

# AN EXAMINATION OF THE CHILD RIGHTS PROTECTION AND CORPORAL PUNISHMENT IN NIGERIA\*

## **Abstract**

*There is a saying that cuts across the nation that “children are the future.” They are the future of any family, country etc. To this extent, it is the duty of every government and society to ensure that children are given every care, help, protection, training and education, they may need, in order to grow into useful citizens and members of society. All legal instruments made for protecting the rights of children come under one banner, “the best interest of the child”. When children break the law, it is pertinent to remember that the essence of justice administration is to mould and not to break; to correct and not to punish. The goal is to ensure that such child is healed enough to be successfully reintegrated into society as useful individuals, to themselves, and to society at large. The question is: How can a child be corrected, if the Biblical “rod of correction” is withheld from him? Is it in the best interest of the child to ban corporal punishment? The writers in this work examine the legal concept of a child and the provision of the law, geared towards protection of the child. And make an assessment/examination as to whether those provisions are adequate or not. The writers also assess the provision of the Child Rights Act which prohibits corporal punishment.*

## **Introduction**

Article 4 (1) of the African Charter on the Rights and Welfare of a Child<sup>1</sup> provides that “in all actions concerning the child undertaken by any person or authority, the best interests of the child shall be primary consideration”.

This provision has been entrenched by Section 1 of the Child Rights Act<sup>2</sup> in our law, which provides that “in every action concerning a child, whether undertaken by an individual, public or private body, institutions of service, court of law, or administrative or legislative authority, the best interest of the child shall be the primary consideration”. A replica of the provision is also found in Article 3 (1) of the Convention on the Rights of the Child<sup>3</sup>.

The fact that the CRC has been ratified by almost all the member States of the United Nations Organization, the “best interest of the child” principle would appear to be the norm presently, both internationally and otherwise. A consensus on the phrase is one thing but how to actualize it, is the more important. It involves determining what is the best interest of the child in every conceivable situation, entrenchment through positive legislation and the issue of enforcement.

More so, the fact that the best interest of the child “shall be a primary consideration” in the decision affecting the child is an indication that it will not always be the single, overriding factor to be considered<sup>4</sup> but in the administration of justice,

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<sup>1</sup> ACRWC, July 1999

<sup>2</sup> Child’s Rights Act, Cap 2003 hereinafter referred to as CRA.

<sup>3</sup> Convention on the Rights of the Child 1989, ratified by Nigeria in 1991. Hereinafter referred to as CRC.

<sup>4</sup> **Human Rights in the Administration of Justice**: A manual on Human Rights for judges, Prosecutors and lawyers UN, New York and Geneva, 2003 <http://www.ohch.org/Document/Publication/training/9Titleen.pdc>.

there may be competing or conflicting human rights interest; for instance, between children, different groups of children and between children and adults.<sup>5</sup>

### **Who is a Child?**

Looking at the Constitution of the Federal Republic of Nigeria,<sup>6</sup> one cannot find any definition of “a child”. Black’s Law Dictionary<sup>7</sup> defined a child as a person under the age of majority.

The Labour Act<sup>8</sup> defines a child as a young person under the age of twelve years and a young person as one under the age of fourteen years. The Children and Young Person’s Act,<sup>9</sup> defined a child as a “person under the age of fourteen years and a young person to mean “ a person who has attained the age of fourteen years and is under the age of seventeen years. The African Charter on the Rights and Welfare of the Child<sup>10</sup> defined a child as “every human being below the age of eighteen years” The United Nation’s Convention on the Rights of the Child<sup>11</sup> defines a child as a person below the age of eighteen years except in the law applicable to the child, the age of majority is attained earlier. The proviso to this definition renders it nothing more than a suggestion.

According to Section 277 of the Act, a child is a person below the age of eighteen years. It must be noted that the legislation on issues concerning children in Nigeria is in the residuary legislative list and as such depends on the States. Individual States are meant to adopt and adapt the Child Rights Act. Most States of the Federation like Abia, Anambra, Bayelsa, Ebonyi, Edo, Ekiti, Imo, Jigawa, Kwara, Lagos, Nassarawa, Ogun, Ondo, Rivers, Taraba, have adopted the CRA. In the process of adapting, some states have changed the definition of “ a child”. In some States, a child, is a young person under the age of thirteen years. In other States like Akwa Ibom State, he/she is a young person under the age of sixteen years.<sup>12</sup>

The writers are of the view, that the perception of age as a definition of a child in Nigeria, depends on who is defining and varies according to cultural background. Furthermore, the lack of a comprehensive definition that is applicable throughout the nation, is an all encompassing handicap with regard to the just application of the provisions of the law.

### **History of Child Protection**

There has never been a time when children were completely bereft of protection. Before the era of legal protection, adults were aware, when a child was being maltreated and tried to help the child. In America, Criminal prosecution has been used to punish flagrant abusers of children. In 1907, for example, a New York shop keeper

<sup>5</sup> **Implementation Handbook for the Convention on the Rights of the Child** (New York, UNICEF, 1989) P.681.

