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Bringing Human Rights Home: An Examination of the Domestication of Human Rights Treaties in Nigeria

Edwin Egede*

Abstract

This article analyses the domestication of human rights treaties in Nigeria. It points out the shortcomings of the present dualist model under the 1999 constitution of the Federal Republic of Nigeria and makes suggestions for reform. It also examines the effect of beliefs and cultural values on the effective application of human rights treaties in Nigeria.

INTRODUCTION

Nigeria, as a nation state in the international community, has been active in signing and ratifying human rights treaties.¹ Undoubtedly the influence of the Universal Declaration of Human Rights and treaties dealing with traditional civil and political rights have permeated various Nigerian constitutions which, since independence, have always included a chapter devoted to guaranteeing fundamental human rights within Nigeria's borders.² However, frequent intervention of the military in Nigerian politics and their style and practice of immediately suspending the fundamental constitutional human rights provisions (as well as declaring military decrees to be superior to the constitution),³ has brought to the fore

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1 Available at <<http://www.ohchr.org/english/countries/ratification/index.htm>> (last accessed 24 April 2007).

2 See chapter IV of the 1999 constitution of the Federal Republic of Nigeria. There have been the 1960 (Independence), 1963 (First Republic), 1979 (Second Republic), 1989 (Third Republic) and the present 1999 (Fourth Republic) constitutions. See also TM Franck and AK Thiruvengadam "International law and constitution-making" (2003) *Chinese Journal of International Law* 467 at 500-04.

3 See the case of *Labiya v Anretiola & Ors* [1992] 8 NWLR (Part 258), 139 at 162, a Supreme Court decision during the military era in Nigeria, where the court put the decree (decrees were legislation by Nigeria's then federal military government) suspending and amending the existing constitution and all decrees of the federal military government in a superior position to the unsuspended provisions of the constitution.

the issue of the domestic application of human rights treaties ratified by Nigeria.⁴ As a result, there have been several decisions of various courts in Nigeria, including the Supreme Court,⁵ which have had significant bearing on the issue of the domestic incorporation and application of human rights treaties in Nigeria.

THE POSITION OF TREATIES IN NIGERIAN LAW: A DUALIST APPROACH

Section 12 of the 1999 constitution⁶

Nigeria operates a dualist system, whereby treaties, including those dealing with human rights, cannot be applied domestically unless they have been incorporated through domestic legislation. Although not specifically stated in the constitution, the practice in Nigeria, similar to that of the United Kingdom, is that the executive arm of central government has the exclusive power to enter into an international treaty. For the treaty to be enforceable in Nigeria, under section 12(1) of the 1999 constitution, it must be enacted as law by the legislative arm of central government. Section 12(1) provides that: “No treaty between the federation and any other country shall have the force of law except to the extent to which any such treaty has been enacted into law by the National Assembly.”⁷ The National Assembly, the federal legislative arm of government, is empowered to enact legislation for the purpose of implementing treaties, even in respect of matters not included in the Exclusive Legislative List.⁸ However, for matters outside the Exclusive Legislative List, a bill to implement a treaty shall not be presented

4 There have been several military regimes in Nigeria: Aguiyi Ironsi (1966); Yakubu Gowon (1966–75); Murtala Mohammed (1975–76); Olusegun Obasanjo (1976–79); Mohammedu Buhari (1983–84); Ibrahim Babaginda (1984–93); Sani Abacha (1993–98) and Abdulsalami Abubakar (1998–99).

5 See secs 6 and 230–84 of Nigeria’s 1999 constitution, the Constitution of the Federal Republic of Nigeria (Promulgation) Decree (now Act) no 24, 1999, on the courts listed in the constitution. The Supreme Court is the highest court in the hierarchy of courts in Nigeria and its decisions are binding on all other courts.

6 This constitution came into force on 29 May 1999 with the swearing in of the democratic government of President Olusegun Obasanjo. See sec 1(2) of the Constitution of the Federal Republic of Nigeria (Promulgation) Act.

7 See also items 26 and 31 of the Exclusive Legislative List contained in the second schedule of the 1999 constitution.

8 See sec 12(2) of the 1999 constitution. Nigeria operates a federal system of government just like that of the United States of America, with a central government (the Federal Government) and 36 states (States Governments), and has a two tier legislative system: the federal level (the National Assembly consisting of the Senate and the House of Representatives) as well as at the state level (the House of Assembly). The constitution divides legislative powers between the federal and the state legislative organs by specifically creating two lists, Exclusive and Concurrent Lists. Matters in the Exclusive List are reserved for the National Assembly to legislate upon, while the Concurrent List contains matters that both the national and state legislatures may legislate upon. Matters which are neither contained in the Exclusive or Concurrent Lists are regarded as falling within an unspecified Residual List and are within the exclusive legislative competence of the House of Assembly of the States.

to the president for his assent, nor shall it be enacted, unless it is ratified by a majority of all the legislative houses of the states in the federation.⁹

In view of Nigeria's chequered political history, replete with several military interventions, it has had several constitutions which adopted the same dualist approach as section 12 of the present constitution.¹⁰ The requirement that a treaty must be enacted as a municipal law before it can be enforced in Nigeria appears to be merely a historical incidence and a colonial relic. As a result of the years of being under the colonial domination of Britain, Nigeria, on independence, automatically adopted the British practice requiring a treaty to be transformed into law before it could apply locally. In the Supreme Court of Nigeria case of *Ibidapo v Lufthansa Airlines*, Wali JSC explained, "Nigeria, like any other Commonwealth country, inherited the English common law rules governing the municipal application of international law."¹¹

Section 12 and the Supreme Court of Nigeria

The Supreme Court of Nigeria examined section 12(1) in relation to the African Charter on Human and Peoples' Rights (the African Charter) in the case of *Abacha v Fawehinmi* (the *Abacha* case).¹² One of the crucial issues that arose in this case was the status of a domesticated treaty under section 12 vis-à-vis other municipal laws. The applicant filed an application in court against the respondents for, among other things, unlawful arrest and detention contrary to the provisions of the 1979 constitution (which at the time of his arrest was the existing constitution) and also the provisions of the African Charter on Human and Peoples' Rights (Ratification and Enforcement) Act (the African Charter Act).¹³ The African Charter Act domesticated the African Charter. The respondents filed a preliminary objection challenging the jurisdiction of the court to hear the case. They argued that the court's jurisdiction was ousted by various decrees of the

9 Id sec 12(3)

10 Similar dualist provisions were contained in previous constitutions. Sec 69 of the 1960 constitution, Laws of the Federation 1960, states, "Parliament may make laws for Nigeria or any part thereof with respect to matters not included in the Legislative Lists for the purpose of implementing any treaty, convention or agreement between the Federation and any other country or any arrangement with or decision of an international organization of which the Federation is a member: Provided that any provision of law enacted in pursuance of this section shall not come into operation in a Region unless the Governor of that Region has consented to its having effect". Sec 74 of the 1963 constitution, Laws of the Federation 1963 was identical to sec 69 above, while secs 12 and 13 of the 1979 and 1989 constitutions respectively contained identical provisions to sec 12 of the present 1999 constitution. See note 2 above on the different Nigerian constitutions.

11 [1997] 4 NWLR (Part 498) 124 at 150. For UK practice see *J H Rayner v Department of Trade and Industry* [1990] AC 418 at 550 and also R Singh QC "The use of international law in the domestic courts of the United Kingdom (2005) 56(2) *Northern Ireland Legal Quarterly* 119 at 120-21.

12 [2000] 6 NWLR (Part 660) 228.

13 Cap. 10, Laws of the Federation of Nigeria, 1990.

then federal military government.¹⁴ In the course of the arguments on the preliminary objection, one crucial argument raised by the applicant was that the provisions of the relevant decrees were inferior to the provisions of the African Charter and therefore could not override the African Charter under which he was seeking relief. The trial judge, after hearing arguments on the preliminary objection, held that the jurisdiction of the court was ousted and struck out the suit. The applicant appealed to the Court of Appeal. The Court of Appeal held, amongst other things, that the African Charter, having been enacted into Nigerian law, assumed a superior position to all other municipal laws. Mustapher JCA of the Court of Appeal, reading the lead judgment, stated as follows:

“It seems to me that the learned trial Judge acted erroneously when he held that the African Charter contained in Cap. 10 of the Laws of the Federation of Nigeria 1990 are (sic) inferior to the Decrees of the Federal Military Government. It is commonplace that no Government will be allowed to contract out by local legislation, its international obligations. It is my view, that notwithstanding the fact that Cap.10 was promulgated by the National Assembly in 1983, it is a legislation with international flavour and the ouster clauses contained in Decree No 107 of 1993 or No 12 of 1994 cannot affect its operation in Nigeria ... While the Decrees of the Federal Military Government may over-ride other municipal laws, they cannot oust the jurisdiction of the court whenever properly called upon to do so in relation to matters pertaining to human rights under the African Charter. They are protected by the international law and the Federal Military Government is not legally permitted to legislate out its obligations.”¹⁵

14 The relevant decrees in this case were: the State Security (Detention of Persons) Decree no 2 of 1984 as amended by decree no 11 of 1994; the Federal Military Government (Supremacy and Enforcement of Powers) Decree no 12 of 1994; and the Constitution (Suspension and Modification) Decree no 107 of 1993. These decrees did not explicitly oust the African Charter Act. For example, sec 4 of the State Security (Detention of Persons) Act provides: “(1) No suit or other legal proceedings shall lie against any person for anything done or intended to be done in pursuance of this Act. (2) Chapter IV of the Constitution of the Federal Republic of Nigeria is hereby suspended for the purposes of this Act and any question whether any provision thereof has been or is being or would be contravened by anything done or proposed to be done in pursuance of this Act shall not be inquired into in any court of law, and accordingly sections 219 and 259 of the Constitution shall not apply in relation to any such question.” By virtue of the Constitution (Suspension and Modification) Decree 1993 (decree no 107 of 1993), decrees under the military regime were superior to any other law including the unsuspended part of the constitution. This particular decree was enacted by the military regime of the late General Sani Abacha (1993–1998). This has always been the practice of military regimes in Nigeria upon taking over the reigns of power from democratic civilian government. See *Labiya v Anretiola & Ors* (see note 3 above) at 162 per Karibi Whyte JSC.

15 *Fawehinmi v Abacha* [1996] 9 NWLR (Part 475) 710 at 747. For an analysis of this Court of Appeal decision, see generally E Egede “The New Territorial Waters (Amendment) Act 1998 – comments on the impact of international law on Nigerian law” (2000) 12 *African journal of International and Comparative Law* 84–104.

This decision of the Court of Appeal was followed in several other Court of Appeal cases dealing with the African Charter.¹⁶ These Court of Appeal decisions appear to have been motivated by the well intentioned desire, not only to protect citizens from human rights abuses by the then military government, but also to ensure that Nigeria honours its international obligations in the human rights treaties it has ratified. The respondents, not satisfied with the decision of the Court of Appeal in the *Abacha* case, appealed to the Supreme Court. The Supreme Court, like the trial court and the Court of Appeal, had to examine section 12(1) of the 1979 constitution, which is identical to section 12(1) of the 1999 constitution. As a result of the constitutional issue involved in this case, the Supreme Court was constituted by seven justices.¹⁷ The court was unanimous in confirming the dualist effect of section 12(1) of the constitution.¹⁸

The exclusion from domestic application of human rights treaties to which Nigeria has become a party by succession,¹⁹ accession or ratification²⁰ by the deliberate (or perhaps inadvertent) failure by the legislature to enact them into law appears to be unwarranted. The inequity of section 12(1) is highlighted by the rather blunt and disturbing statement of one of

16 Such as *Comptroller of Nigerian Prisons & 2 Ors v Adekanye & 26 Ors* [1999] 10 NWLR (Part 623) 400 and *Ubani v Director of State Security Services* [1999] 11 NWLR (Part 625) 129.

17 The justices in this case were Justices Salihu Modibbo Alfa Belgore, Michael Ekundayo Ogundare, Uthman Mohammed, Anthony Ikechukwu Iguh, Okay Achike, Samson Odemwingie Uwaifo and Akintola Olufemi Ejiwunmi. For cases involving the interpretation of constitutional provisions, such as the present case, the Supreme Court is constituted by seven justices. See sec 234 of the 1999 constitution.

