895, the Child Protection Act 38 of 1901 and the Children's Care and Protection Act 25 of 1913.<sup>85</sup>

Despite the South African Child Care Act,<sup>86</sup> which harmonised all the existing laws on child justice administration, children, especially street children, were not protected under the Act as the Child Care Act in its long title 'provides for the establishment of children's courts and the appointment of commissioners of child welfare; and for the protection and welfare of *certain children*'.<sup>87</sup> However, the drafting of a new Constitution for South Africa as well as the ratification of the CRC in 1995 and the Hague Conventions on Abduction and Adoption, in 1996 and 2003, ushered in an era of change by setting the stage for a comprehensive review of the Child Care Act.<sup>88</sup>

Subsequently, new legislation<sup>89</sup> was enacted to provide adequate, special and specific laws that protect the rights of children in South

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78 See sec 28(1)(g) of the South African Constitution.

79 Sec 12 of the South African Constitution deals generally with the rights to freedom and security of the person.

80 Sec 35 of the South African Constitution deals generally with arrested and detained persons.

81 These are the Children's Act 38 of 2005 (as amended) and the Child Justice Act 38 of 2008 (as amended).

82 This is referred to as civil jurisdiction by virtue of sec 42(8)(c) of the Children's Act 38 of 2005 (as amended).

83 This is referred to as the criminal jurisdiction by virtue of the long title to the South African Child Justice Act 38 of 2008 (as amended).

84 Long title and Preamble to the South African Child Justice Act 38 of 2008 provides: 'Before 1994, South Africa, as a country, had not given many of its children, particularly black children, the opportunity to live and act like children, and also that some children, as a result of circumstances in which they find themselves, have come into conflict with the law.'

85 The Children's Care and Protection Act 25 of 1913 was later replaced with the Children's Act 31 of 1937 followed by the Children's Act 33 of 1960 and the Child Care Act 74 of 1983.

86 South African Child Care Act 74 of 1983 (as amended).

87 My emphasis.

88 See A Skelton & P Proudlock 'Interpretation, objects, application and implementation of the Children's Act' in CJ Davel & AM Skelton (eds) *Commentary on the Children's Act* (2014) 2.

Africa, including black and street children.<sup>90</sup> The enactment is in accordance with the values underpinning the South African Constitution, which is the *grundnorm* that emphasises 'the best interests of children, and single them out for special protection and affording children in conflict with the law specific safeguards'.<sup>91</sup> Based on these statutes, the civil jurisdiction of the court was separated from the criminal jurisdiction on child justice administration in South Africa. The Child Justice Act<sup>92</sup> was enacted specifically as the criminal adjudicatory law to take care of South African children who are in conflict with the law.<sup>93</sup> However, '[t]he Constitution, the Criminal Procedure Act and the common law of South Africa have not been superseded or altered by the Child Justice Act but serve instead to enhance the welfare and special needs of children who are in conflict with the law'.<sup>94</sup>

Instructively, this section is limited to the rights of children in conflict with the law in the child justice court to the presumption of innocence, legal representation and privacy. The Child Justice Act contains some commendable provisions regarding trials of children in respect of the above limitations. For instance, section 63(1)(b) of the Act provides that '[a] child justice court<sup>95</sup> must apply the relevant provisions of the Criminal Procedure Act relating to plea and trial of accused persons, as extended or amended by the provisions set out in chapters 9 and 10 of the Child Justice Act'.<sup>96</sup> According to section 63(4) of the Act, '[a] child justice court must, during the proceedings, ensure that the best interests of the child are upheld'.<sup>97</sup>

In addition, sections 5, 17 and 29 of the Child Justice Act emphasise that a child under the age of 10 years who is alleged to

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89 These are the Children's Act 38 of 2005 (as amended) and the Child Justice Act 38 of 2008 (as amended).

90 As above.

91 See generally ch 2 of the South African Constitution and sec 28 in particular. See also the Panel of Constitutional Experts Memorandum on Children 5 February 1996 2, cited in Boezaart et al (n 88 above).

92 South African Child Justice Act.

93 Some of the laudable provisions were analysed in the latter part of this article as a leverage in enhancing the Nigerian child justice administration regime.