<sup>6</sup> 1999 cap c23 LFN 2004 (as amended in 2010).

<sup>7</sup> B.N. Garner (West Group, St Paul MINN, 8<sup>th</sup> ed. 2004) p.254.

<sup>8</sup> Cap LI LFN, 2004 .

<sup>9</sup> section 2,Cap 22,Laws of the Federation of Nigeria 2004.

<sup>10</sup> Article 2, ACRWC 1999.

<sup>11</sup> CRC, 1989 which Nigeria ratified in 1991 and domesticated in 2003.

<sup>12</sup> Isua N.B., “Juvenile Justice and the Jurisdiction of the Family Court”, presented at the 2009 All Nigerian Judges Conference, Abuja, p.8.

was convicted of sadistically assaulting his slave and her three years old daughter<sup>13</sup>. In 1869, an Illinois father was prosecuted for confining his blind son in a cold cellar in the middle of winter.<sup>14</sup>

Organized child protection emerged, from the rescue of nine years old Mary Ellen Wilson. She lived with her guardians in one of New York's worst tenements. She was routinely beaten and neglected. A religious missionary named Etta Wheeler, learned of the child's plight and determined to rescue her. Wheeler consulted the police, who declined to investigate. She sought advice from Henry Bergh, the founder of the American Society for the Prevention of Cruelty to Animals. Bergh asked his lawyer, Elbridge Gerry to find a legal mechanism to rescue the child. Elbridge Gerry employed a variant of the writ of habeas corpus to remove Mary Ellen from her guardians.<sup>15</sup> Following the rescue of Mary Ellen, Henry Bergh and Elbridge Gerry, decided to create a non-governmental charitable society devoted to child protection and this gave rise to the New York Society for the Prevention of Cruelty to Children (NYSPCC), the world's first entity devoted entirely to child protection.<sup>16</sup>

Looking at the situation in Nigeria, the issue of child protection was non-existent for a long time. During the colonial rule, the welfare of the Nigerian child was not particularly, a major concern to the colonial master. The first attempt at legislation, geared towards child protection in Nigeria, was in 1943, when the Children and Young Persons' Act (CYPA) was promulgated for application in any part of the Protectorate of Nigeria on the order of the Governor-in-council. Subsequently, other legislations were promulgated.

### **Human Rights Instruments and Institutions for Child Protection**

- 1. The Universal Declaration of Human Rights (UDHR):** The UDHR<sup>17</sup> which was the first international Human Rights Instrument to be drawn, declares that "All human beings are born free and equal in dignity and rights."<sup>18</sup> Article 25(2) of UDHR, provides that motherhood and childhood are entitled to special care and assistance and, all children, whether born in or out of wedlock, shall enjoy the same social protection.
- 2. African Charter on Human and Peoples' Rights:** The African Charter made only one mention of the word "Child" in its provisions. Article 18 (3)<sup>19</sup> provides that States parties should ensure the protection of the rights of the child as stipulated in international declarations and covenants. By this provision, the African Charter effectively endorses internationally accepted principle on Children's rights including all the provisions on the administration of juvenile justice.
- 3. The African Charter on the Rights and Welfare of the Child (ACRWA) and the Convention on the Rights of the Child (CRC):** These are the two

<sup>13</sup> E.B Myers, "A Short History of Child Protection in America", *Family Law Quarterly*, 2008, volume 42, No. 3 p. 50.

<sup>14</sup> *Fletcher v. People* (1869) 52 111.395.

<sup>15</sup> E.B. Myers *supra* p.3.

<sup>16</sup> *Ibid* p.4.

<sup>17</sup> Adopted and Proclaimed by General Assembly Resolution 217A December, 1948.

<sup>18</sup> Article 1 UDHR.

<sup>19</sup> African Charter.

international instruments, which make special provisions for the rights of the child. The ACRWC has been signed and ratified by Nigeria. The highlight of its provisions is that “Every Child has the inherent right to life, and States shall ensure to the maximum child survival and development.”<sup>20</sup>

4. **The National Human Rights Commission:** Nigerian’s signature to the United Nations Declaration of Human Rights, puts an obligation on her to disseminate, display, and incorporate human rights in institutions of learning. Nigeria has an obligation to educate children, on human rights as expressed in particular articles of the declaration.<sup>21</sup> To meet up with this obligation, as recommended at the Vienna Conference on Human Rights, the National Human Rights Commission was established in 1996 by the Federal Military Government.
5. **The Child Rights Act:** The Convention on the Rights of the Child enjoins that:
 

State Parties shall undertake to disseminate the Convention’s principles and take all appropriate legislative, administrative and other measures for the implementation of the Rights recognized in the present Convention.<sup>22</sup>

Against this background, the Child Rights Act was passed in 2003. The structure of the Act was informed by the mandate to provide a legislation, which incorporates all the rights and responsibilities of children, and which consolidates all laws relating to children in a single legislation.