18 *Abacha* case at note 12 above per Ogundare JSC at 288 and Achike JSC at 314 who delivered the lead judgements for the majority and minority respectively. The dualist position of the application of treaties in Nigeria under section 12(1) had been endorsed by the Supreme Court in the earlier case of *African Reinsurance Corporation v Abata Fantaye* [1986] 3 NWLR (part 32) 811, a case between the African Reinsurance Corporation and Nigeria which concerned a non human rights treaty. In this case the court emphatically held that the treaty, though ratified by Nigeria, did not have any force of law because it had not been enacted into law by the federal legislative body (at that time the federal military government). Interestingly, this case though relevant was never referred to by the Supreme Court in the *Abacha* case.

19 See the exchange of letters between the United Kingdom and the Government of Nigeria on 1 October 1960 in which the Nigerian government confirmed and agreed that:

(a) All the obligations and responsibilities of the government of the United Kingdom which arise from any valid international instrument are from 1 October 1960 assumed by the Federation of Nigeria in so far as such instruments may be held to have application to or in respect of the Federation of Nigeria.

(b) The rights and benefits heretofore enjoyed by the government of the United Kingdom in virtue of the application of any such international instrument to or in respect of the Federation of Nigeria are from 1 October 1960, enjoyed by the Government of Nigeria.

See the case of *Ibidapo v Lufthansa Airlines* (see note 11 above) at 144-45.

20 See arts 11 to 16 of the Vienna Convention on the Law of Treaties (VCLT) (1969) 8 International Legal Materials (ILM) 679; (1969) 63 American Journal of International Law 875.

the Supreme Court justices in the *Abacha* case when he said, “It is therefore manifest that no matter how beneficial to the country or the citizenry an international treaty to which Nigeria has become a signatory may be it remains unenforceable, if it is not enacted into law of the country by the National Assembly.”²¹

What this indicates is that human rights treaties to which Nigeria is a party, which are actually meant for the ultimate benefit of the citizenry, have no effect except at the instance of the legislature. This, in the view of the author, appears to detract from the crucial objective of entering into such treaties, which are meant to protect individuals from the excesses of the government and its agencies.²²

Apart from endorsing that, under section 12(1) of the constitution, no treaty (including those dealing with human rights) could have force of law in Nigeria unless brought into domestic legislation by the National Assembly, the Supreme Court in the *Abacha* case also examined the status of such domesticated treaty legislation vis-à-vis other municipal legislation.

THE RELATIONSHIP BETWEEN IMPLEMENTED TREATIES AND OTHER NIGERIAN LAWS

Domesticated human rights treaty legislation and the constitution

Again, the justices of the Supreme Court in the *Abacha* case were unanimous in holding that domesticated human rights treaty legislation was in no way superior to the constitution.²³ The need for the Supreme Court to clarify the status of the African Charter Act vis-à-vis the constitution became necessary in view of certain statements by the Court of Appeal in this case and subsequent cases, which implied that the legislation domesticating the African Charter was superior to the constitution.²⁴

These Court of Appeal cases, though laudable attempts by the court to curb human rights abuses during the then military regime, created the problem of the status of the African Charter Act vis-à-vis the 1999 constitution under the present democratic civilian regime. It is not surprising that the Supreme Court rejected the view that the African Charter Act was superior to the constitution, since to do otherwise would have been a judicial absurdity in view of the clear provisions of the constitution which declares it to be the supreme law of the land.²⁵

21 *Abacha* case at note 12 above per Ejiwunmi JSC at 356–57.

22 See the Vienna Declaration and Programme of Action, 1993 World Conference on Human Rights, UN doc. A/CONF 157/24, (1993) 32 ILM 1661, which declares that “... all human rights derive from the dignity and worth inherent in the human person, and that the human person is the central subject of human rights and fundamental freedoms, and consequently should be the principal beneficiary...”

23 *Abacha* case at note 12 above per: Ogundare JSC at 289; Mohammed JSC, at 301–302; Achike JSC at 317–18; Uwaifo JSC at 343.

24 See note 15 above. Also see *Ubani v Director, State Security Service*, above at note 16 at 129.

25 Secs 1(1) and (3) of the 1999 constitution, which are identical to the same sections in the 1979 constitution say: “This Constitution is supreme and its provisions shall have

The issue of the status of the constitution vis-à-vis domesticated human rights legislation is not merely an academic debate as there exists a real possibility of a conflict between the constitutional provisions and certain sections of the African Charter Act, which domesticates the African Charter. The fundamental human rights provisions of the constitution are limited to civil and political rights, while the African Charter Act goes beyond this to include socio-economic, cultural and solidarity rights. While it may be said that the African Charter generally supplements and does not necessarily derogate from the constitution, there are certain rights under the African Charter which are enforceable but are expressly identified by the constitution as unenforceable. For instance, article 17(1) of the African Charter says, "Every individual shall have the right to education". This right is not contained in the fundamental human rights provision of the constitution.²⁶ However, section 18 of chapter II of the constitution, headed "Fundamental objectives and directive principles of state policy"²⁷ urges the government to direct its policy towards providing equal and adequate educational opportunities at all levels, as well as to strive to eradicate illiteracy and to provide as and when practicable free, compulsory and universal primary education, secondary education, adult education and adult literacy programmes. The constitution, however, makes it clear that the fundamental objectives and directive principles under chapter II are not enforceable in court.²⁸ Consequently, a possible conflict arises whereby the right to education is an enforceable right under the African Charter but

contd

binding force on all authorities and persons throughout the Federal Republic of Nigeria. If any other law is inconsistent with the provisions of this Constitution, this Constitution shall prevail, and that other law shall to the extent of the inconsistency be void." However when there was military intervention in Nigeria, these provisions were always repealed by the military junta which gave a superior status to its legislation (decrees) over the constitution.

- 26 Chapter IV of the 1999 constitution incorporates the traditional civil and political rights such as: right to life (sec 33); right to human dignity (sec 34); right to personal liberty (sec 35); right to fair hearing (sec 36); right to private and family life (sec 37); right to freedom of thought, conscience and religion (sec 38); right to freedom of expression and the press (sec 39); right to peaceful assembly and association (sec 40); right to freedom of movement (sec 41); right to freedom from discrimination (sec 42); right to acquire and own immovable property anywhere in Nigeria (sec 43).
- 27 See generally E E O Alemika "Fundamental objectives and directive principles of state policy within the framework of a liberal economy" and J O Akande, "Fundamental objectives and directive principles of state policy within the framework of a liberal economy: a note" in I A Ayua, DA Guobadia and AO Adekunle (eds) *Nigeria - Issues in the 1999 Constitution* (2000, Lagos, Nigerian Institute of Advanced Legal Studies) 198-234.
- 28 Sec 6(6)(c) of the constitution says, "The judicial powers vested in accordance with the foregoing provisions of this section shall not, except as otherwise provided by this Constitution, extend to any issue or question as to whether any act or omission by any authority or person or as to whether any law or any judicial decision is in conformity with the Fundamental Objectives and Directive Principles of State Policy set out in Chapter II of this Constitution." See *Archbishop Okogie v Attorney General of Lagos State* (1981) 2 NCLR 337 at 350.

is not enforceable under the constitution. In such a situation the conflict will be resolved in favour of the Nigerian constitution.²⁹

Domesticated human rights treaty legislation and other municipal legislation

This section examines the status of domesticated human rights treaty legislation vis-à-vis firstly acts and secondly laws.³⁰

Acts of the National Assembly

In the *Abacha* case, the Supreme Court justices divided on the issue of the status of domesticated treaty legislation (including human rights treaties) vis-à-vis subsequent “ordinary” legislation³¹ of the National Assembly. The justices were divided between the liberal constructionists (the majority)³² and the strict constructionists (the minority).³³ The liberal constructionists, led by Ogundare JSC, while not ready to go as far as the Court of Appeal in holding categorically that domesticated treaties (in this case the African Charter Act)³⁴ were superior to other legislation of the National Assembly, were prepared to apply certain rules of construction to arrive at the same conclusion in this particular case.³⁵ So far as the liberal constructionists were concerned, since the legislature would be presumed not to intend to breach Nigeria’s international obligations, the courts should interpret a conflict between a domesticated treaty and subsequent municipal law in such a way that the former would prevail, unless specifically repealed by the latter. However, they were careful to emphasize that this view should not be taken to give the domesticated treaty law any superior status over the constitution, the paramount municipal law. Neither should it be taken to debar the legislature from subsequently enacting municipal legislation that would expressly repeal the domesticated treaty law. In the words of the

29 See note 25 above.

30 The Nigerian federal legislative organ, the National Assembly, legislates by way of “acts”, while the States Houses of Assembly legislate by way of “laws.” See sec 318(1) of the 1999 constitution.

31 Ordinary legislation is used in this sense to cover the legislation of the National Assembly which is not a domestication of an international treaty.

32 Ejiwunmi, Iguh, Ogundare and Uwaifo JJSC.

33 Achike, Belgore and Mohammed JJSC.

34 Cap.10, Laws of the Federation of Nigeria 1990 with a commencement date of 17 March 1983.

35 The majority concluded that, assuming that the legislature does not intend to breach its international obligations, subsequent laws passed by the federal military government which do not specifically repeal the African Charter Act would not be regarded as having repealed such an act with an international flavour. The English case of *Attorney General v British Broadcasting Corporation* (1981) AC 303 was referred to on this point. See note 12 above, per Uwaifo JSC at 345. See also the statement of Chief Justice Marshall in the American case of *Murray v The Schooner Charming Betsy* 6 US (2 Cranch) 64, 118 (1804) where he said that “an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains.”

learned Supreme Court justice reading the lead judgment for the majority liberal constructionists:

“No doubt Cap.10 is a statute with international flavour. Being so, therefore, I would think that if there is a conflict between it and another statute, its provisions will prevail over those of that other statute for the reason that it is presumed that the legislature does not intend to breach an international obligation. To this extent I agree with their Lordships of the Court below that the Charter possesses "a greater vigour and strength" than any other domestic statute... Nor can its international flavour prevent the National Assembly, or the Federal Military Government before it remove (sic) it from our body of municipal laws by simply repealing Cap.10.”³⁶

The majority liberal constructionist justices were also quick to emphasize that such domesticated treaty legislation could not be used to determine the validity of a subsequent act of the National Assembly. One of the justices pointed out as follows: “The application of this principle [principle of interpretation that there is a rebuttable presumption that the legislature does not intend to violate rules of international law] does not imply that a statute will be declared ultra vires as being in contravention of a treaty or of an international law, or that the treaty is superior to the national laws (a completely erroneous concept), but that the courts would desist from a construction that would lead to a breach of an accepted rule of international law”.³⁷

The purport of this liberal constructionist view is that, although there is a presumption in favour of domesticated treaty law in the event of conflict with other municipal laws, such presumption may be rebutted if it is explicitly repealed, modified or varied by a subsequent municipal law. From this decision, there is, therefore, nothing “sacred” about a domesticated human rights treaty law since it can be repealed, modified or varied by the legislature. The only onus the liberal constructionist view appears to put upon the legislature is that it can only repeal, modify or vary a domesticated human rights treaty law explicitly rather than implicitly. This clearly differs from the position of the Court of Appeal which put domesticated human rights laws on a higher pedestal than other municipal laws.³⁸

The strict constructionists, on the other hand, took the position that the domesticated treaty legislation had no special status and was on a par with any other act of the National Assembly. Neither were they inclined to presume that the legislature does not intend to breach international obligations, by holding that domesticated treaty legislation still applies if it is not expressly repealed, amended or varied by a subsequent act. Achike

36 *Abacha* case at note 12 above per Ogundare JSC at 289. See also Iguh JSC at 303-304, Uwaifo JSC at 345, and Ejiwunmi JSC at 357.

37 *Id* per Uwaifo JSC at 345.