94 See *S v Mahlangu & Another* GSI Case CC70/2010, 22 May 2012 (unreported).

95 This means any court provided for in the Criminal Procedure Act, dealing with the bail application, plea, trial or sentencing of a child.

96 Chs 9 and 10 of the Child Justice Act deal with the trial of children in the child justice court ranging from the child justice court and conduct of trials involving children, diverting children's matters to the appropriate court in minor offences in order to meet the child's basic needs and general sentencing options available to children adjudged to be in conflict with the law in order to promote the 'best interests of the child'.

97 The Appeal Court in the case of *S v Ndwandwe* KZP Case AR 99/12, 6 August 2012 (unreported) held that the child justice court had failed to comply with sec 63 of the Child Justice Act by not promoting the best interests of the child. The Appeal Court emphasised that the 'primacy of the rights of children prevails irrespective of whether the child witness is a complainant or an accused' in order to ensure justice.

have committed an offence will be 'handed over to a probation officer to be dealt with in accordance with section 9' of the Act, while a child above the age of 10 years 'will be taken for preliminary inquiry' after the probation officer's assessment by way of 'written notice,<sup>98</sup> summons<sup>99</sup> or arrest'.<sup>100</sup> However, it should be noted that a child alleged to have committed an offence may be placed in a child and youth care centre or prison in certain circumstances provided for in sections 29 and 30 of the Act, but before such placement, the Act enjoins the victim and the child to undergo a family group conference<sup>101</sup> and victim offender mediation<sup>102</sup> after their consent<sup>103</sup> has been sought and obtained.

Interestingly, the Child Justice Act emphasises the right of presumption of innocence of the child and his or her right to privacy under sections 11 and 63(5) of the Act, by compelling 'the state to prove beyond reasonable doubt'<sup>104</sup> the culpability of the child, especially the capacity to commit an offence by a child 'who is 10 years or older but under the age of 14 years'. Further, 'no person may be present at any sitting of a child justice court unless that person's presence is necessary and granted by the presiding officer'. The combined effect of sections 80 to 83 of the Act is that the right of a child offender to 'legal representation of his/her choice either at his/her own expense' or as 'directed by the presiding officer' is emphasised. A child offender may under no circumstances be allowed to 'waive legal representation' as the 'presiding officer may direct that the child be represented by legal aid'.<sup>105</sup>

## 5 Issues regarding child justice administration in Nigeria

A child is viewed as a vulnerable and dependent being and, thus, deserving of special care.<sup>106</sup> This perception gives rise to the creation of different legal frameworks involving children who are in conflict with the law or children in need of care and protection or who fall

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98 See sec 18 of the Child Justice Act.

99 Sec 19 Child Justice Act.

100 Sec 20 Child Justice Act.

101 This is provided for in sec 61 of the Child Justice Act.

102 This is provided for in sec 62 of the Child Justice Act.

103 Secs 61(1)(b) & 62(1)(b) Child Justice Act.

104 See *S v Mgcina* 2007 (1) SACR 82 (T).

105 See sec 24(1) of the Legal Aid South Africa Act, 2014. See also sec 25(1) of the Child Justice Act 39 of 2014. See also *S v Bekisi* 1992 (1) SACR 39 N(C) and *S v Manuel & Others* 1997 (2) SACR 505 (C).

106 The inference can be drawn from the World Declaration on the Survival and Development of Children which provides that '[c]hildren of the world are innocent, vulnerable and dependent'.

within the purview of status/minor offences.<sup>107</sup> The article will be limited to the examination of child justice administration in respect of the child's point of entrance in adjudication in the child justice court and the rights available to a child in court proceedings, such as the child's right to be considered innocent, to legal representation, and to privacy.

The CRA, like South African legislation,<sup>108</sup> has in section 3 adopted all the fundamental human rights enshrined in the Constitution of the Federal Republic of Nigeria, 1999 (as amended), in addition to the rights specifically provided for as far as children are concerned. For instance, section 11 of the CRA provides specifically for the right to dignity of the child, including sexual abuse, neglect or maltreatment, torture, inhuman or degrading treatment or punishment, among others, in order to combat juvenile delinquency in Nigeria, as these factors may lead to juvenile delinquency.