Section 264 (1) of the Act, provides for the establishment of a committee to be known as the State Child Right Implementation Committee (referred to as “State Committee” in the Act) The State Committee has the functions <sup>23</sup>to initiate actions that will ensure the observance and popularization of the rights and welfare of the child as provided for in the CRA, CRC, and the AU Charter on the Rights and Welfare of the Child and the Declaration of the Worlds Summit for Children.

### **Child Justice Administration in Nigeria**

The concept “Child Justice Administration” was born out of the understanding that children are different from adults and need special care and protection against the harshness of the normal court process. Justice Administration comprises both civil and criminal processes.

In Europe, during the Middle Ages, children became entities to be reckoned with, as soon as they could participate in adult activities, which was necessary for survival. These activities were helping to grow food, tending the flocks, gathering firewood and such other activities as were necessary for survival. The children were therefore expected to work as adults and obey adult law. A child who commits a crime

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<sup>20</sup> Article 5 ACRWA.

<sup>21</sup> J. Symonides, **The Human Rights; New Dimension and Challenges**, Sidney: UNESCO Publishing, 1989 p.33.

<sup>22</sup> Article 4 CRC *Ibid*.

<sup>23</sup> Section 265(1) CRA *op cit*.

therefore, receives the punishment prescribed for the crime as an adult. Such children thus were treated as miniature adults and were subjected as such at that time.<sup>24</sup>

In the 16<sup>th</sup> and 17<sup>th</sup> century, these attitudes began to change and most of the European countries began to think that children needed adult protection and guidance. The French educational and religious revolution of the 16th century kick-started this new thinking. At this time too, the doctrine of intent which means the state of mind accompanying an act, especially a forbidden act, was developed. This concept changed the way children were treated, since it highlighted the fact that children are generally naïve and innocent and do not know enough about the consequences of their actions to be held responsible for such actions.<sup>25</sup>

In Nigeria, the first conscious effort for the concept of juvenile justice, was in 1943 when the Children and Young Persons Act<sup>26</sup> was promulgated by the British Colonial Government, for application in any part of the Protectorate of Nigeria, on the order of the Governor-in-council.

The Children and Young Person's Act (CYPA), which is an important legislation in Nigeria, dealing with the treatment of young offenders, was initially enacted as an Ordinance in 1943. It was subsequently amended through several legislations. Intended as a national law, provision was made for its adoption as regional law and subsequently, state law. As a result, the law was extended to the Eastern and Western Regions of Nigeria in 1946 by Order in Council, No. 22 of 1946. The Law was enacted for the then Northern Region in 1958 and constituted the Children and Young Persons' Law (CYPL) Cap 21 of the Laws of Northern Nigeria 1963.

The Act was promulgated to make provision for the welfare of the young and the treatment of young offenders and establishment of Juvenile Courts. Section 29<sup>27</sup> provides that:

where a person is brought before any court otherwise than for the purpose of giving evidence, and it appears to the court that he is a child or a young person, the court shall make inquiry as to the age of that person.

This provision is presumably geared towards ensuring that only juvenile courts deal with children and young person. That presumption is however negated by another provision of the Act which states that:

...where in the course of any proceedings in any court other than a juvenile court, it appears that the person charged or to whom the proceedings relate is under the age of seventeen years, nothing in this section shall be construed as preventing the court, if it thinks it is undesirable to

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<sup>24</sup> I.N. Isua, "Juvenile Justice and the Jurisdiction of the Family Court", a paper presented at the 2009 All Nigerian Judges Conference Abuja, 16th-20th November, p.3.

<sup>25</sup> *Ibid* p.4.

<sup>26</sup> Cap 32, Laws of the Federation of Nigeria and Lagos, 1958.

<sup>27</sup> CYPA.

adjourn the case, from proceeding with the hearing and determination of the case.<sup>28</sup>

### **The Child Right's Act and Juvenile Justice System**

The Child Right's Act, promulgated in 2003, was basically an attempt to compile all laws and issues concerning children, into one legal document. With regard to juvenile justice System, the Act contains definite provisions, aimed at protecting children from the harsh process of the criminal justice administration. The Child Right's Act, provides that no child shall be subjected to the criminal justice system or to criminal sanctions, but a child alleged to have committed an act which could constitute a criminal offence if he were an adult, shall be subjected to the child justice system and processes set out in the Act.<sup>29</sup> This provision entails the abrogation of any form of punishment for any person below the age of eighteen years regardless of the enormity of the offence committed by such a person. Police investigation and adjudication in the court are to be used as measures of last resort, where the offence is of a serious nature. Even where a child is prosecuted and found guilty of an offence, restriction of liberty is still a measure of last resort. When a child is apprehended, the court or police, as the case may be, shall, without delay, consider the issue of release.<sup>30</sup> Detention pending trial shall be used only as a measure of last resort and for the shortest possible period of time.