38 See note 15 above.

JSC, reading the decision of the strict constructionists, vehemently opposed to the position of the Court of Appeal, stated:

“No authority was given in support of this far-reaching proposition. On the contrary, the proposition is manifestly at variance with section 12(1) of the 1979 Constitution ... Indeed, enacting the African Charter as an Act of our municipal law and as a schedule to the only two sections of the Act, ie Cap 10 LFN 1990, a close study of that Act does not demonstrate, directly or indirectly, that it had been ‘elevated to a higher pedestal’ in relation to other municipal legislations (sic). The provisions of the only two sections of Cap.10, LFN 1990 incorporating the African Charter into our municipal law are conspicuously silent on a ‘higher pedestal’ to which the learned Justice of the lower court arrogates to the African Charter vis-à-vis the ordinary laws. The general rule is that a treaty, which has been incorporated into the body of the municipal laws, ranks at par with the municipal laws. It is rather startling that a law passed to give effect to a treaty should stand on a ‘higher pedestal’ above all other municipal laws, without more, in the absence of any express provision in the law that incorporated the treaty into municipal law.”³⁹

Although technically section 12(1) does not in any way distinguish between treaty legislation and other municipal laws, it does appear that the strict constructionist view is unnecessarily rigid and legalistic, since the courts, in the exercise of their duty to do justice and protect rights, should utilize methods within the framework of the law, including using rules of interpretation, to support the preservation rather than the proscription of rights under domesticated human rights treaties.⁴⁰

In the author’s opinion, the majority (the liberal constructionists) and minority (the strict constructionists) decisions of the Supreme Court reveal the deficiency of section 12(1) of the constitution, especially as regards domesticated human rights treaty legislation. The government may ratify human rights treaties for the benefit of its citizens, enact them as law and then subsequently repeal, modify or amend the laws to deprive its citizens of the benefits of the treaties! The dualist nature of section 12(1) permits this.⁴¹ This dualist attribute of section 12(1) in itself raises the truism that

39 *Abacha* case at note 12 above at 316. See also the judgments of Belgore JSC at 299 and Mohammed JSC at 301.

40 See the 1996 South African constitution which specifically imposes a duty upon the South African courts to prefer an interpretation of a law which is consistent with international law. Sec 233 says, “When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law.”

41 See generally F Morgenstern “Judicial practice and the supremacy of international law” (1950) 27 *British Yearbook of International Law* 42 and I Seidl-Hohenveldern “Transformation or adoption of international law into municipal law” (1963) 12 *International & Comparative Law Quarterly* 88.

the same legislature, which gives authority for the domestic application of a ratified treaty by enacting it as law, must, by logical deduction, have the authority to repeal, modify or amend such laws.⁴²

The inherent shortcoming of the dualist nature of section 12(1) in guaranteeing the individuals' right to enjoy the protection of rights under human rights treaties ratified by Nigeria, suggests, in the author's view, a need to adjust this provision.⁴³

Laws of the States Houses of Assembly

It is interesting to note that the Supreme Court's decision in the *Abacha* case only related to a conflict between treaty legislation and legislation enacted by the National Assembly. In Nigeria's federal system,⁴⁴ where the states have powers to legislate on certain matters,⁴⁵ the possibility of conflict between domesticated human rights treaties, such as the African Charter Act, and state laws is certainly not a remote possibility. An example of this real and present possibility emerges with the introduction of Islamic criminal law by certain states in the north of Nigeria.⁴⁶ The Houses of Assembly of these states enacted, some argue in a manner contrary to the 1999 constitution,⁴⁷ penal code laws introducing,⁴⁸ amongst other things, certain penalties for offences against Sharia law such as amputation of

42 Morgenstern, id at 51.

43 See section below: "The need to amend section 12 of the 1999 constitution".

44 See sec 2 of the 1999 Constitution. See also generally B O Nwabueze, *Federalism in Nigeria under the Presidential Constitution* (1983, Sweet and Maxwell, London).

45 Id secs 4(6) and (7).

46 Zamfara was the first state to enact legislation on this issue and since then a number of states in the north of Nigeria (for example Bauchi, Borno, Gombe, Jigawa, Kaduna, Kano, Katsina, Kebbi, Niger, Sokoto and Yobe) have followed suit. See US Department of State 2000 Annual Report on International Religious Freedom: Nigeria, available at <http://www.state.gov/www/global/human_rights/irf/irf_rpt/irf_nigeria.html> (last accessed 17 May 2007). Also see O U Kalu, "Safiyya and Adamah: punishing adultery with Sharia stones in twenty-first-century Nigeria" (2003) 102 *African Affairs* 389-408.

47 The constitutionality of these laws has not been determined by the Nigerian courts but, for an interesting analysis of the constitutionality of these laws, see: A U Iwobi "Tiptoeing through a constitutional minefield: the great Sharia controversy in Nigeria" (2004) 48(2) *Journal of African Law* 111-64; and B Nwabueze, "The unconstitutionality of the state enforcement of Sharia law" available at <<http://www.ogbaru.org/buezeon%20sharia.html>> (last accessed 17 May 2007). See sec 10 of the 1999 constitution which says, "The Government of the Federation or of a State shall not adopt any religion as State Religion."

48 An example of such law is the Zamfara State Penal Code Law no 10 of 2000 which consists of 409 sections and ten schedules. For example, sec 127 provides for caning by 100 lashes and imprisonment for one year (unmarried offenders) or stoning to death (married offenders) as punishment for the offence of extra-marital sexual intercourse. Sec 145 provides for amputation of the right hand from the wrist as punishment for the offence of theft. Sec 153(d) provides for crucifixion for robberies involving murder and seizure of property.

arms,⁴⁹ whipping,⁵⁰ stoning to death⁵¹ and crucifixion.⁵² These penalties could be said to conflict with article 5 of the African Charter, domesticated as the African Charter Act, which says, “Every individual shall have the right to the respect of the dignity inherent in a human being and to the recognition of his legal status. All forms of exploitation and degradation of man particularly slavery, slave trade, torture, *cruel, inhuman or degrading punishment* and treatment shall be prohibited.”⁵³ (Emphasis added)

Under the 1999 constitution, where there is a conflict between any law validly made by the National Assembly and that enacted by the House of Assembly of a state, the former prevails and the latter (to the extent of its inconsistency) is void.⁵⁴ Therefore, since the African Charter Act is by virtue of section 12(1) deemed to be a law validly made by the National Assembly, the Sharia laws of the states should be, at least to the extent of their inconsistency with the charter provisions, void.

SPECIFIC NIGERIAN LEGISLATION DOMESTICATING HUMAN RIGHTS TREATIES IN NIGERIA

African Charter on Human and Peoples’ Rights (Ratification and Enforcement) Act (the African Charter Act)⁵⁵

The African Charter Act legislation merely contains two sections and a schedule which sets out the provisions of the African Charter. The first section provides that, as from the act’s commencement on 17 March 1983,

49 Mallam Bello Jangedi was indicted under the Zamfara law for allegedly stealing some animals; on conviction one of his hands was amputated. Another victim of the Zamfara law, Lawali Isah, had one of his hands amputated for stealing three bicycles. See I Maru “Man loses hand for stealing three bicycles” (2001) *This Day* (Nigerian Newspaper) available at <<http://www.thisdayonline.com/archive/2001/05/05/20010505news09.html>> (last accessed 17 May 2007).

50 Bariya Ibrahim Magazu, a 17 year old girl, was indicted under the Zamfara law for engaging in pre-marital sex resulting in pregnancy; on conviction she was sentenced to 100 lashes. See “Nigerian flogging condemned” (2001) BBC news, available at <<http://news.bbc.co.uk/1/hi/world/africa/1132168.stm>> (last accessed 17 May 2007).

51 Safiyatu Hussein, accused of committing adultery, would have been stoned to death but for the intervention of the international community which led to her acquittal on technical procedural grounds by the Sharia Court of Appeal. See Kalu “Safiyya and Adamah”, above at note 46 at 394-408. See S V Barrow “Nigerian justice: death-by-stoning sentence reveals empty promises to the state and the international community” (2003) 17 *Emory International Law Review* at 1203-1249. Also see the *Amina Lawal* case (unreported, referenced in Barrow “Nigerian justice” at 1204-08) where the Sharia Court of Appeal also reversed the conviction and sentence to death by stoning for the offence of adultery on technical procedural grounds.

52 See sec 153(d) of the Zamfara Penal Code.

53 See Iwobi “Tiptoeing through a constitutional minefield”, above at note 47 at 138-48.

54 Sec 4(5) of the 1999 constitution says: “If any Law enacted by the House of Assembly of a State is inconsistent with any law validly made by the National Assembly, the law made by the National Assembly shall prevail, and that other Law shall to the extent of the inconsistency be void”.

55 See note 34 above.

the African Charter provisions have force of law in Nigeria and should be given full recognition and effect and be applied by all authorities and persons exercising legislative, executive and judicial powers in Nigeria. The second section gives the formal title of the Act.

The African Charter contained in the schedule to this legislation, consisting of 68 articles, appears to deal with the three generations of human rights: civil and political rights;⁵⁶ economic, social and cultural rights,⁵⁷ and solidarity rights.⁵⁸ However, as a result of the interdependence and indivisibility of human rights, the demarcation between these three generations in the African Charter is sometimes not clear-cut and appears to overlap.⁵⁹ The charter also imposes certain duties upon the state, as well as the individual.⁶⁰ Article 1 imposes an obligation on all states parties to “recognize the rights, duties and freedoms enshrined in this Charter and ... undertake to adopt legislative or other measures to give effect to them.”⁶¹ The legislation of the National Assembly therefore complies with its obligation under article 1. The Supreme Court justices in the *Abacha* case were unanimous about the enforceability of the African Charter by the Nigerian courts.⁶²

One critical issue however relates to the implementation of certain provisions of the charter. While it is easy to implement the traditional civil

56 Arts 2-14: protection from discrimination; equality; right to life; freedom from exploitation and degradation particularly slavery, slave trade, torture, cruel, inhuman or degrading punishment and treatment; right to liberty and security of person; right to fair hearing; freedom of conscience and religion; right to receive information and freedom of expression; freedom of association and assembly; freedom of movement; right to participate in government; and right to property.

57 Arts 15-17: right to work; right to health; and right to education.

58 Arts 19-24 dealing with the rights of peoples: equality of all peoples; right to self-determination; right of peoples to dispose freely of their wealth and natural resources; right of peoples to development; right of peoples to national and international peace and security; and right of peoples to a clean and healthy environment.

59 See C A Odinkalu, “Analysis of paralysis or paralysis by analysis? Implementing economic, social, and cultural rights under the African Charter on Human and Peoples’ Rights” (2001) 23 *Human Rights Quarterly* 327 at 337-48, where the author suggests that the African Charter addresses economic, social and cultural rights at five levels which he identified as: cross-cutting rights (rights that straddle, underlie or facilitate the exercise of both civil and political rights and economic, social and cultural rights); new rights (rights that are mostly economic, social or cultural and are not covered by other international human rights regimes); classic economic, social and cultural rights (traditional economic, social and cultural rights); women’s, traditional and cultural rights (rights dealing with the protection of women’s rights and also the need to take into account African tradition and culture in interpreting charter rights); and group and collective rights (economic, social and cultural rights as collective human rights).

60 Arts 17(3), 18(2), 22(2), 25 and 26 as well as 27-29. See generally on obligations under the African Charter, C Anyangwe “Obligations of state parties to the African Charter on Human and Peoples Rights” (1998) 10 *African journal of International and Comparative Law* 625-59.

61 *Id* at 629-35.

62 *Abacha* case at note 12 above per Ogundare JSC at 289, Belgore JSC at 298, Mohammed JSC at 301, Iguh JSC at 303, Achike JSC at 315, Uwaifo JSC at 340 and Ejiwunmi JSC at 356.

and political rights in the African Charter, which are similar to the rights contained in chapter IV of the constitution (and in essence the subject-matter of the *Abacha* case, as well as several other cases based on the charter),⁶³ problems may arise regarding the implementation of economic, social and cultural rights, as well as solidarity rights.⁶⁴ Certain provisions of the charter dealing with socio-economic rights, which are obviously intended to be justiciable, would have to be reconciled with similar provisions under chapter II of the 1999 constitution dealing with the fundamental objectives and directive principles of state policy, which are not justiciable.⁶⁵ Further, the implementation of socio-economic rights is capital intensive in nature and raises the issue of whether the Nigerian government is in a position to implement these rights domestically. For example, article 16 of the African Charter provides that, “Every individual shall have the right to enjoy the best attainable state of physical and mental health. States Parties to the present Charter shall take the necessary measures to protect the health of their people and to ensure that they receive medical attention when they are sick.” It is difficult to imagine how the government can implement this provision in a nation where the poverty level is high and where health facilities are inadequate.⁶⁶ This, therefore, raises the question of what happens if, due to inadequate resources or lack of an enabling environment, the government is unable to carry out its obligations effectively. Can the government of Nigeria, on this ground or any other ground, amend, vary or abrogate the African Charter Act? There is a dearth of decisions of the Nigerian courts on the implementation of socio-economic rights under the charter. However, perhaps guidance can be obtained from other jurisdictions, such as South Africa, whose constitution has incorporated socio-economic rights as enforceable rights. For instance, there is the South African case of *The Government of the Republic of South Africa & Ors v Irene Grootboom & Ors* (the *Grootboom* case)⁶⁷ that specifically sought to interpret the provisions of the Bill of Rights in the 1996 South African constitution relating to the

63 The relevant articles of the African Charter under which the appellant in this case applied are arts 4, 5, 6 and 12 which deal with such traditional rights as right to respect for life and integrity of person, right to respect of human dignity, right to liberty and security of person, and right to freedom of movement. See also the *Adekanye* and *Ubani* Cases (see note 16 above).