### 5.1 Child's point of entry into court proceedings

In order to adequately deal with children, especially those in conflict with the law or beyond parental control, the CRA, similar to chapter 9 of the South African legislation, allows all persons and authorities handling cases involving children 'the use of discretionary powers at all levels of the child justice system'.<sup>109</sup> However, unlike in sections 17 to 20 of the South African Child Justice Act, the initiation of court proceedings against a child offender or a child in need of care and protection takes the form of arrest<sup>110</sup> by the police<sup>111</sup> or petition by social workers, even in the case of children below the age of 10 years, as opposed to the South African child justice regime.

It is worth noting that before the start of an interview or interrogation, the parent or guardian and the child are provided with a copy of the written allegation against the child and are adequately informed about the child's constitutional rights, including the right to

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107 These are behaviours that are considered violations of the law only if committed by juveniles, such as truancy, running away from home, and so on.

108 See secs 10, 12, 28, 34 & 35 of the South African Constitution which relate to human dignity, freedom and security of the person, children, access to courts, and arrested, detained and accused persons. See also the long titles to the South African Children's Act 38 of 2005 (as amended) and the South African Child Justice Act 75 of 2008 (as amended).

109 The inference can be drawn from sec 208(1) of the Child Rights Act which provides that '[a] person who makes determination on the child offenders shall exercise such discretion as he deems most appropriate in each case at all proceedings and at different levels of child justice administration, including investigation, prosecution, adjudication and the follow-up of dispositions'. See Owasanoye & Wernham (n 47 above) 31. Here the 'police have the first opportunity to divert child offenders from the formal court system followed by the prosecutors and then the magistrate and judges who are empowered to operate a model that is restorative then rehabilitative and in the least retributive'.

110 The form of complaint or petition to the family court by the police or social worker can be in the form set out in Part I of the Eleventh Schedule to the CRA.

111 Sec 207(1)(c) CRA.

remain silent,<sup>112</sup> similar to what is contained in chapter 3 of the South African Child Justice Act. Similar to sections 63(3), 65 and 80(1)(a)(b) of the South African Child Justice Act, the child also has the right to be informed that he or she may have a lawyer present during the interview or interrogation,<sup>113</sup> and the right to talk to his or her parent or to demand that the parent be present during the interrogation.

Similar to sections 22 to 25 of the South African Child Justice Act, the police have the right in the child justice system to release a child suspect to his or her parents or guardian on bond,<sup>114</sup> except if the charge is one of murder or manslaughter or some other serious crime,<sup>115</sup> or if it is in the interests of the child offender to be dissociated with an undesirable person or his or her incarceration would not defeat the ends of justice.<sup>116</sup> The CRA prohibits the use of any incriminating statement by the probation officer who is considering an informal trial against a child in any criminal proceeding.<sup>117</sup> However, there is a constitutional right that a legal practitioner be engaged to attend before this interview or interrogation session is conducted.

In practice, however, one of the problems relating to child justice administration in Nigeria is that, in many cases, child offenders are taken into custody only for questioning, in which case they are not entitled to legal representation. The public, particularly the parents of child offenders, are usually not adequately informed about their rights to be present at the interrogation or their rights to insist on being present during the child offender's interrogation.<sup>118</sup> Importantly, there has been no evidence of adherence to the provisions regarding the interrogation of the child offender in accordance with the

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112 Under sec 211 of CRA it is the responsibility of the police to inform the parents or guardian of the apprehended child as soon as practicable.

113 See sec 216 of the CRA, 2003 and sec 81 of the Child Justice Act.

114 Sec 215(d) of the Child Rights Act which is to the effect that '[t]he child is not deprived of his personal liberty unless he is found guilty of (i) a serious offence involving violence against another person; or (ii) persistence in committing other serious offences and there is no other appropriate response that will protect the public safety'. Also, the 1999 Nigerian Constitution in sec 35 recognises three exceptional circumstances where the constitutional right to personal liberty of persons including 'children in conflict with the law' may be inoperative. These are '(i) for the purpose of bringing him before a court in execution of the order of a court or upon reasonable suspicion of his having committed a criminal offence or to such extent as may be reasonably necessary to prevent his committing a criminal offence; (ii) in the case of a person who has not attained the age of eighteen years, for the purpose of his education or welfare; (iii) ... or vagrants, for the purpose of their care or treatment or the protection of the community'.