### **The Family Court**

Section 149 of the Act,<sup>31</sup> establishes for each of the States of the Federation and the FCT, Abuja, a court to be known as the family court, (referred to as "the court" in the Act) for the purposes of hearing and determining matters relating to children. Section 150 of the Act<sup>32</sup> provides that the family court shall be at two levels:

- a. the Court as a division of the High Court at the High Court level; and
- b. the Court as a Magistrate Court at the Magistrate Court level

### **Jurisdiction of the Court**

Section 151 (1) of the Act,<sup>33</sup> provides:

Subject to the provisions of the Act and in addition to such other jurisdiction as may be conferred on it by any other law, the court, shall have unlimited jurisdiction to hear and determine:

- a. any civil proceedings in which the existence or extent of a legal right, power, duty, liability, privilege, interests, obligation or claim in respect of a child is in issue; and

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<sup>28</sup> Section 6(3) *Ibid.*

<sup>29</sup> Section 204 CRA.

<sup>30</sup> Section 211 (1) (b) CRA.

<sup>31</sup> CRA.

<sup>32</sup> CRA.

<sup>33</sup> CRA.

- b. any criminal proceedings involving or relating to any penalty, forfeiture, punishment or other liability in respect of an offence committed by a child, against a child or against the interest of a child.

In addition to the fundamental rights applicable to every person, children have special rights under the Act. Some of these are the right to rest and leisure and engage in play, sports and recreational activities appropriate to their age etc.<sup>34</sup> Section 14(2) of the Act, stipulates that every child has the right to parental care, protection and maintenance to the extent of the means of his parents or guardians. Where such maintenance is not provided, the child has the right to enforce this right in the family court.

The writers wonder, what the draftmen intended to achieve by this particular provision. By the immaturity of the child, one wonders how an immature mind can have the capacity to understand adult finances. A child can only sue through another person who could either be the parents or guardians. One wonders how a parent or guardian of a child can bring an action against himself. This provision should be expunged from the Act.

#### **Due Process in the Administration of Child Justice System**

On the apprehension of a child, the parent or guardian of the child must be notified immediately as soon as possible. Where a child is brought before the court, the court shall, as soon as possible, explain to him and his parents or guardian in a language they understand, the substance of the alleged offence.<sup>35</sup> If the child does not admit the facts of an alleged offence, the court shall proceed to hear the evidence of the witnesses in support of the facts.<sup>36</sup> It is important to note, that the legal status and fundamental rights of the child must be respected. In particular;

- a. the presumption of innocence;
- b. the right to be notified of the charges;
- c. the right to remain silent;
- d. the right to the presence of a parent or guardian;
- e. the right to legal representation and free legal aid.<sup>37</sup>

Whenever a child is charged with a criminal offence other than a minor offence, the appropriate officers shall properly investigate the background of the child, the circumstances in which the child is living and circumstances under which the offence was committed and report to the court before the case is finally disposed of.<sup>38</sup> Report should also be made of the social and family background of the child, his school career and educational experience. This is the social inquiry report which would be in the best interest of the child. The court shall consider the well-being of the child, to be the guiding factor in consideration of his case.<sup>39</sup> The Court must ensure

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<sup>34</sup> Section 12 CRA.

<sup>35</sup> Section 117 (1) CRA.

<sup>36</sup> Section 217 (3) CRA.

<sup>37</sup> Section 210 CRA.

<sup>38</sup> Section 219 CRA.

<sup>39</sup> Section 215 (1) (e) CRA.

that the reaction taken, is always in proportion, not only to the circumstances and gravity of the offence but also to the circumstances and ends of the child and the needs of the society.<sup>40</sup>

### **Restriction on Punishment**

The Child Rights Act<sup>41</sup> provides that: no child shall be ordered to be:

- a. imprisoned;
- b. subjected to corporal punishment, or
- c. subjected to the death penalty or have the death penalty recorded against him.

In **S v. Shenjan**,<sup>42</sup> a South African case, the court held that "... it is the experience of prison administrators, that unduly prolonged imprisonment, far from contributing towards reform, brings about the complete mental and physical deterioration of the prisoner---."

With children, this effect could easily be expected to be much worse. Yet in certain cases, it would seem to the writer, that avoiding imprisonment would be tantamount to compromising public safety. In cases of extreme violence like murder and rape, especially where it is proved that the child has no mental problem, it is not so clear what non institutionalization aims to achieve. Where a child may steal because he is hungry, a child who can kill or rape another in cold blood has no need for vocational training. The safety of the public which comprises the safety of other children should be the primary concern.

### **Diversion**

Diversion has been defined as "strategies developed in the youth justice system to prevent young people from committing crime or to ensure that they avoid formal court action and custody if they are arrested and prosecuted."<sup>43</sup> Section 40(3)(b) of the CRC and Rule 11 of the Beijing Rules, provide that States should give consideration, wherever appropriate, to dealing with a juvenile offender without resorting to a formal trial, provided that human rights and legal safeguards are fully respected. Diversion is usually premised on an acknowledgement of responsibility for the offence, and an agreement to make amends for the crime, usually by performing community service or compensating the victim. Sometimes the offender is sent to a course or programme, to deal with a specific problem (e.g. drug addiction, sexual offences, anger management, self esteem). One of the reasons for diversion is the belief that juvenile offenders are mostly first time offenders and are equally non-serious offenders.