64 P Alston & G Quinn “The nature and scope of states parties’ obligations under the International Covenant on Economic, Social and Cultural Rights” (1987) 9 *Human Rights Quarterly* 156–229 and Alston “Out of the abyss: the challenges confronting the new UN Committee on Economic, Social and Cultural Rights” (1987) 9 *Human Rights Quarterly* 332–81.

65 See discussion in the section above on “Domesticated human rights treaty legislation and the constitution”.

66 See UN Development Program Human Development Report 2003 which states that 34.1% of Nigerians were below the poverty line in the period 1987–2000; available at <<http://hdr.undp.org/reports/global/2003/>> (last accessed 17 May 2007).

67 Case CCT 11/00 of 4 October 2000.

socio-economic right to have access to adequate housing.⁶⁸ This case held that the government had a positive obligation to take reasonable steps within its available resources to implement this right.⁶⁹ In determining whether the state is carrying out its obligation the court pointed out:

“Mere legislation is not enough. The state is obliged to act to achieve the intended result, and the legislative measures will invariably have to be supported by appropriate, well-directed policies and programmes implemented by the executive. These policies and programmes must be reasonable both in their conception and their implementation. The formulation of a programme is only the first stage in meeting the state’s obligations. The programme must also be reasonably implemented. An otherwise reasonable programme that is not implemented reasonably will not constitute compliance with the state’s obligations”.⁷⁰

In the same light, the resolution of the African Commission on Human and Peoples’ Rights on Economic, Social and Cultural Rights in Africa adopting the Declaration of the Pretoria Seminar on Economic, Social and Cultural Rights in Africa, requires states parties to adopt legislative and other measures, either individually or through international cooperation and assistance, that would “give full effect to the economic, social and cultural rights contained in the African Charter, by using the maximum of their resources”.⁷¹ Further, it states that states parties have “an obligation to ensure the satisfaction of, at the very least, the minimum essential levels of each of the economic, social and cultural rights contained in the African Charter”.⁷² It then goes on to list certain factors which hinder the full realization of economic, social and cultural rights, such as the lack of good governance and planning, the failure to allocate sufficient resources to implement these rights, the lack of political will, corruption, and the misuse and misdirection of financial resources. It calls for African states to take effective steps to remedy these shortcomings.⁷³

Though the *Grootboom* case and the resolution of the African Commission mentioned above would appear apposite in determining whether or not

68 Sec 26 provides: “(1) Everyone has the right to have access to adequate housing. (2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of this right. (3) No one may be evicted from their home, or have their home demolished, without an order of court made after considering all the relevant circumstances. No legislation may permit arbitrary evictions.” Sec 28(1) (c) provides: “Every child has the right to basic nutrition, shelter, basic health care services and social services.”

69 See J C Mubangizi and B C Mubangizi, “Poverty, human rights law and socio-economic realities in South Africa” (2005) 22(2) *Development Southern Africa* 277–90.

70 See note 67 above, paragraph 42 of the judgment of Yacoob J.

71 ACHPR/Res.73 (XXXVI) 04. See paragraph 2 of the Statement on Social, Economic and Cultural Rights in Africa, Pretoria, 17 September 2004.

72 *Ibid.*

73 *Id.*, paragraph 3.

the Nigerian government has breached its obligation to implement socio-economic rights, there are still difficulties in determining whether such rights are being adequately implemented. For instance, when are policies appropriate and well directed? When are policies reasonably implemented? When is there maximum use of resources in implementing these rights? When would a state party be regarded to have met its obligation of satisfying the minimum essential levels of these rights? Although this might seem obvious in the case of a clearly corrupt, inept and visionless leadership, it might be difficult in other instances when an executive with scarce resources has to make policy decisions on where and how to allocate those resources. Further, it raises difficulties of who determines whether policies are appropriate, well directed and reasonably implemented. Also, who determines whether there is maximum utilization of resources, at least to meet the minimum essential level of implementation of these rights? Is it the courts, the executive arm of government or the citizens?

In its State Party Report submitted in 1996 to the Committee on the International Covenant on Economic, Social and Cultural Rights, the Nigerian government had this to say on the implementation of the rights under the covenant: "On the whole, Nigeria has been implementing these rights despite the current severe economic turbulence being experienced. The economic situation of the vast majority of the population has deteriorated considerably and inflation has increased immensely; so the implementation of these rights are (sic) subjected to the economic situation of the country".⁷⁴ The economy of Nigeria has not improved significantly since then. It would not appear that Nigerians in general would wholeheartedly agree with the above statement in view of the structural adjustment programme, privatization and various market reform programmes, which have caused the Government to divest and hand over interests in various essential services to the private sector, thereby causing the prices of those services to skyrocket out of the reach of a large majority of those who are impoverished.⁷⁵ In cases where the government still retains a direct interest in such services, scarcity of funding has resulted in inadequate services for consumers. For example, the annual per capita public spending on health is said to be less than US \$5, and as low as US \$2 in some parts of Nigeria, which is far below the US \$34 recommended by the World Health Organization (WHO) for low income countries.⁷⁶ As a result, public hospitals are under-funded, understaffed and lack adequate drugs

74 Paras 35 and 36 of Implementation of the International Covenant on Economic, Social and Cultural Rights, initial reports submitted by states parties under arts 16 and 17 of the Covenant (Addendum), Nigeria, E/1990/5/Add.31 of 23 February 1996.

75 F Cheru "Economic, social and cultural rights: effects of structural adjustment policies on the full enjoyment of human rights" (independent expert report submitted in accordance with Commission decisions 1998/102 and 1997/103, E/CN.4/1999/50 of 24 February 1999).

76 See World Health Organization Country Cooperation Strategy: Federal Republic of Nigeria, 2002-07, available at <http://www.who.int/countries/en/cooperation_strategy_nga_en.pdf> (last accessed 17 May 2007).

and facilities. Consequently, the citizens are forced to have recourse to the private sector or, if lacking the wherewithal, to suffer in silence.

The *Grootboom* case appears to suggest that the courts are to determine whether the policies of the executive directed towards ensuring that the people enjoy their socio-economic rights are reasonable. It pointed out that, in doing so, the courts should look out for, amongst other things: whether the allocation of responsibilities and functions by the executive has been coherently and comprehensively addressed; that the programme is not haphazard but rather represents a systematic response to a pressing social need; and that the programme is sufficiently flexible to respond to those in desperate need in society and to meet their immediate and short-term requirements.⁷⁷ So far, there has not been, to the author's knowledge, any decision of the Nigerian courts on the obligation of the Nigerian government with respect to socio-economic rights under the African Charter Act. It would be interesting to see what the Nigerian courts would have to say about whether the Nigerian government is, within the available resources and through appropriate well directed and reasonably implemented policies, positively fulfilling its obligation to implement domestically socio-economic rights under the African Charter. However, it is interesting to note that, in the decision of the African Commission in the *Social and Economic Rights Action Center (SERAC) and the Center for Economic and Social Rights (CESR) / Nigeria (SERAC and CESR / Nigeria)*,⁷⁸ the Commission found, among other things, that the Nigerian government was in breach of article 16 of the charter, by permitting multinational oil companies to engage in mining activities which caused serious environmental degradation and consequently affected the health of the people of Ogoniland.⁷⁹ The decision of the Commission though not binding on the Nigerian courts would have strong persuasive authority as to the proper interpretation of the provisions of the charter.⁸⁰

As regards solidarity rights, the Nigerian government was also indicted recently in the decision of the African Commission in *SERAC and*

77 See note 67 above at paragraphs 54 and 56.

78 This decision concerned communication 155/96, case no ACHPR/COMM/A044/1 done at the 30th Ordinary Session of the Commission held in Banjul, The Gambia from 13 to 27 October 2001. See D Shelton "Decision regarding communication 155/96 (social and economic rights action center / center for economic and social rights v Nigeria case no ACHPR/COMM/A044/1)" (2002) 96(4) *American Journal of International Law* 937-42.

79 The Commission also found the Nigerian government in breach of arts 2 (right to enjoy rights and freedoms guaranteed in the African Charter without discrimination of any kind, including as to race, ethnic group, colour, sex, language, religion etc); 4 (right to life); 14 (right to property); 18(1) (right to family with the duty of the state to take care of its physical and moral health); 21 (right of peoples to dispose freely of their wealth and natural resources); and 24 (right of peoples to a clean and safe environment). Also, although the rights to housing or shelter and food are not explicitly recognized by the charter, the Commission found they were implicit in certain guaranteed rights in the charter and found the Nigerian government to be in breach of these rights (see paragraphs 63-66).

80 Art 45 (3) of the African Charter.

CESR / Nigeria for its failure to carry out, amongst other things, its obligation under article 24 guaranteeing the right to a clean and safe environment. The justiciability of such solidarity rights before the Nigerian courts under the African Charter Act was endorsed by the courts in the case of *Gunme & Ors v Attorney General of the Federal Republic of Nigeria*.⁸¹ In this case, 12 Cameroonians acting for themselves and the people of southern Cameroon sought a declaration from the court that, under article 20 of the African Charter (the right to self-determination), Nigeria had a legal duty to place before the International Court of Justice (ICJ) and the United Nations General Assembly the claim of the peoples of southern Cameroon to self-determination and independence from Cameroon, as well as to ensure diligent prosecution of the claim. Although the court in the end did not decide the case on its merits, it dismissed the preliminary objection of the Attorney-General to the institution of the suit. As far as the court was concerned, this right was a legally justiciable right by virtue of the African Charter Act.⁸² There is also the more recent Federal High Court of Nigeria case of *Jonah Gbemre v Shell Petroleum Development Corporation & 2 Ors* (the *Gbemre* case).⁸³ In this case the applicant, on behalf of himself and as a representative of the Iwherekana community in Delta state, Nigeria, brought an application before the court to enforce his fundamental human rights in respect of the gas flaring activities of Shell Petroleum Development Corporation. The court declared that the gas flaring activities of the respondents in that community, amongst other things, constituted an

81 Suit no FHC/ABJ/CS/30/2002. This was a decision of the Federal High Court, a superior court of first instance deemed to be a federal court under the 1999 constitution (secs 249–54 of the constitution). Also see N Enonchong “Foreign state assistance in enforcing the right to self-determination under the African Charter: *Gunme & Ors v Nigeria*” (2002) 46(2) *Journal of African Law* 246–58.

82 The Court did not decide this case on its merits because the parties arrived at a settlement that was filed before the Federal High Court and entered as an order of the court. In the settlement, the Federal Republic of Nigeria agreed to institute a case before the International Court of Justice and take any other necessary measures to place the case of the self-determination of the peoples of the southern Cameroons before the United Nations General Assembly and any other relevant international organizations. See Enonchong “Foreign state assistance” above at note 81 at 250–51. To the knowledge of this writer there has been no active step by the Nigerian government to comply with the terms of the settlement. Enonchong speculated in his article that there may be a connection between this case and the *Cameroon v Nigeria* (Bakassi) case which was before the International Court of Justice at that time ([2002] ICJ Rep 303). See Enonchong “Foreign state assistance” above at note 81 at 255–56.

83 Suit no FHC/B/CS/153/05. The judgment of the Federal High Court was delivered on 14 November 2005. As at the date of this article, the judgment had not been complied with and Shell and Nigerian National Petroleum Corporation (NNPC) have continued gas flaring in the relevant community. Also in the case of *Shell v Ijaw Aborigines of Bayelsa State* (unreported, referenced in Anon 1–31 May 2006 *African Research Bulletin* 16657), Okechukwu Okeke J of the Federal High Court, Portharcourt, delivered a judgment on 24 February 2006 requiring Shell to pay the Ijaws the sum of \$1.5bn imposed by the National Assembly on Shell as compensation for the environmental degradation caused by Shell’s oil mining activities in the Niger Delta area of Nigeria.

infringement of the applicant's constitutionally guaranteed right to life and dignity of human person, including the "right to clean, poison-free, pollution-free and healthy environment."⁸⁴ In this case, the court based its decision on the constitutional basis of rights to life and human dignity, as well as the provisions of the African Charter including the solidarity right to a clean environment under article 24. The court held that the provisions of legislation that permitted continued gas flaring were "inconsistent with the applicant's rights to life and/or dignity of human person enshrined in sections 33(1) and 34(1) of the Constitution of the Federal Republic of Nigeria, 1999 and articles 4, 16 and 24 of the African Charter on Human and Peoples Rights (Ratification and Enforcement) Act ... and are therefore unconstitutional, null and void..."⁸⁵ It should be noted that, at the time of writing, there is an appeal pending before the Court of Appeal challenging the jurisdiction of the trial court.⁸⁶ It is hoped that the Nigerian appellate courts in the near future will have an opportunity to make a categorical and clear-cut decision on the enforcement not only of solidarity rights, but also economic, social and cultural rights in Nigeria, especially those contained in the African Charter Act.