115 Sec 222 CRA.

116 P Harms *Detention in delinquency cases, 1990-1999* (2003); Fact Sheet. Washington, DC US Department of Justice, Office of Justice Programs, Office of Juvenile Justice and Delinquency Prevention. See also secs 211 and 212 of the CRA which provide procedures to be followed during apprehension of juveniles and, if need be, for the juvenile to be detained.

117 See secs 209 & 211(1)(2) of the CRA.

118 See field survey conducted by MA Abdulaheem-Mustapha 'An analysis of the framework for juvenile justice administration in Nigeria'. See sec 211 of the CRA.

provisions of the Child Rights Act,<sup>119</sup> and this hampers the constitutional right of the child to a fair hearing.

However, section 207 of the CRA, which differs from section 89 of the South African Child Justice Act,<sup>120</sup> provides for a specialised children's police unit with well-trained police officers for the prevention of child offences to handle interviews or interrogations of a child in their custody. Incidentally, there is no evidence of the existence of such a unit in the Nigerian police force, as studies have shown that child offenders are held together with women in the juvenile and women centre (JWC) of the police force. In a survey carried out,<sup>121</sup> 71 per cent (849 out of 1 500) of respondents strongly disagreed that there were special cells for children in police stations in Nigeria.

The implication of this finding is that children are being kept in the same cells as adult offenders. This finding is confirmed in an interview conducted in the Bauchi state police headquarters in Nigeria, where one of the respondents said: 'We do not have separate police cells for child offenders; we put them behind the counter or in an empty adult cell.'<sup>122</sup> The reason for the creation of such a specialised children's unit in the police force is to ensure that the child's first contact is well managed in such a way as to respect his or her legal status, to promote the well-being of the child offender, and to avoid harm with due regard to the circumstances of the case.

### 5.1.1 Trial of the child offender in the family court

The combined effect of sections 151 and 162 of the CRA means that the family court in Nigeria has unlimited and exclusive jurisdiction to hear and determine both civil and criminal matters relating to a child alleged to have committed an offence or a child in need of care and protection. These provisions of the CRA are contrary to what is found in the South African child justice administration regime,<sup>123</sup> where the South African Child Justice Act deals with criminal proceedings,<sup>124</sup> basically involving those children who are in conflict with the law, while the South African Children's Act<sup>125</sup> deals with civil proceedings involving those children that are beyond parental control, that is,

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119 See secs 209 & 219 of the CRA.

120 Sec 89 of the Child Justice Act provides for 'one-stop child justice centres with a part designated to be used by the police during inquiry instead of the Children Police Unit established in the CRA'.

121 Abdurraheem-Mustapha (n 118 above).

122 Interview conducted at Bauchi police headquarters on 12 February 2014 by MA Abdurraheem-Mustapha.

123 Interview conducted with the presiding magistrates in the Family Court and Child Justice Court, Grahamstown, South Africa, 20 March 2015 by MA Abdurraheem-Mustapha.

124 See a similar provision in the long title to the South African Child Justice Act 78 of 2008 (as amended).

125 See secs 47, 70, 150 & 152 of the South African Children's Act 38 of 2005 (as amended).



children in need of care and protection, thereby separating the administration of child justice.

It is, therefore, contended that the unlimited jurisdiction of the family court under the CRA may lead to a congestion of children's cases and create an unnecessary delay in child justice administration, as it follows that a single magistrate will be presiding over cases involving both children and adults, as the CRA has not made provision for separate courts although, in practice, the same magistrate adjudicates on both children in conflict with the law and those in need of care and protection, but in different courts and different sittings.<sup>126</sup> Also, these provisions negate the Act in section 215(3) which emphasises that the court shall handle children's cases expeditiously and without undue delay.