### **Corporal Punishment**

The Black's Law Dictionary<sup>44</sup> defines corporal punishment as physical punishment which means, 'punishment that is inflicted upon the body (including

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<sup>40</sup> Section 215 (1) (b).

<sup>41</sup> Section 221 (1).

<sup>42</sup> 1985 (SA) 5 (A) at 331f.

<sup>43</sup> Muncie J; **Youth and Crime: A critical introduction**, London, Sage, 1999, p. 305.

<sup>44</sup> *Op.cit* page 1269.

imprisonment)” it is the deliberate infliction of pain, intended as correction or punishment.

With regard to children, “corporal punishment is the use of physical force with the intention of causing the child to experience bodily pain or discomfort so as to correct or punish the child’s misbehaviour.<sup>45</sup> To Dayton,<sup>46</sup> corporal punishment is “a discipline method in which a supervising adult deliberately inflicts pain upon a child in response to a child’s unacceptable behaviour and/or inappropriate language.

Diana Baumrind<sup>47</sup> defined spanking (an aspect of corporal punishment mostly used for children) as striking the child on the buttocks or extremities with an open hand without inflicting physical injury, with the intent to modify behaviour.

Professor Muray Strauss<sup>48</sup> defined corporal punishment as “the use of physical force with the intention of causing a child to experience pain but not injury, for the purpose of correction or control of the child’s behaviour.

It is observed, that the practice is generally held to differ from torture, in that it is applied for disciplinary reasons and is therefore intended to be limited rather than intended to totally destroy the will of the victim.<sup>49</sup>

Before now, corporal punishment has been a prominent feature of penal sentence, both for juveniles and adults. Even now it is still applicable in most third world countries as a judicial sentence. In Nigeria, it has been prohibited as a judicial sentence for children but it still applies for adults in certain violent or sexual offences.

### **Forms of Corporal Punishment**

Past forms of corporal punishment included branding, birching, mutilation, amputation,<sup>50</sup> and the use of the pillory<sup>51</sup> and the stocks.<sup>52</sup> Leather straps have been used, wooden spoons, belts, slippers, hairbrushes or any handy object. Among commonly used forms of punishment was birching. This punishment meant beating a person across the backside with birch twigs; once a common punishment in schools, it could also be imposed by the courts for minor offences. The use of the ruler was a punishment commonly used in primary schools in the 20th century. The teacher hits the child on the hand with a wooden ruler. The bamboo cane was, and is still being used.

### **School Corporal Punishment**

<sup>45</sup> S.H. Bitensky, **Corporal Punishment of Children: A Human Rights Violation**, Ardsley NY: Translational Publishers, 2006.

<sup>46</sup> J.J Dayton, **Corporal Punishment in public schools: The Legal and Political Battle Continues**, Education Law Reporter 1994, 89.

<sup>47</sup> D. Baumrind, “Does CAUSALLY Relevant Research Support a Blanket Injunction Against Disciplinary Spanking by Parent?” invited address at the 109<sup>th</sup> Annual Convention of the American Psychological Association (August 20, 2001).

<sup>48</sup> M. Strauss, “Corporal Punishment in America and its Effects on Children”, **Journal of Child Centered Practice** 1996; 57.

<sup>49</sup> Strauss *op.cit* p.57.

<sup>50</sup> This is no longer used as a form of punishment either judicially or in educational setup except for States practicing Sharia Law or as contained in Sharia Penal Code.

<sup>51</sup> A wooden frame with holes into which somebody’s head and hands could be locked, formerly used as a means of public punishment.

<sup>52</sup> A wooden frame in which an offender was secured by the hand and feet or by head and hands and left in public to be ridiculed or abused.

School corporal punishment covers official punishment of school children for misbehaviour that involves manual labour of all sorts, striking the child for a given number of times in a generally methodical and premeditated ceremony etc. Striking as a punishment is usually administered either on the hands or across the buttocks with an implement specifically kept for the purpose.

### **Corporal Punishment as a Penal Sentence**

Corporal punishment as a penal sentence or Judicial Corporal Punishment (JCP) is the formal application of flogging, canning, birching, whipping, strapping or spanking as an official sentence by order of a court, as laid down for specific offences under the law of the country concerned.<sup>53</sup> During the 18th century, the concept of corporal punishment was attacked by some philosophers and legal reformers. Physical chastisement became less frequent until, in the twentieth century, corporal punishment was either eliminated as a penalty or restricted to beating with a birch rod, cane, whip or other scourge. In ordinary usage, the term now refers to such penal punishment.<sup>54</sup> When corporal punishment is used in this work, the writer means flogging with cane or whip.

Before the advent of the Child Rights Act,<sup>55</sup> the position of the Law in Nigeria as it concerns corporal punishment as a sentence for juvenile offence was quite different. According to the Criminal Code, canning can be inflicted as a judicial punishment.<sup>56</sup> Article 11 (2) of the CYPA<sup>57</sup> states that “no young person shall be ordered to be imprisoned if he can be suitably dealt with in any other way; whether by prohibition, fine, corporal punishment,<sup>58</sup> committal to a place of detention or to an approved institution or otherwise.”