However, it is pertinent to point out that in the *Gbemre* case, the Federal High Court made an order requiring the first respondent, Shell Petroleum Development Corporation, and its joint venture partner the second respondent, Nigerian National Petroleum Corporation (NNPC), to take immediate steps to stop the gas flaring.⁸⁷ It also made an order against the third respondent, the Attorney-General of the Federation, to set in motion the process, after consultation with the Federal Executive Council, to introduce a bill to the National Assembly to amend the existing law and

84 Suit no FHC/B/CS/153/05 at paragraph 1.

85 Ibid at paragraph 4. The relevant legislation referred to by the judge as being null and void is: the Associated Gas Re-injection Act, A25, Vol.1, Laws of the Federation of Nigeria 2004; and the Associated Gas Re-injection (Continued Flaring of Gas) Regulations, Section 1.43 of 1984, which permitted gas flaring during exploitation subject to the payment of financial penalty into the coffers of the Federal Government of Nigeria.

86 See "Shell fails to obey court order to stop Nigeria flaring, again" available at <<http://www.climatelaw.org/media/Nigeria%20May%202007>> (last accessed 17 May 2007).

87 Ibid. It is reported that on 10 April 2006 the Federal High Court granted a stay of execution of court's order pending the appeal by Shell and NNPC, conditional on: (1) Shell and NNPC being "allowed a period of one year from [10 April 2006] to achieve a quarterly phase-by-phase stoppage of [their] gas flaring under the supervision of [the] Honourable Court"; (2) the Managing Director of Shell Nigeria, the Group Managing Director of the NNPC, the Nigerian Petroleum Minister and the Company Secretary of NNPC submitting "a detailed phase-by-phase technical scheme of arrangement, scheduled in such a way as to achieve a total non-flaring scenario in all their on-shore flow stations by 30th April 2007"; and (3) those four individuals appearing before the judge to present the scheme of arrangement in open court on 31 May 2006. Shell and NNPC appealed against the conditions and on 23 May 2006 the Court of Appeal made an order which appeared to vary the conditional stay of the trial court by relieving the four individuals of the obligation to present the scheme of arrangement in open court on 31 May 2006.

make continuous gas flaring a crime.⁸⁸ This appears to suggest that the Nigerian courts, in enforcing solidarity rights, would be interested in looking at the policy and legislative actions of the government in order to determine whether reasonable steps have been taken to ensure that socio-economic, cultural and solidarity rights are guaranteed.

Rights of the Child Act⁸⁹

The Rights of the Child Act was enacted on 16 July 2003 by the federal legislative organ of Nigeria, the National Assembly, after many years of opposition from certain quarters, who feared that such an act would introduce values totally foreign to the diverse societies in Nigeria.⁹⁰

Unlike the African Charter Act, this act does not have the relevant conventions contained in the schedule(s), neither does it explicitly indicate on its face that it is a domestication of the relevant human rights treaties which relate to the rights of the child, namely the United Nations Convention on the Rights of the Child (CRC) and the African Union equivalent, the African Charter on the Rights and Welfare of the Child (ACRWC),⁹¹ which were ratified by Nigeria on 19 April 1991 and 23 July 2001 respectively.⁹² It is, however, common knowledge that the act is an attempt to domesticate the provisions of the United Nations and African Union conventions.⁹³ According to the Nigerian Honourable Minister of Women's Affairs, "The [Rights of the Child] Act gives legal effect to the commitment made by Nigeria under the UN Convention on the Rights of the Child and

88 Id paragraph 6.

89 Act no 26 of 2003. It consists of 278 sections and 11 schedules covering different areas, including the rights and responsibilities of a child, offences against a child, care, protection and supervision of the child, custody and possession of the child, guardianship, wardship, fostering and adoption of the child, as well as the institutional framework for implementing the act.

90 See Integrated Regional Information Networks (IRIN) "Nigeria: IRIN focus on the challenge of enforcing children's rights" Lagos, 12 November 2002, available at <<http://www.reliefweb.int/rw/rwb.nsf/db900SID/OCHA-64DJAV?OpenDocument>> (last accessed 17 May 2007).

91 See D M Chirwa "The merits and demerits of the African Charter on the Rights and Welfare of the Child" (2002) 10 *The International Journal of Children's Rights* 155-77.

92 See Committee on the Rights of the Child - consideration of reports submitted by states parties under article 44 of the convention: second periodic reports of states parties due in 1998, Nigeria, CRC/C/70/Add.24 of 17 September 2004 and Committee on the Rights of the Child, thirty-eighth session - consideration of reports submitted by states parties under article 44 of the convention, concluding observations: Nigeria, CRC/C/15/Add.257 of 13 April 2005. Available at <<http://www.ohchr.org/english/bodies/crc/index.htm>> (last accessed 24 April 2007).

93 See: paragraph 2.1 of the written replies by the government of Nigeria concerning the list of issues (CRC/C/Q/NGA/2) received by the Committee on Implementation of the Rights of the Child relating to the consideration of the second periodic report of Nigeria (CRC/C/70/Add.24), CRC/C/RESP/72 received on 26 November 2004; press briefing by the Honourable Minister of Women's Affairs, O R Akpan, held on 14 September 2004 at the National Centre for Women Development, Central Area, Abuja, available at <<http://www.nigeriafirst.org/docs/wapress.htm>> (last accessed 17 May

the African Union Charter on the Rights and Welfare of the Child".⁹⁴ A perusal of the act reveals that, in reality, it is intended to implement the provisions of these conventions, since it conforms to a large extent to these international human rights instruments. For instance, just like these conventions, the act defines a child as a person under the age of eighteen years⁹⁵ and requires that, in every action, the best interests of the child shall be the primary consideration.⁹⁶ In addition, it provides that every child shall have a right to a name and therefore should be given a name; moreover such child's birth shall be registered in accordance with the Nigerian Birth, Death and etc (Compulsory Registration) Act 1992.⁹⁷ Further, it contains extensive provisions on the rights of a child which are similarly contained in the conventions.⁹⁸ These rights include the rights to: freedom of association and peaceful assembly;⁹⁹ freedom of thought, conscience and religion;¹⁰⁰ private and family life;¹⁰¹ freedom of movement;¹⁰² freedom from discrimination;¹⁰³ and dignity of the child. Further, the child should not be subjected to physical, mental or emotional injury, abuse, neglect or maltreatment, including sexual abuse, neither should the child be subject to torture, inhuman or degrading treatment or punishment, nor be subjected to attacks upon his honour or reputation, nor held in slavery or servitude.¹⁰⁴ Instead the child should have the right to: leisure, recreation and cultural activities;¹⁰⁵ health and health services;¹⁰⁶ parental care, protection and maintenance;¹⁰⁷ free, compulsory and universal primary education;¹⁰⁸ and special protection for those children who need it.¹⁰⁹

The act also provides for national, state and local government' child rights implementation committees, whose functions include "to initiate

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2007); and World Organisation Against Torture / Centre for Law Enforcement Education "Rights of the child in Nigeria – report on the implementation of the Convention on the Rights of the Child by Nigeria: A report prepared for the Committee on the Rights of the Child 38th Session – Geneva, January 2005" available at <http://www.cleen.org/nigeria_ngo_report_OMCT.pdf> (last accessed 17 May 2007).

94 Press briefing by the Honourable Minister of Women's Affairs, Akpan, above at note 93.

95 Sec 277 and arts 1 and 2 of the CRC and ACRWC respectively.

96 Sec 1 and arts 3 and 4 of the CRC and ACRWC respectively.

97 Sec 5 and arts 7 and 6 of the CRC and ACRWC respectively.

98 In addition, in sec 3 the act expressly incorporates the fundamental human rights provisions contained in chapter IV of the Nigerian constitution.

99 Id sec 6.

100 Id sec 7.

101 Id sec 8.

102 Id sec 9.

103 Id sec 10.

104 Id sec 11.

105 Id sec 12.

106 Id sec 13.

107 Id sec 14.

108 Id sec 15.

109 Id sec 16.

actions that shall ensure the observance and popularization of the rights and welfare of a child as provided for” in the CRC, the ACRWC and such other international conventions, charters and declarations relating to children to which Nigeria is or becomes a signatory.¹¹⁰ The latter appears to suggest that treaties relating to the child will be observed by these committees, even if Nigeria has only signed but not ratified them. Perhaps this could be said to be in line with the Vienna Convention on the Law of Treaties (VCLT), which imposes an obligation upon a state that has signed a treaty to refrain from acts which would defeat the intention and purpose of the treaty until it has made clear its intention not to become a party.¹¹¹

The act clearly attempts to apply relevant provisions of international treaties on the basis of a Nigerian/African value system, emphasizing for example respect for one’s elders and a more communal rather than individualistic approach to societal living.¹¹²

The act, just like the ACRWC, while recognizing that duties are imposed on parents or other persons having parental responsibility (who have the primary responsibility for the upbringing and development of the child), also recognizes that the child has certain responsibilities.¹¹³ The act points out that the child has responsibilities towards his family, society, the Federal Republic of Nigeria and other legally recognized communities, nationally and internationally. These responsibilities require that the child (subject to his / her age, ability and other specified limitations contained in the act or any other law) should: work towards the cohesion of his / her family and community; have respect for his / her parents, superiors and elders at all times and assist them in case of need; serve the nation by placing his / her physical and intellectual abilities at its service; contribute to the moral well-being of society; preserve and strengthen social and national solidarity; preserve and strengthen the independence and integrity of the nation; respect the ideals of democracy, freedom, equality, humaneness, honesty and justice for all persons; relate with other members of society who have different cultural values in a spirit of tolerance, dialogue and consultation; contribute to the best of his / her abilities, at all times and at all levels, to the promotion and achievement of Nigerian, African and world unity; and contribute to the best of his / her abilities, at all times and at all levels, to the solidarity of the African people and the human race.¹¹⁴ The intended legal significance of these provisions

110 Id secs 261, 265 and 269.

111 Art 18(a) of VCLT, 8 ILM 679 (1969).

112 See M Mutua “The Banjul Charter and the African cultural fingerprint: An evaluation of the language of duties” (1994-95) 35 *Virginia Journal of International Law* 339-80 and J Cobbah “African values and the human rights debate: An African perspective” (1987) 9 *Human Rights Quarterly* 309-31. For more on belief and cultural considerations on the implementation of human rights in Nigeria, see section below on “Implementation of human rights treaties in Nigeria and beliefs / cultural considerations”.

113 Sec 19 of the act and art 31 of the ACRWC.

114 Sec 19(2) of the act.

is not clear, as it is difficult to see how these responsibilities would be legally enforceable.

The National Assembly has recently (even after the enactment of the Rights of the Child Act) been encouraging the various Houses of Assembly of the states to enact equivalent state laws purportedly for the effective implementation of the rights of the child in all parts of Nigeria. It is claimed that the reason for this is because legislating for the child, under the constitution, generally falls within the legislative competence of the Houses of Assembly of the States.¹¹⁵ There has been growing opposition to this from certain Houses of Assembly of the States, especially in the north of the country, which has a large Moslem population, who are of the view that the whole gamut of the Rights of the Child Act runs contrary to their beliefs and cultural values.¹¹⁶ While the support of the various states is no doubt required for the effective implementation of the rights of the child, it is doubtful if at this stage there is a need for specific legislation by the Houses of Assembly on this. Ordinarily, matters relating to children fall under the Residual Legislative List of the 1999 constitution which is within the sole legislative competence of the states.¹¹⁷ However, there appears to be an exception to this under section 12(2) since the National Assembly, in the case of domestication of treaties, has the power to enact laws in respect of matters also under the Residual Legislative List.¹¹⁸ Section 12(2) states that “The National Assembly may make laws for the Federation or any part

115 Sec 4(7) and second schedule of the 1999 constitution. Four states have enacted their own child's rights law (CRL), while bills to enact a CRL are before 20 other state Houses of Assembly. See paragraph 5.1 of the written replies by the government of Nigeria concerning the list of issues (CRC/C/Q/NGA/2) received by the Committee on Implementation of the Rights of the Child Relating to the Consideration of the Second Periodic Report of Nigeria (CRC/C/70/Add.24), CRC/C/RESP/72 received on 26 November 2004.