Another important issue is whether the establishment of a court for each state of the Nigerian federation as a family court<sup>127</sup> referred to in the CRA should be read as meaning all the High Courts or all the magistrate's courts in each of the states in the federation, or any High Court or any magistrate's court of the state. The literal meaning of the provision of the Act favours the last-mentioned interpretation, which is 'any High Court or any magistrate's court in the state'.

In practice, this could lead to a very unsatisfactory situation, considering the doctrine of *forum convenience*, as the location of the state family court could make children's matters very problematic, particularly those of children in rural areas across the vast geographical area that each Nigerian state occupies. For instance, Kwara State has domesticated the Child Rights Act,<sup>128</sup> has 16 local government areas and more than 30 magistrate's courts, with only one magistrate's court in the city designated as the family court. This poses a challenge to the rights to a fair hearing of children in conflict with the law or in need of care and protection in local government areas that are far from the city,<sup>129</sup> compared to what is provided for in sections 42(1)(6) and 44(1)(a) of the South African Children's Act,<sup>130</sup> which deal only with children in need of care and protection and not with children in conflict with the law.

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126 Interview conducted in Kwara State Family Court, 18 February 2014 by MA Abdulraheem-Mustapha.

127 See secs 149 & 150 of the CRA.

128 Kwara state domesticated the Child Rights Act in 2006. See Kwara State of Nigeria Gazette 7 Vol 41, 2007.

129 Secs 35(4) and (5) of the Constitution of the Federal Republic of Nigeria, 1999 (as amended) provides that a person arrested or detained should be taken to court within a reasonable time, and this means within a radius of 40 kilometers or a day or two days or longer period, as the court may consider reasonable in the circumstances. The unfortunate situation is that each local government in Kwara state has a magistrate's court, but this court cannot hear and determine the case of a child offender unless it is taken to the city where the family court is situated.

130 See also the long title to the South African Child Justice Act which makes provision for more than one child justice court, but more often than not these are ordinary magistrate's courts which exclude the public.

### 5.1.2 Children's rights to the presumption of innocence in court

Section 3 of the CRA incorporates the provisions of section 36(5) of the Nigerian Constitution, which guarantees a child alleged to have committed an offence or who is beyond parental control the right to 'be presumed innocent until the contrary is proved'.<sup>131</sup> This provision places the burden of proving the allegation that a crime has been committed or that the child is in need of care and protection on the prosecution or the complainant.<sup>132</sup> In this regard, a child may remain silent<sup>133</sup> throughout his or her trial as he is not obliged to say anything. This means that a child in court proceedings enjoys all the constitutional safeguards offered by the Constitution and relevant legislation regulating trials similar to that enjoyed by an adult offender. It is contended that the approach of the CRA is consistent with international standards<sup>134</sup> and similar to the Bill of Rights in chapter 2 of the South African Constitution (particularly sections 10, 12, 28 and 38), Chapter 2 of the South African Children's Act (particularly sections 8, 9, 10, 14 and 15) and section 11 of the South African Child Justice Act.

However, a study conducted with 1 500 respondents on child justice administration in Nigeria<sup>135</sup> indicates that 744 (59 per cent) of the respondents agreed that the presumption of innocence is not adequately considered by the family courts in Nigeria, especially in a situation where the child is beyond parental control or in need of care and protection. This was confirmed in interviews conducted in Borstal institutions in Kaduna State and Ilorin in Kwara State,<sup>136</sup> where some officers noted that one of the reasons for the congestion at Borstal institutions was that the family court did not observe the right of presumption of innocence of the child since many children were adjudged to be beyond parental control. It is submitted that this is actually a status or minor offence and that the practice is contrary to international law, which calls for diversionary measures to be applied and institutionalisation to be the last resort.

### 5.1.3 Children's rights to legal representation in court

The right of a child alleged to have committed an offence or who is in need of care and protection to representation in court proceedings by a legal practitioner of his or her choice is fundamental.<sup>137</sup> The court has the obligation to so inform the child of the right to be assisted by

131 See also sec 210(a) of the CRA, <http://www.nials-nigeria.org> (accessed 20 June 2012).

132 Sec 139 Evidence Act Cap E14 Laws of the Federal Republic of Nigeria 2004.

133 Sec 210(c) CRA.

134 S Freeman & M Seymour 'Just waiting: The nature and effect of uncertainty on young people in remand custody in Ireland' (2010) 10 *Youth Justice* 126. See art 37 of the CRC.