Article 14 (f) of CYPA provides that where a child or young person charged with any offence is tried by a court, and the court is satisfied of his guilt, the court shall take into consideration the manner in which under the provisions of this or any other Ordinance, the case should be dealt with, whether by ordering the offender to be whipped. Also, whenever a male person, who in the opinion of the court has not attained seventeen years of age, has been found guilty of any offence, the court may, in its discretion, order him to be whipped in addition to or in substitution for any other punishment to which he is liable.<sup>59</sup> In addition to imprisonment, other violent and sexual offences also attract a sentence of whipping. Those provisions did not make any demarcation between child offenders and adults. The CRA however, provided in Section 221 (1) (b) that no child shall be ordered to be subjected to corporal punishment. This provision is contrary to the provision of S.295 of the Criminal Code and S.55 of the Penal Code, both of which endorse the use of corporal punishment as a disciplinary method for persons below the age of eighteen years. The writers wonder

<sup>53</sup> Judicial Corporal Punishment- wikipedia, the free encyclopedia at [http://en.wikipedia.org/wiki/judicial\\_corp-punishment](http://en.wikipedia.org/wiki/judicial_corp-punishment). 17/6/2011.

<sup>54</sup> G. Hawkins, **Corporal punishment**, *op cit* p.251.

<sup>55</sup> Child Rights Act 2003.

<sup>56</sup> Criminal Code Act, Cap C38 Laws of the Federation of Nigeria, 2004.

<sup>57</sup> Children and Young Persons Act LFN 1958.

<sup>58</sup> Emphasis mine.

<sup>59</sup> Criminal Code *op cit*, Section 18.

at the reason for such prohibition in a society like ours and sees none, but pressure from the international community.

Agitations are ongoing to have corporal punishment totally banned as a means of discipline or correction in penal institutions, school, homes and alternative care centers all over the world.<sup>60</sup> It has been proved that Nigeria is far immune to these pressures and agitations from the international Community. Nigeria's 2005 periodic report to the UN Committee on the Rights of Child, contained some protestations to the fact that the Minister of Education had sent a notice to all Nigerian schools intimating them of the fact that corporal punishment in Nigeria schools is no longer acceptable. Again as at August 2010, there was a Bill before the Lagos State House of Assembly, which sought to prohibit corporal punishment of children in Lagos State both in schools and in the home.

### **Child Protection Institutions and Corporal Punishment**

#### **The Committee on the Rights of the Child**

It is the view of the Committee on the Rights of the Child that "children-like all people have a right to respect for their human dignity and physical integrity, a right which is recognized throughout international human rights law. According to the Committee, Corporal punishment of children, violates their dignity and breaches this right".<sup>61</sup> The committee has consistently stated that legal and social acceptance of physical punishment of children, in the home and in institutions, is not compatible with the Convention on the Rights of the Child. Since 1993, in its recommendations, following examination of reports from various States Parties to the Convention, the Committee has recommended prohibition of physical punishment in the family and in institutions.

In 2006, the Committee on the Rights of the Child adopted a general comment on children's right to protection from corporal punishment which aims "to highlight the obligation of all states parties to move quickly to prohibit and eliminate all corporal punishment and all other cruel and degrading forms of punishment of children and to outline the legislative and other awareness-raising and educational measures that states must take."<sup>62</sup> In another paragraph the Committee stated "... there is no ambiguity, all forms of physical or mental violence does not leave room for any level of legalized violence against children. Corporal punishment and other cruel or degrading forms of punishment are forms of violence and the state must take all appropriate legislative, administrative, social and educational measures to eliminate them."<sup>63</sup> In its concluding observation on Nigeria's initial report made in 1996, the

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<sup>60</sup> Global Initiative to End All Corporal Punishment of Children, Global Progress. Available at [\(http://www.endcorporalpunishment.org/pages/frame/htm\(follow "Global Progress" hyperlink the follow the online global tables\)](http://www.endcorporalpunishment.org/pages/frame/htm(follow+\) (showing that, internationally, bans on corporal punishment tend to occur first in schools and institutions, and lastly in the home) accessed 11/6/11.

<sup>61</sup> Dr. Sharon Rustemier, "**Corporal Punishment of Children v. Alternative Disciplinary Approaches**" ISPCAN Virtual Issues Discussion 26-29 June 2006. available at [www.endcorporalpunishment.org](http://www.endcorporalpunishment.org). accessed on 11/6/11.

<sup>62</sup> General Comment No. 8 (2006) on "The right to protection from corporal punishment and other cruel and degrading forms of punishment" (para. 2) available at <http://www.ohchr.org/english/bodies/crc/docs/co/CRC.C.GC.8.pdf>. 11/6/11.