116 See: Anon “Child rights implementation slow” (29 June 2004) *This Day* (Nigerian Newspaper) available at <<http://www.thisdayonline.com/archive/2004/06/29/20040629news09.html>> (last accessed 2 July 2007); F Muraina (reporting on a one-day seminar by the Ondo State Ministry of Information on the rights of a child) “The child's rights within cultural norms” (25 July 2005) *This Day* (Nigerian Newspaper) available at <<http://www.thisdayonline.com/nview.php?id=23616>> (last accessed 2 July 2007); and A Madugba “Shariah Council against Child Rights Act” (21 August 2005) *This Day* (Nigerian Newspaper) available at <<http://www.wlum1.org/english/newsfulltxt.shtml?cmd%5B157%5D=x-157-318899>> (last accessed 2 July 2007). See section below on “Implementation of human rights treaties in Nigeria and beliefs / cultural considerations”.

117 Sec 4 of the 1999 constitution. See note 8 above.

118 Sec 4(4)(b) of the 1999 constitution recognizes that the National Assembly may enact laws for the federation or any part of it in respect of matters outside the Exclusive and Concurrent Lists if permitted by the constitution. Sec 4 (4) states: “In addition and without prejudice to the powers conferred by subsection (2) of this section, the National Assembly shall have power to make laws with respect to the following matters, that is to say - (a) [matters on the Concurrent Legislative List in Part II of the Second Schedule]; and (b) any other matter with respect to which it is empowered to make laws in accordance with the provisions of this Constitution.”

thereof with respect to matters not included in the Exclusive Legislative List for the purpose of implementing a treaty". The Rights of the Child Act is purportedly the domestication of the relevant treaties ratified by Nigeria; therefore the National Assembly is empowered under section 12(2) of the constitution to make laws, not only for the federation, but also for "any part thereof". The input of the States Houses of Assembly in such a situation is enunciated in section 12(3) which states that "A bill for an Act of the National Assembly passed pursuant to the provisions of subsection (2) of this section shall not be presented to the president for assent, and shall not be enacted unless it is ratified by a majority of all the Houses of Assembly in the Federation". Therefore a bill of the National Assembly to implement a treaty in respect of matters falling within the Residual Legislative List of the constitution (including matters relating to children) would be enacted for the federation or "any part thereof" if it has been ratified by a majority of all the Houses of Assembly of the federation and thereafter presented to the president for assent. Such an act would be enforceable as a valid law even in the territory of a dissenting state.¹¹⁹ Moreover, under section 4(5) of the constitution, an act domesticating a treaty would prevail over any inconsistent law enacted by the House of Assembly, which would be void to the extent of the inconsistency.¹²⁰

It is presumed that the majority of the Houses of Assembly had ratified the Rights of the Child Bill before the president assented to it.¹²¹ Therefore, by virtue of section 12(2) of the constitution, the act is applicable and enforceable in all parts of Nigeria. It is suggested that the issue now should not be one of enacting similar legislation at state level, but rather the enforcement of the act as a law validly made by the federal legislative organ under section 12 of the constitution, which ought to be implemented in all parts of Nigeria without the need for further state legislation. It is further suggested that the focal point for effective implementation of the act should now be large-scale education and counselling of people, especially in areas where there is significant opposition to the implementation of rights set out in the Rights of the Child Act and its correlation with cultural norms.¹²²

119 In the previous 1960 and 1963 Nigerian constitutions, a treaty on any matter within the legislative competence of the regions that was promulgated into law by the federal legislature did not apply to such regions without the consent of the governor of the region. It was therefore possible at that time for the application of such domesticated treaties to be excluded from a particular region by the governor's refusal to consent to its application. See note 11 above.

120 See note 54 above.

121 It is presumed that this statute is constitutional. In the US case of *Ogden v Saunders* 12 Wheat. (25 US) 213 at 270, a Supreme Court judge, Mr Justice Bushrod Washington, said, "It is but a decent respect due to the wisdom, the integrity and patriotism of the legislative body by which any law is passed, to presume in favour of its validity, until its violation of the Constitution is proved beyond all reasonable doubt".

122 Fortunately steps in this regard are already being taken by the federal government and relevant organizations, including non-governmental organizations. See Muraina "The child's rights within cultural norms" at note 116 above.

THE POSITION OF NON-DOMESTICATED HUMAN RIGHTS TREATIES IN NIGERIA

Under section 12(1) of the constitution, human rights treaties signed and ratified by Nigeria (no matter how beneficial to the citizens) are not enforceable within Nigeria if they are not domesticated.¹²³ This appears to defeat the purpose of the numerous human rights treaties entered into by Nigeria, which are meant for the benefit of individuals within the territory of Nigeria. In reality, although the relevant rights provided in these non-domesticated treaties are discernable from the fundamental human rights provisions of the constitution, the domestication of these treaties would have the effect of strengthening the local application of the pertinent rights.

Examples of human rights treaties (to which Nigeria is party) that are not domesticated include the International Convention on the Elimination of All Forms of Racial Discrimination,¹²⁴ the International Covenant of Economic, Social and Cultural Rights,¹²⁵ the International Covenant on Civil and Political Rights (ICCPR),¹²⁶ the International Convention on the Suppression and Punishment of the Crime of Apartheid,¹²⁷ the Convention on the Elimination of all Forms of Discrimination Against Women (CEDAW),¹²⁸ the Convention Against Apartheid in Sports,¹²⁹ the Convention on the Political Rights of Women,¹³⁰ the Slavery Convention, as amended by the protocol of 7 December 1953,¹³¹ and the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.¹³²

Interestingly, Nigeria is not yet a party to the Convention on the Prevention and Punishment of the Crime of Genocide, despite the growing notoriety of the crime of genocide in view of its incidence in former Yugoslavia and Rwanda.¹³³ It is not clear why Nigeria is still not a party to this important human rights treaty, but perhaps this could simply be attributed to bureaucratic inertia.

123 *Abacha* case at note 12 above per Ejiwunmi JSC at 356-57.

124 By accession on 16 October 1967, available at <<http://www.ohchr.org/english/countries/ratification/index.htm>> (last accessed on 24 April 2007).

125 By accession on 29 July 1993, *id.*

126 By accession on 29 July 1993, *id.*

127 By ratification on 31 March 1977, *id.*

128 By ratification on 13 June 1985, *id.*

129 By ratification on 20 May 1987, *id.*

130 By ratification on 17 November 1980, *id.*

131 By accession on 26 June 1961, *id.*

132 By ratification on 28 June 2001, *id.*

133 See note 124 above for listing of when Nigeria became party to various conventions. Also see: The International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of the Former Yugoslavia Since 1991 UNSC Res. 827, 48th Sess., Annex at 40, UN doc. S/25704 (1993) reprinted in 32 ILM 1203; The International Criminal Tribunal for the Prosecution of Persons Responsible for Serious Violations of International Humanitarian Law in the Territory of Rwanda SC Res. 955, UN SCOR, 49th Sess., 3453rd mtg., UN doc. S/Res/955 (1994).

In terms of regional human rights treaties, although Nigeria has ratified the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa and the Protocol to the African Charter on Human and Peoples' Rights on the Establishment of an African Court on Human and Peoples' Rights, it is yet to domesticate these protocols.¹³⁴ On the other hand, it has not yet ratified the African Youth Charter and the more recent African Charter on Democracy, Elections and Governance (although at the time of writing no African state has ratified either of these charters).¹³⁵

There have been calls on several occasions for the government to take steps to domesticate those human rights treaties which Nigeria has ratified.¹³⁶ For example, a non-governmental agency, Women in Law and Development in Africa (WILDAF) has been at the forefront of the call for Nigeria to domesticate the CEDAW, which Nigeria has ratified, in order to strengthen the domestic protection of women against discrimination, an issue that, in many ways, is rampant in various societies in Nigeria.¹³⁷ The failure to domesticate certain human rights treaties that Nigeria has ratified is, to an extent, attributable to opposition in certain parts of the country to such implementation, on the grounds that the human rights treaties contain provisions which are contrary to local beliefs and cultural values.¹³⁸

134 The Protocol on the Rights of Women was adopted in Maputo, Mozambique on 11 July 2003 and entered into force on 25 November 2005, while the Protocol on the Establishment of an African Court on Human and Peoples' Rights was adopted in Ouagadougou, Burkina Faso on 9 June 1998 and entered into force on 25 January 2004. Available at <<http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>> (last accessed 17 May 2007).

135 The African Youth Charter (a charter to promote and protect the rights of youths, being persons between the ages of 15 and 35) was adopted in Banjul, Gambia on 2 July 2006 and as at the time of writing this article is yet to come into force. While the African Charter on Democracy, Elections and Governance (a charter to promote good governance, popular participation, rule of law and human rights) was adopted in Addis Ababa, Ethiopia on 30 January 2007 and is yet to come into force. Available at <<http://www.africa-union.org/root/au/Documents/Treaties/treaties.htm>> (last accessed 17 May 2007).

136 The bill to domesticate the convention is reported to be before the National Assembly but so far it has not been enacted as domestic legislation. See Committee on Elimination of Discrimination against Women 637th and 638th meetings, press release WOM/1427 of 20 January 2004 available at <<http://www.un.org/News/Press/docs/2004/wom1427.doc.htm>> (last accessed 2 July 2007).

137 See WILDAF (Nigeria) "CEDAW daily implementation in Nigeria" (July 2002), available at <http://www.wildaf-ao.org/fr/IMG/pdf/CEDAW_implementation_Nigeria.pdf> (last accessed 17 May 2007) and CEDAW "Consideration of reports submitted by states parties under article 18 of the Convention on the Elimination of All Forms of Discrimination against Women: combined fourth and fifth periodic reports of states parties, Nigeria" CEDAW/C/NGA/4-5 of 28 April 2003, available at:<<http://daccessdds.un.org/doc/UNDOC/GEN/N97/267/73/IMG/N9726773.pdf?OpenElement>> (last accessed 17 May 2007).

138 See section below, "Implementation of human rights treaties in Nigeria and beliefs / cultural considerations", for more on the impact of beliefs and cultural considerations on the implementation of human rights in Nigeria.

Indirect ways of applying non-domesticated human rights treaties

Using non-domesticated human rights treaties to aid interpretation

Despite the strict provisions of section 12(1) of the constitution, the courts are able to apply non-domesticated human rights treaties indirectly, by relying on them to assist in interpreting similar provisions in the constitution and other municipal legislation. One of the justices of the Supreme Court of Nigeria in the *Abacha* case, though constrained by the provisions of section 12(1) of the constitution, recognized the importance of international human rights instruments in interpreting local laws. The learned justice of the Supreme Court, Ejiwunmi JSC, while acknowledging that a treaty not incorporated into law cannot be enforced, said, “However, it is also pertinent to observe that the provisions of an unincorporated (sic) treaty might have indirect effect upon the construction of statutes or might give rise to a legitimate expectation by citizens that the government, in its acts affecting them, would observe the terms of the treaty”.¹³⁹

Although the learned justice of the Supreme Court did not cite any case in support of this contention, he appears to have been influenced by cases such as the Botswana case of *Unity Dow v Attorney General of Botswana*.¹⁴⁰ This case was cited with approval by another justice, Uwaifo JSC, who, in a rather impassioned statement, suggested an activist and pragmatic approach by the courts in the defence of the liberty and justice of individuals from abuse by the state.¹⁴¹ In this case, Aguda JA, incidentally a Nigerian then serving in the Botswana Court of Appeal, said:

“I take the view that in all these circumstances a court in this country, faced with the difficulty of interpretation as to whether or not some legislation breached any of the provisions entrenched in chapter II of [the Botswanan] constitution which deal with Fundamental Rights and Freedoms of individuals, is entitled to look at the international agreements, treaties and obligations entered into before or after the legislation was enacted to ensure that such domestic legislation does not breach any of the international conventions, agreements, treaties and obligations binding upon this country save upon clear and unambiguous language. In my view this must be so *whether or not such international conventions, agreements, treaties, protocols or obligations have been specifically incorporated into our domestic law.*” (Emphasis added)¹⁴²

The learned justices of the Supreme Court, Ejiwunmi and Uwaifo JJSC, however, stopped short of referring to specific unincorporated human rights treaties, which they regarded as relevant in interpreting the relevant provisions of the African Charter on Human & Peoples’ Rights (Ratification and Enforcement) Act. The justices had the opportunity to refer to similar

139 *Abacha* case at note 12 above at 357.