135 Studies conducted by Abdurraheem-Mustapha (n 73 above).

136 Interviews conducted in Borstal institutions in Kaduna and Ilorin, 14 and 18 February 2014 respectively.

a lawyer upon apprehension.<sup>138</sup> The child has the right to communicate with his or her lawyer during the preliminary inquiry. Where the child has no counsel, the court must assign one to him or her.<sup>139</sup>

This provision of the CRA is to some extent consistent with sections 80 to 83 of the South African Child Justice Act<sup>140</sup> and section 28(1)(h) of the South African Constitution. However, sections 14, 54 and 55 of the South African Children's Act has added special protections for the child by going beyond the provision of the CRA<sup>141</sup> which limited the assistance to be rendered to the child to legal representation only, by broadening the assistance to include a family advocator, the parents or guardian, who may not necessarily be legal practitioners, in order to avoid technicalities in the proceedings. There are specific provisions regarding the legal representation of children in the Child Justice Act.<sup>142</sup> These are important in policy and in practice. In fact, legal representation is one of the great success stories, as the Legal Aid Board has rolled out services so that hardly any children are unrepresented.<sup>143</sup>

However, in practice, most of the family courts in Nigeria do not observe this provision as studies have shown<sup>144</sup> that minor offences, such as where a child is alleged to be beyond parental control, are not heard at all as the complainants most often are parents. Instead of obtaining the assistance of a legal practitioner or legal aid, the child is

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137 See secs 155 & 210(e) of the CRA. It has been observed in *Haley v Ohio* (332 US 596 599-600 (1948)) <http://www.fairfaxzerotolerancereform.org> (accessed 13 October 2013) that 'juveniles stand in particular need of careful advice concerning their constitutional rights by someone who is expressly and solely identified with their interests'. The child 'needs counsel and support if he is not to become the victim first of fear, then of panic', <http://www.njdc.info> (accessed 18 November 2013). See also RW Sterling 'Role of juvenile defence counsel in delinquency court' National Juvenile Defender Centre, Spring 2009 1.

138 Sec 36(6)(c) Nigerian Constitution, 1999. See also Principle 5 United Nations Basic Principles on the Role of Lawyers (1990); *AG Trinidad and Tobago v Whiteman* (1992) 3 NZLR 540 <http://www.nwu.ac.za> (accessed 15 March 2013).

139 Sec 155 of the Child Rights Act, 2003 provides that 'a child has the right to be represented by a legal practitioner and to free legal aid in the hearing and determination of any matter concerning the child in the court' <http://www.unicef-irc.org> (accessed 20 April 2013).

140 See ch 11 of the Child Justice Act.

141 See *MS v S (Centre for Child Law as Amicus Curiae)* 2011 (2) SACR 88 (CC), cited in the *Commentary to the Children's Act* (2104) <http://www.jutalaw.co.za> (accessed 20 February 2015).

142 See generally ch 11 of the South African Child Justice Act 78 of 2008.

143 See secs 22(1)(b) & 24(1) of the Legal Aid South Africa Act of 2014.

144 In a study conducted by Abdulraheem-Mustapha (n 73 above), one of the parents interviewed observed that '[t]he current juvenile justice system in Nigeria does not recognise the child's rights to fair trial, especially in legal representation, unlike what is obtainable in other countries of Africa'.

committed to remand homes or a Borstal institution,<sup>145</sup> contrary to the provisions of the CRA.

#### 5.1.4 Children's rights to privacy in court

The right to privacy is specific to a child alleged to have committed an offence or who is in need of care and protection. This is contained in section 205 of the CRA, similar to sections 56 and 63(5) of the South African Children's Act and Child Justice Act respectively. The only persons entitled to attend the hearing are the officers of the court, the parties, the legal practitioner representing him or her, parents, the child offender's custodian or guardian, witnesses, and 'other persons directly concerned in the case' or 'institutions dealing with problems relating to children and probation officers'.<sup>146</sup> In order to secure the enforcement of the right to privacy of the child, the law prohibits the publication of information that may lead to the identification of the child being prosecuted.<sup>147</sup> The rationale is to protect the privacy of the child and also to protect him or her from the effects of brutalisation, traumatisation and stigmatisation that may result from a public trial.