<sup>63</sup> Paragraph 18 *ibid.*

Committee stated “... the problem of violence against children and the physical abuse of children in the family, in schools, in the community and in society are also of major concern to the Committee.”<sup>64</sup>

Concerning Nigeria’s second report 2005, “the committee takes note that Section 221 of the Child Rights Act, prohibits corporal punishment in judicial settings, and that a ministerial note has been sent to schools notifying them of the prohibition of corporal punishment in schools. Nevertheless, the committee recommended that all Nigerian legislations that endorse corporal punishment should be amended.”<sup>65</sup>

### **United Nations’ Human Rights Committee**

The United Nations Human Rights Committee has repeatedly expressed concern about the acceptance of legislation prescribing corporal punishment.<sup>66</sup> It has indicated that the prohibition against torture in the ICCPR extends to a prohibition of corporal punishment and excessive chastisement ordered as punishment for a crime or as an educative or disciplinary measure.<sup>67</sup>

### **Experts on the Right and Welfare of the Child**

In its concluding observations on initial reports (November 2009) “... the committee requests the state party to include in the next periodic report, information on programmes for child retention in school, student teacher ratio, gender disparities, corporal punishment in schools and the nature of facilities in place.”<sup>68</sup>

UNESCO recommends that corporal punishment be prohibited in schools, homes and institutions as a form of discipline, and alleges that it is a violation of human rights as well as counterproductive, ineffective, dangerous and harmful to children.<sup>69</sup>

### **Comparing the Response of other Nations**

Sweden was the first nation to ban all corporal punishment of children. In 1979, all corporal punishment of children in Sweden was outlawed.<sup>70</sup> As at August 2010, whether by legislation or Supreme Court ruling, twenty-eight other countries have similarly abolished canning including Tunisia and Kenya.

### **Corporal Punishment and Civilization**

Corporal punishment is a very controversial subject. The writers interacted with a few people and were very surprised to find out that some Nigerians actually favour the proposition of a ban on corporal punishment. However to ordinary people, it is an unheard of venture and a proposal to strike at the very heart of sensible child rearing. However, among some educated ones, a ban is acceptable. The writers believe

<sup>64</sup> 30 October 1996, CRC/C/15/Add.257 concluding observations on initial report, paragraph 15.

<sup>65</sup> 13 April 2005 CRC/C/15/Add.257, concluding observation on second report, paragraph 38

<sup>66</sup> Human Rights Committee, General comment 20HRI/GEN/1/Rev., p.30.

<sup>67</sup> Ibid, in para 5.

<sup>68</sup> Experts on the Rights and Welfare of the Child, November 2009, Concluding observations on initial report, recommendation 5.

<sup>69</sup> Hart, Stuart N. et al (2005) **Eliminating Corporal Punishment: The Way Forward to Constructive Child Discipline Education on the move Paris UNESCO**. ISBN 9231039911 quoted in Corporal Punishment in the home Wikipedia.

<sup>70</sup> Joan E. Durrant, **A Generation Without Smacking** 6-7 (2000) (giving a history of the 1979 ban Swedish Children and Parents’ Code ch 6,1,2.

their views to be informed by a misconception that it is so in civilized societies, coupled with a desire to follow suit and join the bandwagon. For this reason, we tried to get information as to what actually obtains in the most revered of western states, the United States of America and how Americans view corporal punishment.

In America, the legal situation covering corporal punishment in the home varies from state to state. Contrary to popular opinion, corporal punishment in US homes is not illegal. Throughout the fifty states of the United States of America, corporal punishment is lawful in the home despite some opposition. “Reasonable force” and “non-excessive corporal punishment” are typically allowed by the laws of each state. Bans have been proposed in Massachusetts<sup>71</sup> and California on all corporal punishment of children, including by parents, but these moves were heavily defeated.<sup>72</sup>

In 2008, the Minnesota Supreme Court ruled that spanking a child is legal and does not constitute abuse. The ruling stated that “we are unwilling to establish a bright line rule that the infliction of any pain constitutes either physical injury or physical abuse, because to do so would effectively prohibit all corporal punishment of children by parents and it is clear to us that the legislature did not intend to ban corporal punishment.” The case involved a man who had spanked his 12-year-old son 36 times and who was declared innocent by the Minnesota Supreme Court.<sup>73</sup>

Again in **Willis v State**,<sup>74</sup> where a woman hit her eleven years old son with a belt or extension cord and caused bruises that were neither serious nor permanent, the Supreme Court held that the punishment was reasonable, thereby overturning battery conviction by the lower court.

At the school level, thirty states and the District of Columbia have banned corporal punishment in public schools while in twenty states, it is still lawful. Opponents of the use of corporal punishment have tried to tie it with word such as abuse, cruelty, violence, degradation, inhuman treatment, torture, etc. Is every form of physical discipline tantamount to violence and abuse? Confronted with that question, the European Court of Human Rights held in the case of **Costello-Roberts v UK**<sup>75</sup> that giving a 7-year-old boy three ‘whacks’ with a gym shoe over his trousers was not a forbidden degrading treatment. While excessive use of corporal punishment can be called abuse, so can the excessive use of any form of discipline.