140 [1992] LRC (Const.) 623.

141 *Abacha* case at note 12 above at 342.

142 *Id* at 673.

provisions in other international human rights treaties ratified by Nigeria, such as the ICCPR, as a guide to the interpretation of the African Charter Act and the various federal military government legislation referred to by the government's lawyers in this case.¹⁴³ This practice has been adopted by other common law jurisdiction with a similar dualist system to that of Nigeria.¹⁴⁴ Perhaps the case of *Abacha v Fawehinmi* would have been an apt opportunity for the Supreme Court, as the highest court in Nigeria, to have made a clear and specific statement in support of the use of international human rights standards, as reflected in treaties ratified by Nigeria, as an aid to interpret the constitution and provisions of other municipal laws.¹⁴⁵ There are examples of Nigerian judges who have referred to non-domesticated treaties ratified by Nigeria to assist in interpreting relevant Nigerian laws, although these appear to be few and far between. An example of this is the Court of Appeal case of *Mojekwu v Ejikeme*,¹⁴⁶ where the *Nrachi Nwanyi*¹⁴⁷ custom of a group located in the east of the country (which had the effect of extinguishing a deceased person's lineage even though he had a female descendant) was struck out as being repugnant. One of the judges, Justice Niki Tobi who has since been elevated to the Supreme Court, made reference to the CEDAW in arriving at his decision that the *Nrachi Nwanyi* custom was repugnant and ought to be struck out.

Non-domesticated human rights treaties as customary international law

Another way that human rights treaties can apply in Nigeria without the need to be enacted as domestic legislation is if the provisions of the treaty have crystallized into rules of customary international law. In Nigeria, like most other common law countries, customary international law applies automatically without the need for it to be enacted in domestic legislation.¹⁴⁸

143 See arts 7, 9, 10 and 12 of the ICCPR. See also the decision of the Ugandan Supreme Court in *Charles Onyango-Obbo and Anor v Attorney General* 43 ILM 686 (2004), where the court referred to the relevant provision in the ICCPR to arrive at its decision on an issue involving the right to freedom of expression under the Ugandan constitution.

144 See the Bermudian case of *Ministry of Home Affairs v Fisher* [1980] AC 319 at 328, 330 [PC, Bermuda], where the Privy Council adopted this style of interpretation. See also the Indian cases of *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225 and *PUCI v Union of India* (1997) 1 SCC 301.

145 However see the House of Lords case of *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 HL which held that international human rights instruments may only be used to interpret domestic legislation if the provisions of the local legislation are ambiguous.

146 [2000] 5 NWLR 402.

147 Under this custom a man, who has no male children and who performs certain rites, is allowed to keep back one of his daughters to raise male issue to succeed him; if he fails to perform the rites, his lineage is deemed to be extinguished even though he may have female descendants.

148 See *Ibidapo v Lufthansa Airlines* at note 11 above. Also see the English cases of: *Buvot v Babuit* (1737) cases t. Talbot 281; *Triquet v Bath* (1764) 3 Burr. 1478; *Trendtex Trading Corporation v Central Bank of Nigeria* [1977] 2 WLR 356; *R v Bow Street Magistrate, Ex parte Pinochet* (No 3) [1999] 2 WLR 827 HL (E); and the American case of *The Paquete Habana*, 175 US 677 at 700

In *Federal Republic of Germany v Denmark and Netherlands* (the North Sea Continental Shelf cases),¹⁴⁹ which is authority for the fact that customary international law can arise from treaty provisions, the ICJ said, “With respect to the other elements usually regarded as necessary before a conventional rule can be considered to have become a general rule of international law, it might be that, even without the passage of any considerable period of time, a very widespread and representative participation in the convention might suffice of itself, provided it included that of States whose interests were specially affected”.¹⁵⁰

A perusal of various human rights treaties indicates that most of them have been adopted widely by most states in the world.¹⁵¹ Arguably, it could be said that a significant part of the provisions of these treaties have the character of customary international law. Such human rights treaty provisions, which have crystallized into customary international law, escape the ambit of section 12(1) of the 1999 constitution and have automatic domestic application without the need for specific domestic legislation.

The possibility of the provisions of non-domesticated human rights treaties having crystallized into customary international norms (and therefore automatically being applicable in Nigeria) was not considered by the Supreme Court in the *Abacha* case. However the position of the court, especially the majority liberal constructionists’ decision which seemed to be inclined to activist and pragmatic methods of protecting individuals’ human rights, suggests that the courts would be willing to adopt this means, if necessary, to protect human rights.¹⁵² This is more so if domestic legislation does not explicitly exclude the application of such customary international human rights norms. It is, therefore, expected that the

contd

(1900). See the Ghanaian case of *Republic v Director of Prisons Ex parte Allotey & Anor* [1973] 2 GLR 480. See also the Indian case of *Vellore Citizens’ Welfare Forum v Union of India* (1996) 5 SCC 647.

149 8 ILM 340 (1969). See also *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua v United States of America)* (Merits) Case [1986] ICJ Rep. 14; A Amato “Manifest Intent and the generation by treaty of customary rules of international law” (1970) 64 *American Journal of International Law* 892; and R R Baxter “Multilateral treaties as evidence of customary international law” (1965-66) 41 *British Yearbook of International Law* 275.

150 8 ILM at 72

151 For example, as at 24 April 2007, the number of states parties to the following human rights were: Convention on the Prevention and Punishment of the Crime of Genocide - 140 parties; International Convention on the Elimination of All Forms of Racial Discrimination - 173 parties; International Covenant on Economic, Social and Cultural Rights - 156 parties; International Covenant on Civil and Political Rights - 160 parties; Convention on the Elimination of All Forms of Discrimination Against Women - 185 parties; Convention of the Rights of the Child - 193 parties; and Convention Against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment - 144 parties. Statistics available at <<http://www.ohchr.org/english/countries/ratification/index.htm>> (last accessed 24 April 2007).

152 *Abacha* case at note 12 above per Uwaifo JSC at 342.

Nigerian courts would be favourably disposed to applying, in relevant cases, provisions of non-domesticated human rights treaties as customary international law, when dealing with cases of human rights abuses.¹⁵³

There is no doubt that the Nigerian courts need to be more imaginative as to ways to apply international human rights treaties (especially those to which Nigeria is a party) even if they have not been enacted as a law of the National Assembly under section 12(1) of the constitution. The Nigerian courts, in the exercise of their powers to determine “any question as to the civil rights and obligations”¹⁵⁴ of any person, certainly need to “draw inspiration from international law on human and peoples’ rights”,¹⁵⁵ especially those rights contained in treaties (incorporated and unincorporated) to which Nigeria is a party.

THE NEED TO AMEND SECTION 12 OF THE 1999 CONSTITUTION

A careful perusal of the human rights treaties which Nigeria has ratified reveals that, unlike certain other states, it has not entered any reservation to exclude or modify the legal effect of the treaties.¹⁵⁶ It, therefore, seems anomalous that non-domesticated human rights treaties ratified by Nigeria cannot directly be enforced before the municipal courts as a result of section 12(1) of the constitution. This is more so when one of the foreign policy objectives of Nigeria is the “respect for international law and treaty obligations...”¹⁵⁷

Under the 1999 constitution, Nigeria follows a presidential system of government based on the constitution of the United States of America. Under the US constitution, ratified treaties are regarded as part of the law of the land, since article VI, clause 2 states: “This Constitution, and the Laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any thing in the Constitution or Laws of any State to the contrary notwithstanding”.¹⁵⁸

Although the US provision is a step in the right direction towards making ratified treaties automatically part of domestic laws, it might not be the best approach for Nigeria since there are difficulties in interpreting article

153 See *Filartiga v Pena-Irala* 630 F.2d 876 (2d Cir. 1980). See generally T Meron *Human Rights and Humanitarian Norms as Customary Law* (1989, Clarendon Press, Oxford).

154 Secs 6(6)(b) and 46 of the 1999 constitution.

155 See art 60 of the African Charter which requires the Commission in carrying out its function to draw inspiration from international law including treaties on human and peoples’ rights. The Nigerian courts can also apply this as a guiding principle.

156 Available at <<http://www.ohchr.org/english/countries/ratification/index.htm>> (last accessed 24 April 2007).

157 Sec 19(d) of the 1999 constitution.

158 See: *Trans World Airlines, Inc. v Franklin Mint Corp.* 466 US 243 at 252 (1984); *Weinberger v Rossi* 456 US 25 at 32 (1982); *Washington v Washington State Commercial Passenger Fishing Vessel Association* 443 US 658 at 690 (1979).

VI, clause 2. The US courts have, over the years, distinguished between self-executing treaties (having automatic domestic application) and non self-executing treaties (requiring implementing domestic legislation),¹⁵⁹ a distinction which Paust argues is a judicial invention and rather subjective in its application.¹⁶⁰ As a result of the lack of clear-cut and objective rules, the US courts have, on certain occasions, found human rights treaties to be self-executing¹⁶¹ and on other occasions not to be self-executing.¹⁶² This, in itself, creates a problem with regard to the direct domestic application of certain ratified human rights treaties.

It is suggested that the monistic model applied by most continental European countries may be a preferable option for the Nigerian constitution, rather than the full dualist model of most common law states or the partial dualist model of the USA.¹⁶³

Certain African States have adopted in their constitutions the automatic domestic application of treaties. An interesting model, which could serve as a guide to this suggested amendment of section 12(1) of the Nigerian constitution, is the 1992 constitution of Cape Verde, which makes it clear that a treaty that has been validly ratified by Cape Verde has, upon publication, force of law domestically. Article 11(2) and (4) of this constitution says:

“International Treaties and Agreements validly approved and ratified shall be in force in the Cape Verdian judicial system after the official publication

159 See *Forster v Neilson* 27 US (2 Pet.) 253 at 254 (1829); *Cook v United States* 288 US 102 at 119 (1933); *Frolova v USSR* 761 F.2d 370 at 373 (7th Cir.1985); *People of Saipan v US Department of Interior* 502 F.2d 90 at 97 (9th Cir. 1974); 420 US 1003 (1975).

160 J J Paust *International Law as Law of the United States* (1996, Carolina Academic Press, Durham NC) at 51 and “Self-executing treaties” (1983) 82 *American Journal International Law* 760.

161 *Clark v Allen* 331 US 503 (1947); *Asakura v Seattle* 225 US 332 (1924); *People of Saipan v US Department of Interior* at note 159 above; *Von Dardel v USSR* F. Supp. 246 at 256 (DDC 1985); *Curran v City of New York* 77 NYS 2d 206 (1947).

162 *Demjanjuk v Meese* 784 F.2d, 1114 at 1116 (DC Cir. 1986); *Frolova v USSR*, above at note 159; *Filartiga v Pena-Irala* 630 F.2d 876 at 881–82 n. 9 (2d Cir. 1980); *Anh v Levi* 586 F.2d 625 at 629 (6th Cir. 1978).

163 The constitutions of most continental European countries recognize that treaties ratified by the state, including human rights treaties, automatically become part of the law of the land, without any distinction between self-executing and non-self-executing treaties. For example, art 55 of the 1958 French constitution provides that treaties duly ratified and published shall operate as laws within the municipal setting and states: “Treaties or agreements duly ratified or approved shall upon their application, have an authority superior to that of laws, subject for each agreement or treaty to its application by the other party”. Also see art 25 of the basic law of the Federal Republic of Germany which states: “The general rules of public international law are an integral part of federal law. They take precedence over the laws and shall directly create rights and duties for the inhabitants of the federal territory”. However note art 59 of the German basic law, which declares that treaties which regulate the political relations of the federation or relate to matters of federal legislation need federal legislation for them to be incorporated into the domestic system.

as long as they are in force in the international legal system. Rules, principles of international Law, validly approved and ratified internationally and internally, and in force, shall take precedence over all laws and regulations below the Constitutional level".¹⁶⁴

This model, while preserving constitutional supremacy, allows for the automatic application and supremacy of ratified and officially published treaties, including human rights treaties, over non-constitutional laws.