It is important to note that there is no special or dedicated court environment for the trial of a child in Nigeria,<sup>148</sup> although courts exercising jurisdiction have the obligation to observe all laws and procedures stipulated for a child alleged to have committed an offence or one who is in need of care and protection. The enactment of the CRA seems to have harmonised the child justice system in Nigeria. However, it does not make provision for a special structure for family courts,<sup>149</sup> contrary to what is provided for in section 89 of the South African Child Justice Act. Although family courts have been

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145 Interview conducted by MA Abdulraheem-Mustapha in Borstal institutions in Kaduna and Ilorin in her PhD research work (n 73 above), 12 and 18 February respectively.

146 Secs 156, 159(1) 216(1) & (2) CRA. This is similar to secs 66 & 74 of the Children's Act.

147 See sec 157 & 205 of the CRA. The publication includes records of child offenders.

148 Instructively, a few states, especially Lagos state, have a visible structure of child justice administration on the ground. However, in most states, such structures are not readily visible. Instead of a permanent family court, magistrates hear cases involving child offenders outside the normal courtrooms or outside normal court sessions, either in the courtrooms or in their chambers. Osinbajo & Kalu (n 36 above).

149 See sec 149 of the CRA. From the report of the 7th United Nations Congress on the Prevention of Crime and Treatment of Offenders CA/Conf.121/22/Rev 1 <http://www.pogar.org> (accessed 15 April 2013), it was observed with seriousness that the juvenile courts derogated from the international standards of preventing the mingling of juveniles with adult criminals as they use existing courts structures for juvenile trials which expose the juveniles to formal criminal processes with a view to determining whether or not these have any adverse effect on subsequent attempts at their rehabilitation and regeneration into society

created in most states that have domesticated the Child Rights Act, studies<sup>150</sup> have shown that the practice of using conventional court environments with the same magistrate presiding over adult cases remains, contrary to the objectives and spirit of child justice administration, thereby exposing child offenders to future dangers.

Studies have shown,<sup>151</sup> in a questionnaire administered to 1 500 respondents in the administration of child justice in Nigeria, that 881 (70 per cent) agreed that the establishment of family courts outside the conventional court environment would prevent the mingling of child delinquents with adult criminals. This finding corresponds with the view expressed by the presiding magistrate of the Kwara State family court in an interview<sup>152</sup> that '[t]he family court sits in chambers to hear and determine child cases yet these sittings are still in the conventional court environment'. It is, therefore, argued that this practice exposes the child alleged to have committed an offence or who is in need of care and protection to adult criminals.

## **6 Reform of child justice administration in Nigeria: Lessons from South Africa**

- 1 The non-inclusion of the definition of a child in the Nigerian Constitution brings about inconsistency in the definition of a child as the Nigerian legislation, such as the CRA, cannot be adopted uniformly as it has to be domesticated by all the states in the federation. A lesson, therefore, is to be drawn from the Constitution of the Republic of South Africa, which designates section 28 to issues of children. In section 28(3) a 'child' is defined to mean 'a person under the age of 18 years'. I recommend the amendment of the Nigerian Constitution to include a section to reflect issues of children in order to make a child's age of uniform.
- 2 It is also recommended that the Nigerian CRA be amended to include the 'minimum age' at which a child can be held criminally liable, as it argues for different treatment of a 10 year-old child offender and an offender of 17 years of age, as they cannot have the same mental capacity for committing an offence. Thus, a lesson may be drawn from sections 7, 9, 10 and 11 of the South African Child Justice Act, which classifies offences according to the minimum age of a child. For instance, in section 7 of the South African Child Justice Act, 'a child offender under the age of 10 years does not have criminal capacity' and can be neither

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150 Interview conducted with the presiding magistrate in the family court in Kwara State, 18 February 2014 in Abdulraheem-Mustapha (n 73 above).