### **Ban of Corporal Punishment and the Right to Freedom of Religion**

Britain banned corporal punishment in public schools in 1986 and in all schools in 1998. A Christian school in Liverpool, brought action in an English court on behalf of several independent religious schools to have the 1998 ban overturned. It claimed that the ban breaches the freedom of conscience provision of the European Convention on Human Rights. Passages from the Bible were cited to support the claim that corporal punishment of children is an essential part of Christian belief. The action was dismissed by the court in November 2001 on the basis that the belief in corporal

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<sup>71</sup> Should spanking Your Child Be Illegal? ABC News, 28 November, 2007.

<sup>72</sup> Sanders, Jim **Spanking Bill Rejection**, Sacramento Bee, California 1 June 2007.

<sup>73</sup> **William v. State** (2008) SC 219

<sup>74</sup> (2008)SC 518.

<sup>75</sup> (1993)ECHR Series A, No. 247C

punishment for religious reasons was not a manifestation of religion and not one of the articles of the Christian faith. The European Commission of Human Rights had rejected an application in 1982 by Swedish parents who alleged that Sweden's 1979 ban on parental physical punishment breached their right to respect for family life and religious freedom.<sup>76</sup> Section 38 of the Nigerian Constitution protects the right of citizens to freedom of thought, conscience and religion. It particularly provided the freedom to manifest and propagate one's religion or belief in worship, teaching, practice and observance. If this fundamental right is still protected by the Nigerian Constitution, then a Christian parent or guardian who believes according to the provision of the Christian Bible in proverbs 22:15, that "foolishness is bound in the heart of a child but the rod of correction shall drive it far from him" should be able to discipline his child physically without fear of interference from any quarter.

Opponents of corporal punishment of children are highly critical of its extensive use and the severity with which it is inflicted. They have been at pains to show that corporal punishment is not used merely as a last resort but is inflicted regularly and for the smallest of infractions. They have also recorded the extreme harshness of many instances of corporal punishment.<sup>77</sup> The most well-known case that was brought before the United States courts is that of **Ingraham v Wrights**.<sup>78</sup> The facts of the case is that on 6th October 1977, a group of pupils at Drew Junior High School in Florida were slow in leaving the stage of the school auditorium when a teacher asked them to do so. The principal, Willie Wright, jr. took the pupils to his office to be paddled. One a 14-year-old, James Ingraham, refused to accept the punishment. An assistant to the principal held Ingraham prone across a table while Wright hit the child over twenty times with a paddle. The beating caused a hematoma, from which fluid later oozed out. A doctor had to prescribe painkillers, laxative, sleeping pills and ice packs. The child had to rest at home for over ten days and could not sit comfortably for three weeks. Though there was a public outcry of abuse, the court rightly held that the boy did not receive cruel or unusual punishment.

Children need to be protected, but they also need to be disciplined. Therefore, the opponents of corporal punishment in our own are wrong in saying that physical punishment should never be inflicted.

## **Conclusion**

In the real sense of it, there is nothing wrong with the provisions of the Child Right's Act which made provision for protection of the rights of children. It seems that the operators are defective in the way they handle things. Our laws are very perfect but the operators are very weak. If the operators could rise up to the challenge, imbibing the spirit of selflessness and exhibiting true love for the nation, our children would enjoy all their fundamental rights as provided for by the Child Right's Act.

For child offenders, there must be a consequence for crime or misbehaviour (a sanction, without which the law is nothing but a huge joke), and for children, nothing serves that purpose better than the adequate number of strokes, depending on the

<sup>76</sup> **Seven Individuals v Sweden**, (1982) ECHR, AD 13

<sup>77</sup> D. Benatar, Corporal punishment: Philosophical Study. Available at <http://www.corpun.com/benatar.htm>

<sup>78</sup> (1977) US vol. 430, p.657.

seriousness of the offence and the age of the Child. Jack Donnelly<sup>79</sup> said “it is impossible to have rights respected without a special force, which can justify the claims to such rights, the same can easily be said of laws and rules, it is impossible to have laws obeyed without sanctions.

### **Recommendation**

The writers proffer the following recommendations

1. Domestication of CRA at the State level: The CRA in its rights-responsibilities approach, is culturally sensitive, compatible, relevant and above all in the best interest of the Nigerian child. It is hoped that the stakeholders that have been instrumental to seeing that the Act was passed at the National level will act collectively to see that the Act is eventually promulgated into law in all the States of the Federation.
2. Section 221 (1) (b) of the Act (CRA) which prohibits the use of corporal punishment as a judicial sentence for juvenile should be repealed.
3. Nigeria, as a sovereign nation, should protect her sovereignty by not allowing international bodies, to intrude into the domestic affairs of the country.
4. There should be a provision for an elaborate and specific form of application of corporal punishment, for instance, who should do the caning, for what offences, the maximum number of strokes and the site on the body where it should be inflicted. Such a strategy would preclude or at least minimize the incidence of abuse.
5. States that have not yet adopted the Child Right’s Act are advised to jettison the provisions of S.221 (b) of the Act in the event of their adopting the CRA.

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<sup>79</sup> Jack Donnelly **Universal Human Rights in Theory and in Practice**, Ithaca and London: Cornell University Press, p. 9