Another African state, Ghana, on the other hand, while adopting under its constitution the dualist position inherited from Britain, makes special provision for the automatic application of human rights treaties. Section 33(5) of the 1992 Ghanaian constitution provides in its fundamental human rights chapter that, "The rights, duties, declarations and guarantees relating to the fundamental human rights and freedoms specifically mentioned in this chapter shall not be regarded as excluding others not specifically mentioned which are considered to be inherent in a democracy and intended to secure the freedom and dignity of man". This omnibus provision has been interpreted by the Ghanaian Supreme Court, in the case of *National Patriotic Party v Attorney-General*, as permitting international human rights instruments to be enforced in Ghana without the need for domesticating legislation.¹⁶⁵

In this writer's view, there is no reason why Nigeria should not discard the strictly dualist model under section 12(1) of the constitution, a relic inherited from its colonial past. The application of the dualist model in the United Kingdom is because treaty-making is a prerogative of the Crown and does not require the approval of the legislature. Therefore, the automatic domestic application of treaties would be a denial of parliamentary supremacy.¹⁶⁶ In Nigeria, there is no concept of parliamentary supremacy since it operates a US style constitutional system, where the constitution is supreme. However, Nigeria, just like the United Kingdom, vests in the federal executive the prerogative of treaty-making, without the input of the legislature that has the constitutional responsibility to make domestic laws. It is suggested that the constitution should be amended to allow for a role for the legislature prior to the ratification of a treaty. Like, for instance, the US and Ghanaian Constitutions, the Nigerian constitution could require that no treaty be ratified, unless it is approved by a specified majority in Nigeria's federal legislature, preferably the Senate.¹⁶⁷ Such a role for the

164 Available at <<http://capeverde-islands.com/cvconstitution.html#p1t2>> (last accessed 17 May 2007).

165 (1992) Supreme Court of Ghana Law Reports 729 at 788. See generally S Minkah-Premo "A comparative analysis of the rights of women under the African Charter on Human and Peoples' Rights and the 1992 Ghanaian Constitution's Bill of Rights" (1999) 11 *ASICL Proc.* 229-75.

166 See *Parlement Belge* (1879) 4 PD 129.

167 See art II, sec 2 of the US constitution and sec 75 of the Ghanaian constitution. Also see Egede "The New Territorial Waters (Amendment) Act 1998" at note 15 above at 100-101, where the author made suggestions for a role for the Nigerian Senate in the ratification of treaties.

federal legislature in the ratification of treaties would meet possible objections, based on the well-worn arguments that it would amount to law-making by the executive if treaties had automatic application in Nigeria.

Perhaps, if the Nigerian constitution does not totally discard the dualist model as a result of the desire to retain its historical common law heritage of domestic implementation of treaties, a less radical option may be to amend section 12(1) with a view to adopting a similar position to that for Ghana, by including provisions that permit the automatic application of human rights treaties ratified by Nigeria, without the need for domesticating legislation.

IMPLEMENTATION OF HUMAN RIGHTS TREATIES IN NIGERIA AND BELIEFS / CULTURAL CONSIDERATIONS

A significant consideration in the domestic implementation of human rights treaties in Nigeria is the impact of certain beliefs and cultural values. Whilst there must be a minimum core standard for the protection of human rights, the reality on the ground does point to the significance of beliefs and cultural values in the domestic implementation of human rights standards. Various African human rights instruments acknowledge the input of certain beliefs and cultural values in human rights implementation. For instance, in its preamble, the African Charter (which purports to be an attempt to package human rights against the background of African values)¹⁶⁸ states that it takes into consideration “the virtues of [African] historical tradition and the values of African civilization which should inspire and characterize [African] reflection on the concept of human and peoples’ rights.” The ACRWC, also in its preamble, points out that it takes into consideration “the virtues of [African] cultural heritage, historical background and the values of African civilization which should inspire and characterize [African] reflection on the concept of the rights and welfare of the child.” It however warns that any “custom, tradition, cultural or religious practice that is inconsistent with the rights, duties and obligations contained in the present Charter shall to the extent of such inconsistency be discouraged.”¹⁶⁹ Even the CRC acknowledges the significance of local customs in the implementation of the convention.¹⁷⁰ However, there is always a need to balance the beliefs and cultural values of a people group and the need to guard against human rights abuses under the cover of beliefs and cultural values.

168 Mutua “The Banjul Charter and the African cultural fingerprint” at note 112 above at 339–46; and Odinkalu “Analysis of paralysis or paralysis by analysis?” at note 59 above at 336, where he quoted Leopold Sedar Senghor, the then President of Senegal and one of the founding fathers of the charter, who said that the experts that met to draft the charter should, “keep constantly in mind our values of civilization and the real needs of Africa.”

169 ACRWC, art 1.

170 CRC, art 5.

In the domestic implementation of human rights in Nigeria, there is a constant need for such a balance, as there have been examples of resistance to implementation of human rights in certain quarters as a result of the perception that it is contrary to local beliefs and cultural values. For instance, for a long while there was resistance to the Rights of the Child Act. There was concern in certain parts of Nigeria, especially in the north, about setting the age of a child as being under 18 years in view of local practice of giving away girls in marriage at younger ages.¹⁷¹ In spite of this, the Rights of the Child Act, in line with the relevant treaties, retains the relevant age as being under 18 years.¹⁷² The act proceeds further to declare that a person under the age of 18 years is incapable of contracting a valid marriage and any such purported marriage would be null, void and of no effect. It additionally creates offences under which parents and guardians who give a child in betrothal or marriage (as well as any other person to whom a child is given in betrothal or marriage) would be guilty.¹⁷³ The position of the act is perhaps not surprising in view of the prevalent health problem in Nigeria, especially in the north, of vesico vaginal fistula (VVF) caused as a result of giving adolescent females away in marriage.¹⁷⁴

Further, the interpretation of certain human rights treaty provisions in Nigeria may vary from the interpretation given by other jurisdictions, especially more developed ones, as a result of the beliefs and cultural values of most Nigerian people. For instance, what would amount to an inhuman and degrading treatment or punishment of a child would have to be understood in the Nigerian context.¹⁷⁵ Whilst totally abhorring the physical abuse of a child under the guise of corporal punishment, generally the beliefs and cultural values of the diverse societies in Nigeria endorse corporal punishment of a child as long as it is “reasonable chastisement”.¹⁷⁶ The view is that corporal punishment instils discipline and causes a child to grow up to become a responsible member of society. Therefore, for example, corporal punishment is still applied in Nigerian schools

171 See IRIN “Nigeria: IRIN focus on the challenge of enforcing children’s rights” at note 90 above.

172 Sec 277.

173 Sec 23.

174 VVF is the breakdown of tissue in the vaginal wall communicating into the bladder as a result of pregnancy and childbirth of an adolescent female child that results in seriously degrading conditions including urinary incontinence that stigmatize and lead to dire social consequences for the victims. 70% of the cases of VVF in Nigeria occur in the north. See Foundation for Women’s Health, Research and Development, VVF, available at <<http://www.forwarduk.org.uk/vesico.htm>> (last accessed 17 May 2007).

175 Sec 11(b) of the Rights of the Child Act and arts 37(a) and 16(1) of the CRC and the ACRWC respectively.

176 However, note sec 221 of the Rights of the Child Act which prohibits corporal punishment by the courts.

despite a ministerial note that has been sent to schools to notify them that corporal punishment has been prohibited.¹⁷⁷

In addition, although the provisions of CEDAW, a treaty ratified by Nigeria without any reservation, prohibit discrimination against women, there are certain discriminatory practices directed against women and female children that are encouraged by beliefs and culture. In the area of inheritance, for instance, there are certain customs that encourage discrimination against women and female children. Examples abound in certain parts of Nigeria of customary laws that prevent both a widow and her daughters from inheriting property where there is no male child. Fortunately, the courts have, in certain cases, struck down some of these customs as being discriminatory and therefore repugnant.¹⁷⁸ In the case of *Mojekwu v Mojekwu*,¹⁷⁹ for instance, the Court of Appeal struck down an Ibo custom that denied the widow the right to inherit the property of her deceased husband. However, there have also been unfortunate cases, such as the Supreme Court case of *Akinnubi v Akinnubi*,¹⁸⁰ where the court actually upheld a Yoruba custom that regarded a widow, whose husband died intestate, as part of the deceased's estate to be administered or inherited by the deceased's family.¹⁸¹ Also, the recent cases from certain northern states, in which three women, Safiyyatu Hussein, Amina Lawal and Bariya Ibrahima Magazu, were convicted for offences involving extra marital sexual relations contrary to Sharia criminal laws while the men involved were not even prosecuted, provide further indication of ingrained discrimination against women based on beliefs and culture.¹⁸²

CONCLUSION

Under section 12 of the Nigerian constitution, treaties ratified by Nigeria must be enacted as domestic legislation for them to be enforceable. While a

177 See paragraph 38 of CRC/C/15/Add.257, 13 April 2005 where the Committee on the Rights of the Child expressed concern that corporal punishment was still widely practised in the penal system (despite its prohibition by sec 221 of the Rights of the Child Act), as well as in schools (despite a ministerial note that had been sent by the Nigerian government to schools to notify them that corporal punishment had been prohibited) and also in the family and other institutions in Nigeria. See note 92 above for url.

178 See also *Theresa Onwo v Nwajor Oko & 12 Ors* (1996) 6 NWLR (part 456) 584; *Mojekwu v Ejikeme* at notes 146 and 147 above; and *Alajemba Uke & Anor v Albert Iro* (2001) 11 NWLR (part 723) 203. See WILDAF (Nigeria) "CEDAW daily implementation in Nigeria" at note 137 above; and the Combined Fourth and Fifth Periodic Report of Nigeria to the Committee on the Elimination of Discrimination Against Women Section B, para.1.0 of CEDAW/C/NGA/4-5 (28 April 2003), available at <<http://daccessdds.un.org/doc/UNDOC/GEN/N03/345/65/PDF//N0334565.pdf?OpenElement>> (last accessed 17 May 2007).

179 (1997) 7 NWLR (Part 512) 28.

180 (1997) 2 NWLR 144.

181 See WILDAF (Nigeria) "CEDAW daily implementation in Nigeria" at note 137 above.

182 See notes 50 and 51 above.

few human rights treaties have been domesticated under this dualist system, a number of ratified treaties are yet to be domesticated. The utility of this dualist position of the Nigeria constitution is doubtful. This section of the constitution appears to be merely a relic of Nigeria's colonial past and there is no justifiable reason why treaties ratified by Nigeria should not have automatic domestic application. Such automatic domestic application of ratified human rights treaties, as is done in certain other jurisdictions, in the view of this writer, would go a long way in bringing human rights home to the ultimate beneficiaries of these treaties: individuals within Nigeria's borders. The amendment of section 12, a constitutional provision, as suggested in this article, would however involve a tedious and complicated process.¹⁸³ Therefore, pending any such amendment, it is suggested that Nigeria's courts should be more proactive in applying non-domesticated treaties indirectly, either as an aid to interpret other domestic legislation or as customary international law norms.

The African Charter, a human rights treaty which has been domesticated in Nigeria, includes social, economic and cultural as well as solidarity rights and therefore raises crucial questions as to the domestic implementation of these rights. So far there has been no decision of the Nigerian appellate courts that provides a clear guide as to how socio-economic and cultural, as well as solidarity rights, under the charter should be interpreted and enforced. However, guidance can be obtained from decisions of the South African courts, which have had the benefit of interpreting and enforcing similar provisions in the South African constitution, and also decisions of the African Commission. All in all, the implementation of these non-traditional human rights is capital intensive, so their effective implementation ultimately depends on the political will of the government (executive and legislative) to take all appropriate steps, including the adoption of legislative measures, to implement such rights.¹⁸⁴

Undoubtedly, beliefs and cultural values play a significant role in the effective domestic implementation of human rights treaties in Nigeria. Whilst beliefs and cultural values cannot be disregarded, it is crucial that the government and the courts play a more proactive role in ensuring that such beliefs and cultural values are not used as a cover to justify blatant human rights abuses. The government must take positive steps to legislate against and educate, as well as counsel, the citizens, in respect of beliefs and cultural values that are inconsistent with the effective implementation of ratified human rights treaties. The courts, on the other hand, should be more active in striking out any repugnant belief or culture that is inconsistent with ratified human rights treaties.

183 Sec 9(2) of the constitution indicates that the provisions of sec 12(1) cannot be altered by either house of the National Assembly unless the proposal "is supported by the votes of not less than two-thirds majority of all the members of that House and approved by resolution of the Houses of Assembly of not less than two-thirds of all the States".

184 Art 2(1) of the International Covenant of Economic, Social and Cultural Rights.