151 Studies conducted by Abdulraheem-Mustapha (n 73 above).

152 Interview (n 150 above).

arrested nor prosecuted for the offence committed and the child will be dealt with under the provisions of section 9 thereof.<sup>153</sup>

- 3 The problem of a single magistrate at magisterial level and single High Court at High Court level of each state hinders the effective administration of child justice in Nigeria, as studies have shown<sup>154</sup> that these courts are loaded with cases involving children, contrary to what is the case in the South African legislation, which approach is preferable as the provisions of the South African legislation bring justice to every child alleged to have committed an offence or one who is in need of care and protection.<sup>155</sup>
- 4 It is also recommended that the CRA be amended to reflect the methods adopted by the South African Child Justice Act, which provides for securing the attendance of a child alleged to have committed an offence by way of either written notice, summons or arrest<sup>156</sup> upon a determination of the nature or seriousness of the offence. For instance, section 20(1) of the South African Child Justice Act provides that 'a child may not be arrested for an offence referred to in Schedule 1, unless there are compelling reasons justifying the arrest'.<sup>157</sup>

The problem with the creation of a specialised children's unit in the Nigerian police force, addressed earlier in this article, will be resolved if lessons are drawn from South Africa, where the entry into the child justice system is basically through a preliminary inquiry connected with the establishment of the family group conference,<sup>158</sup> victim-offender mediation<sup>159</sup> and one-stop child justice centres,<sup>160</sup> as opposed to the methods provided for in the CRA. The idea is to make proceedings involving children more inquisitorial and to avoid technicalities and the merging of child offenders with adult criminals in conventional police stations and courts, which are not in practice separately available in Nigeria.

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153 Sec 9 of the Child Justice Act provides that 'a child under the age of 10 years' will not be arrested but 'handed over to his/her parents or appropriate adult or guardian or a suitable child and youth care centre'.

154 See field survey conducted by Abdulraheem-Mustapha (n 73 above).

155 See generally secs 42(1)(6) and 44(1)(a) of the South African Children's Act. See also the long title to the South African Child Justice Act which makes provision for more than one child justice court.

156 See secs 17-20 of the South African Child Justice Act.

157 Schedule 1 to the South African Child Justice Act deals with minor offences like 'theft, receiving stolen property where the amount does not exceed R2 500 or fraud, extortion or forgery where the amount does not exceed R1 500, malicious injury to property where amount does not exceeds R1 500, etc'.

158 See sec 61 of the South African Child Justice Act.

159 See sec 62 of the South African Child Justice Act.

160 These are structural facilities provided for under sec 89 of the South African Child Justice Act for 'child justice court, police services office for preliminary inquiry', and offices for use by probation officers, among others.

- 5 Based on the empirical study used for purposes of this article regarding experiences in cases determined in the Nigerian family court, it is recommended that the CRA be amended to separate the civil and criminal jurisdiction of the family court by drawing a lesson from the South African child justice administration regime<sup>161</sup> in order to bring about a balance in the Nigerian child justice system.

## 7 Conclusion

The article has considered issues of child justice administration in Nigeria, particularly the CRA, and argues that there is a need for government to implement some of the innovative provisions in the CRA and to draw some lessons from the South African experience. The Child Rights Act is a federal Act which seeks to incorporate contemporary principles, philosophy and standards of child justice administration into the Nigerian legal system. It is also considered a comprehensive uniform law on the protection of children's rights nationwide. However, it has been observed that, in some states in Nigeria, there are differences in the treatment of cases involving children. This hampers the uniformity of the CRA at national level.

It has also been observed that the CRA seems to have incorporated all previous legislation dealing with the child justice system. There is a need to learn lessons from South Africa, as identified in this article, in order to harmonise this legislation. The existing provisions of the CYP Act and other related laws in Nigeria need to be repealed and any provision thereof which is inconsistent with the provisions of the CRA must be declared null and void to the extent of its inconsistency, in order to evolve a child justice system regime that will be humane and responsive.

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<sup>161</sup> Sec 63(2) of the South African Child Justice Act provides that the Act will be applicable to 'the child alleged to have committed an offence having similar facts with the adult offender and the Criminal Procedure Act of South Africa will be applicable to the adult offender'.